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**CASE LAW OF THE  
EUROPEAN COURT OF HUMAN RIGHTS  
CONCERNING THE PROTECTION  
OF PERSONAL DATA**

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**CASE LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS  
CONCERNING THE PROTECTION OF PERSONAL DATA**

**Contents**

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

- 1. *Eur. Court of HR, Klass and others v. Germany*, judgment of 6 September 1978, application no. 5029/71. Law authorising secret services to carry out secret monitoring of communications (postal and telephone)..... 18**
- 2. *Eur. Court of HR, Malone v. The United Kingdom*, judgment of 2 August 1984, application no. 8691/79. Interception of postal and telephone communications and release of information obtained from “metering” of telephones, both effected by or on behalf of the police within the general context of criminal investigation..... 21**
- 3. *Eur. Court of HR, Leander v. Sweden*, judgment of 26 March 1987, application no. 9248/81. Use of information kept in a secret police-register when assessing a person’s suitability for employment on a post of importance for national security..... 24**
- 4. *Eur. Court of HR, Gaskin v. The United Kingdom*, judgment of 7 July 1989, application no. 10454/83. Refusal to grant former child in care unrestricted access to case records kept by social services..... 27**
- 5. *Eur. Court of HR, Kruslin v. France*, judgment of 24 April 1990, application no. 11801/85, and *Eur. Court of HR, Huvig v. France*, judgment of 24 April 1990, application no. 11105/84. The applicants complained about the telephone tapping carried out by senior police officer under warrant issued by investigating judge. .... 30**
- 6. *Eur. Court of HR, Niemietz v. Germany*, judgment of 16 December 1992, application no. 13710/88. The applicant complained about the search of his office in course of criminal proceedings against a third party..... 33**
- 7. *Eur. Court of HR, Murray v. The United Kingdom*, judgment of 28 October 1994, application no. 14310/88. As far as a person suspected of terrorism is concerned, entry into and search of her home for the purpose of effecting the arrest; record of personal details and photograph without her consent..... 35**
- 8. *Eur. Court of HR, McMichael v. The United Kingdom*, judgment of 24 February 1995, application no. 16424/90. The applicant complained about the non-disclosure to them of some confidential documents submitted in care proceedings.....37**
- 9. *Eur. Court of HR, Z. v. Finland*, judgment of 25 February 1997, application no. 22009/93. The applicant complains about the seizure of medical records and their inclusion in investigation file without the patient’s prior consent in criminal proceedings; the limitation**

of the duration of the confidentiality of the medical data concerned; the publication of her identity and HIV infection in a court judgment given in those proceedings .....	43
10. <i>Eur. Court of HR, Halford v. The United Kingdom</i> , judgment of 25 June 1997, application no. 20605/92. The applicant complains that telephone calls made from her office in Merseyside Police Headquarters had been intercepted and that she had not had available to her any effective remedy for this complaint. ....	44
11. <i>Eur. Court of HR, Anne-Marie Andersson v. Sweden</i> , judgment of 27 August 1997, application no. 20022/92. The applicant complained of the impossibility for a patient, prior to the communication of personal and confidential medical data by medical authority to a social services authority, to challenge the measure before a court.....	46
12. <i>Eur. Court of HR, M.S. v. Sweden</i> , judgment of 27 August 1997, application no. 20837/92. The applicant maintained that the communication of her medical records by the clinic to the Social Insurance Office constituted a violation of her right to respect for private life under Article 8 of the Convention.....	48
13. <i>Eur. Court of HR, Lambert v. France</i> , judgment of 24 August 1998, application no. 23618/94. Judgment whereby Court of Cassation refused a person locus standi to complain of interception of some of his telephone conversations, on the ground that it was a third party's line that had been tapped.....	51
14. <i>Eur. Court of HR, Amann v. Switzerland</i> , judgment of 16 February 2000, application no. 27798/95. The applicant complained that the interception of the telephone call and the creation by the Public Prosecutor's Office of a card on him and the storage of that card in the Confederation's card index had violated Article 8.....	53
15. <i>Eur. Court of HR, Rotaru v. Romania</i> , judgment of 4 May 2000, application no. 28341/95. The applicant complained of an infringement of his right to private life in that the Romanian Intelligence Service held a file containing information on his private life and that it was impossible to refute the untrue information. ....	60
16. <i>Eur. Court of HR, P.G. and J.H. v. the United Kingdom</i> , judgment of 25 September 2001, application no. 44787/98. The applicants complained about the use of covert listening devices to monitor and record their conversations at B's flat, the monitoring of calls from B's telephone and the use of listening devices to obtain voice samples while they were at the police station.....	563
17. <i>Eur. Court of HR, M.G v. the United Kingdom</i> , judgment of 24 September 2002, application no. 39393/98. Requested access to applicant's social service records.. ....	62
18. <i>Eur. Court of HR, Taylor-Sabori v. the United Kingdom</i> , judgment of 22 October 2002, no. 47114/99. The applicant complained about the interception of pager messages by the police and subsequent reference to them at the trial. ....	684

19. *Eur. Court of HR, Allan v. the United Kingdom*, judgment of 5 November 2002, application no. 48539/99. The applicant complained of use of covert audio and video surveillance within a prison cell and the prison visiting area. .... 66
20. *Eur. Court of HR, Peck v. the United Kingdom*, judgment of 28 January 2003, application no. 44647/98. The applicant complained about the disclosure of the CCTV footage to the media, which resulted in images of himself being published and broadcast widely, and about a lack of an effective domestic remedy.. .... 68
21. *Eur. Court of HR, Cotlet v. Romania*, judgment of 3 June 2003, application no. 38565/97. The applicant complained under Article 8 of the Convention of interference with his correspondence with the Convention institutions. He also complained of a violation of his right of individual application, as guaranteed by Article 34 of the Convention..... 71
22. *Eur. Court of HR, Odièvre v. France*, judgment of 13 February 2003, application no. 42326/98. Applicant complained about her inability to find out about origins of her mother. The Court ruled that the request for disclosure of her mother’s identity, was subject to the latter’s consent being obtained .....73
23. *Eur. Court of HR, Perry v. the United Kingdom*, judgment of 17 July 2003, application no. 63737/00 (violation of Article 8 of the Convention). Use of videotape by the Police for identification and prosecution purposes .....74
24. *Eur. Court of HR, Matwiejczuk v. Poland*, judgment of 2 December 2003, application no. 37641/97 (No violation of Article 34). The applicant complained about the length of his pre-trial detention, the length of the criminal proceedings against him and that his letters were monitored during his detention.. .... 75
25. *Eur. Court of HR, Von Hannover v. Germany*, judgment of 24 June 2004, application no. 59320/00. Applicant complained about obligation of states to protect an individual’s image, even for photos taken of public figures in public spaces.. .... 76
26. *Eur. Court of HR, Sciacca v. Italy*, judgment of 11 January 2005, application no. 50774/99. The applicant submits that the dissemination of the photograph at a press conference organised by the public prosecutor’s office and the tax inspectors infringed her right to respect for her private life. .... 78
27. *Eur. Court of HR, Pisk-Piskowski v. Poland*, judgment of 14 January 2005, application no. 92/03. The applicant complained that the proceedings resulting in his conviction had been unfair and that his right to respect for his correspondence had been infringed. .... 79
28. *Eur. Court of HR, Matheron v. France*, judgment of 29 March 2005, application no. 57752/00. The applicant complains under Article 8 of the Convention (right to respect for his private life) that evidence was used against him that had been obtained by telephone tapping in separate proceedings. Not being a party to those proceedings, he had been unable to contest their validity..... 81

29. *Eur. Court of HR, Vetter v. France*, judgment of 31 May 2005, application no. 59842/00. Complaint that there was no statutory basis in French law for the installation of listening devices in the flat or the recording of the applicant’s conversations. .... 83

30. *Eur. Court of HR, Wisse v. France*, judgment of 20 December 2005, application no. 71611/01. The applicants contend that the recording of their conversations in the prison visiting rooms constituted interference with their right to respect for their private and family life.....85

31. *Eur. Court of HR, Turek v. Slovakia*, judgment of 14 February 2006, application no. 57986/00. The applicant complains about being registered as a collaborator with the former Czechoslovak Communist Security Agency, the issuing of a security clearance to that effect and the dismissal of his action challenging that registration..... 86

32. *Eur. Court of HR, Segerstedt-Wiberg and Others v. Sweden*, judgment of 6 June 2006, application no 62332/00. The applicants complain about the storage of certain information about them in Swedish Security Police files and the refusal to reveal the extent of the information stored..... 95

33. *Eur. Court of HR, L.L. v. France*, judgment of 10 October 2006, application no. 7508/02. The applicant complains about the production and use in court proceedings of documents from his medical records, without his consent and without a medical expert having been appointed in that connection. ....100

34. *Eur. Court of HR, Copland v. United Kingdom*, judgment of 3 April 2007, application no. 62617/00, Complaint that, during the applicant’s employment at the College, her telephone, e-mail and internet usage had been monitored at the Deputy Principal’s instigation..... 102

35. *Eur. Court of HR, I. v. Finland*, judgment of 3 April 2007, application no. 20511/03, Complaint that the applicant’s colleagues had unlawfully consulted her confidential patient records and that the district health authority had failed to provide adequate safeguards against unauthorised access of medical data. .... 97

36. *Eur. Court HR, Liberty and others v. United Kingdom*, judgment of 1 July 2008, application no. 58243/00. Interception by the Ministry of Defence of the external communications of civil-liberties organisations. .... 99

37. *Eur. Court of HR, Cemalettin Canlı v. Turkey*, judgment of 18 November 2008, application no. 22427/04. The applicant complained that the records kept by the police and the publication in the national press of the details of those records had had adverse effects on his private life within the meaning of Article 8 (right to respect for private and family life). He further relied on Article 6 § 2 (presumption of innocence) and Article 13 (right to an effective remedy)..... 109

38. *Eur. Court of HR, K.U. v. Finland*, judgment of 2 December 2008, application no. 2872/02. The applicant complains about the invasion of his private life and the fact that no

effective remedy existed under Finnish law to reveal the identity of the person who had posted the ad about him on the Internet dating site.. ..... 1122

39. *Eur. Court of HR, S. and Marper v. the United Kingdom*, judgment of 4 December 2008, applications nos. 30562/04 and 30566/04. The applicants complain under Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the Convention about the retention by the authorities of their fingerprints, cellular samples and DNA profiles after their acquittal or discharge.....114

40. *Eur. Court of HR, Bykov v. Russia*, judgment of 10 March 2009, application no. 4378/02. The applicant complains under Article 5 § 3 (right to liberty and security), Article 8 (right to respect for private and family life) and Article 6 (right to a fair trial) of the European Convention on Human Rights about the insufficient reasons given for extending the applicant's pre-trial detention, the use of a surveillance technique which was not accompanied by adequate safeguards against possible abuses..... 118

41. *Eur. Court of HR, K.H. and others v. Slovakia*, judgment of 28 April 2009, application no. 32881/04. The applicants complain under Article 8 (right to respect for private and family life), and Article 6§ 1 (access to court) and Article 13 (right to an effective remedy) of the European Convention on Human Rights about not having been allowed to make photocopies of their medical records, the impossibility for the applicants or their lawyers to obtain photocopies of their medical records having limited their effective access to court and not guaranteeing a remedy to challenge a law itself..... 121

42. *Eur. Court of HR, Szuluk v. The United Kingdom*, judgment of 2 June 2009, application no. 36936/05. The applicant complains under Article 8 (right to respect for private and family life and for correspondence) of the European Convention on Human Rights about the monitoring by prison authorities of medical correspondence between the applicant – a convicted prisoner – and his external specialist doctor.. ..... 123

43. *Eur. Court of HR, Iordachi and others v. Moldova*, judgment of 14 September 2009, application no. 25198/02. Respect for private life Status of potential victims; lack of clarity or adequate safeguards in legislation on interception of communications: violation. .... 125

44. *Eur. Court of HR, Tsourlakis v. Greece*, judgment of 15 October 2009, application no. 50796/07. The applicant complains under Article 8 (right to respect for private and family life and for correspondence) of the European Convention on Human Rights about being prevented from consulting the report of the Child Welfare Society about his son..... 127

45. *Eur. Court of HR, Haralambie v. Romania*, judgment of 27 October 2009, application no. 21737/03. The applicant complains under Article 6§ 1 (access to court) and Article 8 (right to respect for private and family life and for correspondence) of the European Convention on Human Rights about the proceedings concerning the restoration of the land that had belonged to his mother and the obstacles to his right of access to the personal file created on him by the former secret services..... 129

46. *Eur. Court of HR, B.B. v. France, Gardel v. France, M.B. v. France*, judgments of 17 December 2009, applications nos. 5335/06, 16428/05, 22115/06. The applicants complain

under Article 8 (right to respect for private and family life and for correspondence) of the European Convention on Human Rights about their inclusion in the Sex Offender Database and the retroactive application of the legislation under which it was created.. 131

47. *Eur. Court of HR, Dalea v. France*, judgment of 2 February 2010, application 58243/00. Inability to access or secure rectification of personal data in Schengen database. The Court ruled that applicant's inability to gain personal access to all the information he had requested could not in itself prove that the interference was not justified by national security interests..... 133

48. *Eur. Court of HR, Ciubotaru v. Moldova*, judgment of 27 April 2010, application no. 27138/04. The applicant complains under Article 8 (right to respect for private and family life and for correspondence) of the European Convention on Human Rights about the authorities' refusal to register his Romanian ethnic identity in his identity papers.. ..... 135

49. *Eur. Court of HR, Uzun v. Germany*, judgment of 2 September 2010, application no. 35623/05. Applicant complained about information obtained on him via GPS surveillance. The Court considered that adequate and effective safeguards against abuse had been in place.. 137

50. *Eur. Court of HR, Kennedy v. The United Kingdom*, judgment of 18 May 2010, application no. 26839/05. The applicant complains under Article 8 (right to respect for private and family life and for correspondence), Article 6 § 1 (right to a fair trial) and Article 13 (right to an effective remedy) about the alleged interception of his communications, the unfair hearing before the IPT, and having been denied an effective remedy..... 139

51. *Eur. Court HR, Köpke v. Germany*, judgment of 5 October 2010, application no 420/07. Case concerning video surveillance of supermarket cashier suspected of theft declared inadmissible..... 142

52. *Eur. Court of HR, Mikolajová v. Slovakia*, judgment of 18 January 2011, application no 4479/03 Disclosure of police decision stating that the applicant had committed an offence, even though no criminal proceedings were ever brought..... 144

53. *Eur. Court of HR, Wasmuth v. Germany*, judgment of 17 February 2011, application no. 12884/03. Requirement to indicate on wage-tax card possible membership of a Church or religious society entitled to levy church tax.. ..... 145

54. *Eur. Court of HR, Sipoş v. Romania*, judgment of 3 May 2011, application no. 26125/04. Journalist's right to respect for reputation should have prevailed over TV channel's freedom of expression. .... 147

55. *Eur. Court of HR, Mosley v. the United Kingdom*, judgment of 10 May 2011, application no. 48009/08. The European Convention on Human Rights does not require media to give prior notice of intended publications to those who feature in them..... 149

56. *Eur. Court of HR, Shimovolos v. Russia*, judgment of 21 June 2011, application no. 30194/09. Applicant complained about police listing and surveillance on his account of membership in a human rights organisation..... 152



57. *Eur. Court of HR, Avram and Others v. Moldova*, judgment of 05 July 2011, application no. 41588/05. Five women broadcast on national television in a sauna romp with police officers should have received higher compensation.. ..... 153
58. *Eur. Court of HR, Khelili v. Switzerland*, judgment of 18 October 2011, application no. 16188/07. A French woman classified as a “prostitute” for fifteen years in Geneva police database violated her right to respect for private life..... 143
59. *Eur. Court of HR, Axel Springer AG v. Germany*, judgment of 7 February 2012, application no. 39954/08. Media coverage of celebrities’ private lives: acceptable if in the general interest and if in reasonable balance with the right to respect for private life..... 157
60. *Eur. Court of HR, Von Hannover v. Germany (no. 2)*, judgment of 7 February 2012, applications nos. 40660/08 and 60641/08, Applicant complained about refusal of domestic courts to issue injunction restraining further publication of a photograph of a famous couple taken without their knowledge ..... 147
61. *Eur. Court of HR, E.S. v. Sweden*, judgment of 21 June 2012, application no. 5786/08. Sweden did not fail to protect 14-year old girl after her stepfather attempted to film her naked.. 149
62. *Eur. Court of HR, Godelli v. Italy*, judgment of 25 September 2012, application no. 33783/09. Confidentiality of information concerning a child’s origins: the Italian system does not take account of the child’s interests ..... 151
63. *Eur. Court of HR. Mitkus v. Latvia*, judgment of 2 October 2012 application no. 7259/03. The applicant complains under Article 8 of the Convention that a newspaper article disclosed information about his HIV infection and published his photo..... 153
64. *Eur. Court of HR, Alkaya v. Turkey*, judgment of 9 October 2012, application no. 42811/06. Press disclosure of a celebrity’s address breached her right to respect for her private and family life.....15  
6
65. *Eur. Court of HR. M.M. v. the United Kingdom*, judgment of 13 November 2012, application no. 24029/07. The applicant complained about retention of caution on criminal record for life. The Court ruled that the retention and disclosure of the applicant’s caution data accordingly could not be regarded as having been in accordance with the law..... 158
66. *Eur. Court of HR. Michaud v. France*, judgment of 6 December 2012, application no. 12323/11. The applicant alleged that the information protected by lawyer – client privilege is particularly sensitive. The Court noted that the impugned interference was “in accordance with the law” within the meaning of Article 8..... 174
67. *Eur. Court of HR. Bernh Larsen Holding AS and Others v. Norway*, judgment of 14 March 2013, application no. 24117/08. The applicants complained about a decision ordering them to provide the tax auditors with a copy of all data on a computer server which the three companies used jointly. The Court considered that a fair balance has been

struck between the companies' right to respect for "home" and "correspondence" and their interest in protecting the privacy of persons working for them, on the one hand, and the public interest in ensuring efficient inspection for tax assessment purposes, on the other hand. Therefore it is in accordance with the law..... 1762

68. *Eur. Court of HR. Saint-Paul Luxembourg S.A. v. Luxembourg*, judgment of 18 April 2013, application no. 26419/10. The applicant argued that the search and seizure operation carried out at his company's premises had been intrusive. The incident amounted to interference with the applicant company's right to respect for its "home". The Court recognized that the interference had been in accordance with the law and had pursued several legitimate aims but ruled that these measures weren't necessary at this stage of the investigation..... 164

69. *Eur. Court of HR. M.K. v. France*, judgment of 18 April 2013, application no. 19522/09. The Court found that the absence of safeguards for collection, preservation and deletion of fingerprint records of persons suspected but not convicted of criminal offences is contrary to Article 8 of the Convention.....16  
6

70. *Eur. Court of HR, Avilkina and Others v. Russia*, judgment of 6 June 2013, application no. 1585/09. The applicants claimed that the unjustified disclosure of confidential medical data relating to the refusal of Jehovah's Witnesses to undergo a blood transfusion, is contrary to Article 8. The order of the disclosure of the applicants' confidential medical information without giving them any notice or opportunity to object or appeal is illegitimate. .... 168

71. *Eur. Court of HR. Węgrzynowski and Smolczewskiv v. Poland*, judgment of 16 July 2013, application no. 33846/07. The applicants complained about Court's refusal to order the newspaper to remove an article damaging the applicants' reputation from its Internet archive. The respondent State had complied with its obligation to strike a balance between the rights guaranteed under Article 8 and 10 of the Convention.. .... 169

72. *Eur. Court of HR. Radu v. the Republic of Moldova*, judgment of 15 April 2014, application no. 50073/07. The applicant complained about a State-owned hospital's disclosure of medical information to her employer. The proceedings were brought against the hospital and the Police Academy claiming compensation for a breach of her right to private life. The Court found that the interference was not "in accordance with the law" within the meaning of Article 8..... 170

73. *Eur. Court of HR. L.H. v Latvia*, judgment of 29 April 2014, application no. 52019/07. The applicant complained about a lack of precision of domestic law that allows public authorities the collection of his medical data. The Court found that the applicable law had failed to indicate with sufficient clarity the scope of discretion conferred on competent authorities and manner of its exercise ..... 172

74. *Eur. Court of HR. Elberte v Latvia*, judgment of 13 January 2015, application no. 61243/08. The case concerned the removal of body tissue from Ms Elberte's deceased husband by forensic experts after his death, without her knowledge or consent. Unknown

to Ms Elberte, pursuant to a State-approved agreement, tissue had been removed from her husband's body after her husband's autopsy and sent to a pharmaceutical company in Germany for the creation of bio-implants. She only learned about the course of events two years after her husband's death when a criminal investigation was launched in Latvia into allegations of wide-scale illegal removal of organs and tissues from cadavers. However, domestic authorities eventually did not establish any elements of crime. .... 173

75. *Eur. Court of HR. Brunet v France*, judgment of 18 September 2014, application no. 21010/10. The applicant complained about his registration in a recorded offences database after criminal proceedings against him were discontinued. The prosecutor rejected definitively the applicant's demand of removal arguing that the law doesn't allow him to. The applicant couldn't reach a real opportunity to ask the removal of his data. The retention could be regarded as a disproportionate breach of the applicant's right to respect for his private life and was not necessary in a democratic society. The State had overstepped its discretion to decide and thus violated Article 8 .....17  
6

76. *Eur. Court of HR. Dragojević v. Croatia*, judgment of 15 January 2015, application no. 68955/11,. The case principally concerned the secret surveillance of telephone conversations of a drug trafficking suspect. The Court found in particular that Croatian law, as interpreted by the national courts, did not provide reasonable clarity as to the authorities' discretion in ordering surveillance measures and it did not in practice – as applied in Mr Dragojević's case – provide sufficient safeguards against possible abuse..  
178

77. *Eur. Court of HR. Case Yuditskaya and others v. Russia*, judgment of 12 February 2015, application no. 5678/06. The applicants alleged, in particular, that there had been no grounds for conducting a search of the premises of their law firm and seizing their computers. The Court concluded that there has been a violation of Article 8 of the Convention..... 180

78. *Eur. Court of HR. Haldimann and Others v Switzerland*, judgment of 24 February 2015, application no. 21830/09. Balance between freedom of expression and right to privacy. The applicants complained about their conviction for having recorded and broadcasted an interview of a private insurance broker using a hidden camera. In the video, the broker's face was pixelated and his voice. The Court considered that the interference in the private life of the broker, who had turned down an opportunity to express his views on the interview in question, had not been serious enough to override the public interest in information on malpractice in the field of insurance brokerage. The Court found, by majority, that there had been a violation of the freedom of expression.. ..... 181

79. *Eur. Court of HR. Case of Zaichenko v. Ukraine*, judgment of 26 February 2015, application no. 45797/09.. The applicant complained about his involuntary psychiatric confinement and the unlawful collection of information about him by the police in that context. The Court concluded a violation of Article 8. .... 183

80. *Eur. Court of HR. Case of M.N. and Others v. San Marino*, judgement of 7 July 2015, application no. 28005/12. The applicants complained about the decision ordering the seizure of banking documents relating to them, alleging that they did not have effective access to court to complain about it and that it interfered with their private life and correspondence. .... 185

81. *Eur. Court of HR. Case of Sõro v. Estonia*, judgment of 3 September 2015, application no. 22588/08. The applicant alleged that the publication, thirteen years after the restoration of Estonian independence, of information about his service in the former State security organisations (KGB) had violated his right to respect for his private life. The Court rules that such a passage of time must have decreased any threat the applicant could have initially posed to the new democratic system. The Court concluded that the applicant's right to respect for his private life was subject to a disproportionate interference. .... 206

82. *Eur. Court of HR. Bremner v. Turkey*, judgment of 13 October 2015, application no. 37428/06. Television broadcast showing non-blurred images of an individual obtained using a hidden camera while meeting someone to offer free Christian literature wasn't justified by general-interest. The State overpassed its margin of appreciation and violated Article 8..... 190

83. *Eur. Court of HR. R.E v. United Kingdom*, judgment of 27 October 2015, application no. 62498/11. Covert surveillance of a detainee's consultations with his lawyer violates Article 8 since these consultations benefit from a strengthened protection. However, consultations with the person appointed to assist the detainee, as a vulnerable person, following his arrest do not benefit from this protection; Article 8 is not violated on this grievance..... 192

84. *Eur. Court of HR, Brito Ferrinho Bexiga Villa-Nova v. Portugal*, judgment of 1 December 2015, application no. 69436/10. The case concerned access to the bank accounts of a lawyer charged with tax fraud. The Court found that consultation of the lawyer's bank statements had amounted to an interference with her right to respect for professional confidentiality, which fell within the scope of private life.....194

85. *Eur. Court of HR, G.S.B. v. Switzerland*, judgment of 22 December 2015, application no. 28601/11. The case concerned the transmission to the US tax authorities of the applicant's bank account details in connection with an administrative cooperation agreement between Switzerland and the USA. The Court noted that the applicant had had access to several effective and genuine procedural safeguards in order to contest the transmission of his bank details and to secure protection against arbitrary implementation of agreements concluded between Switzerland and the US .....19

6

86. *Eur. Court of HR. Roman Zakharov v. Russia*, judgment of 4 December 2015, application no. 47143/06. The applicant is a user of mobile phone complaining of system of secret surveillance without effective domestic remedies. Although the applicant cannot prove that his own conversations have been surveyed, the mere

existence of the legislation allowing it restricts the liberty of communicating. The Court concluded that domestic legal provisions governing the interception of communications did not provide adequate and effective guarantees and thus violate Article 8.....199

87. *Eur. Court of HR, Szabó and Vissy v. Hungary*, judgment of 12 January 2016, application no. 37138/14. The Court recognised that situations of extreme urgency in the fight against terrorism could arise in which a requirement for prior judicial control would run the risk of losing precious time. However, judges must be able to control surveillance measures post factum. The Court decided that the domestic law did not provide an effective judicial-control mechanism and did not provide sufficiently precise, effective and comprehensive safeguards on the ordering, execution and potential redressing of surveillance measures. .... 224

88. *Eur. Court of HR, Y.Y. v. Russia*, judgment of 23 February 2016, application no. 40378/06. The applicant complained that the St Petersburg Committee for Healthcare had collected and examined her medical records and those of her children and forwarded its report containing the results of its examination, to the Ministry of Healthcare without her consent. The Court found a violation of Article 8 because the actions in dispute did not constitute a foreseeable application of the relevant Russian law.....206

89. *Eur. Court of HR, Šantare and Labazņikovs v. Latvia*, judgment of 31 March 2016, application no. 34148/07. The applicants complained that covert interception of their mobile phone conversations, which were subsequently used during their trial, had not been carried out in compliance with Article 8 of the Convention. The Court found a violation of Article 8.....209

90. *Eur. Court of HR, Cevat Özel v. Turkey*, judgment of 7 June 2016, application no. 19602/06. The applicant complained about the surveillance of his communications and the absence of notification. The Court recognised that the measures of surveillance could be lawful but the absence of notification impeded the applicant to ensure his rights. The Court thus concluded the violation of Article 8.....227

91. *Eur. Court of HR, Karabeyoğlu v. Turkey*, judgment of 7 June 2016, application no. 30083/10. The applicant alleged that the monitoring of his communications and those of his wife and two children had been arbitrary and illegal, that his professional and personal reputation had been damaged as a result, and complained that he and his family had been denied the right of access to a court because of the failure of the Ministry of Justice to send him the documents concerning the phone-tapping operations. The Court found no violation of Article 8 as regards the telephone tapping in connection with the criminal investigation, but found a violation as regards the use in disciplinary proceedings of the information obtained by means of telephone tapping, and of Article 13 (right to effective remedy).. ....236

92. *Eur. Court of HR, Versini-Campinchi and Crasnianski v. France*, judgment of 16 June 2016, application no. 49176/11. The case concerned the interception, transcription and use in disciplinary proceedings against her of conversations which

the applicant, who is a lawyer, had had with one of her clients. The Court held that as the transcription of the conversation between the applicant and her client had been based on the fact that the contents could give rise to the presumption that the applicant had herself committed an offence, and the domestic courts had satisfied themselves that the transcription did not infringe her client's rights of defence, the fact that the former was the latter's lawyer did not suffice to constitute a violation of Article 8 of the Convention in the applicant's regard. ....218

93. *Eur. Court of HR, Vukota-Bojić v. Switzerland*, judgment of 18 October 2016, application no. 61838/10. The applicant complained that the surveillance by the insurance company had been in breach of her right to respect for private life, and that it should not have been admitted in the proceedings that resulted in the reduction of her disability pension. The Court held that the secret surveillance ordered had interfered with the applicant's private life. However, the surveillance had not been prescribed by law, it had failed to regulate with clarity when and for how long surveillance could be conducted, and how data obtained by surveillance should be stored and accessed. There had therefore been a violation of Article 8. ....222

94. *Eur. Court of HR, Bašić v Croatia*, judgment of 25 October 2016, application no. 22251/13. The applicant complained that the secret surveillance of his telephone conversations, subsequently used as evidence during his trial, had been in violation of the guarantees of Articles 8 and 6 § 1 of the Convention. The Court found a violation of Article 8.....246

95. *Eur. Court of HR, Figueiredo Teixeira v. Andorra*, judgment of 8 November 2016, application no. 72384/14. The case concerned the storage and communication to the judicial authority of data from telephone calls made by the applicant, who was suspected of the serious offence of drug trafficking. The Court found in particular that since the impugned interference was prescribed in national law, a person holding a prepaid mobile phone card could reasonably have expected those provisions to be applied in his case. Furthermore, the criminal procedure provided a wide range of safeguards against arbitrary actions. Hence, no violation of Article 8 was found. ....249

96. *Eur. Court of HR, Surikov v. Ukraine*, judgment of 26 January 2017, application no. 42788/06. The applicant complained that his employer had arbitrarily collected, retained, and used sensitive, obsolete and irrelevant data concerning his mental health in considering his application for promotion, and had unlawfully and unfairly disclosed this data to the applicant's colleagues and to a civil court during a public hearing. The Court found a violation of Article 8.....25  
1

97. *Eur. Court of HR, Matanović v. Croatia*, judgment of 4 April 2017, application no. 2742/12. The case concerned a complaint about entrapment, secret surveillance measures and the non-disclosure and use of the evidence thus obtained. Mr Matanović, the applicant, was convicted of corruption in 2009. His conviction was essentially based on evidence obtained via telephone tapping following a covert operation involving an informant. The Court found that there had been no violation of

Article 6 § 1 as concerned Mr Matanović’s complaint of entrapment, a violation of the same Article with as concerned the non-disclosure of certain evidence in the criminal proceedings against Mr Matanović, and a violation of Article 8 because the procedure for ordering and supervising the tapping of Mr Matanović’s telephone had not been lawful....255

98. *Eur. Court of HR, Trabajo Rueda v. Spain*, judgment of 30 May 2017, application no. 32600/12. The applicant complained that the police seizure and inspection of his computer had amounted to an interference with his right to respect for his private life and correspondence. The Court deemed that the police seizure of the computer and inspection of the files which it contained, without prior judicial authorisation, had not been proportionate to the legitimate aims pursued and had not been “necessary in a democratic society” ..... 236

99. *Eur. Court of HR, Bogomolova v. Russia*, judgment of 20 June 2017, application no. 13812/09. The case concerned the use of a minor’s image without parental authorisation. The Court found a violation of Article 8, stating in particular that the domestic courts had failed to examine whether the applicant had given her consent for the publication of the photograph, focusing instead on the authorisation she had given that her son be photographed. The Court also highlighted the false impressions and inferences which could be drawn from the context of the photograph.....238

100. *Eur. Court of HR, Aycaguer v France*, judgment of 22 June 2017, application no. 8806/12. The case concerned the applicant’s refusal to undergo biological testing, the result of which was to be included in the national computerised DNA database (FNAEG). The Court found a violation of Article 8, noting that no appropriate action had been taken on the reservation by the Constitutional Court regarding the constitutionality of FNAEG and that there was no provision for differentiating the period of storage depending on the nature and gravity of the offences committed. Secondly, the Court ruled that the regulations on the storage of DNA profiles in the FNAEG did not provide the data subjects with sufficient protection .....240

101. *Eur. Court of HR, Dagregorio and Mosconi v. France*, judgment of 22 June 2017, application no. 65714/11. The applicants considered that their conviction for refusing to undergo biological testing amounted to a disproportionate interference with their right to respect for their private life and their physical integrity. Relying on Article 14 (prohibition of discrimination) read in conjunction with Article 8, they alleged discrimination, emphasising that only individuals suspected or convicted of a certain category of criminal offence were subject to biological testing. Under Article 11 (freedom of assembly and association), they alleged that there has been a violation of their trade-union freedom. Lastly, under Article 14 in conjunction with Article 11, they submitted that the authorities should not have treated them in the same way as the persons targeted by the legislature when the FNAEG had been set up. The Court unanimously declared the application inadmissible.....242

102. *Eur. Court of HR, Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, judgment of 27 June 2017, application no. 931/13. After two companies had published the personal tax information of 1.2 million people, the domestic authorities ruled that such wholesale publication of personal data had been unlawful under data protection laws, and barred such mass publications in future. The companies complained to the European Court of Human Rights that the ban had violated their right to freedom of expression. The Court held that the ban had interfered with the companies' freedom of expression. However, it had not violated Article 10 because it had been in accordance with the law, it had pursued the legitimate aim of protecting individuals' privacy, and it had struck a fair balance between the right to privacy and the right to freedom of expression. However, the Court did find a violation of Article 6 § 1 (right to a fair hearing within a reasonable time), due to the excessive length of the proceedings .....244

103. *Eur. Court of HR, Terrazoni v. France*, judgment of 29 June 2017, application no. 33242/12. The case concerned the use, in the context of disciplinary proceedings against a judge, of the transcript of a telephone conversation that had been intercepted by chance in criminal proceedings in which the judge had not been involved. The Court found no violation of Article 8, as the interference complained of had been in accordance with the law and had been aimed at establishing the truth both in relation to the initial criminal proceedings against F.L. and in relation to the ancillary criminal proceedings concerning the judge. The Court concluded that there had been effective scrutiny capable of limiting the interference in question to what was necessary in a democratic society.....247

104. *Eur. Court of HR, Mustafa Sezgin Tanrikulu v Turkey*, judgment of 18 July 2017, application no. 27473/06. The applicant complained that the Turkish Court's decision authorising the interception of his communications had been unlawful and in violation of Article 8 of the Convention because of its indiscriminate nature. The Court found a violation of Article 8.....24



**105. Eur. Court of HR, *Bărbulescu v. Romania*, judgment of 5 September 2017, application no. 61496/08. The case concerned the decision of a private company to dismiss an employee after monitoring his electronic communications and accessing their contents, and the alleged failure of the domestic courts to protect his right to respect for his private life and correspondence. The Court concluded that the national authorities had not adequately protected Mr Bărbulescu's right to respect for his private life and correspondence. They had consequently failed to strike a fair balance between the interests at stake.....252**

## JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS (PRESS RELEASES AND LEGAL SUMMARIES)\*

1. *Eur. Court of HR, Klass and others v. Germany*, judgment of 6 September 1978, application no. 5029/71. Law authorising secret services to carry out secret monitoring of communications (postal and telephone).

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no. 5029/71

06.09.1978

Press release issued by the Registrar

### **KLASS AND OTHERS v. GERMANY**

Law authorising secret services to carry out secret monitoring of communications did not violate the Convention

#### **Basic Facts**

The applicants, who are German nationals, are Gerhard Klass, a public prosecutor, Peter Lubberger, a lawyer, Jürgen Nussbruch, a judge, Hans-Jürgen Pohl and Dieter Selb, lawyers. Legislation passed in 1968 - namely an amendment to Article 10 §2 of the Basic Law and an Act of 13 August 1968 restricting the right to secrecy of mail, post and telecommunications - authorises in certain circumstances secret surveillance without the need to inform the person concerned. In addition, the legislation excludes legal remedy before the courts in respect of the ordering and implementation of the surveillance measures; it institutes instead supervision by two agencies, that is a Board of five Members of Parliament appointed by the Bundestag and a Commission of three members nominated by that Board.

Following an appeal lodged by the applicants, the Federal Constitutional Court held on 15 December 1970 that the Act of 13 August 1968 was void insofar as it prevented notification to the subject of the surveillance even when such notification could be made without jeopardising the purpose of the restriction.

#### **Law – Article 25 § 1**

The German Government had contended that, since the substance of the applicants' complaint was the purely hypothetical possibility of being subject to surveillance under the legislation, they could not be considered as "victims" within the meaning of Article 25 of the Convention. This Article empowers the European Commission of Human Rights, subject to certain conditions, to receive petitions from any person "claiming to be the victim of a violation" of the Convention.

Having regard to the specific circumstances of the case,, the Court concluded that the applicants were entitled to claim to be victims of a violation even though - due to the secrecy of any surveillance measures - they were not able to allege in support of their application that they had in fact been subject to surveillance.

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\* The complete texts of the Court's judgments are available on the Court's website at [www.echr.coe.int](http://www.echr.coe.int)

The Court then turned to the question whether the applicants were actually the victims of any violation of the Convention and examined the compatibility with the Convention of the contested legislation.

### **Law – Article 8**

There being no dispute that the contested legislation results in an interference with the applicants' right to respect for their private and family life and correspondence, the cardinal issue was whether that interference is justified under paragraph 2 of Article 8. Since that paragraph provides for an exception to a right guaranteed by the Convention, it must, emphasised the Court, be narrowly interpreted. Thus, "powers of secret surveillance of citizens, characterising as they do the police State, are tolerable under the Convention only insofar as strictly necessary for safeguarding the democratic institutions".

The Court found that the legislation in question has an aim that is legitimate under paragraph 2 of Article 8, namely the safeguarding of national security and the prevention of disorder or crime. It then went on to consider whether the means adopted remain within the bounds of what is necessary in a democratic society in order to achieve that aim.

The Court took notice of the fact that "democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction". It had therefore to be accepted that "the existence of some legislation granting powers of secret surveillance over the mail, post and, telecommunications is, under exceptional conditions, necessary in a democratic Society in the interests of national security and/or for the prevention of disorder or crime".

Although recognising that the Convention leaves to Contracting States a certain discretion as regards the fixing of the conditions under which the system of surveillance is to be operated, the judgment continues: "... this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate!" "The Court must be satisfied that, whatever system is adopted, there exist adequate and effective guarantees against abuse."

In the light of these considerations, the Court then examined the functioning of the system of secret surveillance established by the contested legislation. The judgment notes in particular that:

- according to that legislation, a series of limitative conditions have to be satisfied before a surveillance measure can be ordered ;
- strict conditions are laid down with regard to the implementation of the surveillance measures and to the processing of the information thereby obtained ;
- while "in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge", the two supervisory bodies instituted by the legislation "may, in the circumstances of the case, be regarded as enjoying sufficient independence to give an objective ruling";
- the fact of not informing the individual once surveillance has ceased cannot itself be incompatible with Article 8 since it is this very fact which ensures the efficacy of the measure.

**Law – Article 13**

The Court then examined the case under Article 13 which guarantees that everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority. The Court found, *inter alia*, that:

- the lack of notification of surveillance measures is not, in the circumstances of the case, contrary to the concept of an “effective remedy” and does not therefore entail a violation of Article 13;

- "for the purposes of the present proceedings, an 'effective remedy' under Article must mean a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in any system of secret surveillance";

- in the particular circumstances of this case, the aggregate of remedies available to the applicants under German law satisfies the requirements of Article 13.

**Law – Article 6 § 1**

The Court concluded that Article 6, even if applicable, had not been violated.

**Conclusion:** no violation of Article 8, no violation of Articles 13 and 6 § 1

**2. Eur. Court of HR, *Malone v. The United Kingdom*, judgment of 2 August 1984, application no. 8691/79. Interception of postal and telephone communications and release of information obtained from “metering” of telephones, both effected by or on behalf of the police within the general context of criminal investigation.**

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**no. 8691/79**  
**02.08.1984**

Press release issued by the Registrar

**MALONE v. THE UNITED KINGDOM**

Interception of communications and release of information from metering of telephones by the police violated the Convention

**Basic Facts**

The applicant in the present case is Mr. James Malone, a United Kingdom citizen who currently resides in Dorking, Surrey, in England. In March 1977, he was charged with offences relating to the dishonest handling of stolen goods; he was ultimately acquitted. During his trial, it emerged that a telephone conversation to which he had been a party had been intercepted by the Post Office on behalf of the police on the authority of a warrant issued by the Home Secretary.

Mr. Malone further believes that, at the behest of the police, his correspondence has been intercepted, his telephone lines "tapped" and, in addition, his telephone "metered" by a device recording all the numbers dialled. Beyond admitting the interception of the one conversation adverted to in evidence at his trial, the United Kingdom Government have neither admitted nor denied the allegations concerning correspondence and tapping, and have denied that concerning metering; they have, however, accepted that the applicant, as a suspected receiver of stolen goods, was one of a class of persons whose postal and telephone communications were liable to be intercepted.

It has for long been the publicly known practice for interceptions of postal and telephone communications for the purposes of the detection and prevention of crime to be carried out on the authority of a warrant issued under the hand of a Secretary of State, as a general rule the Home Secretary. There is, however, no overall statutory code governing the matter. Nonetheless, various statutory provisions are relevant, including one under which the Post Office - as from 1981, the Post Office and British Telecommunications - may be required to inform the Crown about matters transmitted through the postal or telecommunication services. There also exists a practice, of which Parliament has been informed, whereby the telephone service - the Post Office prior to 1921 and thereafter British Telecommunications - makes and supplies records of metering at the request of the police in connection with police enquiries into the commission of crime.

In October Mr. Malone instituted civil proceedings in the High Court against the Metropolitan Police Commissioner, seeking, amongst other things, a declaration that any tapping of conversations on his telephone without his consent was unlawful even if done pursuant to a warrant of the Secretary of State. The Vice-Chancellor, Sir Robert Megarry, dismissed his claim in February 1979.

## **Law – Article 8**

### Interception of communications

The present case is concerned only with interception of communications and metering of telephones effected by or on behalf of the police within the general context of a criminal investigation, together with the relevant legal and administrative framework.

The one admitted interception of a telephone call to which Mr. Malone was a party involved an "interference" with the exercise of his right to respect for his private life and his correspondence. In addition, as a suspected receiver of stolen goods, Mr. Malone was a member of a class of persons against whom measures of postal and telephone interception were liable to be employed. This being so, the existence in England and Wales of laws and practices which permit and establish a system for carrying out secret surveillance of communications amounted in itself to such an "interference", apart from any concrete measures taken against him.

The expression "in accordance with the law" in paragraph 2 of Article 8 means firstly that any interference must have some basis in the law of the country concerned. However, over and above compliance with domestic law, it also requires that domestic law itself be compatible with the rule of law. It thus implies that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1. The Court accepted the Government's contention that the requirements of the Convention cannot be exactly the same in the special context of interception of communications for the purposes of police investigations as they are in other contexts. Thus, the "law" does not have to be such that an individual should be enabled to foresee when his communications are likely to be intercepted so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens in general an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.

Furthermore, since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the substantive law itself, as opposed to accompanying administrative practice, must indicate the scope and manner of exercise of any such discretion with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.

It was common ground that the settled practice of intercepting communications on behalf of the police in pursuance of a warrant issued by the Secretary of State was lawful under the law of England and Wales. There were, however, fundamental differences of view between the Government, the applicant and the Commission as to the effect, if any, of certain statutory provisions in imposing legal restraints on the manner in which and the purposes for which interception of communications may lawfully be carried out.

The Court found that, on the evidence adduced, in its present state domestic law in this domain is somewhat obscure and open to differing interpretations. In particular, it cannot be said with any reasonable certainty what elements of the powers to intercept are incorporated in legal rules and what elements remain within the discretion of the executive. In the opinion of the Court, the law of England and Wales does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. To that extent, the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking.

The Court therefore concluded that the interferences found were not "in accordance with the law" within the meaning of paragraph 2 of Article 8.

Undoubtedly, the existence of some law granting powers of interception of communications to aid the police may be "necessary" for prevention of disorder or crime". However, "in a democratic society" the system of secret surveillance adopted must contain adequate guarantees against abuse.

In the light of its conclusion under (b), the Court considered that it did not have to examine further the content of the other guarantees required by paragraph 2 of Article 8 and whether the system complained of furnished those guarantees in the particular circumstances.

#### "Metering" of telephones

The records of metering contain information, in particular the numbers dialled, which is an integral element in the communications made by telephone. Consequently, release of that information to the police without the consent of the subscriber amounts to an interference with the exercise of a right guaranteed by Article 8. The applicant was potentially liable to be directly affected by the practice which existed in this respect. Despite the clarification by the Government that the police had not caused his telephone to be metered, the applicant could claim to be the victim of an interference in breach of Article 8 by reason of the very of the practice.

No rule of domestic law makes it unlawful for the telephone service to comply with a request from the police to make and supply records of metering. Apart from this absence of prohibition, there would appear to be no legal rules concerning the scope and manner of exercise of the discretion enjoyed by the public authorities. Consequently, so the Court found, although lawful in terms of domestic law, the resultant interference was not "in accordance with the law", within the meaning of paragraph 2 of Article 8.

This finding removed the need for the Court to determine whether the interference was "necessary in a democratic society".

Having regard to its decision on Article 8, the Court did not consider it necessary to rule on alleged violations of Article 13.

**Conclusion:** violation of Article 8 in the applicant's case as regards both interception of communications and release of records of metering to the police. No violation of Article 13

#### **Article 50 (Just Satisfaction)**

By way of "just satisfaction" under Article 50, the applicant had claimed reimbursement of legal costs and an award of compensation. Judging that it was not yet ready for decision, the Court reserved the question and referred it back to the Chamber originally constituted to hear the case.

3. ***Eur. Court of HR, Leander v. Sweden***, judgment of 26 March 1987, application no. 9248/81. Use of information kept in a secret police-register when assessing a person's suitability for employment on a post of importance for national security.

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no. 9248/81  
26.03.1987

Press release issued by the Registrar

### **LEANDER v. SWEDEN**

Refusal to grant access to information kept in a secret police-register on grounds of national security did not violate the Convention

#### **Basic Facts**

In August 1979, Mr. Leander was considered for employment at the Naval Museum in Karlskrona, in the south of Sweden. Part of the Museum's premises were located within an adjacent naval base. As a consequence, appointment to the post sought by Mr. Leander had to be preceded by a security check - a so-called personnel control, which involved consulting information held on a secret register kept by the security police. The procedure to be followed was governed principally by the Personnel Control Ordinance 1969, published in the Swedish Official Journal. In Mr. Leander's case, the outcome of the control was such that his employment was refused, without his having received an opportunity to know and to comment upon the information released to the Navy from the secret police-register.

Mr. Leander complained to the Government, requesting annulment of the assessment that he constituted a security risk, a declaration that he was acceptable for employment, access to the information kept on him and an opportunity to comment on this information. The Government rejected the complaint on all points.

#### **Law – Article 8**

It was uncontested that the secret police register contained information relating to Mr. Leander's private life. Both the storing and the release of such information, which had been coupled with a refusal to allow Mr. Leander an opportunity to refute it, amounted to an interference with his right to respect for private life as guaranteed by Article 8 § 1.

The aim of the Swedish personnel control system was clearly a legitimate one for the purposes of Article 8, that is the protection of national security.

The interference had a valid base in domestic law, namely the Personnel Control Ordinance.

The Ordinance, which had been published in the Swedish Official Journal, met the further condition that the "law" in question be accessible to the individual concerned.

It is also a requirement in Article 8 that the consequences of the "law" be foreseeable for the individual concerned. This requirement, the Court pointed out, cannot be the same in the special context of secret controls of staff in sectors affecting national security as in many other fields. The Court concluded that in a system applicable to citizens generally, as under the Personnel Control Ordinance, the "law" in question has to be sufficiently clear as to the



circumstances in which and the conditions on which the public authorities are empowered to resort to this kind of potentially dangerous interference with private life.

Taking into account the various limitations imposed on the registration of information, in particular the prohibition on registration merely on the ground of political opinion, and the explicit and detailed provisions governing the operation of the personnel control procedure, the Court found that Swedish law satisfied the requirement of foreseeability.

According to well-established principles in the Court's case-law, the notion of necessity implies that the interference must correspond to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. The respondent State's interest in protecting national security had to be balanced against the seriousness of the interference with the applicant's right to respect for private life. The Court accepted that, in the circumstances, the State enjoyed a wide margin of appreciation in making its assessment.

There can be no doubt as to the necessity for the Contracting States to have a system for controlling the suitability of candidates for employment in posts of importance for national security. Nevertheless, in view of the risk that a system of secret surveillance for the protection of national security poses of undermining or even destroying democracy on the ground of defending it, the Court had to be satisfied that there existed in the system at issue adequate and effective guarantees against abuse.

The Court noted that the Swedish system was designed to reduce the effects of the personnel control procedure to an unavoidable minimum and that, leaving aside the monitoring affected by the Government themselves, supervision of its proper implementation was entrusted both to Parliament and to independent institutions. The Court attached especial importance, firstly, to the presence of parliamentarians on the police board that authorised the release of the information to the Navy and, secondly, to the supervision effected by the Chancellor of Justice and the Parliamentary Ombudsman as well as the Parliamentary Standing Committee on Justice. The safeguards contained in the Swedish personnel control system were therefore judged sufficient to meet the requirements of Article 8.

Having regard to the wide margin of appreciation available to it, the respondent State was entitled to consider that, in the particular case, the interests of national security prevailed over Mr. Leander's individual interests.

### **Law – Article 10**

It appeared clearly from the provisions of the Personnel Control Ordinance that its purpose was to ensure that persons holding security-sensitive posts had the necessary personal qualifications. This being so, the right of access to the public service, a right not protected by the Convention, lay at the heart of the issue submitted to the Court. There had accordingly been no interference with Mr. Leander's freedom to express opinions.

Article 10 does not, in the circumstances such as those in the case at issue, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual. Accordingly, there had likewise been no interference with Mr. Leander's freedom to receive information.

### **Law – Article 13**

As established in the Court's case-law, the "national authority" referred to in Article 13 need not be a judicial authority in the strict sense. In addition, in the special context of Mr. Leander's case, an "effective remedy" must mean a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in any system of secret

surveillance for the protection of national security. Further, although no single remedy may itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so.

The Court noted that under Swedish law the applicant could have filed complaints with the Parliamentary Ombudsman or the Chancellor of Justice, who both had to be considered independent of the Government. Although both lacked the power to render legally binding decisions, in practice their opinions were usually followed. There also existed the remedy of complaint to the Government, to which Mr. Leander had had recourse, albeit unsuccessfully. The Court held that even if, taken on its own, the complaint to the Government were not to be considered sufficient, the aggregate of available remedies satisfied the conditions of Article 13 in the particular circumstances of the case.

**Conclusion:** no violation of Articles 8, 10 and 13

**4. Eur. Court of HR, Gaskin v. The United Kingdom, judgment of 7 July 1989, application no. 10454/83. Refusal to grant former child in care unrestricted access to case records kept by social services.**

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**no. 10454/83**  
**07.07.1989**

Press release issued by the Registrar

**GASKIN v. THE UNITED KINGDOM**

The procedures followed in relation to access by the applicant to his case records failed to secure respect for the Convention

**Basic Facts**

Following the death of his mother, the applicant, a British citizen born in 1959, was received into care on 1 September 1960 by the Liverpool City Council under the Children Act 1948. He ceased to be in the care of the Council on attaining the age of majority (18) on 2 December 1977. During the period while the applicant was in care, he was boarded out with various foster parents. He contends that he was ill-treated.

Under the provisions of the Boarding-Out of Children Regulations 1955, the local authority was under a duty to keep certain confidential records concerning the applicant and his care.

In 1979 the applicant, wishing to bring proceedings against the local authority for damages for negligence, made an application under the Administration of Justice Act 1970 for discovery of the local authority's case records made during his period in care. Discovery was refused by the High Court on 22 February 1980, on the ground that case records compiled pursuant to the 1955 Regulations were private and confidential. This decision was confirmed by the Court of Appeal on 27 June 1980.

Between 1980 and 1983, various committees of the City Council adopted resolutions on the release of child care records. To a certain extent, these resolutions were challenged in the courts. Finally, in November 1983, Liverpool City Council adopted a further resolution which provided that the information in the applicant's file should be made available to him if the contributors to the file gave their consent to disclosure. This resolution was in line with the Circular issued by the Department of Health and Social Security in August 1983.

The applicant's case record consisted of some 352 documents contributed by 46 persons. On 23 May 1986 copies of 65 documents supplied by 19 persons were sent to the applicant's solicitors. These were documents whose authors had consented to disclosure to the applicant.

**Law – Article 8**

Although the Government argued that the applicant's personal file did not form part of his private life, the Court, like the Commission, found that the file did relate to Mr Gaskin's "private and family life" in such a way that the question of his access thereto fell within the ambit of Article 8. That finding was, reached without expressing any opinion on whether general rights of access to personal data may be derived from Article 8 § 1 of the Convention.

According to the Court's case-law, "although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective 'respect' for family life".

It was common ground that Mr Gaskin neither challenged the fact that information was compiled and stored about him nor alleged that any use was made of it to his detriment. He challenged rather the failure to grant him unimpeded access to that information.

Indeed, the Court found that, by refusing him complete access to his case records, the United Kingdom could not be said to have "interfered" with Mr Gaskin's private or family life. In this connection, the substance of the applicant's complaint was not that the State had acted but that it had failed to act.

It was therefore necessary to examine whether the United Kingdom, in handling the applicant's requests for access to his case records, was in breach of a positive obligation flowing from Article 8 of the Convention.

According to the Government, the proper operation of the child-care service depended on information supplied by professional persons and bodies, and others. If the confidentiality of these contributors were not respected, their co-operation would be lost and this would have a detrimental effect on the child-care service. There was no blanket refusal of access to case records. Access was given to confidential information in so far as the consent of the contributor could be obtained.

According to the applicant, however, the Access to Personal Files Act 1987 and regulations made thereunder illustrated the extent to which information of the kind sought by him would in the future be made available by public authorities. The Government pointed out that the new regulations would not apply to records compiled before the entry into force of the regulations (April 1989).

The local authority obtained consent in respect of 65 out of some 352 documents, and those were released. The Government argued that no obligation to do more than this existed.

In the Court's opinion, however, persons in the applicant's situation have a vital interest, protected by the Convention, in receiving the information necessary to know and understand their childhood and early development. Although a system, like the British one, which makes access to child-care records dependent on the contributor's consent, can in principle be considered to be compatible with the obligations under Article 8, the Court considered that the interests of an individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. In such a case, the principle of proportionality requires that an independent authority decide whether access should be granted.

As no such system was available to Mr Gaskin, the Court held by eleven votes to six that the procedures followed had failed to secure respect for Mr Gaskin's private and family life as required by Article 8 of the Convention.

As regards the alleged breach of Article 10, the Court unanimously held that Article 10 did not embody an obligation on the Government to impart the information in question to the individual. There had thus been no interference with Mr Gaskin's right to receive information as protected by that Article.

**Conclusion:** violation of Article 8, no violation of Article 10

### **Article 50 (Just Satisfaction)**

Making a determination on an equitable basis, the Court awarded to Mr Gaskin the amount of £5,000 as non-pecuniary damage.

The applicant claimed a total sum of £117,000 for legal costs and expenses. The Court considered that the total amount claimed was not reasonable as to quantum. Making an equitable assessment, the Court awarded Mr Gaskin, for legal fees and expenses, the sum of £11,000 less 8,295 French francs already paid in legal aid.

### **Separate Opinions**

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

5. *Eur. Court of HR, Kruslin v. France*, judgment of 24 April 1990, application no. 11801/85, and *Eur. Court of HR, Huvig v. France*, judgment of 24 April 1990, application no. 11105/84. The applicants complained about the telephone tapping carried out by senior police officer under warrant issued by investigating judge.

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**no. 11801/85 and 11105/84**  
**24.04.1990**

Press release issued by the Registrar of the European Court of Human Rights

### **KRUSLIN v. FRANCE and HUVIG v. FRANCE**

The telephone tapping carried out by senior police officer under warrant issued by investigating judge violated the Convention

#### **Basic Facts**

##### Kruslin case

In April 1985 the Indictment Division of the Toulouse Court of Appeal committed Mr Kruslin for trial at the Haute-Garonne Assize Court on charges of aiding and abetting a murder, aggravated theft and attempted aggravated theft. One item of evidence was the recording of a telephone conversation that the applicant had had on a line belonging to a third party, a recording that had been made at the request of an investigating judge at Saint-Gaudens in connection with other proceedings. An appeal on points of law brought by Mr Kruslin on this ground was dismissed by the Court of Cassation.

##### Huvig case

Mr Huvig, who, with his wife's assistance, ran a business at the material time, was the subject of a complaint in December 1973 alleging tax evasion, failure to make entries in accounts and false accounting.

A judicial investigation was begun by an investigating judge at Chaumont, who issued a warrant to the gendarmerie at Langres requiring them to monitor and transcribe all Mr and Mrs Huvig's telephone calls, both business and private ones. The telephone tapping took place over a period of 28 hours in April 1974.

Charges were brought against Mr and Mrs Huvig, who were convicted on nearly all of them by the Chaumont *tribunal de grande instance* in March 1982. In March 1983 the Dijon Court of Appeal upheld the convictions and increased the sentences. In April 1984 the Court of Cassation dismissed an appeal on points of law by the applicants.

#### **Law – Article 8**

The Court found that the interceptions complained of amounted to interferences by a public authority with the exercise of the applicants' right to respect for their correspondence and their private life. It proceeded to ascertain whether such interferences were justified under paragraph 2 of Article 8.

The expression "in accordance with the law", within the meaning of Article 8 § 2, required firstly that the impugned measure should have some basis in domestic law, but also referred to the quality of the law in question, requiring that it should be accessible to the person

concerned, who had moreover to be able to foresee its consequences for him, and compatible with the rule of law.

It had been a matter of dispute before the Commission and the Court whether the first condition had been satisfied. The applicants had said it had not been. The Government submitted that by "law" was meant the law in force in a given legal system, in this instance a combination of the written law - essentially Articles 81, 151 and 152 of the Code of Criminal Procedure - and the case-law interpreting it.

The Delegate of the Commission considered that in the case of the Continental countries, including France, only a substantive enactment of general application - whether or not passed by Parliament - could amount to a "law" for the purposes of Article 8 § 2 of the Convention.

The Court pointed out, firstly, that it was primarily for the national authorities, notably the courts, to interpret and apply domestic law. It was therefore not for the Court to express an opinion contrary to theirs on whether telephone tapping ordered by investigating judges was compatible with Article 368 of the Criminal Code. For many years now, the courts - and in particular the Court of Cassation - had regarded Articles 81, 151 and 152 of the Code of Criminal Procedure as providing a legal basis for telephone tapping carried out by a senior police officer under a warrant issued by an investigating judge. The Court held that settled case-law of that kind could not be disregarded. In relation to paragraph 2 of Article 8 of the Convention and other similar clauses, the Court had always understood the term "law" in its substantive sense, not its formal one, and had included both enactments of lower rank than statutes and unwritten law.

In sum, the Court held that the interferences complained of had had a legal basis in French law.

The second requirement which emerged from the phrase "in accordance with the law" - the accessibility of the law - did not raise any problem. The same was not true of the third requirement, the law's "foreseeability" as to the meaning and nature of the applicable measures. As the Court had pointed out in an earlier judgment, Article 8 § 2 of the Convention did not merely refer back to domestic law but also related to the quality of the law, requiring it to be compatible with the rule of law.

The Government had submitted that the Court had to be careful not to rule on whether French legislation conformed to the Convention in the abstract and not to give a decision based on legislative policy.

Since the Court had to ascertain whether the interferences complained of were "in accordance with the law", it had to assess the relevant French "law" in force at the material times in relation to the requirements of the fundamental principle of the rule of law. Tapping and other forms of interception of telephone conversations represented a serious interference with private life and correspondence and accordingly had to be based on a "law" that was particularly precise. It was essential to have clear, detailed rules on the subject, especially as the technology available for use was continually becoming more sophisticated.

The Government had listed seventeen safeguards which they said were provided for in French law. These related either to the carrying out of telephone tapping or to the use made of the results or to the means of having any irregularities righted, and the Government had claimed that the applicants had not been deprived of any of them.

The Court did not in any way minimise the value of several of the safeguards. It noted, however, that only some of them were expressly provided for in Articles 81, 151 and 152 of the Code of Criminal Procedure. Others had been laid down piecemeal in judgments given over years, the great majority of them after the interceptions complained of by the applicants. Some had not yet been expressly laid down in the case law at all. Above all, the system did

not for the time being afford sufficient safeguards against various possible abuses. For example, the categories of people liable to have their telephones tapped by judicial order and the nature of the offences which might give rise to such an order were nowhere defined. Nothing obliged a judge to set a limit on the duration of telephone tapping. Similarly unspecified were the procedure for drawing up the summary reports containing intercepted conversations; the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge (who could hardly verify the number and length of the original tapes on the spot) and by the defence; and the circumstances in which recordings might be or had to be erased or the tapes be destroyed, in particular where an accused had been discharged by an investigating judge or acquitted by a court. The information provided by the Government on these various points showed at best the existence of a practice, but a practice lacking the necessary regulatory control in the absence of legislation or case law.

In short, French law, written and unwritten, did not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. This was truer still at the material times, so that the applicants had not enjoyed the minimum degree of protection to which citizens were entitled under the rule of law in a democratic society.

**Conclusion:** violation of Article 8.

### **Article 50 (Just Satisfaction)**

#### Kruslin case

The applicant claimed, firstly, compensation in the amount of 1,000,000 French francs (FRF) in respect of his fifteen-year prison sentence. He also sought reimbursement of FRF 70,000 in respect of lawyer's fees and expenses in the national proceedings. He made no claim for the proceedings at Strasbourg, as the Commission and the Court had granted him legal aid. The Government and the Delegate of the Commission expressed no opinion on the matter.

The Court considered that the finding that there been a breach of Article 8 afforded Mr Kruslin sufficient just satisfaction for the alleged damage and that it was accordingly unnecessary to award pecuniary compensation.

As to the costs and expenses, the Court held that France was to pay the applicant the sum of FRF 20,000 which he had sought in respect of one set of national proceedings. It dismissed the remainder of his claims.

#### Huvig case

The applicants had asked the Commission to award them "just compensation", but before the Court they had not sought either compensation or reimbursement of costs and expenses.

As these were not matters which the Court had to examine of its own motion, it found that it was unnecessary to apply Article 50 in this case.



**6. Eur. Court of HR, Niemietz v. Germany, judgment of 16 December 1992, application no. 13710/88. The applicant complained about the search of his office in course of criminal proceedings against a third party.**

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**no. 13710/88  
16.12.1992**

Press release issued by the Registrar

**NIEMIETZ v. GERMANY**

The search of a lawyer's office in course of criminal proceedings against a third party violated the Convention

**Basic Facts**

On 9 December 1985 a letter concerning criminal proceedings pending before the Freising District Court was sent by telefax from the Freiburg post office to a judge of that court. It bore the signature "Klaus Wegner" - possibly a fictitious person - followed by the words "on behalf of the Anti-clerical Working Group of the Freiburg Bunte Liste". The applicant had for some years been chairman of the Bunte Liste, which is a local political party, and the colleague with whom he shared his office had also been active on its behalf.

In view of the contents of the letter, criminal proceedings were subsequently instituted against Klaus Wegner for insulting behaviour. In the course of the investigations the Munich District Court issued, on 8 August 1986, a warrant to search, inter alia, the applicant's office for and to seize any documents revealing the identity of Klaus Wegner; the reason given in the warrant was that mail for the Bunte Liste was sent to a post-office box the contents of which had, until 1985, been forwarded to the applicant's office. The search was effected on 13 November 1986; four cabinets with data concerning clients and six individual files were examined but no relevant documents were found.

On 27 March 1987 the Munich I Regional Court declared the applicant's appeal against the search warrant to be inadmissible, on the ground that it had already been executed. It considered that there was no legal interest in having the warrant declared unlawful and it also noted, amongst other things, that it could not be assumed that mail for the Bunte Liste could concern a lawyer-client relationship. On 18 August 1987 the Federal Constitutional Court declined to accept for adjudication the applicant's constitutional complaint against the search warrant and the Regional Court's decision, on the ground that it did not offer sufficient prospects of success.

**Law – Article 8**

The Court held firstly that there had been an interference with the applicant's rights under Article 8, thereby rejecting the German Government's argument that that provision did not afford protection against the search of a lawyer's office. It noted the following in this connection.

Respect for private life comprised to a certain degree the right to establish and develop relationships with others. There was no reason of principle why the notion of "private life" should be taken to exclude professional or business activities, since it was in the course of

their working lives that the majority of people had a significant opportunity of developing such relationships. To deny the protection of Article 8 on the ground that the measure complained of related only to professional activities could lead to an inequality of treatment, in that such protection would remain available to a person whose professional and non-professional activities could not be distinguished.

In certain Contracting States the word "home" had been accepted as extending to business premises, an interpretation which was consonant with the French text of Article 8 ("domicile"). A narrow interpretation of "home" could give rise to the same risk of inequality of treatment as that mentioned above.

To interpret the words "private life" and "home" as including certain professional or business activities or premises would be consonant with the object and purpose of Article 8; the entitlement of the Contracting States to "interfere" under paragraph 2 of that provision would remain and might be more far-reaching for such activities or premises than would otherwise be the case.

In addition, it was clear from the particular circumstances of the case that the search operations must have covered "correspondence" within the meaning of Article 8.

In the Court's opinion, the interference in question was "in accordance with the law" and pursued aims that were legitimate under paragraph 2 of Article 8, but was not "necessary in a democratic society". It considered in particular that, having regard to the materials that were in fact inspected, the search impinged on professional secrecy to an extent that was disproportionate in the circumstances.

#### **Law – Article 1 of Protocol No. 1**

Mr Niemietz submitted that, by impairing his reputation as a lawyer, the search had violated Article 1 of Protocol No. 1. The Court concluded that no separate issue arose under this provision.

**Conclusion:** violation of Article 8. No violation of Article 1 of Protocol No. 1

#### **Article 50 (just Satisfaction)**

The Court dismissed the applicant's claim for compensation under Article 50: he had not established any pecuniary damage or supplied particulars of his costs and expenses, and the finding of a violation of Article 8 constituted sufficient just satisfaction for any non-pecuniary damage he might have sustained.

7. *Eur. Court of HR, Murray v. The United Kingdom*, judgment of 28 October 1994, application no. 14310/88. As far as a person suspected of terrorism is concerned, entry into and search of her home for the purpose of effecting the arrest; record of personal details and photograph without her consent.

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no. 14310/88  
28.10.1994

Press release issued by the Registrar

### **MURRAY v. THE UNITED KINGDOM**

House search and recording of personal data and photographs without the consent of a person suspected of terrorism does not violate the Convention

#### **Basic Facts**

The six applicants are Irish citizens. The first applicant, Mrs Margaret Murray, and the second applicant, Mr Thomas Murray, are husband and wife. The other four applicants (Mark, Alana, Michaela and Rossina Murray) are their children. At the relevant time in 1982 all six applicants resided together in the same house in Belfast, Northern Ireland.

In June 1982 two of the first applicant's brothers were convicted in the United States of America ("USA") of arms offences connected with the purchase of weapons for the Provisional Irish Republican Army ("Provisional IRA").

Mrs Murray was arrested by the Army at the family home in Belfast at 7.00 a.m. on 26 July 1982, under section 14 of the Northern Ireland (Emergency Provisions) Act 1978. This provision, as construed by the domestic courts, empowered the Army to arrest and detain for up to four hours a person suspected of the commission of a criminal offence, provided that the suspicion of the arresting officer was honestly and genuinely held. According to the Army, Mrs Murray was arrested on suspicion of involvement in the collection of money for the purchase of arms for the Provisional IRA in the USA. While she was dressing, the other applicants were roused and asked to assemble in the living room. The soldiers in the meantime recorded details concerning the applicants and their home. On being asked twice by Mrs Murray under what section of the legislation she was being arrested, the arresting officer, a woman corporal, replied, "Section 14".

Mrs Murray was then taken to Springfield Road Army screening centre and detained two hours for questioning. She refused to answer any questions, save to give her name. At some stage during her stay at the centre she was photographed without her knowledge or consent. She was released at 9.45 a.m. without charge. In 1984 Mrs Murray brought an unsuccessful action before the High Court for false imprisonment and other torts against the Ministry of Defence.

Evidence was given by Mrs Murray and by the corporal. Mrs Murray acknowledged that she had been in contact with her brothers and had been to the USA. Although the corporal did not have a precise recollection of the interrogation of Mrs Murray at the Army centre, she remembered that questions had been asked about money and about America. The trial judge accepted the testimony of the corporal as being truthful. Mrs Murray appealed, again challenging the legality of her arrest and certain related matters in the Court of Appeal, which rejected her claims in February 1987. The Court of Appeal granted her leave to appeal to the House of Lords. This appeal was dismissed in May 1988.

The 1978 Act under which Mrs Murray was arrested forms part of the special legislation enacted in the United Kingdom in an attempt to deal with the threat of terrorist violence in Northern Ireland. Section 14 was replaced in 1987 by a provision requiring that an arrest be based on reasonable suspicion.

### **Law – Article 5 § 1 of the Convention**

Mrs Murray argued that, contrary to paragraph 1 (c) of Article 5, she had not been arrested on "reasonable suspicion" of having committed a criminal offence and that the purpose of her arrest and subsequent detention had not been to bring her before a competent legal authority.

It was relevant but not decisive that the domestic legislation at the time provided for an honest and genuine, rather than reasonable, suspicion. Having a "reasonable suspicion" presupposed the existence of facts or information which would satisfy an objective observer that the person concerned might have committed the offence.

The level of "suspicion" required was not the same as that for the bringing of a charge. In this respect, the length of the deprivation of liberty at risk (a maximum of four hours under section 14 of the 1978 Act) might also be material.

What could be regarded as "reasonable" in relation to a suspicion depended on all the circumstances of the particular case. In view of the difficulties inherent in the investigation and prosecution of terrorist offences in Northern Ireland, the "reasonableness" of the suspicion justifying such arrests could not always be judged according to the same standards that were applied when dealing with conventional crime. Contracting States could not be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing information or facts leading to confidential sources, thereby placing the lives and safety of others in danger. The Court accepted that the power of arrest granted to the Army by section 14 of the 1978 Act represented a bona fide attempt by a democratically elected parliament to deal with terrorist crime under the rule of law; and it was prepared to attach some credence to the United Kingdom Government's declaration as to the existence of reliable but confidential information grounding the suspicion against Mrs Murray. Nonetheless, the Court had to be furnished with at least some facts or information capable of satisfying it that the arrested person was reasonably suspected of having committed the alleged offence, particularly where domestic law had set a lower threshold by merely requiring honest suspicion. In that connection, the Court had regard to relevant findings of fact made by the domestic courts in the civil proceedings brought by Mrs Murray, to the recent conviction of her brothers in the USA of offences connected with the purchase of arms for the Provisional IRA, to her visits to the USA and her contacts with her brothers there, and to the collaboration with "trustworthy" persons residing in Northern Ireland which was implied in the offences of which her brothers were convicted.

The Court concluded that, in the particular circumstances, there did exist sufficient facts or information which would provide a plausible and objective basis for a suspicion that Mrs Murray may have committed the offence of involvement in the collection of funds for the Provisional IRA.

In Mrs Murray's submission it was clear from the surrounding circumstances that she had not been arrested for the purpose of bringing her before the "competent legal authority" but merely for the purpose of interrogating her with a view to gathering general intelligence.

The domestic courts, after hearing witnesses, had found that the purpose of her arrest had been to establish facts concerning the offence of which she was suspected. No cogent elements had been produced in the proceedings before the Convention institutions which could lead the Court to depart from that finding of fact. It could be assumed that, had the suspicion

against Mrs Murray been confirmed, she would have been charged with a criminal offence and brought before a court. Her arrest and detention had therefore been effected for the purpose specified in paragraph 1 (c) of Article 5.

### **Law – Article 5 § 2 of the Convention**

Mrs Murray submitted that at no time during her arrest or detention had she been given any or sufficient information as to the grounds for her arrest.

The Court pointed out that whether the content and promptness of the information conveyed were sufficient had to be assessed in each case according to its special features. Whilst the reasons for

the arrest had not been sufficiently indicated when Mrs Murray was taken into custody, they had been brought to her attention during her subsequent interrogation. Moreover, the interval of a few hours that had elapsed between arrest and interrogation could not be regarded as falling outside the constraints of time imposed by the notion of promptness.

### **Law – Article 8**

All six applicants claimed to be the victims of a violation of Article 8. They complained about the entry into and search of their family home by the Army, including the confinement of the family members other than Mrs Murray for a short while in one room. Mrs Murray also objected to the recording (at the Army centre) of personal details concerning herself and her family, as well as the photograph which was taken of her without her knowledge or consent.

The Court held, however, that the resultant interferences with the applicants' exercise of their right to respect for their private and family life and their home were justified under paragraph 2 of Article 8.

In the first place each of the various measures complained of was found to have been "in accordance with the law".

The Court further considered that the measures, which pursued the legitimate aim of the prevention of crime, were "necessary in a democratic society". In striking the balance between the exercise by the individual of the right guaranteed to him or her under Article 8 § 1 and the necessity for the State to take effective measures for the prevention of terrorist crime, regard had to be had to the responsibility of an elected government in a democratic society to protect its citizens and its institutions against the threats posed by organised terrorism and to the special problems involved in the arrest and detention of persons suspected of terrorist-linked offences. The domestic courts had rightly adverted to the conditions of extreme tension under which such arrests in Northern Ireland had to be carried out. As regards the entry and search, the means employed by the authorities could not be considered to have been disproportionate to the legitimate aim pursued. A similar conclusion was arrived at as regards the recording and retaining of personal details, including the photograph of Mrs Murray.

### **Law – Article 13 of the Convention**

Mrs Murray submitted that, contrary to Article 13, she had had no remedy under domestic law in respect of her claims under Articles 5 and 8.

The Court first held that it was not necessary to examine under Article 13 her complaint concerning remedies for her claims as to arrest, detention and lack of information about the reasons for her arrest (Article 5 §§ 1 and 2), since she had at no stage raised any complaint under Article 5 § 4, the Convention provision which sets forth a specific entitlement to a remedy in relation to arrest and detention.

In relation to her claims as to entry and search and as to the taking and retention of a photograph and personal details (Article 8), the Court found that in both these regards effective remedies were available to her under domestic law. Her feeble prospects of success in the light of the particular circumstances of her case did not detract from the effectiveness of the remedies for the purpose for the purpose of Article 13.

**Conclusion:** no violation of Articles 5, 8 and 13

**Separate Opinions**

The joint dissenting opinion of three judges and the partly dissenting opinions of two other judges are annexed to the judgment.

8. *Eur. Court of HR, McMichael v. The United Kingdom*, judgment of 24 February 1995, application no. 16424/90. The applicant complained about the non-disclosure to them of some confidential documents submitted in care proceedings.

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**no. 16424/90**  
**24.02.1995**

Press release issued by the Registrar

**MCMICHAEL v. THE UNITED KINGDOM**

Non-disclosure to the applicants of some confidential documents submitted in care proceedings gave rise to violations of the Convention

**Basic Facts**

The applicants, Mr Antony and Mrs Margaret McMichael, live in Glasgow, Scotland. On 29 November 1987 the second applicant gave birth to a son, A. The applicants were not then married and Mr McMichael was not named on the birth certificate as the father of the child.

As the mother suffered from a mental illness, A. was taken into care on 11 December 1987 at the request of the Strathclyde Regional Council. The case was brought before a children's hearing on 17 December but postponed to a later date. The function of the children's hearing is to decide whether a child requires compulsory measures of care and, if so, which measures are appropriate. The second applicant, but not the first applicant who did not have parental rights, had the status of a party to the proceedings before the children's hearing.

On 18 February 1988 Mr McMichael's name was added to the birth certificate, but this did not give him parental rights. He did not, in his capacity as natural father of A., ever make an application for an order for parental rights - an application which, at least as from 18 February 1988, would have been dealt with speedily, given the mother's consent.

From December 1987 onwards the children's hearing took a number of decisions determining the custody and access arrangements in relation to A., notably continuing the compulsory measure of care, placing A. with foster parents and refusing the applicant's access to A. On two occasions (4 February and 13 October 1988) when the second applicant attended with the first applicant acting as her representative, the children's hearing had before it certain documents (including social reports on A.) which - pursuant to the applicable procedural rules - were not disclosed to the applicants but the substance of which was explained to them.

The second applicant appealed to the Sheriff Court against the decision of 4 February 1988 by the children's hearing but she subsequently abandoned the appeal. She also appealed against a decision of 5 September 1989 by the children's hearing - a hearing at which similar non-disclosure of a report on A. had occurred. This appeal was upheld and the case remitted to the children's hearing. It would appear that, in accordance with the usual practice, in both appeals documents lodged with the Sheriff Court were not made available to her.

The applicants were married on 24 April 1990 and Mr McMichael thereby obtained parental rights. However, at the request of the Regional Council, A. was freed for adoption on 14 October 1990, the competent court having decided to dispense with the applicants' consent on the basis that they were unreasonably withholding it. On 25 May 1993 the court granted an application by the foster parents to adopt A.

### **Law – Article 6 § 1**

The Court had no jurisdiction to entertain the applicants' reiterated complaints under Article 8 concerning the merits of the care, access and adoption measures, since these complaints had been declared inadmissible at the outset by the Commission.

In the particular circumstances the Court did not consider it necessary to rule whether the scope of the case as referred to the Court extended to a further complaint, not dealt with in the Commission's report or admissibility decision, concerning the fairness of the adoption proceedings. The Court ruled that it was not precluded from taking cognisance of certain material, submitted by the Government, to which the applicants had objected.

The applicants alleged violation of Article 6 § 1 (the right to a fair trial in the determination of one's "civil rights") by reason of both applicants' inability to have sight of certain documents submitted in the care proceedings concerning their child, A.

It was not contested that in relation to the second applicant (Mrs McMichael) Article 6 § 1 was applicable to the care proceedings before the children's hearing and the Sheriff Court. However, the Court held that Article 6 § 1 had no application to the complaint of the first applicant (Mr McMichael). He had not sought to obtain legal recognition of his status as (natural) father of A. As a consequence, he had not been a party along with the mother in the care proceedings. Those proceedings had not therefore involved the determination of any of his "civil rights" under Scots law in respect of A.

The Government conceded the absence of a fair trial before the children's hearing on 4 February and 13 October 1988 and before the Sheriff Court.

As regards the children's hearing the Court recognised that in this sensitive domain of family law there may be good reasons for opting for an adjudicatory body that does not have the composition or procedures of a court of law of the classic kind. Nevertheless, the right to a fair - adversarial - trial means the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party. The lack of disclosure to Mrs McMichael of such vital documents as social reports was capable of affecting her ability not only to influence the outcome of the children's hearing in question but also to assess the prospects of making an appeal to the Sheriff Court.

As a matter of practice certain documents (notably social reports) lodged with the Sheriff Court were not made available to appellant parents. The requirement of an adversarial trial had not been fulfilled before the Sheriff Court, any more than it had been on the relevant occasions before the children's hearing. In sum, Mrs McMichael had not received a "fair hearing" within the meaning of Article 6 § 1 at either of the two stages of the care proceedings.

### **Law – Article 8**

The applicants further alleged a violation of their right to respect for their family life under Article 8 by reason of the non-disclosure to both them of the confidential documents submitted in the care proceedings.

Whilst Article 8 contains no explicit procedural requirements, the decision-making process leading up to measures of interference with family life (such as care, custody and access measures concerning children) must be fair and such as to afford due respect to the interests protected by the Article.

Mr McMichael had not been associated in the care proceedings as a party, as he could have been. However, the two members of the applicant couple had acted very much in concert in their endeavour to recover custody of and have access to A. They were living together and leading a joint "family life". The Court did not deem it appropriate therefore to draw any material distinction between them as regards the interference with their family life resulting from the care proceedings, notwithstanding some differences in their legal circumstances.



The Court pointed to the difference in the nature of the interests protected by Articles 6 § 1 and 8 when judging that, despite its earlier finding of a violation of Article 6 § 1, examination of the same set of facts also under Article 8 was justified.

The unfair character of the care proceedings on specified occasions had already been conceded by the Government. Taking note of this concession, the Court found that in this respect the decision-making process determining the custody and access arrangements in regard to A. did not afford the requisite protection of the applicants' interests as safeguarded by Article 8.

#### **Law – Article 14**

The first applicant claimed that he had been a victim of discriminatory treatment in breach of Article 14, taken together with Article 6 § 1 and/or Article 8, by reason of his lack of legal right, prior to his marriage, to custody of A. or to participate in the care proceedings.

According to the Court's case-law, a difference of treatment is discriminatory if it has no reasonable and objective 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.

Mr McMichael's complaint was essentially directed against his status as a natural father under Scots law. In the Court's view, the aim of the relevant legislation (to provide a mechanism for identifying "meritorious" fathers who might be accorded parental rights) is legitimate and the conditions imposed on natural fathers for obtaining legal recognition of their parental role respect the principle of proportionality. Mr McMichael had not therefore been discriminated against.

**Conclusion:** violation of Articles 6 § 1 and 8 of the European Convention of Human Rights in respect of the second applicant, Mrs McMichael, and of Article 8 in respect of the first applicant, Mr McMichael.

No violation of Articles 6 § 1 or 14 in respect of the first applicant.

#### **Article 50 (Just Satisfaction)**

The applicants, who were legally aided, did not make any claim for reimbursement of costs and expenses. They did however seek financial compensation for distress, sorrow and injury to health.

It could not be affirmed with certainty that no practical benefit would have accrued to the applicants if the procedural deficiency in the care proceedings had not existed. More importantly, some, although not the major part, of the evident trauma, anxiety and feeling of injustice experienced by both applicants in connection with the care proceeding was to be attributed to their inability to see the confidential documents in question. Payment of financial compensation was therefore warranted. The Court awarded the applicants jointly the sum of £8,000 under this head.

The applicants also asked for a number of declarations and consequential orders. The Court, however, ruled that it was not empowered to give the relief sought.



9. ***Eur. Court of HR, Z. v. Finland***, judgment of 25 February 1997, application no. 22009/93. The applicant complains about the seizure of medical records and their inclusion in investigation file without the patient's prior consent in criminal proceedings; the limitation of the duration of the confidentiality of the medical data concerned; the publication of her identity and HIV infection in a court judgment given in those proceedings.

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no. 22009/93  
25.02.1997

Press release issued by the Registrar

### **Z v. FINLAND**

The disclosure during court proceedings and judgement of the applicant's medical records, and the duration of the confidentiality order, violated the Convention

#### **Basic Facts**

The applicant was at the time of the events which gave rise to her complaints under the Convention married to X. They divorced in September 1995. They are both infected with HIV. Between December 1991 and September 1992 Mr X committed a number of sexual offences. Following a first conviction for rape on 10 March 1992, in respect of which he received a suspended prison sentence, Mr X was charged with, among other offences, attempted manslaughter on the ground that he had knowingly exposed his victims to the risk of HIV infection. On 19 March 1992 he had been informed of the results of a blood test showing that he was HIV positive.

In the course of the subsequent criminal proceedings in the Helsinki City Court, a number of doctors and a psychiatrist who had been treating the applicant were compelled, despite their protests, to give evidence concerning, and to disclose information about, the applicant. Mrs Z had herself refused to testify and the doctors' evidence was sought with a view to establishing the date at which Mr X first became aware, or had reason to suspect, that he was HIV positive. In addition, medical records relating to Mr X and Mrs Z were seized during a police search of the hospital where they were both receiving treatment and photocopies of the records were added to the case file. Although the proceedings were *in camera*, reports of the trial appeared in major newspapers on at least two occasions.

On 19 May 1993 the Helsinki City Court convicted Mr X, *inter alia*, on three counts of attempted manslaughter and one of rape and sentenced him to terms of imprisonment totalling seven years. The relevant legal provisions, the operative provisions of the judgment and a summary of the court's reasoning were made public. The court ordered that the full judgment and the case-documents should remain confidential for ten years despite requests from Mr X and his victims for a longer period of confidentiality.

The prosecution, Mr X and the victims all appealed and, at a hearing of the Court of Appeal on 14 September 1993, requested that the court documents should remain confidential for longer than ten years.

In a judgment of 10 December 1993 the Court of Appeal upheld the conviction of X on three counts of attempted manslaughter and, in addition, convicted him on two further such counts. It increased the total sentence to more than eleven years. The judgment, which gave the names of Mrs Z and Mr X in full and went into the circumstances of their HIV infection, was made

available to the press. The Court of Appeal did not extend the period of confidentiality fixed by the first-instance court. Its judgment was widely reported in the press.

On 26 September 1994 the Supreme Court refused Mr X leave to appeal.

On 1 September 1995 the Supreme Court dismissed an application by the applicant for an order quashing or reversing the Court of Appeal's judgment in so far as it concerned the ten-year limitation on the confidentiality order. The court documents in the case are due to become public in the year 2002.

### **Law – Article 8**

It was not established that there had been a leak of confidential medical data concerning the applicant for which the respondent State could be held responsible under Article 8 of the Convention. Nor did the Court have jurisdiction to entertain the applicant's allegation that she had been subjected to discriminatory treatment. It therefore confined its examination to the other matters complained of.

The various measures complained of constituted interferences with the applicant's right to respect for her private and family life. There was nothing to suggest that the measures did not comply with domestic law or that the relevant law was not sufficiently foreseeable in its effects for the purposes of the quality requirement which was implied by the expression "in accordance with the law" in paragraph 2 of Article 8.

The orders requiring the applicant's medical advisers to give evidence, the seizure of her medical records and their inclusion in the investigation file were aimed at the "prevention of ... crime" and the "protection of the rights and freedoms of others". The ten-year limitation on the confidentiality order could be said to have been aimed at protecting the "rights and freedoms of others", but not at the prevention of crime. On the other hand, the Court had doubts as to whether the publication of the applicant's full name as well as her medical condition following their disclosure in the Court of Appeal's judgment pursued any of the legitimate aims enumerated in paragraph 2 of Article 8, but deemed it unnecessary to decide the issue.

In determining whether the impugned measures were "necessary in a democratic society", the Court took into account that the protection of personal data, not least medical data, was of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8. Respecting the confidentiality of health data was a vital principle in the legal systems of all the Contracting Parties to the Convention. It was crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general.

The above considerations were especially valid as regards protection of the confidentiality of information about a person's HIV infection, the disclosure of which could dramatically affect his or her private and family life, as well as social and employment situation, by exposing him or her to opprobrium and the risk of ostracism. For this reason it could also discourage persons from seeking diagnosis or treatment and thus undermine any preventive efforts by the community to contain the pandemic. The interests in protecting the confidentiality of such information would therefore weigh heavily in the balance in determining whether the interference was proportionate to the legitimate aim pursued. Such interference could not be compatible with Article 8 of the Convention unless it was justified by an overriding requirement in the public interest.

Against this background, the Court examined each measure in turn, whilst noting at the outset that the decision-making process did not give rise to any misgivings and that remedies were apparently available for challenging the seizure and for having the limitation on the confidentiality order quashed.

The orders requiring the applicant's medical advisers to give evidence had been made in the context of Z availing herself of her right under Finnish law not to give evidence against her husband. The object was exclusively to ascertain from her medical advisers when X had become aware of or had reason to suspect his HIV infection. Their evidence had been at the material time potentially decisive for the question whether X was guilty of attempted manslaughter in relation to two offences committed prior to 19 March 1992, when the positive results of the HIV test had become available. There could be no doubt that very weighty public interests militated in favour of the investigation and prosecution of X for attempted manslaughter in respect of all of the five offences concerned and not just three of them. The resultant interference with the applicant's private and family life was moreover subjected to important safeguards against abuse. There was no reason to question the extent to which the doctors were required to testify. Especially because the proceedings were confidential and were highly exceptional, the contested orders were unlikely to have deterred potential and actual HIV carriers from undergoing blood tests and from seeking medical treatment. Accordingly, the Court, by eight votes to one, found no violation on this point.

The seizure of the applicant's medical records and their inclusion in the investigation file were complementary to the orders compelling her medical advisers to give evidence. Their context and object were the same and they were based on the same weighty public interests. Furthermore, they were subject to similar limitations and safeguards against abuse. Admittedly, unlike those orders, the seizure had not been authorised by a court but had been ordered by the prosecution. However, this fact could not give rise to any breach of Article 8 since the conditions for the seizure were essentially the same as those for the orders to testify, two of which had been given by the City Court prior to the seizure and the remainder shortly thereafter. Also, it would have been possible for the applicant to challenge the seizure before the City Court. There was no reason to doubt the national authorities' assessment that it was necessary to seize all the material concerned and to include it in the investigation file. Therefore, the Court, by eight votes to one, found no violation on this point either.

The ten-year limitation on the confidentiality order did not correspond to the wishes or interests of the parties in the proceedings, all of whom had requested a longer period of confidentiality. The Court was not persuaded that, by prescribing such a short period, the domestic courts had attached sufficient weight to the applicant's interests. As a result of the information in issue having been produced in the proceedings without her consent, she had already been subjected to a serious interference with her right to respect for private and family life. The further interference which she would suffer if the medical information were to be made accessible to the public after ten years was not supported by reasons which could be considered sufficient to override her interest in the data remaining confidential for a longer period. The Court unanimously concluded that the order to make the material accessible as early as 2002 would, if implemented, amount to a disproportionate interference with her right to respect for her private and family life, in violation of Article 8.

The disclosure of the applicant's identity and HIV infection in the text of the Court of Appeal's judgment made available to the press was not supported by any cogent reasons. Accordingly, the Court unanimously found that the publication of the information concerned gave rise to a violation of the applicant's right to respect for her private and family life as guaranteed by Article 8.

The Court, having taken the applicant's allegations as to the lack of remedies into account in relation to Article 8, did not find it necessary to examine them under Article 13.

**Conclusion:** violation of Article 8 with regards to an order to make the medical data concerned accessible to the public as early as 2002, if implemented, and with regard to the publication of the applicant's identity and medical condition in a court of appeal judgment.

No violation of Article 8 in respect of orders requiring the applicant's medical advisers to give evidence or with regard to the seizure of her medical records and their inclusion in the investigation file in criminal proceedings against her husband.

**Article 50 (Just Satisfaction)**

The Court awarded the applicant FIM 100,000 for non-pecuniary damage. The Court also allowed in part (FIM 160,000) the applicant's claim for costs and expenses, plus any applicable VAT, less FRF 10,835 paid in legal aid by the Council of Europe.

**Separate Opinion**

One judge expressed a partly dissenting opinion and this is annexed to the judgment.

**10. Eur. Court of HR, Halford v. The United Kingdom, judgment of 25 June 1997, application no. 20605/92. The applicant complains that telephone calls made from her office in Merseyside Police Headquarters had been intercepted and that she had not had available to her any effective remedy for this complaint.**

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**no. 20605/92**  
**25.06.1997**

Press release issued by the Registrar

### **HALFORD v. THE UNITED KINGDOM**

The interception of telephone calls made on internal telecommunications system operated by police and on public network and the lack of regulation by domestic law violated the Convention

#### **Basic Facts**

Ms Alison Halford was born in 1940 and lives in the Wirral.

In May 1983 she was appointed Assistant Chief Constable with the Merseyside Police and as such was the highest ranking female police officer in the United Kingdom. After she had failed on several occasions to be appointed to a more senior post, in 1990 she commenced proceedings against the Home Office and Merseyside Police Authority in the Industrial Tribunal alleging discrimination on grounds of sex. She withdrew her complaint in August 1992, following an agreement under which she was to retire from the police force and receive *ex gratia* payments totalling £15,000.

Ms Halford alleges that certain members of the Merseyside Police Authority launched a "campaign" against her in response to her discrimination complaint. This took the form *inter alia* of leaks to the press, the bringing of disciplinary proceedings against her and the interception of her telephone calls. For the purposes of the case before the Court, the Government accepted that there was a reasonable likelihood that calls made from her office telephones had been intercepted, but did not accept that any such likelihood had been established in relation to calls made from her home telephone.

In December 1991, Ms Halford complained to the Interception of Communications Tribunal. In February 1992 the Tribunal informed her that it was satisfied that there had been no contravention of the Interception of Communications Act 1985 in relation to her home telephone, but, under the terms of the Act, it was not empowered to specify whether this was because there had been no interception, or because there had been an interception which had been carried out pursuant to a warrant in accordance with the Act. In a letter to David Alton MP, Ms Halford's Member of Parliament, the Home Office explained that eavesdropping by the Merseyside Police on their own internal telephone system fell outside the scope of the 1985 Act and would not require a warrant.

#### **Law – Article 8**

It was clear from the Court's case-law that telephone calls made from business premises as well as from the home might be covered by the notions of "private life" and "correspondence" within the meaning of Article 8 § 1.

There was no evidence of any warning having been given to Ms Halford, as a user of the internal telecommunications system operated at the Merseyside Police Headquarters, that calls

made on that system would be liable to interception and the Court considered that she would have had a reasonable expectation of privacy for such calls.

Article 8 was therefore applicable to the complaints relating to both the office and home telephones.

#### The office telephones:

There was a reasonable likelihood, as the Government had conceded, that calls made by Ms Halford from her office had been intercepted by the Merseyside Police, probably with the primary aim of gathering material to assist in the defence of the sex discrimination proceedings brought against them. This constituted an "interference by a public authority", within the meaning of Article 8 § 2.

The Interception of Communications Act 1985 did not apply to internal communications systems operated by public authorities, such as that at Merseyside Police Headquarters, and there was no other provision in domestic law to regulate the interception of calls on such systems. Since English law provided no protection to Ms Halford, it could not be said that the interference was "in accordance with the law" as required by Article 8. There had therefore been a violation of that Article.

#### The home telephone

The Court did not consider that the evidence established a reasonable likelihood that calls made on the telephone in Ms Halford's home had been intercepted. In view of this conclusion, it did not find a violation of Article 8 in relation to the home telephone.

#### **Law – Article 13**

The Court found a violation of Article 13 in respect of Ms Halford's complaint about the interception of calls made on her office telephones, in view of the fact that the Interception of Communications Act 1985 did not apply to the internal telephone system operated by the Merseyside Police and there was no other avenue in domestic law for her complaint.

It did not find a violation of Article 13 in relation to her complaint concerning her home telephone, because Article 13 only requires "an effective remedy before a national authority" in respect of arguable claims under the Convention. Ms Halford, however, had not adduced enough evidence to make out an arguable claim.

#### **Law – Articles 10 and 14**

The allegations in relation to these Articles were tantamount to restatements of the complaints under Article 8. It was not therefore necessary for the Court to consider them.

**Conclusion:** violation of Articles 8 and 13 with respect to the claims about the office telephones. No violation of Articles 8 and 13 with respect to claims about the applicant's home telephone

#### **Article 50 (Just Satisfaction)**

The Court awarded Ms Halford £10,000 in compensation for the intrusion into her privacy, and £600 towards her personal expenses incurred in bringing the case to Strasbourg. It also awarded £25,000 of the £142,875 legal costs and expenses she had claimed.



11. *Eur. Court of HR, Anne-Marie Andersson v. Sweden*, judgment of 27 August 1997, application no. 20022/92. The applicant complained of the impossibility for a patient, prior to the communication of personal and confidential medical data by medical authority to a social services authority, to challenge the measure before a court.

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no. 20022/92  
27.08.1997

Press release issued by the Registrar

### **ANNE-MARIE ANDERSSON v. SWEDEN**

The lack of possibility for a patient, prior to the communication of personal and confidential medical data by medical authority to a social services authority, to challenge the measure before a court did not violate the Convention

#### **Basic Facts**

The applicant was born in 1943. She suffered from psychological and psychosomatic disorders which she attributed to court proceedings concerning her eviction from a flat. She also suffered from dental problems which aggravated her mental difficulties.

Following her eviction she and her son, who was born in 1981, lived in several different flats allocated by the welfare authorities. As from May 1988 she was on sick leave.

In April 1989, as a result of the strain caused by her dental pains, she contacted a psychiatric clinic in Göteborg. From August 1991 she was treated by its Chief Psychiatrist, who on several occasions drew her attention to the possible detrimental effects of her situation on her son and advised her to seek assistance from the children's psychiatric clinic or the social welfare authorities. Apparently, the applicant did not do so.

In January 1992 the Chief Psychiatrist informed the applicant that, since the child's health might be at risk, she (the psychiatrist) had an obligation under Swedish law to contact the welfare authorities. Accordingly, the former, acting in accordance with a reporting obligation under the Social Services Act, informed the Social Council of the applicant's health problems. She notified the applicant that she had done so. In October 1991 the headmaster and a teacher of the son's school had expressed their concern to the Social Council about his learning difficulties and general state of health. Following an investigation, the Council, with the applicant's consent, placed her son in a non-residential therapeutic school.

The applicant died on 20 November 1996.

#### **Law – Article 8**

The Court accepted that the applicant's son, Mr Stive Andersson, had sufficient interest to justify the continuation of its examination of the case. On the other hand, the applicant's complaint that the disclosure of the data in question amounted to a violation of her right to respect for private life under Article 8 had been declared inadmissible by the Commission; the Court had therefore no jurisdiction to entertain it.

**Law – Article 6 § 1**

The Court had first to examine whether Article 6 § 1 was applicable to the disagreement between the applicant and the Swedish authorities as to the disclosure of her medical data.

The relevant rule on confidentiality in the Secrecy Act did not apply where a statutory obligation required the disclosure of information to another authority. In the case under consideration, if the chief psychiatrist possessed information about the applicant patient to the effect that intervention by the Social Council was necessary for the protection of her under age son, the psychiatrist was, according to the Social Services Act, under a duty to report immediately to the Social Council. That duty extended to all data in her possession which were potentially relevant to the Social Council's investigation into the need to take protective measures with respect to the son and depended exclusively on the relevance of those data.

In addition to the scope of this obligation, the Court noted that the psychiatrist enjoyed a very wide discretion in assessing what data would be of importance to the Social Council's investigation. In this regard, she had no duty to hear the applicant's views before transmitting the information to the Social Council.

Accordingly, it transpired from the terms of the legislation in issue that a "right" to prevent communication of such data could not, on arguable grounds, be said to be recognised under national law.

In view of the above, Article 6 § 1 was not applicable and had not been violated in the present case.

**Law – Article 13**

A separate issue arose with regard to Article 13. That provision applied only in respect of grievances under the Convention which were arguable. Whether that was so in the case of the applicant's claim under Article 8 had to be determined in the light of the particular facts and the nature of the legal issues raised. In this connection, the Commission's decision on the admissibility of her complaint under Article 8 and the reasoning therein were not decisive but provided significant pointers. The Court for its part found, on the evidence adduced, that the applicant had no arguable claim in respect of a violation of the Convention. There had thus been no violation of Article 13.

**Conclusion:** no violation of Articles 6 § 1 and 13.

**Separate Opinions**

Four judges expressed separate opinions and these are annexed to the judgment.

**12. Eur. Court of HR, M.S. v. Sweden, judgment of 27 August 1997, application no. 20837/92. The applicant maintained that the communication of her medical records by the clinic to the Social Insurance Office constituted a violation of her right to respect for private life under Article 8 of the Convention.**

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**no. 20837/92  
27.08.1997**

Press release issued by the Registrar

### **M.S. v. SWEDEN**

The communication, without the patient's consent, of personal and confidential medical data by one public authority to another and lack of possibility for patient, prior to the measure, to challenge it before a court did not entail violation of Convention rights

#### **Basic Facts**

Ms M.S. was born in 1951 and lives in Sweden. On 9 October 1981 the applicant, who was pregnant at the time, allegedly injured her back while working at a day care centre. She attended the same day a women's clinic at the regional hospital.

Following this incident, the applicant was unable to return to work for any sustained period of time because of severe back pain. After she had been on the sick list for some time she was granted a temporary disability pension and, from October 1994, a disability pension.

In March 1991 she applied to the Social Insurance Office for compensation under the Industrial Injury Insurance Act. She claimed that, as a result of her back injury, she had been on sick leave for various periods between October 1981 and February 1991.

On receiving, at her own request, a copy of the file compiled by the Social Insurance Office, she learned that the Office had, for the purposes of examining her claim, obtained from the hospital medical records relating to the injury reported on 9 October 1981 and to treatment received thereafter. According to the records from October 1981, she had stated that she had had pains in her hips and back, but there was no indication that she considered herself to have been injured at work. Records relating to the period from October 1985 to February 1986 concerned an abortion and subsequent treatment made necessary thereby.

In May 1992 the Social Insurance Office rejected the applicant's compensation claim, finding that her sick leave had not been caused by an industrial injury. The applicant appealed against this decision to the Social Insurance Board, which upheld it in August 1992. Further appeals by the applicant to the County Administrative Court, to the competent Administrative Court of Appeal and then to the Supreme

#### **Law – Article 8**

Under the Swedish system, the contested disclosure depended not only on the fact that the applicant had submitted her compensation claim to the Office but also on a number of factors beyond her control. It could not therefore be inferred from her request for compensation to the Office that she had waived in an unequivocal manner her right under Article 8 § 1 of the Convention to respect for private life with regard to the medical records at the clinic. Accordingly, that the provision applied to the matters under consideration.

The medical records in question contained highly personal and sensitive data about the applicant, including information relating to an abortion. Although they remained confidential, they had been disclosed to another public authority and therefore to a wider circle of public servants. Moreover, the collection and storage of the information and its subsequent communication had served different purposes. The disclosure of the data by the clinic to the Office thus entailed an interference with the applicant's right to respect for private life guaranteed by paragraph 1 of Article 8.

The interference had a legal basis and was foreseeable; it was thus in accordance with the law. Since the communication of data was potentially decisive for the allocation of public funds to deserving claimants it could be said to have pursued the aim of protecting the economic well-being of the country.

The applicant's medical data were communicated by one public institution to another in the context of an assessment of whether she satisfied the legal conditions for obtaining a benefit which she herself had requested. The Office had a legitimate need to check information received from her against data in the possession of the clinic. The claim concerned a back injury which she had allegedly suffered in 1981 and all the medical records produced by the clinic to the Office, including those concerning her abortion in 1985 and the treatment thereafter, contained information relevant to the applicant's back problems. The applicant had not substantiated her allegation that the clinic could not reasonably have considered certain medical records to have been material to the Office's decision. In addition, the contested measure was subject to important limitations and was accompanied by effective and adequate safeguards against abuse.

In view of the above, there were relevant and sufficient reasons for the communication of the applicant's medical records by the clinic to the Office and the measure was not disproportionate to the legitimate aim pursued.

### **Law – Article 6 § 1**

The Court had first to examine whether Article 6 § 1 was applicable to the disagreement between the applicant and the Swedish authorities as to the disclosure of her medical records. The relevant rule on confidentiality in the Secrecy Act did not apply where a statutory obligation required the disclosure of information to another authority. In the case under consideration, the clinic had, according to the Insurance Act, been under an obligation to supply the Office with information on the applicant concerning circumstances of importance to the application of the Act. Thus, the obligation incumbent on the imparting authority vis-à-vis the requesting authority depended exclusively on the relevance of the data in its possession; it comprised all data which the clinic had in its possession concerning the applicant and which were potentially relevant to the Office's determination of her compensation claim.

In addition to the scope of this obligation, the Court noted that the clinic enjoyed a very wide discretion in assessing what data would be of importance to the application of the Insurance Act. In this regard, it had no duty to hear the applicant's views before transmitting the information to the Office.

Accordingly, it appeared from the very terms of the legislation in issue that a "right" to prevent communication of such data could not, on arguable grounds, be said to be recognised under national law.

Having regard to the foregoing, Article 6 § 1 was not applicable and had not been violated in the present case.

**Law – Article 13**

A separate issue arose under Article 13. Having regard to its findings under Article 8, the Court was satisfied that the applicant had had an arguable claim for the purposes of Article 13. It remained to examine whether she had been afforded an effective remedy.

In this regard, it was open to her to bring criminal and civil proceedings before the ordinary courts against the relevant staff of the clinic and to claim damages for breach of professional secrecy. Thus the applicant had had access to an authority empowered both to deal with the substance of her Article 8 complaint and to grant her relief. Having regard to the limited nature of the disclosure and to the different safeguards, in particular the Office's obligation to secure and maintain the confidentiality of the information, the various *ex post facto* remedies referred to satisfied the requirements of Article 13. Accordingly, there had been no violation of that provision.

**Conclusion:** no violation of Articles 8, 6 § 1 and 13.

13. *Eur. Court of HR, Lambert v. France*, judgment of 24 August 1998, application no. 23618/94. Judgment whereby Court of Cassation refused a person *locus standi* to complain of interception of some of his telephone conversations, on the ground that it was a third party's line that had been tapped.

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no. 23618/94  
24.08.1998

Press release issued by the Registrar

### LAMBERT v. FRANCE

Court of Cassation's refusal to grant a person *locus standi* to complain of interception of some of his telephone conversations violated the Convention

#### Basic Facts

The applicant, Mr Michel Lambert, a French national, was born in 1957 and lives at Buzet-sur-Tarn.

In the course of an investigation into offences of theft, burglary, handling the proceeds of theft and aggravated theft, and unlawful possession of class 4 weapons and ammunition, an investigating judge at Riom issued a warrant on 11 December 1991 instructing the gendarmerie to arrange for the telephone line of a certain R.B. to be tapped until 31 January 1992. By means of standard-form written instructions ("*soit transmis*") dated 31 January, 28 February and 30 March 1992 the judge extended the duration of the telephone tapping until 29 February, 31 March and 31 May 1992 respectively. As a result of the interception of some of his conversations, the applicant was charged with handling the proceeds of aggravated theft. He was held in custody from 15 May to 30 November 1992, when he was released subject to judicial supervision.

On 5 April 1993 the applicant's lawyer applied to the Indictment Division of the Riom Court of Appeal for a ruling that the extensions of 31 January and 28 February 1992 were invalid, arguing that they had been ordered merely by standard-form written instructions without any reference to the offences justifying the telephone tapping. The Indictment Division dismissed the application in a judgment of 25 May 1993.

The applicant appealed on a point of law, relying solely on a violation of Article 8 of the European Convention on Human Rights. In a judgment of 27 September 1993 the Court of Cassation affirmed the decision appealed against. It held that "the applicant had no *locus standi* to challenge the manner in which the duration of the monitoring of a third party's telephone line was extended" and that accordingly "the grounds of appeal, which contest[ed] the grounds on which the Indictment Division [had] wrongly considered it must examine [the] objections of invalidity and subsequently dismissed them, [were] inadmissible".

#### Law – Article 8

The Court pointed out that as telephone conversations were covered by the notions of "private life" and "correspondence" within the meaning of Article 8, the admitted measure of interception had amounted to "interference by a public authority" with the exercise of a right secured to the applicant in paragraph 1 of that Article. In that connection, it was of little

importance that the telephone tapping in question had been carried out on the line of a third party.

The Court noted that the investigating judge had ordered the telephone tapping in question on the basis of Articles 100 et seq. of the Code of Criminal Procedure. The interference complained of had therefore had a statutory basis in French law.

The second requirement which derived from the phrase “in accordance with the law” – the accessibility of the law – did not raise any problem in the instant case. The Court considered, as the Commission had done, that Articles 100 et seq. of the Code of Criminal Procedure, inserted by the Act of 10 July 1991 on the confidentiality of telecommunications messages, laid down clear, detailed rules and specified with sufficient clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities.

The Court considered that the interference had been designed to establish the truth in connection with criminal proceedings and therefore to prevent disorder.

It remained to be ascertained whether the interference had been “necessary in a democratic society” for achieving those objectives. The Court accordingly had to ascertain whether an “effective control” had been available to Mr Lambert to challenge the telephone tapping to which he had been made subject.

It noted firstly that the Court of Cassation in its judgment of 27 September 1993 had gone beyond the ground relied on by the applicant concerning the extension of the duration of the telephone tapping and had held that a victim of the tapping of a telephone line not his own had no standing to invoke the protection of national law or Article 8 of the Convention. It had concluded that in the instant case the Indictment Division had been wrong to examine the objections of invalidity raised by the applicant as the telephone line being monitored had not been his own.

Admittedly, the applicant had been able to avail himself of a remedy in respect of the disputed point in the Indictment Division, which had held that the investigating judge’s extension of the duration of the telephone tapping had been in accordance with Articles 100 et seq. of the Code of Criminal Procedure, and it was not the Court’s function to express an opinion on the interpretation of domestic law, which was primarily for the national courts to interpret. However, the Court of Cassation, the guardian of national law, had criticised the Indictment Division for having examined the merits of Mr Lambert’s application.

As the Court had already said, the provisions of the Law of 1991 governing telephone tapping satisfied the requirements of Article 8 of the Convention and those laid down in the *Kruslin* and *Huvig* judgments. However, it had to be recognised that the Court of Cassation’s reasoning could lead to decisions whereby a very large number of people were deprived of the protection of the law, namely all those who had conversations on a telephone line other than their own. That would in practice render the protective machinery largely devoid of substance.

That had been the case with the applicant, who had not enjoyed the effective protection of national law, which did not make any distinction according to whose line was being tapped.

The Court therefore considered that the applicant had not had available to him the “effective control” to which citizens were entitled under the rule of law and which would have been capable of restricting the interference in question to what was “necessary in a democratic society”.

In view of the preceding conclusion, the Court did not consider that it needed to rule on the complaint under Article 13.

**Conclusion:** violation of Article 8

**Article 50 (Just Satisfaction)**

The Court considered that the applicant had undeniably sustained non-pecuniary damage and awarded him the sum of FRF 10,000 under this head, and awarded FRF 15,000 in respect of the costs and expenses.



14. *Eur. Court of HR, Amann v. Switzerland*, judgment of 16 February 2000, application no. 27798/95. The applicant complained that the interception of the telephone call and the creation by the Public Prosecutor's Office of a card on him and the storage of that card in the Confederation's card index had violated Article 8

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**no. 27798/95**  
**16.02.2000**

Press release issued by the Registrar

### **AMANN v. SWITZERLAND**

The recording of a telephone conversation and the creation of a card index and storing of data by the Public Prosecutor entailed a violation of the Convention

#### **Basic Facts**

The applicant, Hermann Amann, a Swiss national, was born in 1940 and lives in Berikon (Switzerland).

In the early 1980s the applicant, who is a businessman, imported depilatory appliances into Switzerland which he advertised in magazines. On 12 October 1981 a woman telephoned the applicant from the former Soviet embassy in Berne to order a "Perma Tweez" depilatory appliance. That telephone call was intercepted by the Federal Public Prosecutor's Office ("the Public Prosecutor's Office"), which then requested the Intelligence Service of the police of the Canton of Zürich to carry out an investigation into the applicant.

In December 1981 the Public Prosecutor's Office filled in a card on the applicant for its national security card index on the basis of the report drawn up by the Zürich police. In particular, the card indicated that the applicant had been "identified as a contact with the Russian embassy" and was a businessman. It was numbered (1153:0) 614, that code meaning "communist country" (1), "Soviet Union" (153), "espionage established" (0) and "various contacts with the Eastern block" (614).

In 1990 the applicant learned of the existence of the card index kept by the Public Prosecutor's Office and asked to consult his card. He was provided with a photocopy in September 1990, but two passages had been blue-pencilled.

After trying in vain to obtain disclosure of the blue-pencilled passages, the applicant filed an administrative-law action with the Federal Court requesting, *inter alia*, 5,000 Swiss francs in compensation for the unlawful entry of his particulars in the card index kept by the Public Prosecutor's Office. In a judgment of 14 September 1994, which was served on 25 January 1995, the Federal Court dismissed his action on the ground that the applicant had not suffered a serious infringement of his personality rights.

#### **Law – Article 8**

##### As regards the telephone call

The Court considered that the measure in question, namely the interception by the Public Prosecutor's Office of the telephone call of 12 October 1981, amounted to an interference with the applicant's exercise of his right to respect for his private life and his correspondence.

The Court pointed out that such interference breached Article 8 unless it was "in accordance with the law", pursued one or more of the legitimate aims referred to in paragraph 2 of that provision and was, in addition, necessary in a democratic society to achieve those aims.

In determining the issue of lawfulness, the Court had to examine whether the impugned measure had a legal basis in domestic law and whether it was accessible and foreseeable to the person concerned. A rule was "foreseeable" if it was formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate their conduct. With regard to secret surveillance measures, the Court reiterated that the "law" had to be particularly detailed.

The Court noted in the instant case that Article 1 of the Federal Council's Decree of 29 April 1958 on the Police Service of the Federal Public Prosecutor's Office and section 17(3) of the Federal Criminal Procedure Act ("FCPA"), on which the Government relied and according to which the Public Prosecutor's Office "shall provide an investigation and information service in the interests of the Confederation's internal and external security", were worded in terms too general to satisfy the requirement of "foreseeability". As regards sections 66 et seq. FCPA, which governed the monitoring of telephone communications, the Government were unable to establish that the conditions of application of those provisions had been complied with. The Court went on to observe that, in the Government's submission, the applicant had not been the subject of the impugned measure, but had been involved "fortuitously" in a telephone conversation recorded in the course of a surveillance measure taken against a third party. The primary object of sections 66 et seq. FCPA was the surveillance of persons suspected or accused of a crime or major offence or even third parties presumed to be receiving information from or sending it to such persons, but those provisions did not specifically regulate in detail the case of persons not falling into any of those categories.

The Court concluded, in the light of the foregoing, that the interference had not been "in accordance with the law". Accordingly, there had been a violation of Article 8 of the Convention.

#### As regards the card

The Court reiterated firstly that the storing of data relating to the "private life" of an individual fell within the application of Article 8 § 1 of the Convention. It pointed out in this connection that the term "private life" must not be interpreted restrictively.

In the present case the Court noted that a card had been filled in on the applicant on which it was stated, *inter alia*, that he was a businessman and a "contact with the Russian embassy". The Court found that those details undeniably amounted to data relating to the applicant's "private life" and that, accordingly, Article 8 was applicable.

The Court then reiterated that the storing by a public authority of data relating to an individual amounted in itself to an interference within the meaning of Article 8. The subsequent use of the stored information had no bearing on that finding and it was not for the Court to speculate as to whether the information gathered was sensitive or not or as to whether the person concerned had been inconvenienced in any way.

The Court noted that in the present case it had not been disputed that a card containing data on the applicant's private life had been filled in by the Public Prosecutor's Office and stored in the Confederation's card index. There had therefore been an interference with the applicant's exercise of his right to respect for his private life.

Such interference breached Article 8 unless it was "in accordance with the law", pursued one or more of the legitimate aims referred to in paragraph 2 and was, in addition, necessary in a democratic society to achieve those aims.

The Court observed that in the instant case the legal provisions relied on by the Government, in particular the Federal Council's Decree of 29 April 1958 on the Police Service of the Federal Public Prosecutor's Office, the Federal Criminal Procedure Act and the Federal Council's Directives of 16 March 1981 applicable to the Processing of Personal Data in the Federal Administration, did not contain specific and detailed provisions on the gathering, recording and storing of information. It also pointed out that domestic law, particularly section 66(1 *ter*) FCPA, expressly provided that documents which were no longer "necessary" or had become "purposeless" had to be destroyed; the authorities had failed to destroy the data they had gathered on the applicant after it had become apparent, as the Federal Court had pointed out in its judgment of 14 September 1994, that no criminal offence was being prepared. The Court concluded, in the light of the foregoing, that there had been no legal basis for the creation of the card on the applicant and its storage in the Confederation's card index. Accordingly, there had been a violation of Article 8 of the Convention.

### **Law – Article 13**

The Court reiterated that Article 13 of the Convention requires that any individual who considers himself injured by a measure allegedly contrary to the Convention should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. That provision did not, however, require the certainty of a favourable outcome.

The Court noted that in the instant case the applicant was able to consult his card as soon as he asked to do so in 1990. It also observed that the applicant had complained in his administrative-law action in the Federal Court that there had been no legal basis for the interception of the telephone call and the creation of his card and, secondly, that he had had no effective remedy against those measures. In that connection the Court reiterated that the Federal Court had had jurisdiction to rule on those complaints and had duly examined them. The Court concluded, in the light of the foregoing, that the applicant had therefore had an effective remedy under Swiss law. Accordingly, there had not been a violation of Article 13 of the Convention.

**Conclusion:** violation of Article 8. No violation of Article 13

### **Article 41 (Just Satisfaction)**

The applicant did not allege any pecuniary damage. However, he claimed 1,000 Swiss francs (CHF) for non-pecuniary damage. The Court held that the non-pecuniary damage had been adequately compensated by the finding of violations of Article 8 of the Convention.

The applicant also claimed CHF 7,082.15 in respect of his costs and expenses for the proceedings before the Convention institutions. The Court considered that the claim for costs and expenses was reasonable and that it should be allowed in full.

**15. Eur. Court of HR, Rotaru v. Romania, judgment of 4 May 2000, application no. 28341/95. The applicant complained of an infringement of his right to private life in that the Romanian Intelligence Service held a file containing information on his private life and that it was impossible to refute the untrue information.**

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**no. 28341/95  
04.05.2000**

Press release issued by the Registrar

### **ROTARU v. ROMANIA**

Storing and use of personal data held by the Romanian intelligence services and absence of the possibility of refuting their accuracy violated the Convention

#### **Basic Facts**

The applicant, Aurel Rotaru, a Romanian national, was born in 1921 and lives in Bârlad (Romania).

In 1992 the applicant, who in 1948 had been sentenced to a year's imprisonment for having expressed criticism of the communist regime established in 1946, brought an action in which he sought to be granted rights that Decree no. 118 of 1990 afforded persons who had been persecuted by the communist regime. In the proceedings which followed in the Bârlad Court of First Instance, one of the defendants, the Ministry of the Interior, submitted to the court a letter sent to it on 19 December 1990 by the Romanian Intelligence Service, which contained, among other things, information about the applicant's political activities between 1946 and 1948. According to the same letter, Mr Rotaru had been a member of the Christian Students' Association, an extreme right-wing "legionnaire" movement, in 1937.

The applicant considered that some of the information in question was false and defamatory – in particular, the allegation that he had been a member of the legionnaire movement – and brought proceedings against the Romanian Intelligence Service, claiming compensation for the non-pecuniary damage he had sustained and amendment or destruction of the file containing the untrue information. The claim was dismissed by the Bârlad Court of First Instance in a judgment that was upheld by the Bucharest Court of Appeal on 15 December 1994. Both courts held that they had no power to order amendment or destruction of the information in the letter of 19 December 1990 as it had been gathered by the State's former security services, and the Romanian Intelligence Service had only been a depositary.

In a letter of 6 July 1997 the Director of the Romanian Intelligence Service informed the Ministry of Justice that after further checks in their registers it appeared that the information about being a member of the "legionnaire" movement referred not to the applicant but to another person of the same name.

In the light of that letter the applicant sought a review of the Court of Appeal's judgment of 15 December 1994 and claimed damages. In a decision of 25 November 1997 the Bucharest Court of Appeal quashed the judgment of 15 December 1994 and declared the information about the applicant's past membership of the "legionnaire" movement null and void. It did not rule on the claim for damages.

The applicant complained of an infringement of his right to private life in that the Romanian Intelligence Service held a file containing information on his private life and that it was

impossible to refute the untrue information. He relied on Article 8 of the European Convention on Human Rights. He also complained of the lack of an effective remedy before a national authority which could rule on his application for amendment or destruction of the file containing untrue information and of the courts' refusal to consider his applications for costs and damages, which he said infringed his right to a court. He relied on Articles 13 and 6 of the Convention.

### **Law – Article 8**

The Court noted that the RIS's letter of 19 December 1990 contained various pieces of information about the applicant's life, in particular his studies, his political activities and his criminal record, some of which had been gathered more than fifty years earlier. In the Court's opinion, such information, when systematically collected and stored in a file held by agents of the State, fell within the scope of "private life" for the purposes of Article 8 § 1 of the Convention. Article 8 consequently applied.

The Court considered that both the storing of that information and the use of it, which were coupled with a refusal to allow the applicant an opportunity to refute it, had amounted to interference with his right to respect for family life as guaranteed by Article 8 § 1. If it was not to contravene Article 8, such interference had to have been "in accordance with the law", pursue a legitimate aim under paragraph 2 and, furthermore, be necessary in a democratic society in order to achieve that aim.

In that connection, the Court noted that in its judgment of 25 November 1997 the Bucharest Court of Appeal had confirmed that it was lawful for the RIS to hold the information as depositary of the archives of the former security services. That being so, the Court could conclude that the storing of information about the applicant's private life had had a basis in Romanian law.

As regards the requirement of foreseeability, the Court noted that no provision of domestic law laid down any limits on the exercise of those powers. Thus, for instance, domestic law did not define the kind of information that could be recorded, the categories of people against whom surveillance measures such as gathering and keeping information could be taken, the circumstances in which such measures could be taken or the procedure to be followed. Similarly, the Law did not lay down limits on the age of information held or the length of time for which it could be kept.

Section 45 empowered the RIS to take over for storage and use the archives that had belonged to the former intelligence services operating on Romanian territory and allowed inspection of RIS documents with the Director's consent. The Court noted that the section contained no explicit, detailed provision concerning the persons authorised to consult the files, the nature of the files, the procedure to be followed or the use that could be made of the information thus obtained.

It also noted that although section 2 of the Law empowered the relevant authorities to permit interferences necessary to prevent and counteract threats to national security, the ground allowing such interferences was not laid down with sufficient precision.

The Court also noted that the Romanian system for gathering and archiving information did not provide any safeguards, no supervision procedure being provided by Law no. 14/1992, whether while the measure ordered was in force or afterwards.

That being so, the Court considered that domestic law did not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. The Court concluded that the holding and use by the RIS of information on the applicant's private life had not been "in accordance with the law", a fact that sufficed to

constitute a violation of Article 8. Furthermore, in the instant case that fact prevented the Court from reviewing the legitimacy of the aim pursued by the measures ordered and determining whether they had been – assuming the aim to have been legitimate – "necessary in a democratic society".

### **Law – Article 13**

The Court noted that Article 54 of the decree provided for a general action in the courts, designed to protect non-pecuniary rights that had been unlawfully infringed. The Bucharest Court of Appeal, however, had indicated in its judgment of 25 November 1997 that the RIS was empowered by domestic law to hold information on the applicant that came from the files of the former intelligence services. The Government had not established the existence of any domestic decision that had set a precedent in the matter. It had therefore not been shown that such a remedy would have been effective. That being so, the relevant preliminary objection by the Government had to be dismissed.

As to the machinery provided in Law no. 187/1999, assuming that the council provided for was set up, the Court noted that neither the provisions relied on by the respondent Government nor any other provisions of that law made it possible to challenge the holding, by agents of the State, of information on a person's private life or the truth of such information. The supervisory machinery established by sections 15 and 16 related only to the disclosure of information about the identity of some of the *Securitate's* collaborators and agents.

The Court had not been informed of any other provision of Romanian law that made it possible to challenge the holding, by the intelligence services, of information on the applicant's private life or to refute the truth of such information.

### **Law – Article 6**

The applicant's claim for compensation for non-pecuniary damage and costs was a civil one within the meaning of Article 6 § 1 and the Bucharest Court of Appeal had had jurisdiction to deal with it. The Court accordingly considered that the Court of Appeal's failure to consider the claim had infringed the applicant's right to a fair hearing within the meaning of Article 6 § 1.

**Conclusion:** violation of Articles 8, 13 and 6

### **Article 41 (Just Satisfaction)**

The Court considered that the sum of FRF 50,000 would afford fair redress for the non-pecuniary damage sustained.

The Court awarded the full amount claimed by the applicant, that is to say FRF 13,450, less the sum already paid by the Council of Europe in legal aid.

16. *Eur. Court of HR, P.G. and J.H. v. the United Kingdom*, judgment of 25 September 2001, application no. 44787/98. The applicants complained about the use of covert listening devices to monitor and record their conversations at B's flat, the monitoring of calls from B's telephone and the use of listening devices to obtain voice samples while they were at the police station.

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no. 44787/98  
25.09.2001

Press release issued by the Registrar

**P.G. AND J.H. v. THE UNITED KINGDOM**

The use of covert listening devices to monitor and record the applicants' conversations and to obtain their voice samples violated the Convention

**Basic Facts**

The applicants are both British nationals. On 28 February 1995, D.I. Mann received information that an armed robbery of a Securicor cash collection van was going to be committed on or around 2 March 1995 by the first applicant and B. at one of several possible locations. Visual surveillance of B.'s home began the same day. No robbery took place.

By 3 March, however, the police had been informed the robbery was to take place 'somewhere' on 9 March 1995. In order to obtain further details, D.I. Mann prepared a report applying for authorisation to install a covert listening device in B.'s flat. On 4 March 1995, the Chief Constable gave oral authorisation and a listening device was installed in a sofa in B.'s flat the same day; the Deputy Chief Constable gave retrospective written authorisation on 8 March 1995. On 14 March 1995, the police requested itemised billing for calls from the telephone in B.'s flat. On 15 March 1995, B. and others who were with him in his home discovered the listening device and abandoned the premises. The robbery did not take place. The applicants were arrested on 16 March 1995 in a stolen car containing two black balaclavas, five black plastic cable ties, two pairs of leather gloves, and two army kitbags.

As they wished to obtain speech samples to compare with the tapes, the police applied for authorisation to use covert listening devices in the applicants' cells and to attach listening devices to the police officers who were to be present when the applicants were charged. Written authorisation was given by the Chief Constable and samples of the applicants' speech were recorded without their knowledge or permission. An expert concluded it was 'likely' the first applicant's voice featured on the taped recordings and 'very likely' the second applicant's voice featured on them.

B. and the applicants were charged with conspiracy to rob. During their trial, evidence derived from the use of the covert listening devices was deemed admissible and some documents, including parts of D.I. Mann's report, were withheld from the applicants and their lawyers. Oral evidence was also taken from D.I. Mann in the absence of the applicants or their lawyers. The applicants were convicted on 9 August 1996 of conspiracy to rob and sentenced to 15 years' imprisonment. Their application to the Court of Appeal for leave to appeal was rejected.

## **Law – Article 8**

### Use of a covert listening device at B.'s flat

Noting that the UK Government had conceded that the police surveillance of B's flat was not in accordance with the law existing at the time in question, the Court held that there had been a violation of Article 8.

### Obtaining information about the use of B.'s telephone

Observing that the information about the use of B.'s telephone was obtained and used in the context of an investigation and trial concerning a suspected conspiracy to commit armed robberies, the Court found that the measure was necessary in a democratic society. There had therefore been no violation of Article 8.

### Use of covert listening devices at the police station

Noting that, at the relevant time, there existed no statutory system to regulate the use of covert listening devices by the police on their own premises, the Court found the interference with the applicants' right to a private life was not in accordance with the law. There had therefore been a violation of Article 8.

## **Law – Article 6 § 1**

### Non-disclosure of evidence during the trial

The Court was satisfied that the defence were kept informed and permitted to make submissions and participate in the decision-making process as far as was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds. The questions which the defence counsel had wished to put to the witness D.I. Mann were asked by the judge in chambers. The Court also noted that the material which was not disclosed in the present case formed no part of the prosecution case whatever, and was never put to the jury. The fact that the need for disclosure was at all times under assessment by the trial judge provided a further, important safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld.

In conclusion, therefore, the Court found that, as far as possible, the decision-making procedure complied with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused. It followed that there had been no violation of Article 6 § 1.

### Use of taped evidence obtained by covert surveillance devices

The Court observed that the taped evidence at the trial was not the only evidence against the applicants. Furthermore, they had had ample opportunity to challenge both the authenticity and the use of the recordings. It was also clear that, had the domestic courts been of the view that the admission of the evidence would have given rise to substantive unfairness, they would have had a discretion to exclude it. The Court further considered that there was no unfairness in leaving it to the jury, on the basis of a thorough summing-up by the judge, to decide where the weight of the evidence lay.

Insofar as the applicants complained that the way in which the voice samples were obtained infringed their right not to incriminate themselves, the Court considered that the voice samples, which did not include any incriminating statements, might be regarded as akin to blood, hair or other physical or objective specimens used in forensic analysis, to which the right did not apply. There had therefore been no violation of Article 6 § 1.



### **Law – Article 13**

The Court observed that the domestic courts were not capable of providing a remedy because it was not open to them either to deal with the complaint that the interference with the applicants' right to respect for their private lives was not in accordance with the law or to grant appropriate relief in connection with the complaint.

The Court further found that the system of investigation of complaints did not meet the standards of independence necessary to constitute sufficient protection against the abuse of authority and to provide an effective remedy within the meaning of Article 13.

**Conclusion:** violation of Articles 8 and 13. No violation of Article 6 § 1

### **Article 41 (Just Satisfaction)**

The Court awarded each applicant 1,000 pounds sterling (GBP) for non-pecuniary damage and a total of GBP 12,000 for costs and expenses.

**17. Eur. Court of HR, M.G v. the United Kingdom, judgment of 24 September 2002, application no. 39393/98. Requested access to applicant's social service records.**

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**no. 39393/98**  
**24.09.2002**

Press release issued by the Registrar

**M.G v. THE UNITED KINGDOM**

The failure to allow the applicant unimpeded access to all social service records relating to him violated the Convention

**Basic Facts**

M.G., a United Kingdom national, was born in 1960 and lives in Leicester. He was in local authority voluntary care from: 8 September to 6 November 1961, 15 February to 20 July 1962, 26 October to 23 December 1962, 4 April 1963 to 4 April 1966 and 16 January to 8 April 1967. During these periods his mother was receiving periodic psychiatric treatment and his father had some difficulty coping with the children on his own. M.G. had contact with both parents while in care.

By letter dated 10 April 1995, the applicant requested access to his social service records. By letters dated 5 and 9 June 1995, he requested specific information including whether he had ever been on the "risk register", whether his father had been investigated or convicted of crimes against children and about the responsibility of the local authority for abuse he had suffered as a child.

By letter dated 12 June 1996 to the local authority the applicant's legal representatives noted that the applicant had been provided with summary information and certain documents. They requested that he be allowed full access to his file. In reply, the local authority indicated that the social service records had been created prior to the entry into force of the Access to Personal Files Act 1987. Further to the applicant's queries, the local authority confirmed that there were no detailed records relating to him after 1967 and little mention of ill-treatment.

In his letter of 21 January 1997, the applicant stated that he was undergoing counselling for abuse he had received as a child and that he had consulted solicitors about a negligence action against the local authority. He requested specific information about allegations of ill-treatment made in November 1966 and about his being abused by his father for eight years thereafter. The local authority responded by letter dated 17 February 1997, referring the applicant to the information already provided in 1995 and to the differences between social work standards and procedures in 1997 and in the 1960s.

The applicant complained, in particular, about inadequate disclosure by the local authority of his social service records, records which related to his time spent in local authority care. He pointed out that he had not yet received all his social service records and referred, in particular, to the period from April 1967 - 1976 for which he has received no records whatsoever. He maintained that the failure to allow him unimpeded access to all social service records relating to him during those periods constituted a violation of Article 8 (right to respect for private and family life).

**Law – Article 8**

The Court noted that one of the main reasons the applicant sought access to his records was his sincere belief that he had been physically abused when he was a child by his father and his need to obtain as much information as possible about that period in order to come to terms with the emotional and psychological impact of any such abuse and to understand his own subsequent and related behaviour.

The Court observed that the applicant was only given limited access to his records in 1995, compared to the records submitted to the Court by the United Kingdom Government. In addition, he had no statutory right of access to those records or clear indication by way of a binding circular or legislation of the grounds upon which he could request access or challenge a denial of access. Most importantly, he had no appeal against a refusal of access to any independent body. The records disclosed by the Government demonstrated the need for such an independent appeal, given that significant portions of the records were blanked out and certain documents had been retained on the basis that non-disclosure was justified by the duty of confidence to third parties.

In such circumstances, the Court concluded that there had been a failure to fulfil the positive obligation to protect the applicant's private and family life in respect of his access to his social service records from April 1995. However, from 1 March 2000 (the date of entry into force of the Data Protection Act 1998) the applicant could have, but had not, appealed to an independent authority against the non-disclosure of certain records on grounds of a duty of confidentiality to third parties.

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

The applicant was awarded 4,000 euros (EUR) for non-pecuniary damage.

**18. Eur. Court of HR, Taylor-Sabori v. the United Kingdom, judgment of 22 October 2002, no. 47114/99. The applicant complained about the interception of pager messages by the police and subsequent reference to them at the trial.**

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**no. 47114/99  
22.10.2002**

Press release issued by the Registrar

### **TAYLOR-SABORI v. THE UNITED KINGDOM**

The interception of pager messages by the police and subsequent reference to them at the trial violated Convention rights

#### **Basic Facts**

Sean-Marc Taylor-Sabori is a United Kingdom national. Between August 1995 and the applicant's arrest on 21 January 1996, he was kept under police surveillance. Using a "clone" of the applicant's pager, the police were able to intercept messages sent to him.

The applicant was arrested and charged with conspiracy to supply a controlled drug. The prosecution alleged that he had been a principal organiser in the importation to the United Kingdom from Amsterdam of over 22,000 ecstasy tablets worth approximately GBP 268,000. He was tried, along with a number of alleged co-conspirators, at Bristol Crown Court in September 1997.

Part of the prosecution case against the applicant consisted of the contemporaneous written notes of the pager messages, which had been transcribed by the police. The applicant's counsel submitted that these notes should not be admitted in evidence because the police had not had a warrant under section 2 of the Interception of Communications Act 1985 for the interception of the pager messages. However, the trial judge ruled that, since the messages had been transmitted via a private system, the 1985 Act did not apply and no warrant had been necessary.

The applicant pleaded not guilty. He was convicted and sentenced to ten years' imprisonment.

The applicant appealed against conviction and sentence. One of the grounds was the admission in evidence of the pager messages. The Court of Appeal, dismissing the appeal on 13 September 1998, upheld the trial judge's ruling that the messages had been intercepted at the point of transmission on the private radio system, so that the 1985 Act did not apply and the messages were admissible despite having been intercepted without a warrant.

The applicant complained, principally, under Articles 8 (right to respect for private and family life) and 13 (right to an effective remedy) that the interception of his pager messages by the police and subsequent reference to them at his trial amounted to an unjustified interference with his private life and correspondence which was not "in accordance with the law" and in respect of which there was no remedy under English law.

#### **Law – Articles 8 and 13**

The European Court of Human Rights noted that, at the time of the events in question, there was no statutory system to regulate the interception of pager messages transmitted via a private telecommunication system. It followed, as the Government had accepted, that the

interference was not "in accordance with the law". The Court, therefore, held, unanimously, that there had been a violation of Article 8.

Concerning Article 13, the Court recalled that in its finding in the case *Khan v. the United Kingdom* (application no. 35394/97, judgment 12/5/2000), in circumstances similar to those in the applicant's case, the courts in the criminal proceedings were not capable of providing a remedy because, although they could consider questions of the fairness of admitting the evidence in the criminal proceedings, it was not open to them to deal with the substance of the Convention complaint that the interference with the applicant's right to respect for his private life was not "in accordance with the law"; still less, to grant appropriate relief in connection with the complaint. As it did not appear that there was any other effective remedy available to Mr Taylor-Sabori for his Article 8 complaint, the Court held, unanimously, that there had been a violation of Article 13.

**Conclusion:** violation of Articles 8 and 13

**Article 41 (Just Satisfaction)**

The Court further held unanimously that the finding of a violation constituted sufficient just satisfaction for any non-pecuniary damage sustained by the applicant and awarded him EUR 4,800 for costs and expenses.

**19. Eur. Court of HR, Allan v. the United Kingdom, judgment of 5 November 2002, application no. 48539/99. The applicant complained of use of covert audio and video surveillance within a prison cell and the prison visiting area.**

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**no. 48539/99**  
**05.11.2002**

Press release issued by the Registrar

### **ALLAN v. THE UNITED KINGDOM**

The use of covert audio and video surveillance within a prison cell and the prison visiting area violated Convention rights

#### **Basic Facts**

Richard Roy Allan is a United Kingdom national. On or about 20 February 1995, an anonymous informant told the police that Mr Allan had been involved in the murder of David Beesley, a store manager, who was shot dead in a Kwik-Save supermarket in Greater Manchester on 3 February 1995.

On 8 March 1995, the applicant was arrested for the murder. In the police interviews which followed, the applicant availed himself of his right to remain silent.

Around this time, recordings were made of the applicant's conversations with his female friend while in the prison visiting area and with his co-accused in the prison cell they shared.

On 23 March 1995, H., a long-standing police informant with a criminal record, was placed in the applicant's cell for the purpose of eliciting information from the applicant. The applicant maintains that H. had every incentive to inform on him. Telephone conversations between H. and the police included comments by the police instructing H. to "push him for what you can" and disclosed evidence of concerted police coaching. After 20 April 1995, he associated regularly with the applicant, who was remanded at Strangeways Prison.

On 25 July 1995, in a 59-60 page witness statement, H. claimed that the applicant had admitted his presence at the murder scene. This asserted admission was not part of the recorded interview and was disputed. No evidence, other than the alleged admissions, connected the applicant with the killing of Mr Beesley.

On 17 February 1998 the applicant was convicted of murder before the Crown Court at Manchester by a 10-2 majority and sentenced to life imprisonment. He appealed unsuccessfully.

The applicant complained of the use of covert audio and video surveillance within his cell, the prison visiting area and upon a fellow prisoner and of the use of materials gained by these means at his trial. He relied on Articles 6 (right to a fair trial), 8 (right to respect for private life) and 13 (right to an effective remedy).

#### **Law – Articles 8, 6 and 13**

Recalling that, at the relevant time, there existed no statutory system to regulate the use of covert recording devices by the police, the European Court of Human Rights held, unanimously, that there had been violations of Article 8 concerning the use of these devices.

The Government having accepted that the applicant did not enjoy an effective remedy in domestic law at the relevant time in respect of the violations of his right to private life under Article 8, the Court also held, unanimously, that there had been a violation of Article 13.

Concerning the complaint under Article 6, the Court noted that, in his interviews with the police following his arrest, the applicant had, on the advice of his solicitor, consistently availed himself of his right to silence.

H., who was a longstanding police informer, had been placed in the applicant's cell and later at the same prison for the specific purpose of eliciting from the applicant information implicating him in the offences of which he was suspected. The evidence adduced at the applicant's trial showed that the police had coached H. The admissions allegedly made by the applicant to H. were not spontaneous and unprompted statements volunteered by the applicant, but were induced by the persistent questioning of H., who, at the instance of the police, had channelled their conversations into discussions of the murder in circumstances which could be regarded as the functional equivalent of interrogation, without any of the safeguards of a formal police interview, including the attendance of a solicitor and the issuing of the usual caution.

The Court considered that the applicant would have been subject to psychological pressures which impinged on the "voluntariness" of the disclosures that he had allegedly made to H.: he was a suspect in a murder case, in detention and under direct pressure from the police in interrogations about the murder, and would have been susceptible to persuasion to take H., with whom he shared a cell for some weeks, into his confidence. In those circumstances, the information gained by the use of H. in this way might be regarded as having been obtained in defiance of the will of the applicant and its use at trial to have impinged on the applicant's right to silence and privilege against self-incrimination. The Court, therefore, held, unanimously, that there had been a violation of Article 6 concerning the admission at the applicant's trial of the evidence obtained through the informer H.

**Conclusion:** violation of Articles 8, 6 and 13

**Article 41 (Just Satisfaction)**

The Court awarded the applicant EUR 1,642 for non-pecuniary damage and EUR 12,800 for costs and expenses. (The judgment is in English only.)

**20. Eur. Court of HR, Peck v. the United Kingdom, judgment of 28 January 2003, application no. 44647/98. The applicant complained about the disclosure of the CCTV footage to the media, which resulted in images of himself being published and broadcast widely, and about a lack of an effective domestic remedy.**

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**no. 44647/98**  
**28.01.2003**

Press release issued by the Registrar

### **PECK v. THE UNITED KINGDOM**

Disclosure of CCTV footage of the applicant to the media violated the Convention

#### **Basic Facts**

The applicant, Geoffrey Dennis Peck, is a United Kingdom national, who was born in 1955 and lives in Essex. On the evening of 20 August 1995, at a time when he was suffering from depression, Mr Peck walked alone down Brentwood High Street, with a kitchen knife in his hand, and attempted suicide by cutting his wrists. He was unaware that he had been filmed by a closed-circuit television (CCTV) camera installed by Brentwood Borough Council.

The CCTV footage did not show the applicant cutting his wrists; the operator was solely alerted to an individual in possession of a knife. The police were notified and arrived at the scene, where they took the knife, gave the applicant medical assistance and brought him to the police station, where he was detained under the Mental Health Act 1983. He was examined and treated by a doctor, after which he was released without charge and taken home by police officers.

On 9 October 1995 the Council issued two photographs taken from the CCTV footage with an article entitled "Defused – the partnership between CCTV and the police prevents a potentially dangerous situation". The applicant's face was not specifically masked. The article noted that an individual had been spotted with a knife in his hand, that he was clearly unhappy but not looking for trouble, that the police had been alerted, that the individual had been disarmed and brought to the police station where he was questioned and given assistance.

On 12 October 1995 the "Brentwood Weekly News" newspaper used a photograph of the incident on its front page to accompany an article on the use and benefits of the CCTV system. The applicant's face was not specifically masked.

On 13 October 1995 an article entitled "Gotcha" appeared in the "Yellow Advertiser", a local newspaper with a circulation of approximately 24,000. The article, accompanied by a photograph of the applicant taken from the CCTV footage, referred to the applicant having been intercepted with a knife and a potentially dangerous situation having being defused. It was noted that the applicant had been released without charge. On 16 February 1996 a follow-up article entitled "Eyes in the sky triumph" was published by the newspaper using the same photograph. It appears that a number of people recognised the applicant.

On 17 October 1995 extracts from the CCTV footage were included in an Anglia Television programme, a local broadcast to an average audience of 350,000. The applicant's face had been masked at the Council's oral request.



In late October or November 1995 the applicant became aware that he had been filmed on CCTV and that footage had been released because a neighbour said he had seen him on television. He did not take any action as he was still suffering from severe depression.

The CCTV footage was also supplied to the producers of "Crime Beat", a BBC series on national television with an average of 9.2 million viewers. The Council imposed orally a number of conditions, including that no one should be identifiable in the footage and that all faces should be masked.

However, in trailers for an episode of "Crime Beat", the applicant's image was not masked at all. After being told by friends that they had seen him on 9 March 1996 in the trailers, the applicant complained to the Council about the forthcoming programme. The Council contacted the producers who confirmed that his image had been masked in the main programme. On 11 March the CCTV footage was shown on "Crime Beat". However, although the applicant's image was masked in the main programme, he was recognised by friends and family.

The applicant made a number of media appearances thereafter to speak out against the publication of the footage and photographs.

### **Law – Article 8**

The applicant complained about the disclosure of the CCTV footage to the media, which resulted in images of himself being published and broadcast widely, and about a lack of an effective domestic remedy. He relied on Articles 8 and 13 of the Convention.

The Court observed that, following the disclosure of the CCTV footage, the applicant's actions were seen to an extent which far exceeded any exposure to a passer-by or to security observation and to a degree surpassing that which the applicant could possibly have foreseen. The disclosure by the Council of the relevant footage therefore constituted a serious interference with the applicant's right to respect for his private life.

The Court did not find that there were relevant or sufficient reasons which would justify the direct disclosure by the Council to the public of stills of the applicant in "CCTV News", without the Council having obtained the applicant's consent or masking his identity, or which would justify its disclosures to the media without the Council taking steps to ensure so far as possible that his identity would be masked. Particular scrutiny and care was needed given the crime prevention objective and context of the disclosures.

Neither did the Court find that the applicant's later voluntary media appearances diminished the serious nature of the interference and nor did these appearances reduce the need for care concerning disclosures. The applicant was the victim of a serious interference with his right to privacy involving national and local media coverage: it could not therefore be held against him that he tried afterwards to expose and complain about that wrongdoing through the media.

Accordingly, the Court considered that the disclosures by the Council of the CCTV material in "CCTV News" and to the "Yellow Advertiser", Anglia Television and the BBC were not accompanied by sufficient safeguards and, therefore, constituted a disproportionate and unjustified interference with the applicant's private life and a violation of Article 8.

In the light of this finding, the Court did not consider it necessary to consider separately the applicant's other complaints under Article 8.

### **Law – Article 13 in conjunction with Article 8**

The Court found that judicial review did not provide the applicant with an effective remedy in relation to the violation of his right to respect for his private life.

In addition, the lack of legal power of the BSC and ITC to award damages to the applicant meant that those bodies could not provide an effective remedy to him. The ITC's power to impose a fine on the relevant television company did not amount to an award of damages to the applicant. And, although the applicant was aware of the Council's disclosures prior to the "Yellow Advertiser" article of February 1996 and the BBC broadcasts, neither the BSC nor the PCC had the power to prevent such publications or broadcasts.

The Court further found that the applicant did not have an actionable remedy for breach of confidence at the relevant time.

Finding, therefore, that the applicant had no effective remedy in relation to the violation of his right to respect for his private life, the Court concluded that there had been a violation of Article 13.

**Conclusion:** violation of Articles 8 and 13

**Article 41 (Just Satisfaction)**

The Court awarded the applicant 11,800 euros (EUR) for non-pecuniary damage and EUR 18,075 for costs and expenses.

21. *Eur. Court of HR, Cotlet v. Romania*, judgment of 3 June 2003, application no. 38565/97. The applicant complained under Article 8 of the Convention of interference with his correspondence with the Convention institutions. He also complained of a violation of his right of individual application, as guaranteed by Article 34 of the Convention.

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no. 38565/97  
03.06.2003

Press release issued by the Registrar

### **COTLET v. ROMANIA**

Interference with applicant's correspondence with the Convention institutions

#### **Basic Facts**

The applicant, Silvestru Cotlet, is a Romanian national who was born in 1964 and lives at Gura-Humorului. The case concerns his difficulties in corresponding with the Convention institutions after lodging his application.

On 23 July 1992 he was convicted of murder by the Caraş-Severin County Court and sentenced to 17 years' imprisonment. He was sent to Drobeta Turnu-Severin Prison and subsequently transferred to penal institutions in Timișoara, Gherla, Jilava, Rahova, Craiova, Tg. Ocna and Mărgineni. He lodged an application with the European Commission of Human Rights from prison in November 1995 complaining about the allegedly unfair nature of the proceedings that had ended with his conviction.

The applicant complained under Article 8 of the Convention of interference with his correspondence with the Convention institutions, including delays in forwarding his letters to the Court and the Commission, the opening of his letters to those institutions, and the prison authorities' refusal to provide him with paper, envelopes and stamps for his letters to the Court. He also complained of a violation of his right of individual application, as guaranteed by Article 34 of the Convention.

#### **Law – Article 8**

##### Delays in forwarding the applicant's letters to the Commission and the Court

The Court noted that between November 1995 and October 1997 the applicant's correspondence had taken between 1 month and 10 days and 2 months and 6 days to reach its destination. Such delays amounted to an interference with his right to respect for his correspondence. Referring to its case-law, the Court observed that it had previously held that the Romanian legislation on the monitoring of prisoners' correspondence was incompatible with the requirement under Article 8 § 2 of the Convention for an interference to be "in accordance with the law". Consequently, finding that that requirement was not satisfied, the Court held that there had been a violation of the Convention under this head.

##### Opening of the applicant's correspondence with the Commission and the Court

As regards the period up to 24 November 1997, when a decree was issued guaranteeing the confidentiality of prisoners' correspondence, the Court found that the fact that the applicant's letters had been opened amounted to an interference with his right to respect for his

correspondence: that interference had been based on national provisions which had not amounted to a “law” for the purposes of Article 8 paragraph 2 of the Convention. Consequently, it held that there had been a violation of the Convention under that head.

With regard to the period after 24 November 1997, the Court noted that the facts were in dispute. The case file showed that the interference with the applicant’s right to respect for his correspondence had continued. In the absence of any specific information from the parties on the point, the Court assumed that the basis for the interference was the Minister of Justice’s decree of 24 November 1997. It noted that the decree was referred to under various different numbers and did not appear to have been published. Accordingly, the Court found that the interference was not “in accordance with the law” and that there had been a violation of Article 8 of the Convention.

#### The prison authority’s refusal to provide the applicant with writing materials for his correspondence with the Court

The Court noted that inherent in the right to respect for correspondence, as guaranteed by Article 8 of the Convention, was the right to writing materials. It noted that several letters in which the applicant had related the difficulties he was experiencing had arrived in envelopes from other prisoners. The Court did not find the Government’s submission that the applicant had been entitled to two free envelopes a month substantiated. It also found that the applicant’s right to respect for his correspondence was not adequately protected by the provision of envelopes. It noted that the Government had not disputed that the applicant’s requests had been turned down because there were no stamped envelopes for overseas correspondents available. In the circumstances, the Court found that the authorities had not discharged their positive obligation to supply the applicant with writing materials for his correspondence with the Court and, accordingly, held that there had been a violation of Article 8 of the Convention.

#### **Law – Article 34**

The Court found that the applicant’s fears about being transferred to another prison or encountering other problems as a result of lodging his application could amount to intimidation. When combined with the failure to provide him with the necessary writing materials for his correspondence with the Court, the delays in forwarding his correspondence to the Court and the Commission and the systematic opening of that correspondence constituted a form of unlawful and unacceptable pressure that violated the applicant’s right of individual application. Consequently, the Court held that there had been a violation of Article 34 of the Convention.

#### **Law – Article 8 in conjunction with Article 34**

In view of its findings on the other complaints, the Court held that no separate examination of this complaint was necessary.

**Conclusion:** violation of Articles 8 and 34

#### **Article 41 (Just Satisfaction)**

The Court awarded the applicant 2,500 euros (EUR) for pecuniary and non-pecuniary damage and EUR 3,300 for costs and expenses, less the EUR 920 he had already received in legal aid.

**22. Eur. Court of HR, Odièvre v. France, judgment of 13 February 2003, application no. 42326/98. Applicant complained about her inability to find out about origins of her mother. The Court ruled that the request for disclosure of her mother's identity, was subject to the latter's consent being obtained**

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**no. 42326/98**  
**13.02.2003**

Press release issued by the Registrar

### ***ODIÈVRE v. FRANCE***

Refusal to divulge identity of biological parents

#### **Basic Facts**

The applicant was born in 1965. She was abandoned by her natural mother at birth and left with the Health and Social Security Department. Her mother requested -that her identity be kept secret from the applicant, who was placed in State care and later adopted under a full adoption order. The applicant subsequently tried to find out the identity of her natural parents and brothers, but was only able to obtain non-identifying information about her natural family.

#### **Law – Article 8**

The Court examined 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 origins 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.

It was noted that the French legislation aimed to protect the mother's and child's health at 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 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.

**Conclusion:** no violation of Article 8

**23. Eur. Court of HR, Perry v. the United Kingdom, judgment of 17 July 2003, application no. 63737/00 (violation of Article 8 of the Convention). Use of videotape by the Police for identification and prosecution purposes.**

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**no. 63737/00**  
**17.07.2003**

Press release issued by the Registrar

**PERRY v. THE UNITED KINGDOM**

Use of videotape by the Police for identification and prosecution purposes

**Basic Facts**

The applicant, Stephen Arthur Perry, is a UK national, born in 1964 and currently detained in HM Prison Brixton. He was arrested on 17 April 1997 in connection with a series of armed robberies of mini-cab drivers in and around Wolverhampton and released pending an identification parade. When he failed to attend that and several further identification parades, the police requested permission to video him covertly.

On 19 November 1997 he was taken to the police station to attend an identity parade, which he refused to do. Meanwhile, on his arrival, he was filmed by the custody suite camera. An engineer had adjusted it to ensure that it took clear pictures during his visit. The pictures were inserted in a montage of film of other persons and shown to witnesses. Two witnesses of the armed robberies subsequently identified him from the compilation tape. Neither Mr Perry nor his solicitor was informed that a tape had been made or used for identification purposes. He was convicted of robbery on 17 March 1999 and sentenced to five years' imprisonment. His subsequent appeals were unsuccessful.

Mr Perry complained, under Article 8 (right to respect for private life) of the Convention, that the police had covertly videotaped him for identification purposes and used the videotape in the prosecution against him.

**Law – Article 8**

The Court noted that there was no indication that Mr Perry had had any expectation that footage would be taken of him in the police station for use in a video identification procedure and, potentially, as evidence prejudicial to his defence at trial. That ploy adopted by the police had gone beyond the normal use of this type of camera and amounted to an interference with the applicant's right to respect for his private life.

The interference had not been in accordance with the law because the police had failed to comply with the procedures set out in the applicable code: they had not obtained the applicant's consent or informed him that the tape was being made; neither had they informed him of his rights in that respect.

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

The Court awarded the applicant EUR 1,500 for non-pecuniary damage and EUR 9,500 for costs and expenses.

**24. Eur. Court of HR, *Matwiejczuk v. Poland*, judgment of 2 December 2003, application no. 37641/97 (No violation of Article 34). The applicant complained about the length of his pre-trial detention, the length of the criminal proceedings against him and that his letters were monitored during his detention.**

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**no. 37641/97  
02.12.2003**

Press release issued by the Registrar

### **MATWIEJCZUK v. POLAND**

The monitoring of the applicant's correspondence violated his Convention rights

#### **Basic Facts**

The applicant, Tomasz Matwiejczuk, is a Polish national born in 1966. He is currently detained in Radom Prison (Poland).

He complained about the length of his pre-trial detention (lasting two years, seven months and 22 days), the length of the criminal proceedings against him (almost three years and two months) and that his letters, including correspondence with the European Court of Human Rights, were monitored during his detention. He relied on: Article 5 § 3 (right to be brought promptly before a judge), Article 6 § 1 (right to a fair trial within a reasonable time), Article 8 (right to respect for correspondence) and Article 34 (effective exercise of the right to file individual applications).

#### **Law – Article 8**

The Court noted that the monitoring of the applicant's correspondence before 1 September 1998 was in breach of Article 8, as Polish law in force at that time did not clearly indicate the scope and manner of the discretion conferred on public authorities to control correspondence. In addition, the opening of a letter from the European Court of Human Rights to the applicant on 23 February 1999 – which had not taken place in the applicant's presence – was also in breach of Article 8, not being in accordance with the law. The Court therefore held, unanimously, that there had been a violation of Article 8.

Given this finding, the Court did not consider it necessary to examine the applicant's claim that there was an interference with the exercise of his right of individual petition. The Court further found that the delivery of the applicants' correspondence had not been delayed and that there had been no violation of Articles 8 or 34 in that respect.

Finding that both the length of the applicant's pre-trial detention and the length of the proceedings against him were not reasonable, the Court held, unanimously, that there had been a violation of Article 5 § 3 and Article 6 § 1.

**Conclusion:** violation of Articles 8, 5 § 3 and 6 § 1.

#### **Article 41 (Just Satisfaction)**

The applicant was awarded EUR 2,000 for non-pecuniary damage and EUR 1,500 less EUR 790 for costs and expenses.



**25. Eur. Court of HR, Von Hannover v. Germany, judgment of 24 June 2004, application no. 59320/00. Applicant complained about obligation of states to protect an individual's image, even for photos taken of public figures in public spaces.**

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**no. 59320/00**  
**24.06.2004**

Press release issued by the Registrar

**VON HANNOVER v. GERMANY**

Obligation of states to protect an individual's image, even for photos taken of public figures in public spaces

**Basic Facts**

The applicant was the eldest daughter of Prince Rainier III of Monaco. A number of German tabloid magazines published photos taken without her knowledge showing her outside her home going about her daily business, either alone or in company. The applicant sought an injunction in the German courts against any further publication of the photos in Germany. This was refused as the lower courts held that due to the applicant's status she had to tolerate the publication without her consent of photos taken outside her home. The Federal Court of Justice held that figures of contemporary society were entitled to respect for their private life even outside their home, but only if they had retired to a secluded place where it was objectively clear to everyone that they wanted to be alone, and where they behaved in a given situation in a manner in which they would not behave in a public place.

**Law – Article 8**

The publication of photos showing the applicant engaged in purely private activities in her daily life fell within the scope of her private life. The photos and accompanying commentaries had been published for the purposes of an article designed to satisfy the curiosity of a particular readership regarding the details of the private life of the princess, who was not a public figure and did not fulfil any official function on behalf of Monaco. In short, the publications in question had not contributed to any debate of general interest to society despite the applicant being known to the public. The Court also stressed that everyone, even if they were known to the general public, had to have a legitimate expectation of protection and respect for their private life, which included a social dimension. The photos in question, which concerned exclusively details of the applicant's private life, had been taken without her knowledge or consent and in the context of daily harassment by photographers. Moreover, increased vigilance in protecting private life was necessary to contend with new communication technologies which, among other things, made possible the systematic taking of photos and their dissemination to a broad section of the public. In defining the applicant as a figure of contemporary society, the domestic courts did not allow her to rely on her right to protection of her private life unless she was in a secluded place out of the public eye. In the Court's view, the criterion of spatial isolation was in reality too vague and difficult for the person concerned to determine in advance. The State, which had a positive obligation under the Convention to protect private life and the right to control the use of one's image, had failed to ensure the effective protection of the applicant's private life.

**Conclusion:** violation of Article 8

**Separate Opinions**

Judges Cabral Barreto and Zupančič expressed concurring opinions, which are annexed to the judgment.

26. *Eur. Court of HR, Sciacca v. Italy*, judgment of 11 January 2005, application no. 50774/99. The applicant submits that the dissemination of the photograph at a press conference organised by the public prosecutor's office and the tax inspectors infringed her right to respect for her private life.

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no. 50774/99  
11.01.2005

Press release issued by the Registrar

### **SCIACCA v. ITALY**

The dissemination of the photograph at a press conference organised by the public prosecutor's office and the tax inspectors infringed the Convention

#### **Basic Facts**

The applicant, Carmela Sciacca, is an Italian national who was born in 1948 and lives in Syracuse (Italy). She was a teacher at a private school in Lentini which owned a company of which she and other teachers were members.

During an investigation into irregularities of management of the school's activities, Mrs Sciacca was prosecuted for criminal conspiracy, tax evasion and forgery. She was arrested and was made subject to a compulsory residence order in November 1998. The tax inspectors drew up a file on her containing photographs and her fingerprints.

Following a press conference on 4 December 1998 given by the public prosecutor's office and the tax inspectors, the dailies *le Giornale di Sicilia* and *la Sicilia* published articles on the facts giving rise to the prosecution which were illustrated by a photograph of the four arrested women, including the applicant. The photograph of Mrs Sciacca, which was published four times, was the one that had been taken by the tax inspectors when the file was drawn up on her and released by them to the press.

At the end of the proceedings the applicant was sentenced to one year and ten months' imprisonment and fined EUR 300. The applicant submitted that the dissemination of her photograph at the press conference had infringed her right to respect for her private life, contrary to Article 8 (right to respect for private life) of the Convention.

#### **Law – Article 8**

The Court noted that the photograph, taken for the purposes of drawing up an official file, had been released to the press by the tax inspectors. According to the information in its possession, there was no law governing the taking of photographs of people under suspicion or arrested and assigned to residence and the release of photos to the press. It was rather an area in which a practice had developed.

The interference with the applicant's right to respect for her private life had thus not been "in accordance with the law" within the meaning of Article 8

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

The Court considered that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage alleged by the applicant and awarded her EUR 3,500 for costs and expenses.

**27. Eur. Court of HR, Pisk-Piskowski v. Poland, judgment of 14 January 2005, application no. 92/03. The applicant complained that the proceedings resulting in his conviction had been unfair and that his right to respect for his correspondence had been infringed.**

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**no. 92/03**  
**14.06.2005**

Press release issued by the Registrar

### **PISK- PISKOWSKI v. POLAND**

Infringement of applicant's right to respect for his correspondence

#### **Basic Facts**

The applicant, Andrzej Pisk-Piskowski, is a Polish national who was born in 1967 and lives in Opole (Poland). On 11 December 2001 the Opole District Court found the applicant guilty of making threats and sentenced him to one year and six months' imprisonment. Neither the applicant nor his officially assigned counsel was present at the delivery of the judgment but both the applicant and his lawyer were present at an earlier hearing held by the trial court. The applicant further failed to lodge an appeal against the judgment given on 11 December 2001 in accordance with the procedural requirements. The first letter sent by the applicant from the Wrocław Detention Centre to the European Court of Human Rights arrived at the Registry on 6 December 2002, stamped "District Court in Legnica, censored on 22.11.02" (*Sąd Rejonowy w Legnicy, cenzurowano dnia 22.11.02*) and "252, 14 NOV 2002, register number 2738/01" (*252, 14 LIS 2002, numer ewid. 2738/01*). The applicant complained, in particular, that the proceedings resulting in his conviction had been unfair and that his right to respect for his correspondence had been infringed. He relied in particular on Article 6 § 1 (right to a fair hearing).

#### **Law – Article 8**

The Court raised ex officio the issues under Articles 8 (right to respect for correspondence) and 34 (right of individual petition) concerning the censorship of his correspondence. It considered that there was a reasonable likelihood that the first letter sent by the applicant had been opened by the domestic authorities, even if there was no stamp to that effect on the envelope. In reaching that conclusion, the Court took into account the fact that the Polish word *ocenzurowano*, which had appeared on the envelope, meant that a competent authority had allowed the dispatch or delivery of the letter after monitoring its content. As long as the authorities continued the practice of marking prisoners' letters with the *ocenzurowano* stamp, the Court had no alternative but to presume that those letters had been opened and their contents read.

The Court noted that Article 103 § 1 of the 1997 Code on the Execution of Criminal Sentences expressly prohibited censorship of, or other forms of interference with, correspondence between convicted detainees and "institutions set up by international treaties ratified by the Republic of Poland concerning the protection of human rights". Since the authorities had disregarded that statutory prohibition, the Court held unanimously that there

had been a violation of Article 8. It further considered that it was not necessary to carry out a separate examination of the applicant's complaint under Article 34.

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

The Court considered that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage he had sustained.

**28. Eur. Court of HR, Matheron v. France, judgment of 29 March 2005, application no. 57752/00. The applicant complains under Article 8 of the Convention (right to respect for his private life) that evidence was used against him that had been obtained by telephone tapping in separate proceedings. Not being a party to those proceedings, he had been unable to contest their validity.**

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**no. 57752/00**  
**29.03.2005**

Press release issued by the Registrar

### **MATHERON v. FRANCE**

The use of evidence obtained through telephone tapping in separate proceedings where the applicant was not a party and thus unable to contest its validity violated the Convention

#### **Basic Facts**

The applicant, Robert Matheron, is a French national who was born in 1949. He is currently in Salon de Provence Prison (France).

In 1993 criminal proceedings were instituted against him for international drug-trafficking. Evidence obtained from telephone tapping that had been used in proceedings against a co-defendant was also used against the applicant. The applicant argued that that evidence was inadmissible, but the indictment division ruled that it had no jurisdiction to verify whether evidence obtained from telephone tapping in separate proceedings had been properly communicated and recorded in writing.

On 6 October 1999 the Court of Cassation dismissed an appeal by the applicant, holding that the indictment division only had jurisdiction to determine the validity of the application to adduce the telephone records in evidence, but not to decide whether the telephone tapping was lawful.

On 23 June 2000 the applicant was sentenced to 15 years' imprisonment.

He complained under Article 8 of the Convention (right to respect for his private life) that evidence had been used against him that had been obtained from telephone tapping in separate proceedings. Not being a party to those proceedings, he had been unable to contest their validity.

#### **Law – Article 8**

The main task of the Court was to ascertain whether an “effective control” had been available to the applicant to challenge the telephone tapping to which he had been made subject. It was clear that he had been unable to intervene in the proceedings in which the order to monitor telephone calls had been made. Furthermore, the Court of Cassation had ruled that in such cases the role of the indictment division was confined to checking whether the application to adduce evidence obtained from the telephone tapping had been made in the proper form.

The Court reiterated that the 1991 Act regulating telephone tapping in France was consistent with the Convention. However, it said that the reasoning followed by the Court of Cassation could lead to decisions that would deprive a number of people, namely those against whom evidence obtained from telephone tapping in separate proceedings was used, of the protection afforded by the Act. That was what had happened in the case before the Court in

which the applicant had not enjoyed the effective protection of the Act, which made no distinction on the basis of the proceedings in which the taped telephone conversations were used.

In those circumstances, the Court found that the applicant had not had access to “effective control” allowing him to contest the validity of the evidence obtained through telephone tapping.

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

The Court awarded the applicant EUR 3,500 for non-pecuniary damage and EUR 5,500 for costs and expenses.



**29. Eur. Court of HR, Vetter v. France, judgment of 31 May 2005, application no. 59842/00. Complaint that there was no statutory basis in French law for the installation of listening devices in the flat or the recording of the applicant's conversations**

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**no. 59842/00**  
**31.05.2005**

Press release issued by the Registrar

**VETTER v. FRANCE**

The installation of listening devices in the flat and the recording of the applicant's conversations violated Convention rights

**Basic Facts**

The applicant, Christophe Vetter, is a French national who was born in 1975. He is currently serving a prison sentence.

Following the discovery of a body with gunshot wounds, the police installed listening devices in a flat which the applicant, whom they suspected of the homicide, visited regularly. On the strength of the conversations that were recorded, the applicant was placed under formal investigation for intentional homicide and remanded in custody until 30 December 1997.

The applicant argued that there was no statutory basis for the use of listening devices and that the evidence that had thereby been obtained was inadmissible. The Indictment Division of the Montpellier Court of Appeal and subsequently the Criminal Division of the Court of Cassation rejected that argument, holding that the monitoring of his conversations had not contravened Articles 81 and 100 et seq. of the Code of Criminal Procedure on the confidentiality of telephone communications.

Partly on the basis of the evidence obtained from the recordings, the applicant was committed for trial in the Hérault Assize Court. On 23 October 2000 he was convicted and sentenced to twenty years' imprisonment.

The applicant complained under Article 8 of the Convention (right to respect for private life) that there was no statutory basis in French law for the installation of the listening devices in the flat or the recording of his conversations and that his right to respect for his private life had accordingly been violated. He also complained under Article 6 § 1 (right to a fair hearing) that the procedure followed in the Court of Cassation was unfair in that neither the report of the reporting judgment nor the submissions of the advocate general had been communicated to him and that his complaint under Article 8 of the Convention had been dismissed on the ground that he had no standing.

**Law – Articles 8 and 6**

The Court noted that the matters complained of by the applicant amounted to interference with his right to respect for his private life. However, it was not satisfied that Articles 100 et seq. of the Code of Criminal Procedure had afforded any statutory basis for the order to install the listening devices at the time it was made and implemented, as those provisions only regulated the interception of telephone communications and did not refer to listening devices. Even assuming that the provisions of the Code Criminal Procedure had constituted a basis for

the measure, the Court considered that the “law” so identified did not have the requisite quality required by the Court’s case-law.

In conclusion, the Court noted that French law did not set out the extent of the authorities’ discretion with regard to listening devices or the procedure by which it was to be exercised with sufficiently clarity. In those circumstances, it held unanimously that there had been a violation of Article 8 of the Convention.

The Court held that no separate question arose under Article 6 of the Convention in respect of the decision by the Criminal Division of the Court of Cassation to dismiss the applicant’s appeal under Article 8 on the grounds that he had no standing.

Lastly, referring to its settled case-law, the Court held unanimously that there had been a violation of **Article 6 § 1** in the proceedings in the Court of Cassation as the reporting judge’s report had not been communicate to the applicant or his counsel before the hearing, whereas the advocate general had received a copy.

**Conclusion:** violation of Articles 8 and 6 § 1

**Article 41 (Just Satisfaction)**

The Court awarded the applicant EUR 1,500 for non-pecuniary damage.

**30. Eur. Court of HR, Wisse v. France, judgment of 20 December 2005, application no. 71611/01. The applicants contend that the recording of their conversations in the prison visiting rooms constituted interference with their right to respect for their private and family life.**

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**no. 71611/01  
20.12.2005**

Press release issued by the Registrar

### **WISSE v. FRANCE**

The recording of the applicants' conversations in the prison visiting rooms violated the Convention

#### **Basic Facts**

The applicants, Jean-François Wisse and his brother Christian Wisse, are French nationals who were born in 1959 and 1952 respectively. They are currently detained in France in Ploemeur Detention Centre and Brest Prison, where they are serving sentences of 25 years and 20 years respectively following their conviction in 1992 for armed robbery and attempted murder.

The applicants were arrested on 9 October 1998 on suspicion of committing armed robberies at the branches of the Crédit Agricole bank in Tinténiac and Combourg, and were placed in pre-trial detention. Under a warrant issued by the investigating judge, the telephone conversations between the applicants and their relatives in the prison visiting rooms were recorded between November 1998 and February 1999.

The applicants made an unsuccessful application to have the steps in the proceedings relating to the recording of their conversations declared invalid. The Court of Cassation dismissed an appeal lodged by them on that point on 12 December 2000.

Relying on Article 8 (right to respect for private and family life), the applicants argued that the recording of their conversations in the prison visiting rooms constituted interference with their right to respect for their private and family life.

#### **Law – Article 8**

In the Court's view, the systematic recording of conversations in a visiting room for purposes other than prison security deprived visiting rooms of their sole *raison d'être*, namely to allow detainees to maintain some degree of "private life", including the privacy of conversations with their families. The conversations conducted in a prison visiting room, therefore, could be regarded as falling within the scope of the concepts of "private life" and "correspondence".

The recording and subsequent use of the conversations between the applicants and their relatives in the visiting rooms amounted to an interference with their private lives which was not in accordance with the law within the meaning of Article 8 § 2. French law did not indicate with sufficient clarity how and to what extent the authorities could interfere with detainees' private lives, or the scope and manner of exercise of their powers of discretion in that sphere.

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

The Court considered that the finding of a violation of the Convention constituted in itself sufficient just satisfaction for the alleged non-pecuniary damage.

31. *Eur. Court of HR, Turek v. Slovakia*, judgment of 14 February 2006, application no. 57986/00. The applicant complains about being registered as a collaborator with the former Czechoslovak Communist Security Agency, the issuing of a security clearance to that effect and the dismissal of his action challenging that registration.

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no. 57986/00  
14.02.2006

Press release issued by the Registrar

### **TUREK v. SLOVAKIA**

The continued existence of a former Czechoslovak Communist Security Agency file registering the applicant as one of its agents and the resultant effects violated Convention rights

#### **Basic Facts**

The applicant, Ivan Turek, is a Slovakian national who was born in 1944 and lives in Prešov (Slovakia). He held a senior public sector post dealing with the administration of education in schools.

In March 1992, in response to a request made by his employer under the Lustration Act, an Act of 1991 which defined supplementary requirements for holding certain posts in the public sector, the Ministry of the Interior of the Czech and Slovak Federal Republic issued a negative security certificate in respect of the applicant. As a consequence, he felt compelled to leave his job.

The document stated that he had been registered by the former State Security Agency (*Štátna bezpečnosť*, "StB") as its collaborator within the meaning of the Act and that he was therefore disqualified from holding certain posts in the public sector. The applicant claimed he had unwillingly met up with StB agents before and after trips he had made abroad in the mid 80s but had never passed on to them any confidential information and had not operated as an informer for the agency.

The applicant initially lodged an action against the Federal Ministry on 25 May 1992, but subsequently directed his action against the Slovak Intelligence Service (*Slovenská informačná služba* – "the SIS"), which had in effect taken over the StB archives. He sought a judicial ruling declaring that his registration as a collaborator with the StB had been wrongful.

In August 1995, at the request of Kolšice Regional Court, the SIS handed over all ex-StB documents concerning the applicant in its possession with the indication that the documents were top secret and that the rules on confidentiality were to be observed. The court then held a number of hearings where it heard the testimonies of several former StB agents. At a hearing held on 24 September 1998 the SIS submitted the Internal Guidelines of the Federal Ministry of 1972 concerning secret collaboration. That document was classified and the applicant was therefore denied access to it. The applicant's action was dismissed on 19 May 1999.

In October 1999 the Supreme Court upheld the regional court's judgment. It found, in particular, that only unjustified registration in the StB files would amount to a violation of an individual's good name and reputation. It had therefore been crucial for the applicant to prove

that his registration had been contrary to the rules applicable at the material time, which he had failed to do.

### **Law – Article 8**

The Court recognised that, particularly in proceedings related to the operations of state security agencies, there might be legitimate grounds to limit access to certain documents and other materials. However, in respect of lustration proceedings, that consideration lost much of its validity, particularly since such proceedings were by their nature orientated towards the establishment of facts dating from the communist era and were not directly linked to the current functions of the security services. Furthermore, it was the legality of the agency's actions which was in question.

It noted that the domestic courts considered it of crucial importance for the applicant to prove that the State's interference with his rights was contrary to the applicable rules. Those rules were, however, secret and the applicant did not have full access to them. On the other hand, the State – the SIS – did have full access. The Court found that that requirement placed an unrealistic and excessive burden on the applicant and did not respect the principle of equality. There had therefore been a violation of Article 8 concerning the lack of a procedure by which the applicant could seek protection for his right to respect for his private life.

The Court found it unnecessary to examine separately the effects on the applicant's private life of his registration in the StB files and of his negative security clearance.

### **Law – Article 6 § 1**

With particular regard to what was at stake for the applicant, the Court found that the length of the proceedings, lasting seven years and some five months for two levels of jurisdiction, was excessive and failed to meet the reasonable time requirement in breach of Article 6.

**Conclusion:** violation of Articles 8 and 6 § 1

### **Article 41 (Just Satisfaction)**

The Court awarded the applicant 8,000 euros (EUR) in respect of non-pecuniary damage and EUR 900 for costs and expenses

### **Separate Opinion**

Judge Maruste expressed a dissenting opinion, which is annexed to the judgment.

**32. Eur. Court of HR, Segerstedt-Wiberg and Others v. Sweden, judgment of 6 June 2006, application no 62332/00. The applicants complain about the storage of certain information about them in Swedish Security Police files and the refusal to reveal the extent of the information stored.**

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**no 62332/00**  
**06.06.2006**

Press release issued by the Registrar

### **SEGERSTEDT-WIBERG AND OTHERS v. SWEDEN**

Storage of information about the applicants by the police as well as the refusal to reveal the extent of the stored information violated Convention rights

#### **Basic Facts**

The applicants, all Swedish nationals, are: Ms Segerstedt-Wiberg (born in 1911), Mr Nygren (1948), Mr Ehnebom (1952), Mr Frejd (1948) and Mr Schmid (1939). The applicants all made unsuccessful requests to view in their entirety the records held about them by the Swedish Security Police. Their requests were refused on the ground that making them available might jeopardise crime prevention or national security. The authorities and domestic courts relied on Chapter 5, section 1(2), of the 1980 Secrecy Act; that it was “not clear that the information may be imparted without jeopardising the purpose of the decision or measures planned or without harm to future activities”.

Ms Segerstedt-Wiberg is the daughter of a well-known publisher and anti-Nazi activist, Torgny Segerstedt. From 1958 to 1970 she was a Liberal Member of Parliament. She is a prominent public figure in Sweden.

On 22 April 1998 she asked to view her Security Police records, claiming that damaging information was being circulated about her, including rumours that she was “unreliable” in respect of the Soviet Union. Her request was refused. In the light of an amendment to the Secrecy Act, she asked whether or not her name was on the Security Police register and was subsequently granted authorisation to view certain records which concerned letter bombs which had been sent to her in 1990. On 8 October 1999 she brought proceedings to be allowed to consult her file in its entirety. Her request was refused under Chapter 5, section 1(2).

On 13 December 2002 the Swedish Security Service decided to release all information (51 pages) stored on Ms Segerstedt-Wiberg up until 1976. The Swedish Government has also informed the European Court of Human Rights that, in 2001, Ms Segerstedt-Wiberg was registered by the Security Service because of a new incident that could have been interpreted as a threat against her.

Mr Nygren is an established journalist at Göteborgs-Posten, one of the largest daily newspapers in Sweden. He had written a number of articles in the paper on Nazism and on the Security Police which have attracted wide public attention.

On 27 April 1998 the Security Police rejected a request from Mr Nydren for access to their quarterly reports on Communist and Nazi activities for the years 1969 to 1998. On 7 June 1999 he further requested permission to read his Security Police file and any other documents containing his name. He was given access to two pages of information,

concerning his participation in a political meeting in Warsaw in 1967, but his requests were otherwise refused under Chapter 5, section 1(2).

Mr Ehnebom, has been a member of the KPML(r) - Marxist-Leninist (revolutionaries) Party - established in 1970) since 1978. He is an engineer and since 1976 has been employed by the Ericsson Group.

On 10 April 1999 he submitted a request to the Security Police to see all files that might exist on him. He was granted access to 30 pages of information, including copies of two security check forms concerning him from 1980 used by the FMV (the Försvarets Materialverk, an authority responsible for procuring equipment for the Swedish Army, and with whom the Ericsson Group worked). The forms noted that Mr Ehnebom was a member of the KPML(r) and in contact with leading party members of the party. Mr Ehnebom submitted that that information was behind the FMV's call for him to be removed from his post. His requests were otherwise refused under Chapter 5, section 1(2).

Mr Frejd has been a member of the KPML(r) since 1972 and since 1974 the Chairman of Proletären FF, a sports club with about 900 members. He is well known within sports circles in Sweden and has actively worked with children and young people in sport to foster international solidarity and facilitate social integration through sport.

On 23 January 1999 he requested access to information about him contained in the Security Police register. He was granted permission to see parts of his file which included a note that he was a active KPML(r) member and had stood for the party in a local election. On 1 March 2000 he asked to see his file in its entirety and all other records that might have been entered concerning him. His request was refused under Chapter 5, section 1(2).

Mr Schmid was from 1999 to 2004 a member of the European Parliament, belonging to the GUE/NGL Group and sitting for the Swedish Left Party.

On 9 December 1997 he filed a request to have access to all information held about him by the Security Police. He was given access to selected files, but his request was otherwise rejected under Chapter 5, section 1(2). The entries viewed by Mr Schmid concerned mostly political matters such as participation in a campaign for nuclear disarmament and general peace movement activities, including public demonstrations and activities related to membership of the Social-Democratic Student Association. One entry, dated 12 May 1969, stated that he had extreme left-wing leanings and had suggested using guerrilla tactics and, if necessary, violence during a demonstration.

## **Law – Article 8**

### Storage of the information released to applicants

The Court was satisfied that the storage of the information at issue had a legal basis in the 1998 Police Data Act. It noted in particular that Section 33 of the Act allowed the Security Police register to include personal information concerning a person suspected of a crime threatening national security or a terrorist offence, or undergoing a security check or where “there are other special reasons”. While the Security Police had some discretion in deciding what constituted “special reasons”, that discretion was not unfettered. For example, under the Swedish Constitution, no entry regarding a citizen could be made in a public register exclusively on the basis of that person's political opinion, without his or her consent. And, among other things, a general prohibition of registration on the basis of political opinion was set out in section 5 of the Police Data Act. Against that background, the Court found that the scope of the discretion conferred on the competent authorities and the manner of its exercise was indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference. Accordingly,



the interference with the respective applicants' private life was "in accordance with the law", within the meaning of Article 8.

The Court also accepted that the storage of the information in question pursued legitimate aims, namely the prevention of disorder or crime, in the case of Ms Segerstedt-Wiberg, and the protection of national security, for the other applicants.

While the Court recognised that intelligence services might legitimately exist in a democratic society, it reiterated that powers of secret surveillance of citizens were tolerable under the Convention only in so far as strictly necessary for safeguarding democratic institutions. Such interference had to be supported by relevant and sufficient reasons and be proportionate to the legitimate aim or aims pursued. In the applicants' case, Sweden's interest in protecting national security and combating terrorism had to be balanced against the seriousness of the interference with the respective applicants' right to respect for private life.

Concerning Ms Segerstedt-Wiberg, the Court found no reason to doubt that the reasons for keeping on record the information relating to bomb threats in 1990 against her were relevant and sufficient as regards the aim of preventing disorder or crime. The measure was at least in part intended to protect her; there was therefore no question of any disproportionate interference with her right to respect for her private life.

However, as to the information released to Mr Nygren (his participation in a political meeting in Warsaw in 1967), the Court, bearing in mind the nature and age of the information, did not find its continued storage to be supported by reasons which were relevant and sufficient as regards the protection of national security.

Similarly, the storage of the information released to Mr Schmid (that he, in 1969, had allegedly advocated violent resistance to police control during demonstrations) could in most part hardly be deemed to correspond to any actual relevant national security interests for Sweden. Its continued storage, though relevant, could not be deemed sufficient 30 years later. Therefore, the Court found that the continued storage of the information released to Mr Nygren and Mr Schmid entailed a disproportionate interference with their right to respect for private life.

The information released to Mr Ehnebom and Mr Frejd raised more complex issues in that it related to their membership of the *KPML(r)*, a political party which, the Swedish Government stressed, advocated the use of violence and breaches of the law in order to bring about change in the existing social order. The Court observed that the relevant clauses of the *KPML(r)* party programme rather boldly advocated establishing the domination of one social class over another by disregarding existing laws and regulations. However, the programme contained no statements amounting to an immediate and unequivocal call for the use of violence as a means of achieving political ends. Clause 23, for instance, which contained the most explicit statements on the matter, did not propose violence as either a primary or an inevitable means in all circumstances. Nonetheless, it affirmed the principle of armed opposition. The Court reiterated its position that the constitution and programme of a political party could not be taken into account as the sole criterion for determining its objectives and intentions; the contents of the programme had to be compared with the actions of the party's leaders and the positions they defended.

The *KPML(r)* party programme was the only evidence relied upon by the Government, however. Beyond that they did not point to any specific circumstance indicating that the impugned programme clauses were reflected in actions or statements by the party's leaders or members or that they constituted an actual or even potential threat to national security when the information was released in 1999, almost 30 years after the party had come into existence. The reasons for the continued storage of the information about Mr Ehnebom and

Mr Frejd, although relevant, could not be considered sufficient and therefore amounted to a disproportionate interference with their right to respect for private life. The Court concluded that the continued storage of the information that had been released was necessary concerning Ms Segerstedt-Wiberg, but not for any of the remaining applicants. Accordingly, the Court found that there has been no violation of Article 8 concerning Ms Segerstedt-Wiberg, but that there had been a violation concerning the other four applicants.

#### Refusal to grant applicants full access to information stored about them by Security Police

The Court reiterated that a refusal of full access to a national secret police register was necessary where the State might legitimately fear that the provision of such information might jeopardise the efficacy of a secret surveillance system designed to protect national security and to combat terrorism. In the applicants' case the national administrative and judicial authorities involved had all found that full access would jeopardise the purpose of the system. The Court did not find any ground on which it could arrive at a different conclusion.

The Court concluded that Sweden was entitled to consider that the interests of national security and the fight against terrorism prevailed over the interests of the applicants in being advised of the full extent to which information was kept about them on the Security Police register. Accordingly, the Court found that there had been no violation of Article 8.

#### **Law – Articles 10 and 11**

The Court considered that the storage of personal data related to political opinion, affiliations and activities that had been deemed unjustified for the purposes of Article 8 § 2 *ipso facto* constituted an unjustified interference with the rights protected by Articles 10 and 11. Having regard to its findings under Article 8, the Court therefore found that there had been violations of Articles 10 and 11 concerning all the applicants except Ms Segerstedt-Wiberg.

#### **Law – Article 13**

Considering the applicants' access to an effective remedy under Article 13, the Court observed that the Parliamentary Ombudsman and Chancellor of Justice could receive individual complaints and had a duty to investigate them in order to ensure that the relevant laws had been properly applied. By tradition, their opinions commanded great respect in Swedish society and were usually followed. However, as the Court had found previously, they lacked the power to render a legally-binding decision. In addition, they exercised general supervision and did not have specific responsibility for inquiries into secret surveillance or into the entry and storage of information on the Secret Police register. The Court had already found neither remedy, when considered on its own, to be effective within the meaning of Article 13.

In the meantime, a number of steps had been taken to improve the remedies, notably authorising the Chancellor of Justice to pay compensation, with the possibility of judicial appeal against the dismissal of a compensation claim, and the establishment of the Records Board (empowered to monitor on a day-to-day basis the Secret Police's entry and storage of information and compliance with the Police Data Act). The Data Inspection Board had also been set up. Moreover, a decision by the Security Police whether to advise a person of information kept about him or her on its register could form the subject of an appeal to the County Administrative Court and the Supreme Administrative Court.

The Court noted that the Records Board had no competence to order the destruction of files or the erasure or rectification of information kept in the files. It appeared the Data

Inspection Board had wider powers. It could examine complaints made by individuals. Where it found that data was being processed unlawfully, it could order the processor, on pain of a fine, to stop processing the information other than for storage. The Board was not itself empowered to order the erasure of unlawfully stored information, but could make an application for such a measure to the County Administrative Court. However, the Court had received no information indicating the effectiveness of the Data Inspection Board in practice. It had therefore not been shown that that remedy was effective. In addition the applicants had no direct access to any legal remedy as regards the erasure of the information in question. In the view of the Court, those shortcomings were not consistent with the requirements of effectiveness in Article 13 and were not offset by any possibilities for the applicants to seek compensation. The Court found that the applicable remedies, whether considered on their own or together, could not satisfy the requirements of Article 13 and that there had therefore been a violation of Article 13.

**Conclusion:** violation of Articles 8, 10, 11 and 13

**Article 41 (Just Satisfaction)**

The Court awarded 3,000 euros (EUR) to Ms Segerstedt-Wiberg, EUR 7,000 each to Mr Nygren and Mr Schmid and EUR 5,000 each to Mr Ehnebom and Mr Frejd in respect of non-pecuniary damage. It awarded EUR 20,000 to the applicants, jointly, for costs and expenses.

**33. Eur. Court of HR, L.L. v. France, judgment of 10 October 2006, application no. 7508/02. The applicant complains about the production and use in court proceedings of documents from his medical records, without his consent and without a medical expert having been appointed in that connection.**

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**no. 7508/02**  
**10.10.2006**

Press release issued by the Registrar

### **L.L. v. FRANCE**

The production and use in court proceedings of medical data without the applicant's consent violated the Convention

#### **Basic Facts**

The applicant is a French national who was born in 1957 and lives in France.

In 1996 the applicant's wife filed a petition for divorce on the grounds of his repeated acts of domestic violence and chronic alcoholism. In 1998 the *Tribunal de Grande Instance*, having noted in particular that she had produced medical certificates in support of those allegations, granted the divorce on grounds of fault by the applicant and confirmed the interim measures whereby the mother had been given custody of the couple's two children, who were born in 1985 and 1988.

The applicant appealed against that decision, claiming that his ex-wife had acted fraudulently in obtaining a report of an operation that he had undergone to remove his spleen, and arguing that she was therefore not entitled to use it in court proceedings. He further maintained that he had never given her a copy of that report, nor had he released the doctor who signed it from his duty of medical secrecy in that connection. In February 2000 the Court of Appeal upheld the judgment under appeal. It found in particular that the medical certificates produced by the applicant's ex-wife confirmed that he was an alcoholic and that he was violent as a result. With a view to appealing on points of law, the applicant lodged an application for legal aid with the Court of Cassation's legal aid office, but his request was denied.

In the meantime, following a report of ill-treatment filed by the applicant, the children's judge ordered a measure of educational assistance in an open environment for the couple's children.

The applicant complained about the production and use in court proceedings of documents from his medical records, without his consent and without a medical expert having been appointed in that connection.

#### **Law – Article 8**

The Court noted that, by basing its decision on the details of the operation report and quoting the passages that it found relevant, the Court of Appeal had disclosed and rendered public personal data concerning the applicant.

The Court further observed that in their decisions the French courts had first referred to the witness statements testifying to the applicant's drink problem and to the "duly detailed" medical certificates recording the "reality of the violence inflicted on the wife", concluding that the conduct taken into account had constituted a serious and repeated breach of marital

duties and obligations and had led to an irretrievable breakdown in the marriage. It was only on a subsidiary basis that the courts had referred to the impugned medical report in support of their decisions, and it therefore appeared that they could have reached the same conclusion without it.

The Court therefore considered that the impugned interference with the applicant's right to respect for his private life, in view of the fundamental importance of the protection of personal data, was not proportionate to the aim pursued and was not "necessary in a democratic society", "for the protection of the rights and freedoms of others".

The Court further noted that domestic law did not provide sufficient safeguards as regards the use in this type of proceedings of data concerning the parties' private lives, thus justifying a fortiori the need for a strict review as to the necessity of such measures.

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

The Court considered that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage alleged by the applicant, and dismissed the claim for costs and expenses incurred in the domestic proceedings.

**34. Eur. Court of HR, Copland v. United Kingdom, judgment of 3 April 2007, application no. 62617/00, Complaint that, during the applicant's employment at the College, her telephone, e-mail and internet usage had been monitored at the Deputy Principal's instigation**

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**no. 62617/00**  
**03.04.2007**

Press release issued by the Registrar

**COPLAND v. UNITED KINGDOM**

The monitoring of an employee's telephone, e-mail and internet usage violated the Convention

**Basic Facts**

In 1991 the applicant was employed by Carmarthenshire College ("the College"). The College is a statutory body administered by the State. In 1995 the applicant became the personal assistant to the College Principal ("the CP") and from the end of 1995 she was required to work closely with the newly appointed Deputy Principal ("the DP").

In about July 1998, whilst on annual leave, the applicant visited another campus of the College with a male director. She subsequently became aware that the DP had contacted that campus to enquire about her visit and understood that he was suggesting an improper relationship between her and the director.

During her employment, the applicant's telephone, e-mail and Internet usage were subjected to monitoring at the DP's instigation. According to the Government, this monitoring took place in order to ascertain whether the applicant was making excessive use of College facilities for personal purposes. The Government stated that the monitoring of telephone usage consisted of analysis of the College telephone bills showing telephone numbers called, the dates and times of the calls, and their length and cost. The applicant also believed that there had been detailed and comprehensive logging of the length of calls, the number of calls received and made, and the telephone numbers of individuals calling her. The Government submitted that the monitoring of telephone usage took place for a few months up to about 22 November 1999. The applicant contended that her telephone usage was monitored over a period of about eighteen months until November 1999.

The applicant's Internet usage was also monitored by the DP. The Government accepted that this monitoring took the form of analysing the websites visited, the times and dates of the visits to the websites and their duration, and that this monitoring took place from October to November 1999. The applicant did not comment on the manner in which her Internet usage was monitored but submitted that it took place over a much longer period of time than the Government had admitted.

In November 1999 the applicant became aware that enquiries were being made into her use of e-mail at work when her step-daughter was contacted by the College and asked to supply information about e-mails that she had sent to the College. The applicant wrote to the CP to ask whether there was a general investigation taking place or whether her e-mails only were being investigated. By an e-mail of 24 November 1999, the CP advised the applicant that, whilst all e-mail activity was logged, the information technology department of the College was investigating only her e-mails, following a request by the DP.

There was no policy in force at the College at the material time regarding the monitoring of telephone, e-mail or Internet usage by employees. In about March or April 2000 the applicant was informed by other members of staff at the College that between 1996 and late 1999 several of her activities had been monitored by the DP or those acting on his behalf. The applicant also believed that people to whom she had made calls were in turn telephoned by the DP, or those acting on his behalf, to identify the callers and the purpose of the call. She further believed that the DP became aware of a legally privileged fax that was sent by herself to her solicitors and that her personal movements, both at work and when on annual or sick leave, were the subject of surveillance.

### **Law – Article 8**

According to the Court’s case-law, telephone calls from business premises are prima facie covered by the notions of “private life” and “correspondence” for the purposes of Article 8 § 1. It follows logically that e-mails sent from work should be similarly protected under Article 8, as should information derived from the monitoring of personal Internet usage. Additionally, the applicant in the present case had been given no warning that her calls would be liable to monitoring; therefore she had a reasonable expectation as to the privacy of calls made from her work telephone. The same expectation should apply in relation to the applicant’s e-mail and Internet usage.

The Court observes that the use of information relating to the date and length of telephone conversations and in particular the numbers dialled can give rise to an issue under Article 8 as such information constitutes an “integral element of the communications made by telephone”. The mere fact that these data may have been legitimately obtained by the College, in the form of telephone bills, is no bar to finding an interference with rights guaranteed under Article 8. Moreover, storing of personal data relating to the private life of an individual also falls within the application of Article 8 § 1. Thus, it is irrelevant that the data held by the College were not disclosed or used against the applicant in disciplinary or other proceedings.

Accordingly, the Court considers that the collection and storage of personal information relating to the applicant’s telephone, as well as to her e-mail and Internet usage, without her knowledge, amounted to an interference with her right to respect for her private life and correspondence within the meaning of Article 8. It remains to be assessed whether such interference could be justified.

The Court is not convinced by the Government’s submission that the College was authorised under its statutory powers to do “anything necessary or expedient” for the purposes of providing higher and further education, and finds the argument unpersuasive. Moreover, the Government do not seek to argue that any provisions existed at the relevant time, either in general domestic law or in the governing instruments of the College, regulating the circumstances in which employers could monitor the use of telephone, e-mail and the Internet by employees. Furthermore, it is clear that the Telecommunications (Lawful Business Practice) Regulations 2000 (adopted under the Regulation of Investigatory Powers Act 2000) which make such provision were not in force at the relevant time.

Accordingly, as there was no domestic law regulating monitoring at the relevant time, the interference in this case was not “in accordance with the law” as required by Article 8 § 2 of the Convention. The Court would not exclude that the monitoring of an employee’s telephone, e-mail or Internet usage at the place of work may be considered “necessary in a democratic society” in certain situations in pursuit of a legitimate aim. However, having regard to its above conclusion, it is not necessary to pronounce on that matter in the instant case.

In light of the finding of a violation of Article 8, it was held unnecessary to examine the case under Article 13.

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

The Court awarded Ms Copland EUR 3,000 in respect of non-pecuniary damage and EUR 6,000 for costs and expenses.



**35. Eur. Court of HR, I. v. Finland, judgment of 3 April 2007, application no. 20511/03, Complaint that the applicant's colleagues had unlawfully consulted her confidential patient records and that the district health authority had failed to provide adequate safeguards against unauthorised access of medical data.**

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**no. 20511/03**  
**17.07.2008**

Press release issued by the Registrar

### **I. v. FINLAND**

Lack of safeguards against unauthorised access to medical data violated the Convention

#### **Basic Facts**

The applicant, I., is a Finnish national who was born in 1960 and lives in Finland. Between 1989 and 1994 the applicant worked on fixed-term contracts as a nurse in a public hospital. From 1987 onwards she consulted that hospital's polyclinic for infectious diseases as she had been diagnosed as HIV-positive.

The case concerned the applicant's allegation that, following certain remarks made at work at the beginning of 1992, she suspected that colleagues had unlawfully consulted her confidential patient records and that the district health authority had failed to provide adequate safeguards against unauthorised access of medical data. She relied on Article 8 (right to respect for private life), Article 6 § 1 (right to a fair hearing) and Article 13 (right to an effective remedy).

#### **Law – Article 8**

The Court held that the protection of personal data, in particular medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. The above considerations are especially valid as regards protection of the confidentiality of information about a person's HIV infection, given the sensitive issues surrounding this disease. The domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention.

The Court notes that at the beginning of the 1990s there were general provisions in Finnish legislation aiming at protecting sensitive personal data. It notes that the data controller had to ensure that personal data were appropriately secured against, among other things, unlawful access. The data controller also had to make sure that only the personnel treating a patient had access to his or her patient record.

Undoubtedly, the aim of the provisions was to secure personal data against the risk of unauthorised access. The need for sufficient guarantees is particularly important when processing highly intimate and sensitive data, as in the instant case, where, in addition, the applicant worked in the same hospital where she was treated. The strict application of the law

would therefore have constituted a substantial safeguard for the applicant's right secured by Article 8 of the Convention, making it possible, in particular, to police strictly access to an disclosure of health records.

However, the County Administrative Board found that, as regards the hospital in issue, the impugned health records system was such that it was not possible to retroactively clarify the use of patient records as it revealed only the five most recent consultations and that this information was deleted once the file had been returned to the archives. Therefore, the County Administrative Board could not determine whether information contained in the patient records of the applicant and her family had been given to or accessed by an unauthorised third person. This finding was later upheld by the Court of Appeal following the applicant's civil action. The Court for its part would also note that it is not in dispute that at the material time the prevailing regime in the hospital allowed for the records to be read also by staff not directly involved in the applicant's treatment.

It is to be observed that the hospital took ad hoc measures to protect the applicant against unauthorised disclosure of her sensitive health information by amending the patient register in summer 1992 so that only the treating personnel had access to her patient record and the applicant was registered in the system under a false name and social security number. However, these mechanisms came too late for the applicant.

The Court of Appeal found that the applicant's testimony about the events, such as her colleagues' hints and remarks beginning in 1992 about her HIV infection, was reliable and credible. However, it did not find firm evidence that her patient record had been unlawfully consulted. The Court notes that the applicant lost her civil action because she was unable to prove on the facts a causal connection between the deficiencies in the access security rules and the dissemination of information about her medical condition. However, to place such a burden of proof on the applicant is to overlook the acknowledged deficiencies in the hospital's record keeping at the material time. It is plain that had the hospital provided a greater control over access to health records by restricting access to health professionals directly involved in the applicant's treatment or by maintaining a log of all persons who had accessed the applicant's medical file, the applicant would have been placed in a less disadvantaged position before the domestic courts. For the Court, what is decisive is that the records system in place in the hospital was clearly not in accordance with the legal requirements contained in the Personal Files Act, a fact that was not given due weight by the domestic courts.

The Government have not explained why the guarantees provided by the domestic law were not observed in the instant hospital. The Court notes that it was only in 1992, following the applicant's suspicions about an information leak, that only the treating clinic's personnel had access to her medical records. The Court also observes that it was only after the applicant's complaint to the County Administrative Board that a retrospective control of data access was established.

Consequently, the applicant's argument that her medical data were not adequately secured against unauthorised access at the material time must be upheld.

The Court notes that the mere fact that the domestic legislation provided the applicant with an opportunity to claim compensation for damages caused by an alleged unlawful disclosure of personal data was not sufficient to protect her private life. What is required in this connection is practical and effective protection to exclude any possibility of unauthorised access occurring in the first place. Such protection was not given here.

The Court further held unanimously that there was no need to examine the complaints under Articles 6 and 13.

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

The applicant was awarded EUR 5,771.80 in respect of pecuniary damage, EUR 8,000 in respect of non-pecuniary damage and EUR 20,000 for costs and expenses.

**36. Eur. Court HR, *Liberty and others v. United Kingdom*, judgment of 1 July 2008, application no. 58243/00. Interception by the Ministry of Defence of the external communications of civil-liberties organisations.**

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**no. 58243/00**  
**01.07.2008**

Press release issued by the Registrar

**LIBERTY AND OTHERS v. THE UNITED KINGDOM**

Interception by the Ministry of Defence of the external communications of civil-liberties organisations violated the Convention

**Basic Facts**

The Interception of Communications Act 1985 made it an offence intentionally to intercept communications by post or by means of a public telecommunications system. However, the Secretary of State was authorised to issue a warrant permitting the examination of communications if it was considered necessary in the interests of national security, to prevent or detect serious crime or to safeguard the State's economic well-being. Warrants could be issued in respect of communications (whether internal or external) linked to a particular address or person, or (under section 3(2) of the Act) to external communications generally, with no restriction on the person or premises concerned. Section 6 of the Act required the Secretary of State to make such arrangements as he considered necessary to ensure safeguards against abuses of power. Arrangements were reportedly put in place, but their precise details were not disclosed in the interests of national security. The Act also provided for a tribunal (the Interception of Communications Tribunal – ICT) to investigate complaints from any person who believed their communications had been intercepted and for the appointment of a Commissioner with reporting and review powers.

The applicants were a British and two Irish civil-liberties organisations. They alleged that between 1990 and 1997 their telephone, facsimile, e-mail and data communications, including legally privileged and confidential information, had been intercepted by an Electronic Test Facility operated by the British Ministry of Defence. Although they had lodged complaints with the ICT, the Director of Public Prosecutions and the Investigatory Powers Tribunal (IPT) challenging the lawfulness of the interceptions, the domestic authorities found that there had been no contravention of the 1985 Act. The IPT specifically found that the right to intercept and access material covered by a warrant, and the criteria by reference to which it was exercised, were sufficiently accessible and foreseeable to be in accordance with law. (The 1985 Act has now been replaced).

**Law – Article 8**

The mere existence of legislation which allowed communications to be monitored secretly entailed a surveillance threat for all those to whom it might be applied and so constituted an interference with the applicants' rights. Section 3(2) of the 1985 Act allowed the British authorities a virtually unlimited discretion to intercept any communications between the United Kingdom and an external receiver described in the warrant. Warrants covered very broad

classes of communications and, in principle, any person who sent or received any form of telecommunication outside the British Islands during the period in question could have had their communication intercepted. The authorities also had wide discretion to decide which communications from those physically captured should be listened to or read.

Although during the relevant period there had been internal regulations, manuals and instructions to provide for procedures to protect against abuse of power, and although the Commissioner appointed under the 1985 Act to oversee its workings had reported each year that the “arrangements” were satisfactory, the nature of those “arrangements” had not been contained in legislation or otherwise made available to the public. Further, although the Government had expressed concern that the publication of information regarding the arrangements during the period in question might have damaged the efficiency of the intelligence-gathering system or given rise to a security risk, the Court noted that extensive extracts from the Interception of Communications Code of Practice were now in the public domain, which suggested that it was possible to make public certain details about the operation of a scheme of external surveillance without compromising national security. In conclusion, domestic law at the relevant time had not indicated with sufficient clarity, so as to provide adequate protection against abuse of power, the scope or manner of exercise of the very wide discretion conferred on the State to intercept and examine external communications. In particular, it had not set out in a form accessible to the public any indication of the procedure to be followed for examining, sharing, storing and destroying intercepted material. The interference was not therefore “in accordance with the law”.

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

The Court considered that the finding of a violation constituted sufficient just satisfaction for any non-pecuniary damage caused to the applicants, and awarded them 7,500 euros (EUR) for costs and expenses.

**37. Eur. Court of HR, Cemalettin Canlı v. Turkey, judgment of 18 November 2008, application no. 22427/04. The applicant complained that the records kept by the police and the publication in the national press of the details of those records had had adverse effects on his private life within the meaning of Article 8 (right to respect for private and family life). He further relied on Article 6 § 2 (presumption of innocence) and Article 13 (right to an effective remedy).**

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**no. 22427/04.  
18.11.2008**

Press release issued by the Registrar

### **CEMALETTIN CANLI v. TURKEY**

Retention and publication of police records of the applicant breached Convention rights

#### **Basic Facts**

The applicant, Cemalettin Canlı, is a Turkish national who was born in 1969 and lives in Ankara. In 2003 while criminal proceedings were pending against him, a police report entitled “information form on additional offences” was submitted to the court, mentioning two sets of criminal proceedings brought against him in the past for membership of illegal organisations. However, in 1990, the applicant had been acquitted in the first criminal case and the second set of proceedings had been discontinued. The applicant complained that the records kept by the police and the publication in the national press of the details of those records had had adverse effects on his private life within the meaning of Article 8. He further relied on Article 6 § 2 and Article 13.

#### **Law – Article 8**

The Court noted that Mr Canlı had never been convicted by a court of law concerning the allegations of membership of illegal organisations. It thus considered that referring to the applicant as a “member” of such organisations in the police report had been potentially damaging to his reputation, and that the keeping and forwarding to the criminal court of that inaccurate police report had constituted an interference with Mr Canlı’s right to respect for his private life. The Court observed that the relevant Regulations obliged the police to include in their records all information regarding the outcome of any criminal proceedings relating to the accusations. Nevertheless, not only had the information in the report been false, but it had also omitted any mention of the applicant’s acquittal and the discontinuation of the criminal proceedings in 1990. Moreover, the decisions rendered in 1990 had not been appended to the report when it had been submitted to the court in 2003. Those failures, in the opinion of the Court, had been contrary to the unambiguous requirements of the Police Regulations and had removed a number of substantial procedural safeguards provided by domestic law for the protection of the applicant’s rights under Article 8. Accordingly, the Court found that the drafting and submission to the court by the police of the report in question had not been “in accordance with the law”. There was no need to examine separately the complaints under Articles 6 and 13.

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

Mr Canlı was awarded EUR 5,000 in respect of non-pecuniary damage and EUR 1,500 for costs and expenses.

38. *Eur. Court of HR, K.U. v. Finland*, judgment of 2 December 2008, application no. 2872/02. The applicant complains about the invasion of his private life and the fact that no effective remedy existed under Finnish law to reveal the identity of the person who had posted the ad about him on the Internet dating site.
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no. 2872/02  
02.12.2008

Press release issued by the Registrar

### **K.U. v. FINLAND**

Finnish authorities' failure to protect a child's right to respect for private life following an advertisement being posted about him on an Internet dating site breached the Convention

#### **Basic Facts**

The applicant, K.U., is a Finnish national who was born in 1986. The case concerned the applicant's complaint that an advertisement of a sexual nature was posted about him on an Internet dating site and that, under Finnish legislation in place at the time, the police and the courts could not require the Internet provider to identify the person who had posted the ad.

In March 1999 an unknown individual posted the ad on an Internet dating site in the name of the applicant without his knowledge. The applicant was 12 years old at the time. The ad mentioned his age and year of birth and gave a detailed description of his physical characteristics. There was also a link to the applicant's web page where his picture and telephone number, accurate save for one digit, could be found. The ad announced that he was looking for an intimate relationship with a boy of his age or older "to show him the way".

The applicant became aware of that announcement when he received an e-mail from a man, offering to meet him and "to then see what he wanted".

The applicant's father requested the police to identify the person who had posted the ad in order to bring charges. The service provider, however, refused as it considered itself bound by the confidentiality of telecommunications as defined under Finnish law.

In a decision issued on 19 January 2001, Helsinki District Court also refused the police's request under the Criminal Investigations Act to oblige the service provider to divulge the identity of the person who had posted the ad. It found that there was no explicit legal provision in such a case, considered under domestic law to concern calumny, which could oblige the service provider to disregard professional secrecy and disclose such information.

Subsequently the Court of Appeal upheld that decision and the Supreme Court refused leave to appeal.

#### **Law – Article 8**

Although in terms of domestic law the applicant's case was considered from the point of view of calumny, the Court preferred to highlight the notion of private life, given the potential threat to the boy's physical and mental welfare and his vulnerable age.

The Court considered that the posting of the Internet advertisement about the applicant had been a criminal act which had resulted in a minor having been a target for paedophiles. It



recalled that such conduct called for a criminal-law response and that effective deterrence had to be reinforced through adequate investigation and prosecution. Moreover, children and other vulnerable individuals were entitled to protection by the State from such grave interferences with their private life.

The incident had taken place in 1999, that is, at a time when it had been well-known that the Internet, precisely because of its anonymous character, could be used for criminal purposes. The widespread problem of child sexual abuse had also become well-known over the preceding decade. It could not therefore be argued that the Finnish Government had not had the opportunity to put in place a system to protect children from being targeted by paedophiles via the Internet.

Indeed, the legislature should have provided a framework for reconciling the confidentiality of Internet services with the prevention of disorder or crime and the protection of the rights and freedoms of others. Although such a framework has subsequently been introduced under the Exercise of Freedom of Expression in Mass Media Act, it had not been in place at the relevant time, with the result that Finland had failed to protect the right to respect for the applicant's private life as the confidentiality requirement had been given precedence over his physical and moral welfare.

Given the finding under Article 8, the Court considered that there was no need to examine the complaint under Article 13

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

The Court awarded K.U. 3,000 euros (EUR) in respect of non-pecuniary damage.

39. *Eur. Court of HR, S. and Marper v. the United Kingdom*, judgment of 4 December 2008, applications nos. 30562/04 and 30566/04. The applicants complain under Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the Convention about the retention by the authorities of their fingerprints, cellular samples and DNA profiles after their acquittal or discharge.

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**nos. 30562/04 and 30566/04**  
**04.12.2008**

Press release issued by the Registrar

### **S. AND MARPER v. THE UNITED KINGDOM**

Retention of applicants' fingerprints, cellular samples and DNA profiles after their acquittal or discharge violated the Convention

#### **Basic Facts**

The applicants, S. and Michael Marper, are both British nationals, who were born in 1989 and 1963 respectively. They live in Sheffield, the United Kingdom. The case concerned the retention by the authorities of the applicants' fingerprints, cellular samples and DNA profiles after criminal proceedings against them were terminated by an acquittal and were discontinued respectively.

On 19 January 2001 S. was arrested and charged with attempted robbery. He was aged eleven at the time. His fingerprints and DNA samples<sup>2</sup> were taken. He was acquitted on 14 June 2001. Mr Marper was arrested on 13 March 2001 and charged with harassment of his partner. His fingerprints and DNA samples were taken. On 14 June 2001 the case was formally discontinued as he and his partner had become reconciled.

Once the proceedings had been terminated, both applicants unsuccessfully requested that their fingerprints, DNA samples and profiles be destroyed. The information had been stored on the basis of a law authorising its retention without limit of time.

#### **Law – Article 8**

The Court noted that cellular samples contained much sensitive information about an individual, including information about his or her health. In addition, samples contained a unique genetic code of great relevance to both the individual concerned and his or her relatives. Given the nature and the amount of personal information contained in cellular samples, their retention per se had to be regarded as interfering with the right to respect for the private lives of the individuals concerned.

In the Court's view, the capacity of DNA profiles to provide a means of identifying genetic relationships between individuals was in itself sufficient to conclude that their retention interfered with the right to the private life of those individuals. The possibility created by DNA profiles for drawing inferences about ethnic origin made their retention all the more sensitive and susceptible of affecting the right to private life. The Court concluded that the retention of both cellular samples and DNA profiles amounted to an interference with the applicants' right to respect for their private lives, within the meaning of Article 8 § 1 of the Convention.

The applicants' fingerprints were taken in the context of criminal proceedings and subsequently recorded on a nationwide database with the aim of being permanently kept and regularly processed by automated means for criminal-identification purposes. It was accepted that, because of the information they contain, the retention of cellular samples and DNA profiles had a more important impact on private life than the retention of fingerprints. However, the Court considered that fingerprints contain unique information about the individual concerned and their retention without his or her consent cannot be regarded as neutral or insignificant. The retention of fingerprints may thus in itself give rise to important private-life concerns and accordingly constituted an interference with the right to respect for private life. The Court noted that, under section 64 of the 1984 Act, the fingerprints or samples taken from a person in connection with the investigation of an offence could be retained after they had fulfilled the purposes for which they were taken. The retention of the applicants' fingerprint, biological samples and DNA profiles thus had a clear basis in the domestic law.

At the same time, Section 64 was far less precise as to the conditions attached to and arrangements for the storing and use of this personal information.

The Court reiterated that, in this context, it was essential to have clear, detailed rules governing the scope and application of measures, as well as minimum safeguards. However, in view of its analysis and conclusions as to whether the interference was necessary in a democratic society, the Court did not find it necessary to decide whether the wording of section 64 met the "quality of law" requirements within the meaning of Article 8 § 2 of the Convention.

The Court accepted that the retention of fingerprint and DNA information pursued a legitimate purpose, namely the detection, and therefore, prevention of crime.

The Court noted that fingerprints, DNA profiles and cellular samples constituted personal data within the meaning of the Council of Europe Convention of 1981 for the protection of individuals with regard to automatic processing of personal data.

The Court indicated that the domestic law had to afford appropriate safeguards to prevent any such use of personal data as could be inconsistent with the guarantees of Article 8 of the Convention. The Court added that the need for such safeguards was all the greater where the protection of personal data undergoing automatic processing was concerned, not least when such data were used for police purposes.

The interests of the individuals concerned and the community as a whole in protecting personal data, including fingerprint and DNA information, could be outweighed by the legitimate interest in the prevention of crime (the Court referred to Article 9 of the Data Protection Convention). However, the intrinsically private character of this information required the Court to exercise careful scrutiny of any State measure authorising its retention and use by the authorities without the consent of the person concerned.

The issue to be considered by the Court in this case was whether the retention of the fingerprint and DNA data of the applicants, as persons who had been suspected, but not convicted, of certain criminal offences, was necessary in a democratic society. The Court took due account of the core principles of the relevant instruments of the Council of Europe and the law and practice of the other Contracting States, according to which retention of data was to be proportionate in relation to the purpose of collection and limited in time. These principles had been consistently applied by the Contracting States in the police sector, in accordance with the 1981 Data Protection Convention and subsequent Recommendations by the Committee of Ministers of the Council of Europe.

As regards, more particularly, cellular samples, most of the Contracting States allowed these materials to be taken in criminal proceedings only from individuals suspected of having committed offences of a certain minimum gravity. In the great majority of the Contracting States with functioning DNA databases, samples and DNA profiles derived from those samples were required to be removed or destroyed either immediately or within a certain limited time after acquittal or discharge. A restricted number of exceptions to this principle were allowed by some Contracting States.

The Court noted that England, Wales and Northern Ireland appeared to be the only jurisdictions within the Council of Europe to allow the indefinite retention of fingerprint and DNA material of any person of any age suspected of any recordable offence.

It observed that the protection afforded by Article 8 of the Convention would be unacceptably weakened if the use of modern scientific techniques in the criminal-justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests. Any State claiming a pioneer role in the development of new technologies bore special responsibility for striking the right balance in this regard.

The Court was struck by the blanket and indiscriminate nature of the power of retention in England and Wales. In particular, the data in question could be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; the retention was not time-limited; and there existed only limited possibilities for an acquitted individual to have the data removed from the nationwide database or to have the materials destroyed.

The Court expressed a particular concern at the risk of stigmatisation, stemming from the fact that persons in the position of the applicants, who had not been convicted of any offence and were entitled to the presumption of innocence, were treated in the same way as convicted persons. It was true that the retention of the applicants' private data could not be equated with the voicing of suspicions. Nonetheless, their perception that they were not being treated as innocent was heightened by the fact that their data were retained indefinitely in the same way as the data of convicted persons, while the data of those who had never been suspected of an offence were required to be destroyed.

The Court further considered that the retention of unconvicted persons' data could be especially harmful in the case of minors such as the first applicant, given their special situation and the importance of their development and integration in society. It considered that particular attention had to be paid to the protection of juveniles from any detriment that could result from the retention by the authorities of their private data following acquittals of a criminal offence.

In conclusion, the Court found that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, failed to strike a fair balance between the competing public and private interests, and that the respondent State had overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention in question constituted a disproportionate interference with the applicants' right to respect for private life and could not be regarded as necessary in a democratic society. The Court concluded unanimously that there had been a violation of Article 8 in this case.

In the light of the reasoning that led to its conclusion under Article 8 above, the Court considered unanimously that it was not necessary to examine separately the complaint under Article 14.

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

The Court considered that the finding of a violation, with the consequences that this would have for the future, could be regarded as constituting sufficient just satisfaction in respect of the non-pecuniary damage sustained by the applicants. It noted that, in accordance with Article 46 of the Convention, it would be for the respondent State to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to fulfil its obligations to secure the right of the applicants and other persons in their position to respect for their private life. The Court awarded the applicants 42,000 euros (EUR) in respect of costs and expenses, less the EUR 2,613.07 already paid to them in legal aid.

40. *Eur. Court of HR, Bykov v. Russia*, judgment of 10 March 2009, application no. 4378/02. The applicant complains under Article 5 § 3 (right to liberty and security), Article 8 (right to respect for private and family life) and Article 6 (right to a fair trial) of the European Convention on Human Rights about the insufficient reasons given for extending the applicant's pre-trial detention, the use of a surveillance technique which was not accompanied by adequate safeguards against possible abuses.

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**no. 4378/02**  
**10.03.2009**

Press release issued by the Registrar

### **BYKOV v. RUSSIA**

Use of surveillance technique was not accompanied by adequate safeguards

#### **Basic Facts**

The applicant, Anatoliy Petrovich Bykov, is a Russian national who was born in 1960 and lives in Krasnoyarsk (Russia). He was chairman of the board of the Krasnoyarsk Aluminium Plant from 1997 to 1999. At the time of his arrest in October 2000 he was a major shareholder and an executive of a corporation called OAO Krasenergomash-Holding. He was also a member of the Krasnoyarsk Regional Parliamentary Assembly.

The applicant complained, in particular, about a covert recording used as evidence in the criminal proceedings against him and about the length of his pre-trial detention.

In September 2000 Mr Bykov allegedly ordered V., a member of his entourage, to kill Mr S., a former business associate. V. did not comply with the order, but on 18 September 2000 he reported the applicant to the Federal Security Service ("the FSB").

The FSB and the police decided to conduct a covert operation to obtain evidence of the applicant's intention to murder S. On 29 September 2000 the police staged the discovery of two dead bodies at S.'s home. They officially announced in the media that one of those killed had been identified as S. The other man was his business partner, Mr I.

On 3 October 2000 V. went to see the applicant at his home. He carried a hidden radio-transmitting device while a police officer outside received and recorded the transmission. Following the instructions he had been given, V. engaged the applicant in conversation, telling him that he had carried out the murder. As proof he handed the applicant several objects borrowed from S. and I. The police obtained a 16-minute recording of the conversation between V. and the applicant.

On 4 October 2000 the applicant's house was searched. The objects V. had given him were seized. The applicant was arrested and remanded in custody. He was charged with conspiracy to commit murder and conspiracy to acquire, possess and handle firearms.

The applicant's pre-trial detention was extended several times and his numerous appeals and requests for release were rejected because of the gravity of the charges against him and the risk that he might abscond and bring pressure to bear on the witnesses.

Two voice experts were appointed to examine the recording of the applicant's conversation with V. They found that V. had shown subordination to the applicant, that the applicant had

shown no sign of mistrusting V.'s confession to the murder and that he had insistently questioned V. on the technical details of its execution. They established that V. and the applicant had a close relationship and that the applicant had played an instructive role in the conversation.

On 19 June 2002 the applicant was found guilty on both counts and sentenced to six and a half years' imprisonment. He was conditionally released on five years' probation. The sentence was upheld on appeal on 1 October 2002.

On 22 June 2004 the Supreme Court of the Russian Federation examined the case in supervisory proceedings. It found the applicant guilty of "incitement to commit a crime involving a murder", and not "conspiracy to murder". The rest of the judgment, including the sentence, remained unchanged.

### **Law – Articles 5 § 3, 6 § 1 and 8**

On **Article 5 § 3**, the Court reiterated that continued pre-trial detention could be justified only if there were specific indications of a genuine public-interest requirement which, notwithstanding the presumption of innocence, outweighed the rule of respect for individual liberty laid down in Article 5 of the Convention. It noted that in the present case the applicant had been kept in pre-trial detention for one year, eight months and 15 days and that all his applications for release had been refused on the grounds of the gravity of the charges and the likelihood of his fleeing, obstructing the course of justice or exerting pressure on witnesses. The Court found, however, that those grounds had not been at all substantiated by the courts concerned, particularly during the initial stages of the proceedings.

As regards **Article 6 § 1**, the Court reiterated that Article 6 guaranteed the right to a fair trial as a whole, and did not lay down any rules on the admissibility of evidence as such, even evidence obtained unlawfully in terms of domestic law. In that connection it observed that the applicant had been able to challenge the methods employed by the police, in the adversarial procedure at first instance and on appeal. He had thus been able to argue that the evidence adduced against him had been obtained unlawfully and that the disputed recording had been misinterpreted. The domestic courts had addressed all these arguments in detail and had dismissed each of them in reasoned decisions. The Court further noted that the statements by the applicant that had been secretly recorded had not been made under any form of duress; had not been directly taken into account by the domestic courts, which had relied more on the expert report drawn up on the recording; and had been corroborated by a body of physical evidence. The Court thus concluded that the applicant's defence rights and his right not to incriminate himself had been respected.

With regards to **Article 8**, the Court observed that it was not disputed that the measures carried out by the police had amounted to interference with the applicant's right to respect for his private life. It pointed out that for such interference to be compatible with the Convention, it had to be in accordance with the law and necessary in a democratic society for one of the purposes listed in paragraph 2 of Article 8. The Court noted that the Russian Operational-Search Activities Act was expressly intended to protect individual privacy by requiring judicial authorisation for any operational activities that might interfere with the privacy of the home or the privacy of communications by wire or mail services. In Mr Bykov's case, the domestic courts had held that since V. had been invited to the applicant's home and no wire or mail services had been involved (as the conversation had been recorded by a remote radio-transmitting device), the police operation had not breached the regulations in force.

In that connection the Court reiterated that in order for the lawfulness requirement in Article 8 to be satisfied with regard to the interception of communications for the purpose of a police investigation, the law had to give a sufficiently clear indication as to the circumstances in which and the conditions on which the police authorities were empowered to resort to such measures. In the present case it considered that the use of a remote radio-transmitting device to record the conversation between V. and the applicant was virtually identical to telephone tapping, in terms of the nature and degree of the intrusion into the privacy of the individual concerned. It noted in that connection that since the law regulated only the interception of communications by wire and mail services, the legal discretion enjoyed by the police authorities had been too broad and had not been accompanied by adequate safeguards against various possible abuses.

**Conclusion:** violation of Articles 5 § 3 and 8. No violation of Article 6 § 1

**Article 41 (Just Satisfaction)**

The Court awarded the applicant, by 12 votes to five, 1,000 euros (EUR) in respect of non-pecuniary damage and, unanimously, EUR 25,000 for costs and expenses.

**Separate Opinions**

Two concurring opinions were expressed, by Judges Cabral Barreto and Kovler. Judge Costa expressed a partly dissenting opinion. Judge Spielmann, joined by Judges Rozakis, Tulkens, Casadevall and Mijović, also expressed a partly dissenting opinion. The opinions are attached to the judgment.



41. *Eur. Court of HR, K.H. and others v. Slovakia*, judgment of 28 April 2009, application no. 32881/04. The applicants complain under Article 8 (right to respect for private and family life), and Article 6§ 1 (access to court) and Article 13 (right to an effective remedy) of the European Convention on Human Rights about not having been allowed to make photocopies of their medical records, the impossibility for the applicants or their lawyers to obtain photocopies of their medical records having limited their effective access to court and not guaranteeing a remedy to challenge a law itself.

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**no. 32881/04**  
**28.04.2009**

Press release issued by the Registrar

### **K.H. AND OTHERS v. SLOVAKIA**

The lack of access to applicant's medical record entails breaches of the Convention

#### **Basic Facts**

The applicants are eight female Slovak nationals of Roma ethnic origin. They were treated in two hospitals in eastern Slovakia during their pregnancies and deliveries, following which none of them could conceive a child again despite their repeated attempts. The applicants suspected that the reason for their infertility might be that a sterilisation procedure was performed on them during their caesarean delivery by medical personnel in the hospitals concerned.

In order to obtain a medical analysis of the reasons for their infertility and possible treatment, the applicants authorised their lawyers to review and photocopy their medical records as potential evidence in future civil proceedings for damages, and to ensure that such documents and evidence were not destroyed or lost. The lawyers made two attempts, in August and September 2002 respectively, to obtain photocopies of the medical records, but were not allowed to do so by the hospitals' management.

The applicants sued the hospitals concerned, asking the courts to order them to release the medical records to the applicants' authorised legal representatives and to allow the latter to obtain photocopies of the documents included in the records.

In June 2003, the courts ordered the hospitals to permit the applicants and their authorised representatives to consult the medical records and to make handwritten excerpts thereof, but dismissed their request to photocopy the documents with a view to preventing their abuse. They also held that the applicants were not prevented to have any future claim, which they might bring for damages, determined in accordance with the requirements of the Convention. In particular, under the relevant law the medical institutions were obliged to submit the required information to, among others, the courts, for example in the context of civil proceedings concerning a patient's claim for damages.

Subsequently seven applicants were able to access their files and to make photocopies of them in accordance with the newly introduced Health Care Act of 2004. As regards the eighth applicant, the hospital only provided her with a simple record of a surgical procedure

indicating that surgery had been performed on her and that she had been sterilised during the procedure.

### **Law – Articles 8, 6 § 1 and 13**

As regards **Article 8**, the Court noted that the applicants had complained that they had been unable to exercise their right of effective access to information concerning their health and reproductive abilities at a certain moment in time. This question had been linked to their private and family lives, and thus protected under Article 8 of the Convention. The Court considered that persons who, like the applicants, wished to obtain photocopies of documents containing their personal data, should not have been obliged to make specific justification as to why they needed the copies. It should have been rather for the authority in possession of the data to show that there had been compelling reasons for not providing that facility.

Given that the applicants had obtained judicial orders permitting them to consult their medical records in their entirety, having denied them the possibility to make photocopies of those records had not been sufficiently justified by the authorities. To avoid the risk of abuse of medical data it would have been sufficient to put in place legislative safeguards with a view to strictly limiting the circumstances under which such data could be disclosed, as well as the scope of persons entitled to have access to the files. The Court observed that the new Health Care Act adopted in 2004 had been compatible with that requirement; however, it had come into play too late to affect the situation of the applicants in this case.

With regards to **Article 6 § 1**, the Court accepted the applicants' argument that they had been in a state of uncertainty as regards their state of health and reproductive ability following their treatment in the hospitals concerned. It also agreed that obtaining the photocopies had been essential for their assessment of the perspectives of seeking redress before the courts in respect of any shortcoming in their medical treatment. As the domestic law applicable at the time had limited excessively the possibility of the applicants or their lawyers to present their cases to the court in an effective manner, and the Government had not presented reasons sufficient to justify this restriction, the Court held that there had been a violation of Article 6 § 1.

Finally, on **Article 13**, the Court found no violation of this Article noting that it did not guarantee a remedy to challenge a law as such before a domestic authority. It also considered unnecessary to examine separately the applicants' complaint under Article 13 in combination with Article 6 § 1, as it held that the requirements of Article 13 were less strict and absorbed by those of Article 6 § 1.

**Conclusion:** violation of Articles 8 and 6 § 1. No violation of Article 13

### **Article 41 (Just Satisfaction)**

The Court awarded to each applicant 3,500 euros (EUR) in respect of non-pecuniary damage and jointly to all applicants EUR 8,000 for costs and expenses.

### **Separate Opinions**

Judge Šikuta expressed a partly dissenting opinion, which is annexed to the judgment.

**42. Eur. Court of HR, Szuluk v. The United Kingdom, judgment of 2 June 2009, application no. 36936/05. The applicant complains under Article 8 (right to respect for private and family life and for correspondence) of the European Convention on Human Rights about the monitoring by prison authorities of medical correspondence between the applicant – a convicted prisoner – and his external specialist doctor.**

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**no. 36936/05**  
**02.06.2009**

Press release issued by the Registrar

**SZULUK v. THE UNITED KINGDOM**

Monitoring of medical correspondence of a convicted prisoner by the prison authorities breached the Convention

**Basic Facts**

The applicant, Edward Szuluk, is a British national who was born in 1955 and is currently in prison in Staffordshire (United Kingdom).

Mr Szuluk was sentenced in November 2001 to 14 years' imprisonment for drugs offences. In April 2001, while on bail pending trial, the applicant suffered a brain haemorrhage for which he had two operations. Following his discharge back to prison, he was required to go to hospital every six months for a specialist check-up.

The applicant complained, unsuccessfully, before the local courts that his correspondence with the neuro-radiology specialist who was supervising his hospital treatment had been monitored by a prison medical officer.

**Law – Article 8**

The Court noted that it was clear and not contested that there had been an “interference by a public authority” with the exercise of the applicant’s right to respect for his correspondence. It further observed that it was accepted by the parties that the reading of the applicant’s correspondence had been governed by law and that it had been aimed at the prevention of crime and the protection of the rights and freedoms of others.

Mr Szuluk submitted that the monitoring of his correspondence with his medical specialist inhibited their communication and prejudiced reassurance that he was receiving adequate medical treatment while in prison. Given the severity of his medical condition, the Court found the applicant’s concerns to be understandable. Moreover, there had not been any grounds to suggest that Mr Szuluk had ever abused the confidentiality given to his medical correspondence in the past or that he had any intention of doing so in the future. Furthermore, although he had been detained in a high security prison which also held Category A (high risk prisoners), he had himself always been defined as Category B (prisoners for whom the highest security conditions were not considered necessary).

Nor did the Court share the Court of Appeal’s view that the applicant’s medical specialist, whose bona fides had never been challenged, could be “intimidated or tricked” into transmitting illicit messages or that that risk had been sufficient to justify the interference with

the applicant's rights. This was particularly so since the Court of Appeal had further acknowledged that the importance of unimpeded correspondence with secretarial staff of MPs (Members of Parliament), although subject to the same kind of risks, outweighed any risk of abuse.

Indeed, uninhibited correspondence with a medical specialist in the context of a prisoner suffering from a life-threatening condition should be given no less protection than the correspondence between a prisoner and an MP. Moreover, the Court of Appeal had conceded that it could, in some cases, be disproportionate to refuse confidentiality to a prisoner's medical correspondence and changes had since been enacted to the relevant domestic law to that effect. The Court also found that the Government had failed to provide sufficient reasons to explain why the risk of abuse involved in correspondence with named doctors whose exact address, qualifications and bona fides were not in question should be perceived as greater than the risk involved in correspondence with lawyers.

The Court therefore concluded that the monitoring of Mr Szuluk's medical correspondence had not struck a fair balance with his right to respect for his correspondence.

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

The Court awarded the applicant 1,000 euros (EUR) for non-pecuniary damage and EUR 6,000 for costs and expenses.

**43. Eur. Court of HR, Iordachi and others v. Moldova, judgment of 14 September 2009, application no. 25198/02. Respect for private life Status of potential victims; lack of clarity or adequate safeguards in legislation on interception of communications: violation.**

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**no. 25198/02**  
**14.09.2009**

Press release issued by the Registrar

### **IODACHI AND OTHERS v. MOLDOVA**

The national legislation did not provide adequate safeguards on interception of communications of the applicants

#### **Basic Facts**

The applicants believed that they were at serious risk of having their telecommunications tapped as they were members of a Moldovan non-governmental organisation specialising in the representation of applicants before the Court. Although they did not claim that any of their communications had in fact been intercepted, they considered that the domestic legislation did not contain sufficient guarantees against abuse and pointed to Supreme Court statistics showing that over 98% of all requests by the investigating bodies for permission to monitor communications had been authorised by the domestic courts in the years 2005-2007. The relevant legislation is contained in the Operational Investigators Activities Act 1994 and the Code of Criminal Procedure, both as amended. It permits the authorities, inter alia, to intercept telephone and other conversations with a view to preventing crime and protecting national security.

#### **Law: Article 8**

(a) Interference: An individual could, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures had in fact been applied to him. The relevant conditions were to be determined in each case according to the Convention rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures. The Court could not exclude the possibility that secret surveillance measures had been applied to the applicants as (i) under the Operational Investigative Activities Act the authorities were authorised to intercept communications of categories of persons with whom the applicants, in their capacity as human-rights lawyers, had extensive contact; (b) the NGO of which the applicants were members had acted in a representative capacity in roughly half the Moldovan cases communicated to the Government; and (c) in a move that had been endorsed by the Government, the Prosecutor General had threatened to prosecute any lawyer who damaged the image of the Republic of Moldova by complaining to international human-rights organisations. The mere existence of the legislation thus entailed a menace of surveillance that necessarily struck at freedom of communication and so constituted interference.

(b) “In accordance with the law”: The issue here was whether the domestic legislation satisfied the foreseeability requirement. As regards the initial stage of the telephone-surveillance procedure (the grant of authorisation), despite improvements made by amendments in 2003, the legislation lacked clarity and detail; in particular, it did not define clearly the nature of the offences for which interception might be sought or the categories of persons liable to have their telephones tapped, which, in addition to suspects and defendants, included “any other person involved in a criminal offence”. Further, the law did not prevent the prosecution authorities from seeking a new interception warrant after the expiry of the initial six-month period and the legislation was unclear as to under what circumstances and against whom a warrant could be obtained in non-criminal cases. In respect of the second stage (surveillance proper), the investigating judge’s role was unduly limited as the law made no provision for acquainting him with the results of the surveillance and did not require him to review whether the statutory requirements had been complied with. Indeed, it appeared to place such supervisory duties on the prosecuting authorities. Moreover, the interception procedure and guarantees appeared only to apply in the context of pending criminal proceedings and not to other cases. There were no clear rules on the procedures for screening, preserving and destroying collected data.

Lastly, there was no procedure governing the activity of the Parliamentary special commission responsible for exercising overall control of the system or for protecting the secrecy of lawyer-client communications. In the light of the fact that the Moldovan courts had authorised virtually all requests for interception made by the prosecuting authorities in 2007, the Court concluded that the investigating judges did not address themselves to the existence of compelling justification for authorising measures of secret surveillance and that the system was largely overused. In conclusion, the law did not provide adequate protection against abuse of State power and so was not “in accordance with the law”.

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

The Court awarded the applicants 3,500 euros (EUR), jointly, for costs and expenses.

**44. Eur. Court of HR, Tsourlakis v. Greece, judgment of 15 October 2009, application no. 50796/07. The applicant complains under Article 8 (right to respect for private and family life and for correspondence) of the European Convention on Human Rights about being prevented from consulting the report of the Child Welfare Society about his son.**

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**no. 50796/07**  
**15.10.2009**

Press release issued by the Registrar

### **TSOURLAKIS V. GREECE**

Father prevented from consulting welfare report about his son

#### **Basic Facts**

The applicant, Mr Konstantinos Tsourlakis, was born in 1956 and lives in Athens. In 1989 he married and the couple had a son. In August 2000 he and his wife separated.

By a judgment of 21 November 2001 the applicant's wife was awarded sole custody of the child, while the applicant was given the use of the matrimonial home. The applicant and his wife appealed. In an interlocutory decision of 31 March 2004 a welfare report was ordered, to be prepared by the Athens Child Welfare Society ("the Society").

In November 2004 the Society's report was filed at the hearing before the Court of Appeal. In a judgment of 19 May 2005 the Court of Appeal granted permanent custody of the child to his mother.

Mr Tsourlakis attempted to obtain a copy of the Society's report. The Society informed him that the report was a confidential document prepared for the exclusive attention of the Court of Appeal. After applying to the Ombudsman's office, which informed him that he could not obtain a copy of the report because he had not addressed his request via the competent prosecutor, Mr Tsourlakis applied to the prosecutor at the Criminal Court. The latter rejected his request, indicating in two sentences added by hand to the applicant's letter that the request concerned personal information about a minor, of which the applicant had no legitimate interest in being apprised.

#### **Law – Article 8**

With regard to the complaint under Article 6, the Court noted that Mr Tsourlakis had not complained at any point during the proceedings that his inability to consult the Society's report had infringed his procedural rights and his right to a fair hearing. This complaint therefore had to be rejected for failure to exhaust domestic remedies, in accordance with Article 35 of the Convention.

The Court further observed that the part of the applicant's Article 8 complaint relating to the use of the Society's report before the Court of Appeal covered the same ground as his complaint under Article 6, which the Court had declared inadmissible.

With regard to the exercise by Mr Tsourlakis of his right to effective access to information concerning his private and family life following the Court of Appeal judgment, the Court noted that the domestic legislation concerning the use made of welfare reports was less than clear

and that the only explanations which the applicant had received had come from the Ombudsman's office.

The information contained in the welfare report had been relevant to Mr Tsourlakis' relationship with his son. In that regard, the courts had acknowledged the affection shown by the father towards his child, which was reaffirmed by his persistent efforts to obtain custody. Being informed of any negative findings contained in the report would have enabled the applicant to take them into account in order to improve the relationship. Moreover, Mr Tsourlakis had had a legitimate claim to be informed of the use made of the details he had provided for the purposes of compiling the report.

The Government had not given reasons for the refusal to allow the applicant to consult the report and had not adduced any compelling reasons to justify the failure to disclose the contents of the document, which contained personal information of direct concern to the applicant. Accordingly, the authorities had not ensured effective observance of the applicant's right to respect for his private and family life.

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

The Court awarded the applicant 5,000 euros (EUR) in respect of non-pecuniary damage.



45. *Eur. Court of HR, Haralambie v. Romania*, judgment of 27 October 2009, application no. 21737/03. The applicant complains under Article 6§ 1 (access to court) and Article 8 (right to respect for private and family life and for correspondence) of the European Convention on Human Rights about the proceedings concerning the restoration of the land that had belonged to his mother and the obstacles to his right of access to the personal file created on him by the former secret services.

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no. 21737/03  
27.10.2009

Press release issued by the Registrar

### **HARALAMBIE v. ROMANIA**

Six years to access a personal file drawn up by the secret services during the Communist period

#### **Basic Facts**

The applicant, Mr Nicolae Haralambie, is a Romanian national who was born in 1930 and lives in Bucharest.

He claimed that he continued to suffer the consequences of the persecution to which he was subjected after the communist regime was established in 1945. At the time this had taken the form, among other things, of the confiscation of agricultural land belonging to his mother. Following a final decision against him by a county court in 2003 concerning a request for restoration of those plots of land, Mr Haralambie asked the National Council for the Study of the Archives of the former Secret Services of the Communist Regime – the *Securitate* – (“the CNSAS”), whether he had been subjected to surveillance measures in the past.

On 28 March 2003 he was informed that a file in his name did exist but that, since the archives were held by the Romanian Intelligence Service, it was necessary to wait for his file to be transferred by that Service. On 19 October 2005 a file in the applicant’s name was transmitted to the CNSAS by the Romanian Intelligence Service.

On 19 May 2008 the CNSAS indicated that the date of birth in the file did not correspond to that of the applicant and that checks were therefore necessary. A few days later the CNSAS invited the applicant to come and consult the file created in his name by the *Securitate*, which he did on 23 June 2008. He was given a copy of the file, which bore the annotations “opened on 12 April 1983” and “the file was microfilmed on 23 July 1996”.

A note indicated that Mr Haralambie had commented unfavourably on politics and on the economic situation. An undertaking by the applicant, dating from 1979, to collaborate with the *Securitate* had also been included, with official comments to the effect that he was evading his security work and that he would be placed under investigation and that his correspondence would be monitored.

#### **Law – Articles 6 § 1 and Article 1 of Protocol No. 1**

The fact that Mr Haralambie’s action concerning the location of the disputed land had been dismissed by the courts without an examination of the merits of the case, on the ground that

the administrative authorities had sole jurisdiction in that area, had impaired the very essence of his right of access to a court. Accordingly, the Court concluded unanimously that there had been a violation of Article 6 § 1. Having regard to this finding, the Court found it unnecessary to examine the cases under Article 1 of Protocol No. 1.

### **Law – Article 8**

The Court reiterated the vital interest for individuals who were the subject of personal files held by the public authorities to be able to have access to them and emphasised that the authorities had a duty to provide an effective procedure for obtaining access to such information.

A Romanian law, amended in 2006, had established an administrative procedure for access to the Securitate files, which set the time-limit for transfer of archives at 60 days. However, it was not until six years after his first request – and thus well beyond this time-limit – that Mr Haralambie was invited to consult his file. The legislative amendment in 2006 indicated the need for speed in such a procedure, a fact recognised by the Romanian authorities, especially since, in this particular case, the applicant was already elderly.

Mr Haralambie's file had been available since 1996 in the form of microfilms, and had been in the possession of the CNSAS since October 2005. The Court considered that neither the quantity of files transferred nor shortcomings in the archive system justified a delay of six years in granting his request. As the authorities had not provided Mr Haralambie with an effective and accessible procedure to enable him to obtain access to his personal files within a reasonable time, the Court concluded unanimously that there had been a violation of Article 8.

**Conclusion:** violation of Articles 6 § 1 and Article 8

### **Article 41 (Just Satisfaction)**

The Court awarded the applicant 4,000 euros (EUR) in respect of pecuniary damage and EUR 2,000 in respect of non-pecuniary damage.

46. *Eur. Court of HR, B.B. v. France, Gardel v. France, M.B. v. France*, judgments of 17 December 2009, applications nos. 5335/06, 16428/05, 22115/06. The applicants complain under Article 8 (right to respect for private and family life and for correspondence) of the European Convention on Human Rights about their inclusion in the Sex Offender Database and the retroactive application of the legislation under which it was created.

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**nos. 5335/06, 16428/05, 22115/06**  
**17.12.2009**

Press release issued by the Registrar

**B.B. V. FRANCE**  
**GARDEL V. FRANCE**  
**M.B. V. FRANCE**

Inclusion in national sex offender database did not infringe the right to respect for private life

**Basic Facts**

The applicants are three French nationals who live in France: Bernard B.B., who was born in 1959 and lives in Toulouse; Fabrice Gardel, who was born in 1962 and is currently held in Monmédy Prison; and M.B., who was born in 1943 and lives in Millau. They were sentenced, in 1996, 2003 and 2001 respectively, to terms of imprisonment for rape of 15 year old minors by a person in a position of authority.

On 9 March 2004 Law no. 2004-204 "adapting the judicial system to the evolution of criminality" created a national judicial database of sex offenders (later extended to include violent offenders). The provisions of the Code of Criminal Procedure concerning this Sex Offender Database entered into force on 30 June 2005.

In August 2005, November 2005 and February 2006, respectively, the applicants were notified of their inclusion in this database on account of their convictions and on the basis of the transitional provisions of the Law of 9 March 2004.

**Law – Articles 7 and 8**

The obligation arising from registration in the national Sex Offender Database pursued a purely preventive and dissuasive aim and could not be regarded as punitive in nature or as constituting a criminal sanction. The fact of having to prove one's address every year and to declare changes of address within a fortnight, albeit for a period of thirty years, was not serious enough for it to be treated as a "penalty".

The Court thus took the view that inclusion in the national Sex Offender Database and the corresponding obligations for those concerned did not constitute a "penalty" within the meaning of Article 7 § 1 of the Convention and that they had to be regarded as a preventive measure to which the principle of non-retrospective legislation, as provided for in that Article, did not apply. This complaint was thus rejected.

The protection of personal data was of fundamental importance to a person's enjoyment of respect for his or her private and family life, all the more so where such data underwent automatic processing, not least when such data were used for police purposes.

The Court could not call into question the prevention-related objectives of the database. Sexual offences were clearly a particularly reprehensible form of criminal activity from which children and other vulnerable people had the right to be protected effectively by the State.

Moreover, as the applicants had an effective possibility of submitting a request for the deletion of the data, the Court took the view that the length of the data conservation – thirty years maximum – was not disproportionate in relation to the aim pursued by the retention of the information.

Lastly, the consultation of such data by the court, police and administrative authorities, was subject to a duty of confidentiality and was restricted to precisely determined circumstances.

The Court concluded that the system of inclusion in the national judicial database of sex offenders, as applied to the applicants, had struck a fair balance between the competing private and public interests at stake, and held unanimously that there had been no violation of Article 8.

**Conclusion:** no violation of Articles 7 and 8

**47. Eur. Court of HR, Dalea v. France, judgment of 2 February 2010, application 58243/00. Inability to access or secure rectification of personal data in Schengen database. The Court ruled that applicant's inability to gain personal access to all the information he had requested could not in itself prove that the interference was not justified by national security interests**

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**no. 58243/00**  
**01.07.2008**

Press release issued by the Registrar

### **DALEA v. FRANCE**

Inability to access or secure rectification of personal data in Schengen database

#### **Basic Facts**

The applicant, a Romanian national, was denied a visa in 1997 for a visit to Germany, and the following year for a visit to France, on the ground that he had been reported by the French authorities to the Schengen Information System for the purposes of being refused entry. The applicant applied to the French National Data-Protection Commission ("the CNIL") seeking access to his personal data in the French Schengen database and the rectification or deletion of that data. The CNIL carried out the requested checks and then indicated that the procedure before it was now exhausted. The applicant brought an action for judicial review before the *Conseil d'Etat*, which found that he had received information concerning his data entry in the French Schengen database and that his action had therefore become devoid of object. The *Conseil d'Etat* further found that, on the basis of the investigation carried out, it was impossible to ascertain the reasons for the applicant's inclusion in the database and that it could not therefore be assessed whether the CNIL's denial of his request for rectification or deletion had been lawful. The CNIL indicated that the applicant had been reported to the Schengen Information System at the request of the French Security Intelligence Agency ("the DST"), which alone could provide the relevant information to enable the *Conseil d'Etat* to ascertain whether or not the applicant's request for rectification of his data had been well-founded. In 2006 the *Conseil d'Etat* observed that, having regard to all the material in the case file, the grounds given by the CNIL for its decision not to rectify or delete the data concerning the applicant provided valid justification for that decision. Accordingly, the applicant's action for the annulment of the CNIL's decision had been ill-founded.

#### **Law – Article 8**

The Convention did not as such guarantee the right of an alien to enter or to reside in a particular country. In so far as the applicant's professional relations, especially with French and German companies and with figures from political and economic circles in France, could be regarded as constituting "private life" within the meaning of Article 8, the interference with this right caused by the reporting of the applicant by the French authorities to the Schengen Information System had been in accordance with the law and had pursued the legitimate aim of protecting national security. The applicant had not shown how he had actually suffered as a result of his inability to travel in the Schengen area. He had merely referred, without giving particulars, to a considerable loss on account of the effect on his company's performance,

and had pointed out that he had not been able to go to France for surgery that he had ultimately obtained in Switzerland, but this had not apparently had any particular consequences for his state of health. The French authorities' interference with the applicant's right to respect for his private life had therefore been proportionate to the aim pursued and necessary in a democratic society. In so far as the applicant had complained of interference with his private life solely on account of his inclusion in the Schengen Information System for a long period, the Court reiterated that everyone affected by a measure based on national security grounds had to be guaranteed protection against arbitrariness. Admittedly, his inclusion in the database had barred him access to all countries that applied the Schengen Agreement. However, in the area of entry regulation, States had a broad margin of appreciation in taking measures to secure the protection against arbitrariness that an individual in such a situation was entitled to expect. The applicant had been able to apply for review of the measure at issue, first by the CNIL, then by the *Conseil d'Etat*. Whilst the applicant had never been given the opportunity to challenge the precise grounds for his inclusion in the Schengen database, he had been granted access to all the other data concerning him and had been informed that considerations relating to State security, defence and public safety had given rise to the report on the initiative of the DST. The applicant's inability to gain personal access to all the information he had requested could not in itself prove that the interference was not justified by national security interests. The French authorities' interference with the applicant's right to respect for his private life had therefore been proportionate to the aim pursued and necessary in a democratic society.

**Conclusion:** inadmissible

**48. Eur. Court of HR, Ciubotaru v. Moldova, judgment of 27 April 2010, application no. 27138/04. The applicant complains under Article 8 (right to respect for private and family life and for correspondence) of the European Convention on Human Rights about the authorities' refusal to register his Romanian ethnic identity in his identity papers.**

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**no. 27138/04**  
**27.04.2010**

Press release issued by the Registrar

### **CIUBOTARU v. MOLDOVA**

Refusal to change ethnic identity in personal identity papers breached the convention

#### **Principal facts**

The applicant, Mihai Ciubotaru, is a Moldovan national who was born in 1952 and lives in Chişinău. He is a writer and a professor of French.

In 2002, when applying to have his old Soviet identity card replaced with a Moldovan one, he submitted that his ethnicity was Romanian. As he was advised that his application would not be accepted unless he indicated his identity was Moldovan, he complied.

Shortly afterwards he requested the relevant State authority to change his identity from "Moldovan" to "Romanian". His request was refused with the argument that since his parents had not been recorded as ethnic Romanians in their birth and marriage certificates, it was impossible for him to be recorded as an ethnic Romanian. Mr Ciubotaru complained unsuccessfully numerous times about it to various officials, following which he brought proceedings in court against the relevant State authority. He asked to have his identity changed in his papers as he did not consider himself an ethnic Moldovan. His request was dismissed by the domestic courts with the same argument as the one advanced by the State administrative authority.

#### **Law – Article 8**

The Court noted that, along with such aspects as name, gender, religion and sexual orientation, an individual's ethnic identity constituted an essential aspect of his or her private life and identity, and thus fell under the protection of Article 8.

Aware of the highly sensitive nature of the issues involved in the present case, the Court distanced itself from the debate within Moldovan society concerning the ethnic identity of the main ethnic group. It took as a working basis the legislation of the Republic of Moldova and the official position of the Moldovan authorities when referring to Moldovans and Romanians.

As regards the requirement by the Moldovan authorities of proof of the ethnic origin of the applicant's parents, the Court did not dispute the right of a Government to require the existence of objective evidence of a claimed ethnicity. It was also ready to accept that it should be open to the authorities to refuse a claim to be officially recorded as belonging to a particular ethnicity where such a claim was based on purely subjective and unsubstantiated grounds.

However, Mr Ciubotaru appeared to have been confronted with a legal requirement making it impossible for him to support his claim. The relevant law and practice of recording ethnic identity had created insurmountable barriers before people who wished to have a different ethnic identity registered in respect of themselves as compared to that recorded in respect of their parents by the Soviet authorities in the past. According to the law, the applicant could have changed his ethnic identity only if he had shown that one of his parents had been recorded in the official records as being of Romanian ethnicity. However, during the Soviet times, the population of Moldova had been systematically registered as being of Moldovan ethnicity, with very few exceptions the criteria for which had been unclear. Therefore, by asking Mr Ciubotaru to show that his parents had been registered as being of Romanian ethnicity, the authorities had placed a disproportionate burden on him in view of the historical realities of the Republic of Moldova.

The Court further observed that Mr Ciubotaru's claim was based on more than his subjective perception of his own ethnicity. It was clear that he was able to provide objectively verifiable links with the Romanian ethnic group such as language, name, empathy and others. However, no such objective evidence could be relied upon under the Moldovan law in force.

The applicant had been unable to have his claim that he belonged to a certain ethnic group examined in the light of the objectively verifiable evidence presented in support of that claim. Having had regard to the circumstances of the case as a whole, the Court concluded that the existing procedure for Mr Ciubotaru to have his recorded ethnicity changed did not comply with Moldova's obligations under the Convention to safeguard his right to respect for his private life.

**Conclusion:** violation of Article 8.

**Article 41 (Just Satisfaction)**

The respondent State should pay the applicant 1.500 euros (EUR) in respect of non-pecuniary damage and EUR 3.500 for costs and expenses



**49. Eur. Court of HR, Uzun v. Germany, judgment of 2 September 2010, application no. 35623/05. Applicant complained about information obtained on him via GPS surveillance. The Court considered that adequate and effective safeguards against abuse had been in place.**

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**no. 35623/05**  
**02.09.2010**

Press release issued by the Registrar

## **UZUN v. GERMANY**

GPS surveillance of serious crime suspect was justified

### **Basic Facts**

In October 1995 the applicant and another man (S.) were placed under surveillance on the orders of an investigating judge because of their suspected involvement in bomb attacks that had been carried out by an extreme left-wing group to which they belonged. Realising that they were under surveillance, the two men sought to escape detection by destroying transmitters that had been installed in S.'s car and by avoiding use of the telephone. To counteract this, in December 1995 the Federal Public Prosecutor General authorised their surveillance by a Global-Positioning System device (GPS) which the authorities arranged to be fitted in S.'s car. The applicant and S. were arrested in February 1996 and subsequently found guilty of various bomb attacks between January and December 1995 on the basis of the evidence obtained through their surveillance, including GPS evidence linking the location of S.'s car to the scene of one of the attacks.

### **Law – Article 8**

The GPS surveillance in the applicant's case had been used systematically to collect and store data on his whereabouts and movements over a three-month period. That data had enabled the authorities to draw up a pattern of his movements, conduct additional investigations and collect further evidence that had been used at his trial. Accordingly, the GPS surveillance and the processing and use of the data thereby obtained had interfered with the applicant's right to respect for his private life.

As to whether the interference was in accordance with the law, the surveillance had a basis in a statutory provision that was accessible to the applicant. The questions whether that provision was sufficiently precise to satisfy the foreseeability requirement and whether it afforded adequate safeguards against abuse were not to be judged by reference to the rather strict standards that applied in the context of surveillance by telecommunications, as GPS surveillance of movements in public places was less intrusive.

The Court considered that adequate and effective safeguards against abuse had been in place. The measures had pursued the legitimate aims of protecting national security, public safety and the rights of the victims, and of preventing crime. It had also been proportionate: GPS surveillance had been ordered only after less intrusive methods of investigation had proved insufficient, had been carried out for a relatively short period (some three months), and had affected the applicant only when he was travelling in his accomplice's car. The applicant could not be said to have been subjected to total and comprehensive surveillance.

Given that the investigation had concerned very serious crimes, the applicant's surveillance by GPS had thus been necessary in a democratic society.

**Conclusion:** no violation of Article 8.

**50. Eur. Court of HR, Kennedy v. The United Kingdom, judgment of 18 May 2010, application no. 26839/05. The applicant complains under Article 8 (right to respect for private and family life and for correspondence), Article 6 § 1 (right to a fair trial) and Article 13 (right to an effective remedy) about the alleged interception of his communications, the unfair hearing before the IPT, and having been denied an effective remedy.**

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**no. 26839/05**  
**18.05.2010**

Press release issued by the Registrar

### **KENNEDY v. THE UNITED KINGDOM**

Secret surveillance measures did not interfere with the applicant's private life

#### **Basic Facts**

The applicant, Malcolm Kennedy, is a British national who was born in 1946 and lives in London. When arrested for drunkenness in 1990 he spent the night in detention with an inmate who was found dead the next day. Mr Kennedy was subsequently found guilty of the man's murder and sentenced to life imprisonment. His case was controversial in the United Kingdom on account of missing and conflicting evidence.

Released from prison in 1996, Mr Kennedy started a removal business. He alleged that his business mail, telephone and email communications were being intercepted because of his high profile case and his subsequent involvement in campaigning against miscarriages of justice.

The applicant complained to the Investigatory Powers Tribunal ("IPT") that his communications were being intercepted in "challengeable circumstances" amounting to a violation of his private life. Mr Kennedy sought the prohibition of any communication interception by the intelligence agencies and the "destruction of any product of such interception". He also requested specific directions to ensure the fairness of the proceedings before the IPT, including an oral hearing in public, and a mutual inspection of witness statements and evidence between the parties.

The IPT proceeded to examine the applicant's specific complaints in private, and in 2005 ruled that no determination had been made in his favour in respect of his complaints. This meant either that there had been no interception or that any interception which took place was lawful.

#### **Law- Article 8**

The Court reiterated that, based on the principle of effective protection by the Convention's system, an individual might – under certain conditions to be determined in each case – claim to be the victim of a violation as a result of the mere existence of secret measures, even if they were not applied to him. This departure from the Court's general approach was to ensure that such measures, although secret, could be challenged and judicially supervised. In the applicant's case, the Court considered that it could not be excluded that secret surveillance measures were applied to him or that he was, at the material time, potentially at risk of being

subjected to such measures. Accordingly, the Court concluded that he could complain of an interference with his Article 8 rights.

The Court considered it clear that the interference in question pursued the legitimate aims of protecting national security and the economic well-being of the country and preventing crime. In addition, it was carried out on the basis of the Regulation of Investigatory Powers Act 2000 (“RIPA”), supplemented by the Interception of Communications Code of Practice (“the Code”). The RIPA was available on the Internet, and hence accessible. It defined with sufficient precision the cases in which communications could be intercepted. While the offences allowing interception were not set out by name, the Court noted that States were not compelled to exhaustively list national security offences as those were by nature difficult to define in advance. Finally, as only communications within the United Kingdom were concerned in the present case – unlike in *Liberty and Others v. the UK*<sup>1</sup> – the domestic law described more fully the categories of persons who could be subject to an interception of their communications.

As regards the processing, communication and destruction of data, the Court noted that the overall duration of interception measures had to be left to the discretion of the domestic authorities, as long as adequate safeguards were put in place. In the present case the renewal or cancellation of interception warrants were under the systematic supervision of the Secretary of State. In addition, contrary to the practice for communications with other countries, the domestic law provided that warrants for internal communications related to one person or one set of premises only, thereby limiting the scope of the authorities’ discretion to intercept and listen to private communications. The law – more specifically the Code – also strictly limited the number of persons who had access to the intercept material, of which only a summary would be disclosed whenever sufficient. It also required the data to be destroyed as soon as they were no longer necessary, and detailed records of the warrants to be kept.

In terms of supervision of the RIPA regime, under the legislation a Commissioner was appointed who was independent from the executive and legislative authorities. His annual report to the Prime Minister was a public document and was laid before Parliament. The Court found his role in ensuring that the legal provisions were applied correctly very valuable, as well as his biannual review of a random selection of specific cases in which interception had been authorized. The Court further highlighted the extensive jurisdiction of Investigatory Powers Tribunal to examine any complaint of unlawful interception of communications. Unlike in many other countries, any person could apply to the IPT, which was an independent and impartial body. It had access to closed material and could require the Commissioner to order disclosure of all documents it considered relevant. When the IPT found in the applicant’s favour, it could quash any interception order, require destruction of intercepted material and order compensation. The publication of the IPT’s legal rulings further enhanced the level of scrutiny over secret surveillance activities in the United Kingdom.

The Court concluded that in the present case the relevant domestic provisions indicated with sufficient clarity the procedures concerning interception warrants as well as the processing, communicating and destruction of data collected. The Court further observed that there was no evidence of any significant shortcomings in the application and operation of the surveillance regime. Therefore there had been no violation of Article 8.

## **Law – Article 6 § 1**

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<sup>1</sup> *Liberty and Others v. the United Kingdom*, no. 58243/00

The Court reiterated that there might be restrictions on the right to fully adversarial proceedings where strictly necessary in the light of a strong countervailing public interest. Restrictions in the IPT proceedings were justified by confidentiality considerations and the nature of the issues justified the absence of an oral hearing. The Court further noted that according to Article 6 § 1 of the Convention, national security might justify the exclusion of the public from the proceedings. As to the policy of the authorities to “neither confirm nor deny”, the Court found it was sufficient that an applicant be informed in those terms.

The Court emphasised the breadth and convenience of access to the IPT enjoyed by those complaining about interception within the United Kingdom. Bearing in mind the importance of secret surveillance to the fight against terrorism and serious crime, the Court considered that the restrictions on the applicant’s rights in the context of the proceedings before the IPT were both necessary and proportionate and were not contrary to Article 6.

### **Law – Article 13**

Having regard to its conclusions in respect of Article 8 and Article 6 § 1, the Court considered that the IPT offered to the applicant an effective remedy insofar as his complaint was directed towards the alleged interception of his communications. In respect of the applicant’s general complaint under Article 8, the Court reiterated that Article 13 did not go so far as to guarantee a remedy allowing a Contracting State’s laws as such to be challenged before a national authority on the ground of being contrary to the Convention or to equivalent domestic legal norms. The Court therefore dismissed the applicant’s complaint under this Article.

**51. Eur. Court HR, Köpke v. Germany, judgment of 5 October 2010, application no 420/07. Case concerning video surveillance of supermarket cashier suspected of theft declared inadmissible**

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**no. 420/07**  
**05.10.2010**

Press release issued by the Registrar

**KÖPKE v. GERMANY**

Case concerning video surveillance of supermarket cashier suspected of theft declared inadmissible

**Basic Facts**

The applicant, a supermarket cashier, was dismissed without notice for theft, following a covert video surveillance operation carried out by her employer with the help of a private detective agency. She unsuccessfully challenged her dismissal before the labour courts. Her constitutional complaint was likewise dismissed.

**Law – Article 8**

A video recording of the applicant's conduct at her workplace had been made without prior notice on the instruction of her employer. The images thereby obtained had been processed and examined by several fellow employees and used in the public proceedings before the labour courts. The applicant's "private life" within the meaning of Article 8 § 1 had therefore been concerned by these measures. The Court had to examine whether the State, in the context of its positive obligations under Article 8, had struck a fair balance between the applicant's right to respect for her private life and both her employer's interest in the protection of its property rights, guaranteed by Article 1 of Protocol No. 1, and the public interest in the proper administration of justice. At the relevant time, the conditions under which an employer could resort to the video surveillance of an employee in order to investigate a criminal offence the employee was suspected of having committed in the course of his or her work had not yet been laid down in statute law. However, the Federal Labour Court had developed in its case-law important safeguards against arbitrary interference with the employee's right to privacy. This case-law had been applied by the domestic courts in the applicant's case. Moreover, covert video surveillance at the workplace following substantiated suspicions of theft did not affect a person's private life to such an extent as to require a State to set up a legislative framework in order to comply with its positive obligations under Article 8. As noted by the German courts, the video surveillance of the applicant had only been carried out after losses had been detected during stocktaking and irregularities discovered in the accounts of the department where she worked, raising an arguable suspicion of theft committed by the applicant and another employee, who were the only employees to have been targeted by the surveillance measure. The measure had been limited in time (two

weeks) and had only covered the area surrounding the cash desk and accessible to the public. The visual data obtained had been processed by a limited number of persons working for the detective agency and by staff members of the employer. They had been used only in connection with the termination of her employment and the proceedings before the labour courts. The interference with the applicant's private life had thus been restricted to what had been necessary to achieve the aims pursued by the video surveillance. The domestic courts had further considered that the employer's interest in the protection of its property rights could only be effectively safeguarded by collecting evidence in order to prove the applicant's criminal conduct in the court proceedings. This had also served the public interest in the proper administration of justice. Furthermore, the covert video surveillance of the applicant had served to clear from suspicion other employees. Moreover, there had not been any other equally effective means to protect the employer's property rights which would have interfered to a lesser extent with the applicant's right to respect for her private life.

The stocktaking could not clearly link the losses discovered to a particular employee. Surveillance by superiors or colleagues or open video surveillance did not have the same prospects of success in discovering a covert theft. In sum, there was nothing to indicate that the domestic authorities had failed to strike a fair balance, within their margin of appreciation, between the applicant's right to respect for her private life and both her employer's interest in the protection of its property rights and the public interest in the proper administration of justice. However, the balance struck between the interests at issue by the domestic authorities did not appear to be the only possible way for them to comply with their obligations under the Convention. The competing interests concerned might well be given a different weight in the future, having regard to the extent to which intrusions into private life were made possible by new, more sophisticated technologies.

**Conclusion:** inadmissible (manifestly-ill-founded).

**52. Eur. Court of HR, Mikolajová v. Slovakia, judgment of 18 January 2011, application no 4479/03 Disclosure of police decision stating that the applicant had committed an offence, even though no criminal proceedings were ever brought**

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**no. 4479/03  
18.01.2011**

Press release issued by the Registrar

**MIKOLAJOVÁ v. SLOVAKIA**

The disclosure of a police decision stating that the applicant had committed an offence although no criminal proceeding was ever conducted violated the Convention

**Basic Facts**

In 2000 the applicant's husband filed a criminal complaint with the police alleging that the applicant had beaten and wounded him. Several days later, the police dropped the case because the applicant's husband did not agree to criminal proceedings being brought against her. In their decision, which was never served on the applicant, the police stated that their investigation had established that the applicant had committed the criminal offence of inflicting bodily injury. A year and a half later, relying on the police decision, an insurance company wrote to the applicant requesting her to reimburse the costs of her husband's medical treatment. The applicant protested to the police about their decision and filed a constitutional complaint alleging the violation of her rights, but to no avail.

**Law – Article 8**

Given the gravity of the conclusion contained in the police decision, namely that the applicant was guilty of a violent criminal offence, coupled with its disclosure to the insurance company, the Court considered that there had been an interference with the applicant's rights protected by Article 8. The police decision had been formulated as a statement of fact thus indicating that the police considered the applicant guilty of the alleged offence. Even though she had never been charged with a criminal offence, the applicant was nonetheless placed on record as a criminal offender possibly for an indefinite period, which must have caused damage to her reputation. Moreover, the Court could not but note the lack of any procedural safeguards in that the applicant had no available recourse to obtain a subsequent retraction or clarification of the impugned police decision. The domestic authorities had thus failed to strike a fair balance between the applicant's Article 8 rights and any interests relied on by the Government to justify the terms of the police decision and its disclosure to a third party.

**Conclusion:** violation of Article 8.

**Article 41 (Just Satisfaction)**

EUR 1,500 in respect of non-pecuniary damage



**53. Eur. Court of HR, Wasmuth v. Germany, judgment of 17 February 2011, application no. 12884/03. Requirement to indicate on wage-tax card possible membership of a Church or religious society entitled to levy church tax.**

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**no. 12884/03**  
**17.02.2011**

Press release issued by the Registrar

**WASMUTH v. GERMANY**

Taxpayer's obligation to disclose non-affiliation with church to employer did not violate his right to freedom of religion

**Basic Facts**

The applicant, Johannes Wasmuth, is a German national who was born in 1956 and lives in Munich. He is a lawyer in private practice and is also employed as a lector in a publishing house. On his wage-tax cards of the last few years, the entry "--" could be found in the field "Church tax deducted", informing his employer that he did not have to deduct any church tax for Mr Wasmuth.

After having unsuccessfully requested the local authorities to issue him a wage-tax card without any information concerning his religious affiliation for the fiscal year of 1997 and 1998 and having unsuccessfully brought proceedings before the German courts in that matter, Mr Wasmuth again unsuccessfully made such a request concerning his tax card to be issued for 2002. He subsequently brought proceedings before the finance court, arguing that the information on the tax card violated his right not to indicate his religious convictions, that there was no legal basis for the public treasury to levy church tax and that it could not be expected of him as a homosexual to participate in a tax collection system which benefited social groups – the churches - whose stated goal was to question and to debase an integral aspect of his personality.

The finance court rejected Mr Wasmuth's claim in February 2002, holding that the local fiscal authorities were entitled under the relevant provisions of Bavarian law and German federal law to obtain information about employees' affiliation or non-affiliation with a religious society authorised to levy church tax and to submit that information to the employer in charge of deducting the tax. The entry "--" served to avoid him having to unduly pay church tax. In the court's view, the interference with Mr Wasmuth's fundamental rights was minimal and he had to accept it in the interest of the proper collection of church tax. The court further pointed out that the views of the Catholic and Protestant churches in Germany did not interfere with Mr Wasmuth's personality rights and that their position on homosexual marriage was shared by many other groups. The churches' position did not give Mr Wasmuth the right to refuse to

participate in the church tax system. The decision was upheld by the Federal Court of Finance. By decision of 30 September 2002 (1 BvR 1744/02), the Federal Constitutional Court rejected Mr Wasmuth's constitutional complaint, referring to its decision of 25 May 2001 (1 BvR 2253/00) not to accept his earlier complaint, in which it had found that the disclosure of a taxpayer's non-affiliation with a religious society authorised to levy religious tax did not place an unacceptable burden on him.

### **Law – Article 9**

In accordance with its recent case-law, the Court found that the obligation to inform the authorities of his non-affiliation with churches or religious societies authorised to levy religious tax constituted an interference with Mr Wasmuth's right not to indicate his religious convictions. The Court was satisfied that that obligation had a basis in German law, as the domestic courts had consistently held. The interference had further served the legitimate aim of ensuring the right of churches and religious societies to levy religious tax. It remained to be established whether the interference had been proportionate to that aim.

The German courts had been called on to balance the negative aspect of Mr Wasmuth's right to freedom of religion against the right of churches and religious societies to levy religious tax as guaranteed by the constitution. The Court agreed with the German Government that the reference on the tax card at issue was only of limited informative value as regards his religious or philosophic conviction, as it simply indicated to the fiscal authorities that he did not belong to one of the six churches or religious societies which were authorised to levy religious tax in Bavaria and exercised that right in practice. The tax card was not in principle used in public; it did not serve any purpose outside the relation between the taxpayer and his employer or the tax authorities. In contrast to other cases in which the Court had found a violation of Article 9, the authorities had not asked Mr Wasmuth to explain why he did not belong to one of the religious societies authorised to levy religious tax and did not verify what his religious or philosophic conviction was. The Court therefore found that the obligation imposed on Mr Wasmuth was, in the circumstances of his case, not disproportionate to the aims pursued.

As regards Mr Wasmuth's complaint that by providing the required information he contributed to the functioning of the church tax system and thereby indirectly supported the churches whose positions he rejected, the Court took note of the German courts' arguments that his participation in the system was minimal and that it served precisely to avoid him having to unduly pay church tax. The Court further had regard to the fact that there was no European standard in the area of funding of churches and religious groups, a question which was closely linked to each country's history and tradition.

In view of those considerations the Court concluded that there had been no violation of Article 9.

### **Law – Article 8**

The Court reiterated that the collection, storage and transfer of data linked to an individual's private life fell within the remit of Article 8 § 1. The obligation imposed on Mr Wasmuth thus constituted an interference with his rights under that Article. However, in the light of its findings under Article 9 the Court held that that interference had been in accordance with the law and that it had been proportionate to a legitimate aim pursued for the purpose of Article 8 § 2. There had accordingly been no violation of Article 8.

## **Article 14**

As regards Mr Wasmuth's complaint under Article 14 that he had been discriminated against as a homosexual, the Court observed that he had not raised that point before the German Federal Constitutional Court. That part of his complaint therefore had to be rejected as inadmissible for non-exhaustion of domestic remedies.

**54. Eur. Court of HR, Sipoş v. Romania, judgment of 3 May 2011, application no. 26125/04. Journalist's right to respect for reputation should have prevailed over TV channel's freedom of expression.**

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**no. 26125/04**  
**03.05.2011**

Press release issued by the Registrar

### **SIPOŞ v. ROMANIA**

Journalist's right to respect for reputation should have prevailed over TV channel's freedom of expression

#### **Basic Facts**

The applicant, Maria Sipoş, is a Romanian national who was born in 1949 and lives in Bucharest. She is a journalist, writer and translator. In 2002, when she was making and presenting a television programme for the Romanian Television Company (SRTV) called "Event", which was broadcast on the national State channel România 1, she was replaced by the channel's management without explanation. Not having received any response to her protest, she made statements to the press alluding to the restoration of censorship in State television.

On 20 March 2003 Ms Sipoş brought criminal proceedings before the Bucharest District Court against the channel's director and the coordinator of the SRTV's press office, accusing both of insults and defamation. She joined the proceedings as a civil party and sought compensation for the non-pecuniary damage that she alleged had been caused to her. On 26 June 2003 the District Court acquitted the defendants on the ground that they had not acted with the intention of insulting or defaming Ms Sipoş but to express an official position of the SRTV concerning her accusations of censorship. Her compensation claim was dismissed. Ms Sipoş appealed against that decision. In a judgment of 3 December 2003 Bucharest County Court acknowledged that the press release contained defamatory assertions about Ms Sipoş. However, having regard to the fact that the defendants had not intended to insult or defame her, and in view of their good faith, it dismissed Ms Sipoş' appeal in a final judgment.

#### **Law – Article 8**

The Court first reiterated that Article 8 did not merely compel the State to abstain from arbitrary interference with the right to respect for private life. The State also had “positive obligations” that might involve the adoption of measures designed to secure respect for private life even in the sphere of the relations between individuals. To be precise, in the case of Ms Sipoş, the Court had to determine whether Romania had struck a fair balance between, on the one hand, the protection of her right to her reputation and to respect for her private life, and on the other, the freedom of expression (Article 10) of those who had issued the impugned press release.

For that purpose it examined the content of the press release.

It first noted that, in its final judgment, Bucharest County Court had admitted that the offending press release contained defamatory remarks about Ms Sipoş.

It further noted that the press release, which had been drafted by a specialised department of Romanian State television and could not therefore be compared to comments made spontaneously, was not confined to a factual statement or explanations. It also contained assertions about political manipulation to which Ms Sipoş had allegedly been subjected, and about her emotional state, which was described in particular as being marked by family problems and as creating difficulties in her relations at work.

The Court took the view in this connection that the assertions presenting Ms Sipoş as a victim of political manipulation were devoid of any proven factual basis, since there was no indication that she had acted under the influence of any particular vested interest. As regards the remarks on her emotional state, the Court noted that they were based on elements of her private life whose disclosure did not seem necessary. As to the assessment about Ms Sipoş’ discernment, it could not be regarded as providing an indispensable contribution to the position of the SRTV, as expressed through the press release, since it was based on elements of the applicant’s private life known to the SRTV’s management.

In conclusion, the assertions complained of by Ms Sipoş had overstepped the acceptable limit and the Romanian courts had not struck a fair balance between the protection of her right to her reputation and the freedom of expression protected by Article 10.

**Conclusion:** violation of Article 8

### **Article 41 (Just Satisfaction)**

The Court held that Romania was to pay the applicant 3,000 euros (EUR) in respect of non-pecuniary damage.

### **Separate Opinion**

Judge Myjer expressed a dissenting opinion, which is annexed to the judgment.

**55. Eur. Court of HR, Mosley v. the United Kingdom, judgment of 10 May 2011, application no. 48009/08. The European Convention on Human Rights does not require media to give prior notice of intended publications to those who feature in them.**

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**no. 48009/08  
10.05.2011**

Press release issued by the Registrar

### **MOSLEY v. THE UNITED KINGDOM**

The European Convention on Human Rights does not require media to give prior notice of intended publications to those who feature in them

#### **Basic Facts**

The applicant, Max Rufus Mosley, is a British national who was born in 1940 and lives in Monaco. He is the former president of the International Automobile Federation, a nonprofit association that represents the interests of motoring organisations and car users worldwide and is also the governing body for Formula One.

In March 2008, the Sunday newspaper *News of the World* published on its front page an article entitled “F1 boss has sick Nazi orgy with 5 hookers”. Several pages inside the newspaper were also devoted to the story which included still photographs taken from video footage secretly recorded by one of the participants in the sexual activities.

An edited extract of the video, in addition to still images, were also published on the newspaper’s website and reproduced elsewhere on the internet.

On 4 April 2008, Mr Mosley brought legal proceedings against the newspaper claiming damages for breach of confidence and invasion of privacy. In addition, he sought an injunction to restrain the *News of the World* from making available on its website the edited video footage.

On 9 April 2008, the High Court refused to grant the injunction because the material was no longer private as it had been published extensively in print and on the Internet. In subsequent privacy proceedings before the High Court, the court found that the images did not carry any Nazi connotations. Consequently there was no public interest and thus no justification for publishing that article and accompanying images, which had breached Mr Mosley’s right to privacy. The court ruled that *News of the World* had to pay to Mr Mosley 60,000 GBP in damages.

#### **Law – Article 8**

The Court noted that the UK courts had found no Nazi element in Mr Mosley’s sexual activities and had therefore concluded that there had been no public interest in, and therefore justification for, the publication of the articles and images. In addition, the newspaper had not appealed against the judgment. The Court therefore considered that the publications in question had resulted in a flagrant and unjustified invasion of Mr Mosley’s private life. Given that Mr Mosley had achieved a finding in his favour before the domestic court, the Court’s

own assessment concerned the balancing act to be conducted between the right to privacy and the right to freedom of expression not in the circumstances of the applicant's particular case but in relation to the UK legal system.

It was clear that the UK authorities had been obliged under the Convention not only to refrain from interfering with Mr Mosley's private life, but also to take measures to ensure his effective enjoyment of that right. The question which remained to be answered was whether a legally binding pre-notification rule was required.

The Court observed that it had implicitly accepted in its earlier case law that damages obtained following a defamatory publication provided an adequate remedy for right-to private-life breaches arising out of newspaper publications of private information.

It then recalled that States enjoyed a certain margin of appreciation in respect of the measures they put in place to protect people's right to private life. Notwithstanding the potential merits of Mr Mosley's individual case, given that a pre-notification requirement would inevitably affect political reporting and serious journalism, in addition to the sensationalist reporting at issue in Mr Mosley's case, the Court stressed that any restriction on journalism required careful scrutiny.

In the United Kingdom, the right to private life had been protected with a number of measures: there was a system of self-regulation of the press; people could claim damages in civil court proceedings; and, if individuals were aware of an intended publication touching upon their private life, they could seek an interim injunction preventing publication of the material. In addition, in the context of private life and freedom of expression, a parliamentary inquiry on privacy issues had been recently held in the UK with the participation of various interested parties, including Mr Mosley himself, and the ensuing report had rejected the need for a pre-notification requirement.

The Court further noted that Mr Mosley had not referred to a single jurisdiction in which a pre-notification requirement as such existed, nor had he indicated any international legal texts requiring States to adopt such a requirement. Last and not least, the current UK system fully corresponded to the resolutions of the Parliamentary Assembly of the Council of Europe on media and privacy.

As to the clarity of any pre-notification requirement, the Court was of the view that the concept of "private life" was sufficiently well understood for newspapers and reporters to be able to identify when a publication could infringe the right to respect for private life. It further considered that a satisfactory definition of those subject to the obligation could be found. However, any pre-notification obligation would have to allow for an exception if public interest was at stake. Thus, a newspaper could opt not to notify an individual if it believed that it could subsequently defend its decision on the basis of the public interest in the information published.

The Court observed in that regard that a narrowly defined public interest exception would increase the chilling effect of any pre-notification duty. In Mr Mosley's case, given that the *News of the World* had believed that the sexual activities they were disclosing had had Nazi overtones, hence were of public interest, they could have chosen not to notify Mr Mosley, even if a legal pre-notification requirement had been in place. Alternatively, a newspaper could choose, in any future case to which a pre-notification requirement was applied, to run the same risk and decline to notify, preferring instead to pay a subsequent fine. The Court emphasised that any pre-notification requirement would only be as strong as the sanctions imposed for failing to observe it; however, particular care had to be taken when examining constraints which might operate as a form of censorship prior to publication. Although punitive

finer and criminal sanctions could be effective in encouraging pre-notification, that would have a chilling effect on journalism, even political and investigative reporting, both of which attracted a high level of protection under the Convention. That ran the risk of being incompatible with the Convention requirements of freedom of expression.

The Court concluded by recognising that the private lives of those in the public eye had become a highly lucrative commodity for certain sectors of the media. The publication of news about such people contributed to the range of information available to the public. Although the dissemination of that information was generally for the purposes of entertainment rather than education, it undoubtedly benefitted from the protection of Article 10. The Article 10 protection afforded to publications might cede to the requirements of Article 8 where the information was of a private and intimate nature and there was no public interest in its dissemination.

However, looking beyond the facts of Mr Mosley's case, and having regard to the chilling effect to which a pre-notification requirement risked giving rise, to the doubts about its effectiveness and to the wide margin of appreciation afforded to the UK in that area, the Court concluded that Article 8 did not require a legally binding pre-notification requirement.

**Conclusion:** no violation of Article 8

**56. Eur. Court of HR, Shimovolos v. Russia, judgment of 21 June 2011, application no. 30194/09. Applicant complained about police listing and surveillance on his account of membership in a human rights organisation.**

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**no. 30194/09**  
**21.06.2011**

Press release issued by the Registrar

### **SHIMOVOLOS v. RUSSIA**

Police listing and surveillance on account of membership in a human rights organisation

#### **Basic Facts**

In May 2007 a European Union-Russia Summit was scheduled to take place in Samara (Russia). At about the same time the applicant's name was registered as a human-rights activist in the so-called "surveillance database". The local authorities were informed that protests were planned during the summit and that it was necessary to stop all members of organisations planning such protests in order to prevent unlawful and extremist acts. They were also informed that the applicant was coming to Samara by train several days before the summit and that he might be carrying extremist literature. When the applicant arrived in Samara, he was stopped by the police and escorted to the police station at around 12.15 p.m. under the threat of force. At the police station the officers drew up an attendance report using a standard template entitled "Attendance report in respect of a person who has committed an administrative offence". However, they crossed out the phrase "who has committed an administrative offence". The applicant was released some 45 minutes later. The police officer who had escorted the applicant to the police station later stated that he had done so in order to prevent him from committing administrative and criminal offences.

#### **Law – Article 8**

The applicant's name was registered in the "surveillance database", which collected information about his movements, by train or air, within Russia and therefore amounted to an interference with his private life. The creation and maintenance of the database and the procedure for its operation were governed by a ministerial order which had never been published or otherwise made accessible to the public. Consequently, the Court found that the domestic law did not indicate with sufficient clarity the scope and manner of exercise of the discretion conferred on the domestic authorities to collect and store information on individuals' private lives in the database. In particular, it did not set out in a form accessible to the public any indication of the minimum safeguards against abuse.

**Conclusion:** violation of Article 8.



**57. Eur. Court of HR, Avram and Others v. Moldova, judgment of 05 July 2011, application no. 41588/05. Five women broadcast on national television in a sauna romp with police officers should have received higher compensation.**

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**no 41588/05**

**5.7.11**

Press release issued by the Registrar

**AVRAM AND OTHERS v. MOLDOVA**

Five women broadcast on national television in a sauna romp with police officers should have received higher compensation

**Basic Facts**

The applicants, Ala Avram, Elena Vrabie, Eugenia Buzu, Ana Moraru and Alina Frumusachi, are five Moldovan nationals who were born in 1979, 1976, 1979, 1979 and 1979 respectively and live in Chişinău.

Friends, the five women complained about the broadcasting on national television on 10 May 2003 of intimate video footage of them in a sauna with five men, four of whom were police officers. At the time, three of the applicants were journalists, the first two for the investigative newspaper *Accente*, one was a French teacher and the other was a librarian. The women claim that they first had contact with the police officers in October 2002 when the editor in chief of *Accente* was arrested on charges of corruption and that, from that point on, the officers provided them with material for their articles. One of the applicants had even become romantically involved with one of the officers.

The footage was used in a programme about corruption in journalism, and notably in the newspaper *Accente*. It showed the applicants, apparently intoxicated, in a sauna in their underwear, with two of them kissing and touching one of the men, and one of them performing an erotic dance. The men in the video had their faces blacked out. It also showed a document concerning Ms Avram's collaboration with the Ministry of Internal Affairs.

The applicants alleged in particular that the video had been secretly filmed by the police officers and used to try to blackmail them into not publishing an article on illegalities at the Moldovan Ministry of Internal Affairs. The officers had given the video to the national television service when the first two applicants had had the article published in their newspaper.

On 17 and 20 May 2003 Ms Avram lodged a criminal complaint alleging blackmail and abuse of power on the part of the police. Both the applicants and the police officers were questioned. The officers denied any implication in the secret filming or blackmail, or indeed ever having had a relationship with the five applicants. In June 2004 the prosecuting authorities dismissed the complaint on the ground that dissemination of defamatory information was not an offence under Moldovan law. That decision was upheld on extraordinary appeal in October 2005.

In the meantime, the applicants also brought civil proceedings against the Ministry of Internal Affairs (for arranging the secret filming and giving documents of a private nature to national television) and National Television (for then broadcasting the images of a private nature).

They requested compensation for a breach of their right to respect for their private and family life under Article 8 of the European Convention. In August 2008 the Supreme Court of Justice gave a final ruling in which it dismissed the complaint against the Ministry of Internal Affairs concerning the secret filming on account of lack of evidence. It held, however, that the Ministry was responsible for handing documents of a private nature concerning Ms Avram over to the National Television Service and that National Television was then responsible for the broadcasting of the sauna scene, in breach of Article 8 of the Convention.

The Supreme Court ordered the National Television Service to pay each applicant 3,600 Moldovan lei (MDL – the equivalent of 214 euros (EUR)), the Ministry of Internal Affairs a further MDL 3,600 to Ms Avram and a guest of the broadcasted programme MDL 1,800 (the equivalent of EUR 107) to Ms Vrabie, the maximum amounts allowed under Article 7/1 of the Moldovan old Civil Code by way of compensation for damage to a person's honour or dignity.

### **Law – Article 8**

The Court noted that the interference with the applicant's right to privacy was not in dispute. It had been acknowledged by the national courts and the applicants awarded compensation. The principal issue then was whether the ensuing awards made had been proportionate to the damage the applicants had sustained and whether the Supreme Court had fulfilled its Convention obligations under Article 8 when applying domestic law, which limited the amount of compensation payable to victims of defamation.

The Court was not persuaded that the Supreme Court had not any other possibility – other than under Article 7/1 of the old Civil Code – to decide on compensation. On the contrary, there were several examples of cases where the Supreme Court had relied on the European Court's practice to compensate breaches of Convention rights and damages were given which were comparable to those awarded by this Court.

In any case, the amounts awarded had been too low to be proportionate to such a serious interference with the applicants' right to respect for their private lives as a broadcast of intimate video footage of them on national television. Indeed, the Court saw no reason to doubt what a dramatic affect that had to have had on their private, family and social lives. The applicants could therefore still claim the status of victim and, accordingly, held that there had been a violation of Article 8.

### **Article 41 (Just Satisfaction)**

The Court held that Moldova was to pay Ms Avram EUR 5,000, Ms Vrabie EUR 6,000 and Ms Buzu, Ms Moraru and Ms Frumusachi EUR 4,000, each, in respect of non-pecuniary damage. EUR 1,500 was awarded for costs and expenses.

### **Separate Opinion**

Judge Poalelungi expressed a concurring opinion which is annexed to the judgment.

**58. Eur. Court of HR, *Khelili v. Switzerland*, judgment of 18 October 2011, application no. 16188/07. A French woman classified as a “prostitute” for fifteen years in Geneva police database violated her right to respect for private life.**

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**no. 16188/07  
18.10.2011**

Press release issued by the Registrar

### **KHELILI v. SWITZERLAND**

A French woman classified as a “prostitute” for fifteen years in Geneva police database violated her right to respect for private life

#### **Basic Facts**

The applicant, Sabrina Khelili, is a French national who was born in 1959 and lives in Saint Priest (France).

During a police check in Geneva in 1993, the police found Ms Khelili to be carrying calling cards which read: “Nice, pretty woman, late thirties, would like to meet a man to have a drink together or go out from time to time. Tel. no. ...” Following this discovery Ms Khelili alleged that the Geneva police entered her name in their records as a prostitute, despite her insistence that she had never been one. The police attested that they were basing their work on the cantonal law on data protection which authorised the police to manage records that might contain personal data for as long as was necessary to enable them to carry out their duties (namely to punish offences and prevent crimes and misdemeanours). In November 1993, as a preventive measure, the Federal Aliens Office issued a two-year ban on her residing in Switzerland.

In 2001 two criminal complaints of threatening and insulting behaviour were lodged against Ms Khelili. In 2003 she found out from a letter issued by the Geneva police that the word “prostitute” still figured in the police files. In May 2005 Ms Khelili was given a suspended sentence for 20 days for two additional complaints of insulting and abusive use of telecommunication installations lodged against her in 2002 and 2003.

In July 2005 the chief of police certified that the word describing her profession in the police database had been replaced with “dressmaker”. After having found out, in 2006, during a telephone conversation that the word “prostitute” still figured in the police computer files, Ms Khelili requested that the information relating to prostitution be deleted from the police records. In 2006 the chief of police confirmed in a letter that that had been done. Ms Khelili also requested that data concerning criminal complaints of threatening and insulting behaviour lodged against her in 2001, which also included the word “prostitute”, be deleted. That request was refused on the ground that such information had to be kept as a preventive measure, given her previous infringements. Ms Khelili argued that maintaining that word in her files would make her day-today life more problematic, because such information would be communicated to her potential future employers.

#### **Law – Article 8**

The Court agreed that in today's case, the interference with Ms Khelili's rights had a legal basis in domestic law. The Court also recognised that Ms Khelili's data was retained for the purpose of the prevention of disorder or crime and the protection of the rights of others.

However, the Court noted that the word "prostitute" as a profession had been deleted from the police database but that that word had not been corrected in connection with criminal proceedings relating to the complaints lodged against Ms Khelili. The Court reiterated that the word at issue could damage Ms Khelili's reputation and make her day-to-day life more problematic, given that the data contained in the police records might be transferred to the authorities. That was all the more significant because personal data was currently subject to automatic processing, thus considerably facilitating access to and the distribution of such data. Ms Khelili therefore had a considerable interest in having the word "prostitute" removed from the police records.

The Court took account, firstly, of the fact that the allegation of unlawful prostitution appeared to be very vague and general and that the link between Ms Khelili's conviction for threatening and insulting behaviour and retention of the word "prostitute" was not sufficiently close. It further noted the contradictory behaviour of the authorities; despite confirmation from the police that the word "prostitute" had been corrected, Ms Khelili learned that that word had been retained on the police computer records.

Consequently, the Court concluded that the storage in the police records of allegedly false data concerning her private life had breached Ms Khelili's right to respect for her private life and considered that the retention of the word "prostitute" for years was neither justified nor necessary in a democratic society.

#### **Article 41 (Just Satisfaction)**

The Court ordered Switzerland to pay Ms Khelili 15,000 euros (EUR) in respect of nonpecuniary damage and rejected the application in respect of costs and expenses.

**59. Eur. Court of HR, Axel Springer AG v. Germany, judgment of 7 February 2012, application no. 39954/08. Media coverage of celebrities' private lives: acceptable if in the general interest and if in reasonable balance with the right to respect for private life.**

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**no. 39954/08**  
**07.02.2012**

Press release issued by the Registrar

**AXEL SPRINGER AG v. GERMANY**

The injunction prohibiting any further publication of newspaper articles about a celebrity violated Article 10

**Basic Facts**

The applicant company, Axel Springer AG ("Springer"), is registered in Germany. It is the publisher of the *Bild*, a national daily newspaper with a large circulation.

In September 2004, the *Bild* published a front-page article about X, a well-known television actor, being arrested in a tent at the Munich beer festival for possession of cocaine. The article was supplemented by a more detailed article on another page and was illustrated by three pictures of X. It mentioned that X, who had played the role of a police superintendent in a popular TV series since 1998, had previously been given a suspended prison sentence for possession of drugs in July 2000. The newspaper published a second article in July 2005, which reported on X being convicted and fined for illegal possession of drugs after he had made a full confession. Immediately after the first article appeared, X brought injunction proceedings against Springer with the Hamburg Regional Court, which granted his request and prohibited any further publication of the article and the photos. The prohibition to publish the article was eventually upheld by the court of appeal in June 2005, the judgment concerning the photos was not challenged by Springer.

In November 2005, Hamburg Regional Court prohibited any further publication of almost the entire article, on pain of penalty for non-compliance, and ordered Springer to pay an agreed penalty. The court held in particular that the right to protection of X's personality rights prevailed over the public's interest in being informed, even if the truth of the facts related by the daily had not been disputed. The case had not concerned a serious offence and there was no particular public interest in knowing about X's offence. The judgment was upheld by the Hamburg Court of Appeal and, in December 2006, by the Federal Court of Justice.

In another set of proceedings concerning the second article, about X's conviction, the Hamburg Regional Court granted his application on essentially the same grounds as those set out in its judgment on the first article. The judgment was upheld by the Hamburg Court of Appeal and, in June 2007, by the Federal Court of Justice.

In March 2008, the Federal Constitutional Court declined to consider constitutional appeals lodged by the applicant company against the decisions.

**Law – Article 10**

It was undisputed between the parties that the German courts' decisions had constituted an interference with Springer's right to freedom of expression under Article 10. It was further

common ground that the interference was prescribed by German law and that it had pursued a legitimate aim, namely the protection of the reputation of others.

As regards the question whether the interference had been necessary in a democratic society, the Court noted that the articles in question, about the arrest and conviction of the actor, concerned public judicial facts, of which the public had an interest in being informed. It was in principle for the national courts to assess how well known a person was, especially where that person, as the actor concerned, was mainly known at national level. The court of appeal had found that, having played the role of a police superintendent over a long period of time, the actor was well known and very popular. The Court thus considered that he was sufficiently well known to qualify as a public figure, which reinforced the public's interest in being informed of his arrest and the proceedings against him.

While the Court could broadly agree with the German courts' assessment that Springer's interest in publishing the articles was solely due precisely to the fact that it was a well-known actor who had committed an offence – which would not have been reported on if committed by a person unknown to the public – it underlined that the actor had been arrested in public at the Munich beer festival. The actor's expectation that his private life would be effectively protected had furthermore been reduced by the fact that he had previously revealed details about his private life in a number of interviews.

According to a statement by one of the journalists involved, the truth of which had not been contested by the German Government, the information published in the *Bild* in September 2004 about the actor's arrest had been obtained from the police and the Munich public prosecutor's office. It therefore had a sufficient factual basis, and the truth of the information related in both articles was not in dispute between the parties.

Nothing suggested that Springer had not undertaken a balancing exercise between its interest in publishing the information and the actor's right to respect for his private life. Given that Springer had obtained confirmation of the information conveyed by the prosecuting authorities, it did not have sufficiently strong grounds for believing that it should preserve the actor's anonymity. It could therefore not be said to have acted in bad faith. In that context, the Court also noted that all the information revealed by Springer on the day on which the first article appeared was confirmed by the prosecutor to other magazines and to television channels.

The Court noted, moreover, that the articles had not revealed details about the actor's private life, but had mainly concerned the circumstances of his arrest and the outcome of the criminal proceedings against him. They contained no disparaging expression or unsubstantiated allegation, and the Government had not shown that the publication of the articles had resulted in serious consequences for the actor. While the sanctions imposed on Springer had been lenient, they were capable of having a chilling effect on the company. The Court concluded that the restrictions imposed on the company had not been reasonably proportionate to the legitimate aim of protecting the actor's private life. There had accordingly been a violation of Article 10.

#### **Article 41 (Just Satisfaction)**

The Court held that Germany was to pay Axel Springer AG 17,734.28 euros (EUR) in respect of pecuniary damage and EUR 32,522.80 in respect of costs and expenses.

#### **Separate Opinions**

In the case *Axel Springer AG*, Judge López Guerra expressed a dissenting opinion, joined by Judges Jungwiert, Jaeger, Villiger and Poalelungi, which is annexed to the judgment.

**60. Eur. Court of HR, *Von Hannover v. Germany (no. 2)*, judgment of 7 February 2012, applications nos. 40660/08 and 60641/08, Applicant complained about refusal of domestic courts to issue injunction restraining further publication of a photograph of a famous couple taken without their knowledge**

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**no.s 40660/08 and 60641/08  
07.02.2012**

Press release issued by the Registrar

**VON HANNOVER v. GERMANY (No. 2)**

Refusal of domestic courts to issue injunction restraining further publication of a photograph of a famous couple taken without their knowledge

**Basic Facts**

The applicants were Princess Caroline von Hannover, daughter of the late Prince Rainier III of Monaco, and her husband Prince Ernst August von Hannover. Since the early 1990s Princess Caroline had sought, often through the courts, to prevent the publication of photographs of her private life in the press. Two series of photographs, published in German magazines in 1993 and 1997, had been the subject of litigation in the German courts that had led to leading judgments of the Federal Court of Justice in 1995 and of the Federal Constitutional Court in 1999 dismissing her claims. Those proceedings were the subject of the European Court's judgment in *Von Hannover v. Germany* (the first *Von Hannover* judgment, no. 59320/00, 24 June 2004), in which the Court found a violation of Princess Caroline's right to respect for her private life under Article 8.

Following that judgment the applicants brought further proceedings in the domestic courts for an injunction restraining further publication of three photographs which had been taken without their consent during skiing holidays between 2002 and 2004 and had already appeared in two German magazines. The Federal Court of Justice granted an injunction in respect of two of the photographs, which it considered did not contribute to a debate of general interest. However, it refused an injunction in respect of the third photograph, which showed the applicants taking a walk during a skiing holiday in St Moritz and was accompanied by an article reporting on, among other issues, Prince Rainier's poor health. That decision was upheld by the Federal Constitutional Court, which found that the Federal Court of Justice had had valid grounds for considering that the reigning prince's poor health was a subject of general interest and that the press had been entitled to report on the manner in which his children reconciled their obligations of family solidarity with the legitimate needs of their private life, among which was the desire to go on holiday. The Federal Court of Justice's conclusion that the photograph had a sufficiently close link with the event described in the article was constitutionally unobjectionable.

**Law – Article 8**

In response to the applicants' submission that the domestic courts had not taken sufficient account of the Court's decision in the first *Von Hannover* judgment, the Court observed that it was not its task to examine whether Germany had satisfied its obligations under Article 46 of the Convention regarding execution of that judgment: that was the responsibility of the



Committee of Ministers. The present applications thus concerned only the new proceedings. Likewise, it was not the Court's task to review the relevant domestic law and practice in abstracto following the changes the Federal Court of Justice had made to its earlier case-law in the wake of the first *Von Hannover* judgment; instead its role was to determine whether the manner in which the law and practice had been applied to the applicants had infringed Article 8.

In applying its new approach the Federal Court of Justice had granted an injunction in respect of two of the photographs on the grounds that neither they, nor the articles accompanying them, contributed to a debate of general interest. As regards the third photograph, however, it had found that Prince Rainier's illness and the conduct of the members of his family at the time qualified as an event of contemporary society on which the magazines were entitled to report and to include the photograph to support and illustrate the information being conveyed. The Court found that the domestic courts' characterisation of Prince Rainier's illness as an event of contemporary society could not be considered unreasonable and it was able to accept that the photograph, considered in the light of the article, did at least to some degree contribute to a debate of general interest (in that connection, it noted that the injunctions restraining publication of the other two photographs, which showed the applicants in similar circumstances, had been granted precisely because they were being published purely for entertainment purposes). Furthermore, irrespective of the question to what extent Princess Caroline assumed official functions on behalf of the Principality of Monaco, it could not be claimed that the applicants, who were undeniably very well known, were ordinary private individuals. They had to be regarded as public figures. As to the circumstances in which the photographs had been taken, this had been taken into account by the domestic courts, which found that the applicants had not adduced any evidence to show that the photographs had been taken surreptitiously, in secret or in otherwise unfavourable conditions.

In conclusion, the domestic courts had carefully balanced the publishing companies' right to freedom of expression against the applicants' right to respect for their private life. In so doing, they had attached fundamental importance to the question whether the photographs, considered in the light of the accompanying articles, had contributed to a debate of general interest and had also examined the circumstances in which they had been taken. The Federal Court of Justice had changed its approach following the first *Von Hannover* judgment and the Federal Constitutional Court, for its part, had not only confirmed that approach, but had also undertaken a detailed analysis of the Court's case-law in response to the applicants' complaints that the Federal Court of Justice had disregarded it. In those circumstances, and regard being had to the margin of appreciation enjoyed by the national courts when balancing competing interests, the domestic courts had not failed to comply with their positive obligations under Article 8.

**Conclusion:** no violation.

**61. Eur. Court of HR, E.S. v. Sweden, judgment of 21 June 2012, application no. 5786/08. Sweden did not fail to protect 14-year old girl after her stepfather attempted to film her naked.**

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**no. 5786/08  
21.06.2012**

Press release issued by the Registrar

### **E.S. v. SWEDEN**

The Swedish legal system did not fail to provide protection to the applicant against her stepfather's violation of her personal integrity by attempting to secretly film her naked when she was 14 years old

#### **Basic Facts**

The applicant, E. S., is a Swedish national who was born in 1987 and lives in Ludvika (Sweden).

In 2002, when she was 14 years old, she discovered that her stepfather had hidden a video camera in the laundry basket in the bathroom, which was in recording mode and directed towards the spot where she normally undressed.

E.S.'s mother reported the incident to the police about two years later and the stepfather was prosecuted for sexual molestation. The district court found that he had had a sexual intent when filming his stepdaughter nude, despite there being no film as it was burnt by the mother after she discovered the incident.

The stepfather was convicted of sexual molestation by the first instance court. He was finally acquitted on appeal. The appeal court concluded that while his motive had been to film the girl for a sexual purpose, filming someone was not a crime in itself as in Swedish law there was no general prohibition against filming an individual without his or her consent. While the act in question was a violation of the girl's personal integrity, the stepfather could not be held criminally responsible for the isolated act of filming her without her knowledge. His appeal on cassation was dismissed.

#### **Law – Article 8**

The Court recalled that, under the European Convention, States were not only expected to do no harm, but they were also obliged to act in order to protect. That included the sphere of relations between individuals themselves.

While States enjoyed in principle a wide discretion as to what measures to take in order to ensure respect for private life, putting in place effective criminal law provisions was required to deter people from harming others, especially when the most intimate aspects of people's private lives were concerned. At the same time, only significant flaws in law and practice would result in a breach of Article 8 of the Convention.

The Court was satisfied that, although Swedish law contained no provision about covert filming, laws were in place which could, at least in theory, cover acts such as the one in this case. Thus, following the incident and its reporting to the police, a criminal investigation had been opened. The matter had been examined by courts of three levels of jurisdiction before which the girl had been legally represented and in a position to claim damages. The first

instance court had convicted E.S.'s stepfather and the second instance court had acquitted him.

Furthermore, the court of appeal, in its judgment acquitting the stepfather of sexual molestation, had pointed out that his acts, at least theoretically, might have represented the crime of attempted child pornography under the Penal Code. The Court concluded that, at the relevant time, E.S. could have been practically and effectively protected under the Penal Code, as the stepfather could have been convicted either for child molestation or for attempted child pornography.

In addition, the Court recalled that its task was not to review legislation in the abstract. Instead, it had to confine itself to examining issues raised by the cases brought before it. It then considered whether, in the present case, the absence of a provision in the Penal Code on attempted covert filming was a significant flaw in Swedish legislation. It then noted that Sweden had taken active steps in order to combat the general problem of illicit or covert filming of individuals by issuing a proposal to criminalise certain acts of such filming in situations where the act violated personal integrity.

In the light of the above, and having regard to the fact that at the relevant time the stepfather's act was in theory covered by the Penal Code's provisions concerning sexual molestation and attempted child pornography, the Court concluded that there were no significant flaws in Swedish legislation and practice that could amount to a breach of Sweden's positive obligations under Article 8.

**Conclusion:** no violation of Article 8.

#### **Separate opinion**

Judges Spielmann, Villiger and Power-Forde expressed a joint dissenting opinion, the text of which is annexed to the judgment.

**62. Eur. Court of HR, *Godelli v. Italy*, judgment of 25 September 2012, application no. 33783/09. Confidentiality of information concerning a child's origins: the Italian system does not take account of the child's interests**

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**no. 33783/09**  
**25.09.2012**

Press release issued by the Registrar

**GODELLI v. ITALY**

Confidentiality of information concerning a child's origins: the Italian system does not take account of the child's interests

**Basic Facts**

The applicant, Anita Godelli, is an Italian national who was born in 1943 and lives in Trieste (Italy). She was abandoned at birth by her mother, who did not agree to be identified. After being placed in an orphanage she was adopted by the Godelli family (simple adoption).

At the age of ten, after learning that she had been adopted, the applicant asked her adoptive parents to provide her with details of her origins, without success. She alleged that her childhood had been very difficult because she had not known about her roots.

When she was 63 the applicant again took steps to discover her origins. Her request was refused as Italian law guarantees the right to keep a child's origins secret and the mother's right to have her wishes respected<sup>1</sup>.

Relying on Article 8 (right to respect for private and family life), Ms Godelli complained of her inability to obtain non-identifying information about her birth family. She maintained that she had suffered severe damage as a result of not knowing her personal history, having been unable to trace any of her roots while ensuring the protection of third-party interests.

**Law – Article 8**

The Court pointed out that Article 8 protected a right to identity and personal development; establishing the truth concerning one's personal identity, including the identity of one's parents, was a contributory factor in that development. The circumstances in which a child was born formed part of the child's, and subsequently the adult's, private life guaranteed by Article 8.

The Court reiterated that the issue of access to information about one's origins and the identity of one's natural parents was not of the same nature as that of access to a case record concerning a child in care or to evidence of alleged paternity. Ms Godelli had sought to trace her birth mother, who had abandoned her at birth and had expressly requested that her identity be kept secret. The interests at stake were the mother's interest in preserving her anonymity, that of the child in learning about her origins and the general interest in preventing illegal abortions and the abandonment of children other than under the proper procedure.

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<sup>1</sup> Law no 184/1983 guarantees the right to keep a child's origins secret in the absence of express authorisation by the judicial authority .

The Court stressed that an individual's interest in discovering his or her parentage did not disappear with age, quite the reverse. Although by the age of 69 Ms Godelli's personality was already formed, she had nevertheless shown a genuine interest in ascertaining her mother's identity; such conduct implied mental and psychological suffering.

In contrast to the French system examined in *Odièvre*, the Italian system, which provided no mechanism for balancing the competing interests at stake, inevitably gave blind preference to the sole interests of the birth mother, preventing Ms Godelli from requesting, as was possible under French law, the disclosure of her mother's identity with the latter's consent. A proposal to amend the relevant legislation had been before the Italian Parliament since 2008.

In principle, the choice of the means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves was a matter falling within States' discretion (margin of appreciation). However, in so far as the Italian legislation did not allow a child who had not been formally recognised at birth and who was subsequently adopted to request either access to non-identifying information concerning his or her origins or the disclosure of the mother's identity, the Court considered that the Italian authorities had failed to strike a fair balance between the interests at stake and had overstepped their margin of appreciation.

**Conclusion:** violation of Article 8

#### **Article 41 (Just Satisfaction)**

The Court held that Italy was to pay the applicant 5,000 euros (EUR) in respect of non-pecuniary damage and EUR 10,000 in respect of costs and expenses.

#### **Separate opinion**

Judge Sajó expressed a dissenting opinion, which is annexed to the judgment.

63. *Eur. Court of HR. Mitkus v. Latvia*, judgment of 2 October 2012 application no. 7259/03. The applicant complains under Article 8 of the Convention that a newspaper article disclosed information about his HIV infection and published his photo.

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no. 7259/03  
02.10.2012

### MITKUS v. LATVIA

The disclosure of the applicant's HIV infection and of his photo on a newspaper violated his rights under Article 8

#### Basic Facts

The applicant, Andris Mitkus, is a Latvian national who was born in 1959. Convicted of extortion in April 2001 and of robbery in July 2002, and sentenced to two and a half years' and eight years' imprisonment respectively, he alleged that he had been infected with HIV and hepatitis C while in prison, when medical staff had used a multiple-use syringe to take a sample of his blood, and complained that no adequate investigation had been conducted by the authorities into his allegation. He relied on Article 3 (prohibition of inhuman or degrading treatment). Further relying on Article 6 § 1 (right to a fair trial within reasonable time), he complained about the excessive length of the criminal proceedings against him. Relying on Article 6 § 3 (d) (right to examine or have examined witnesses against oneself), he also complained that the criminal courts had not heard witnesses on his behalf. Under Article 6 § 1, he further complained in particular that he had not been transported to an appeal court hearing concerning two civil claims he had brought for damages. Finally, he complained that a newspaper article which had disclosed information about his HIV infection, and had published his photo, had violated his rights under Article 8 (right to respect for private life).

#### Law – Articles 3, 6 and 8

The Court reiterates that in assessing evidence in a claim of a violation of **Article 3** of the Convention, it adopts the standard of proof "beyond reasonable doubt". In the present case the Court notes the existence of different opinions as to exactly when the medical service of Central Prison stopped using reusable syringes for blood tests. Despite this uncertainty the Court considers that reasonable doubts equally persist that the applicant was infected with HIV and hepatitis C only after his arrest. The Court has previously found that the existence of a "window period" for detecting the presence of HIV antibodies means that there exists the possibility that the infection might have been contracted prior to the person's arrest. In the light of the above, the Court finds that the material in the case file does not enable it to conclude beyond all reasonable doubt that the applicant was infected with HIV and hepatitis C after his incarceration. It follows that this complaint is manifestly ill-founded. Nevertheless, the Court finds a violation of Article 3 with regards to (the lack of) investigations of the facts alleged by the applicant according to national law.

With regards to the applicant's claims under **Article 6**, the Court considers that the applicant has failed to demonstrate that the fact that the victim's absence from the proceedings

impaired his defence rights to such an extent as to render the whole proceedings unfair. The applicant was convicted on the basis of solid evidence (testimonies of witnesses and his co-defendants, expert reports, and so on). There has thus been no violation of Article 6 on account of the victim's absence from the applicant's criminal trial. However, the Court also notes that the respondents were present and given an opportunity to make oral submissions to appeal courts in both civil cases instituted by the applicant. The applicant himself was absent, despite having requested that his attendance be ensured. In those circumstances the Court cannot but conclude that the applicant was placed at a significant disadvantage vis-à-vis the respondents. The Court does not exclude that if the circumstances of the case were different and the applicant had been informed in sufficient time that he would not be transported to the hearings, it would not have been contrary to Article 6 § 1 of the Convention for him to be required to appoint a representative should he have wished to submit oral arguments to the court. However, in the proceedings under review the applicant did not receive any advance notification that he would not be able to attend the hearings in person. The appeal courts did nothing to rectify the inequality of arms thus created. There has accordingly been a violation of Article 6 § 1 due to the applicant's absence from the hearings of the appeal courts in the civil proceedings between him and Central Prison and between him and SIA "Mediju nams".

With regards to the claim under **Article 8**, The Court has previously held that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, inter alia, personal information relating to a patient. The Court sees no reason to depart from that line of reasoning in the present case, which concerns the publication in a newspaper of the applicant's photo, information concerning his health, and his first name and the first letter of his surname. The Court accordingly finds that the applicant's complaint falls within the scope of Article 8 of the Convention, which has also not been disputed by the parties. Concerning the Government's argument that in the present case the alleged interference with the applicant's right to respect for his private life was not attributable to the State, the Court notes that, although the object of Article 8 of the Convention is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure the right even in the sphere of relations between individuals. What this means is that the Court will need to determine whether the respondent State failed to protect the applicant's Article 8 rights from interference by other individuals. The Court reiterates that, as regards such positive obligations, the notion of "respect" for private life is not clear-cut. In view of the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention, account being taken of the needs and resources of the community and of individuals. The Court nonetheless notes that Article 8, like any other provision of the Convention or its protocols, must be interpreted in such a way as to guarantee not rights that are theoretical or illusory but rights that are practical and effective. In particular in cases concerning newspaper publications, the Court has previously held that the protection of private life has to be balanced, among other things, against the freedom of expression guaranteed by Article 10 of the Convention. It is therefore important to

establish whether in the present case the informative value of the publication in question was sufficient to justify an interference with the right to respect for a person's private life.

The Government suggested that the informative value of the publication in Rīgas Balss derived from the fact that the article reported on unprecedented court proceedings in which representatives of the penitentiary system had been accused of infecting a prisoner with HIV. The Court has indeed previously recognised the publicity of court proceedings and the quality of the work of the judiciary as pertinent topics with an informative value. While the Court recognises that informing the general public about hot topics of jurisprudence is indeed a worthy cause, it remains to be determined whether the Latvian courts struck the correct balance between journalistic freedom and the degree of interference in the applicant's private life. The considerations to be taken into account when appraising the degree of interference with a person's private life are the extent of that person's pre-existing public exposure and the nature of the information disclosed about that person.

With regard to the degree of interference, the Court in its case-law has vigorously defended the privacy rights of individuals who have not consciously and intentionally submitted themselves to public scrutiny. The same degree of protection is not afforded to public figures. It is evident from the case file that the applicant is not a public figure, however that term might be interpreted, and there is no suggestion to the contrary in the submissions of the Government.

Concerning the nature of the disclosed information, the Court has previously emphasised the importance of the protection of personal data, and in particular of medical data, paying particular attention to the importance of the protection of the confidentiality of a person's HIV status, inter alia because of the risk of ostracism of HIV-positive persons.

The Court notes that the applicant's features were clearly visible and distinguishable in the photo that appeared in the publication at issue. Since the article also mentioned his first name and the first letter of his surname as well as details of his past criminal convictions and his place of imprisonment, his identification by his fellow prisoners and other persons was perfectly possible. The applicant has furthermore indicated to the Court that as a result of the publication of the disputed article he was ostracised by other prisoners because of the information about his HIV infection.

As regards the examination of whether the impugned article was written in good faith and in accordance with the ethics of the profession of journalist, The Court has previously found that diligent journalists ought to attempt to contact the subjects of their articles and to give those persons a possibility to comment on the contents of such articles and consent or object to the publishing of the subject's photo. The applicant was not contacted by any representatives of Rīgas Balss. In the light of the applicant's objection to the publication of his photograph and the corresponding order of the Rīga Regional Court, Rīgas Balss could have informed the public about the pending proceedings concerning the alleged negligence of the medical staff at Central Prison without publishing his picture, without the article losing much of its informative value, if any at all.

Taking into account the considerations outlined above and in particular the fact that, as interpreted by the domestic courts, at the relevant time the national data protection laws were not binding on privately published newspaper, the Court finds that the domestic authorities have failed to protect the applicant's right to respect for his private life from interference by the publication of his personal data in Rīgas Balss. There has accordingly been a violation of Article 8 § 1 of the Convention.



**Conclusion:** violation of Articles 3, 6§1 and 8

**Article 41 (Just Satisfaction)**

EUR 16,000 (non-pecuniary damage)

**64. Eur. Court of HR, *Alkaya v. Turkey*, judgment of 9 October 2012, application no. 42811/06. Press disclosure of a celebrity's address breached her right to respect for her private and family life.**

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**no. 42811/06**  
**09.10.2012**

Press release issued by the Registrar

**ALKAYA v. TURKEY**

The disclosure by the press of the home address of a Turkish actress whose apartment had been burgled violated the Convention

**Basic Facts**

The applicant, Ms Yasemin Alkaya, is a Turkish national who was born in 1964 and lives in Istanbul (Turkey). She is well known in Turkey as a cinema and theatre actress. On the morning of 12 October 2002 her home was broken into while she was there. She alerted the police and lodged a complaint.

On 15 October 2002 the daily newspaper *Akşam* published an article on the break-in, by a photograph of the applicant and giving her exact address.

On 3 December 2002 Ms Alkaya brought an action for damages against the newspaper in the Zeytinburnu District Court ("the District Court"). On 29 March 2005 the District Court dismissed the action, holding that Ms Alkaya, because of her celebrity status, was a public figure and that the disclosure of her address could not be considered capable of infringing her rights. Ms Alkaya lodged an appeal on points of law. Her lawyer submitted that, since the publication of the article in question, the applicant had been regularly disturbed in her home and that she had become fearful and afraid of staying at home on her own. The lawyer further argued that her client's personality rights had been infringed. On 12 June 2006 the Court of Cassation upheld the first-instance judgment.

**Law – Article 8**

The Court pointed out that the concept of private life was a broad term which encompassed the right to personal autonomy and personal development, the person's physical and moral integrity and the right to live privately. The guarantee afforded by Article 8 was intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings.

The Court further reiterated that Article 8 protected the individual's right to respect for his or her home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Accordingly, breaches of the right to respect of the home included those that were not concrete or physical. The choice of one's place of residence was an essentially private matter and the free exercise of that choice formed an integral part of the sphere of personal autonomy protected by Article 8. A person's home address constituted personal data or information which fell within the scope of private life and as such was eligible for the protection granted to the latter.

The Court observed that, whereas private individuals unknown to the public could claim particular protection of their right to private life, the same did not apply to public figures. Nevertheless, in certain circumstances, even where a person was known to the general

public, he or she could rely on a “legitimate expectation” of protection of and respect for his or her private life.

In the present case the Court noted that it was not a State act that was at issue, but the level of protection afforded by the domestic courts to Ms Alkaya’s private life, a level she considered to be insufficient. The Court had to ascertain whether the State had struck a fair balance between Ms Alkaya’s right to protection of her private life under Article 8 of the Convention and the right of the opposing party to freedom of expression under Article 10 of the Convention. Ms Alkaya had in no way sought to challenge the publication of an article reporting on the burglary in her home, but rather had complained of the disclosure of her home address which, in her view, was of no public interest.

In that regard the Court reiterated that, while the public had a right to be informed, articles aimed solely at satisfying the curiosity of a particular readership regarding the details of a person’s private life, however well known that person might be, could not be deemed to contribute to any debate of general interest to society. In the present case the Court could not discern any evidence shedding light on the supposed public-interest grounds underlying the newspaper’s decision to disclose Ms Alkaya’s home address.

The Court observed that the District Court had merely referred to Ms Alkaya’s celebrity status in finding that the disclosure of her address could not be considered capable of infringing her personality rights. Likewise, the national courts had not taken into consideration the repercussions on the applicant’s life of the disclosure of her private address in the press. In the Court’s view, this failure by the domestic courts to weigh the interests at stake could not be considered compatible with the State’s positive obligations under Article 8 of the Convention.

#### **Article 41 (Just Satisfaction)**

The Court held that Turkey was to pay the applicant 7,500 euros (EUR) in respect of non-pecuniary damage.

65. *Eur. Court of HR. M.M. v. the United Kingdom*, judgment of 13 November 2012, application no. 24029/07. The applicant complained about retention of caution on criminal record for life. The Court ruled that the retention and disclosure of the applicant's caution data accordingly could not be regarded as having been in accordance with the law.

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no. 24029/07  
13.11.2012

Press release issued by the Registrar

### **M.M. v. THE UNITED KINGDOM**

Retention of caution on criminal record for life

#### **Basic Facts**

In 2000 the applicant, who lived in Northern Ireland, was arrested by the police after disappearing with her baby grandson for a day in an attempt to prevent his departure to Australia following the breakup of her son's marriage. In view of the circumstances in which the incident had occurred, the authorities decided not to prosecute and the applicant was instead cautioned for child abduction. The caution was initially intended to remain on her record for five years, but owing to a change of policy in cases where the injured party was a child, that period was later extended to life. In 2006 the applicant was offered employment as a health worker subject to vetting, but the offer was withdrawn following a criminal-record check by the prospective employer after she disclosed the caution. In her application to the European Court, the applicant complained that the change in policy regarding retention of caution data had adversely affected her employment prospects, in breach of her right to respect for her private life.

#### **Law – Article 8**

Although data contained in the criminal record were, in one sense, public information, their systematic storing in central records meant that they were available for disclosure long after the event. In the present case, the administration of the caution had occurred almost twelve years earlier. The fact that disclosure had followed upon a request by the applicant or with her consent did not deprive her of the protection afforded to Article 8, as individuals had no real choice if the prospective employer insisted, and was entitled to insist, on disclosure.

Article 8 was thus applicable to the retention and disclosure of the caution, which amounted to interference with the applicant's right to respect for her private life. The scope and application of the system for retention and disclosure in Northern Ireland was extensive: the recording system included non-conviction disposals such as cautions, warnings and reprimands and there was a general presumption in favour of the retention of data in central records until the data subject's hundredth birthday. While there might be a need for a comprehensive record, the indiscriminate and open-ended collection of criminal record data was unlikely to comply with the requirements of Article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable and setting out the rules governing, *inter alia*, the circumstances in which data can be collected, the duration of their storage, the use to which they can be put and the circumstances in which they may be destroyed. In the instant case

however there was no statutory law in respect of Northern Ireland governing the collection and storage of data on cautions. Under the applicable guidelines the recording and initial retention of such data were intended in practice to be automatic. The criteria for review appeared to be very restrictive and to focus on whether the data were adequate and up to date. Deletion requests would be granted only in exceptional circumstances and not where the data subject had admitted the offence and the data were accurate. As to the legislation requiring disclosure in the context of a standard or enhanced criminal-record check it made no distinction based on the seriousness or circumstances of the offence, the time which had elapsed since its commission, and whether the caution was spent. The legislation did not allow for any assessment at any stage in the disclosure process of the relevance of conviction or caution data to the employment sought, or of the extent to which the data subject could be perceived as continuing to pose a risk. As a result of the cumulative effect of these shortcomings, the Court was not satisfied that there were sufficient safeguards in the system for retention and disclosure of criminal record data to ensure that data relating to the applicant's private life would not be disclosed in violation of her right to respect for her private life. The retention and disclosure of the applicant's caution data accordingly could not be regarded as having been in accordance with the law.

**Conclusion:** violation of Article 8.

66. *Eur. Court of HR. Michaud v. France*, judgment of 6 December 2012, application no. 12323/11. The applicant alleged that the information protected by lawyer – client privilege is particularly sensitive. The Court noted that the impugned interference was “in accordance with the law” within the meaning of Article 8.

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no. 12323/11  
6.12.2012

Press release issued by the Registrar

### **MICHAUD v. FRANCE**

Information protected by lawyer – client privilege is particularly sensitive

#### **Basic Facts**

The applicant was a French national and was a member of the Paris Bar and of the Bar Council (*Conseil de l'Ordre*). In July 2007 the National Bar Council (CNB) took a decision concerning the adoption of a professional regulation which placed obligations on lawyers pursuant to European Union Directives aimed at the prevention of money laundering.

This resulted in an obligation on lawyers to report possible suspicions in the area in respect of their clients where, in the context of their professional activities, they assisted them in preparing or carrying out transactions or acted as trustees. They were not subject to this obligation where the activity in question was related to court proceedings and, in principle, where they provided legal advice. Failure to comply with this regulation rendered lawyers liable to disciplinary sanctions.

An application to the *Conseil d'État* to have the decision set aside was dismissed.

#### **Law – Article 8**

The measure in question constituted an interference with the right to respect for correspondence. It also amounted to an interference with lawyers' right to respect for their “private life”, as that concept covers activities of a professional or business nature.

The Court noted, firstly, that the impugned interference was “in accordance with the law” within the meaning of Article 8, and that, as it was intended to combat money laundering and related criminal offences, it pursued one of the legitimate aims set out in Article 8, namely the prevention of disorder and the prevention of crime.

When considering the nature of the relationship between lawyers and their clients, the Court reiterated that while Article 8 protects the confidentiality of all “correspondence” between individuals, it affords strengthened protection to exchanges between lawyers and their clients. This was justified by the fact that lawyers were assigned a fundamental role in a democratic society, that of defending litigants. Yet lawyers could not carry out this essential task if they were unable to guarantee to those they were defending that their exchanges would remain confidential.

Two elements were decisive in assessing the proportionality of the measures.

Firstly, lawyers were subject to the obligation to report suspicions only in two cases: where they acted on behalf of their clients in financial or property transactions or acted as trustees; and where they assisted their clients in preparing or carrying out transactions concerning certain defined operations. Thus, the obligation to report suspicions concerned only activities

which were remote from the role of defence entrusted to lawyers, and which resembled those carried out by other professionals who were also subject to this obligation.

Secondly, the legislation specified that lawyers were not subject to the obligation where the activity in question was related to court proceedings and, in principle, when they were providing legal advice. The obligation to report suspicions did not therefore go to the very essence of the defence role which underlay legal professional privilege.

The Court also noted the fact that safeguards were in place to protect how the information was reported.

**Conclusion:** no violation of Article 8

67. *Eur. Court of HR. Bernh Larsen Holding AS and Others v. Norway*, judgment of 14 March 2013, application no. 24117/08. The applicants complained about a decision ordering them to provide the tax auditors with a copy of all data on a computer server which the three companies used jointly. The Court considered that a fair balance has been struck between the companies' right to respect for "home" and "correspondence" and their interest in protecting the privacy of persons working for them, on the one hand, and the public interest in ensuring efficient inspection for tax assessment purposes, on the other hand. Therefore it is in accordance with the law.

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**no. 24117/08**  
**14.3.2013**

Press release issued by the Registrar

### **BERNH LARSEN HOLDING AS AND OTHERS v. NORWAY**

Lack of a requirement for prior judicial authorisation - a fair balance has been struck

#### **Basic Facts**

Three applicant companies, B.L.H., a holding company, Kver and I.O.R. (and two other companies) had their business address at premises owned by Kver. They shared a common server for their respective information technology systems. In March 2004 the regional tax authorities requested one of the applicant companies, Bernh Larsen Holding (B.L.H.), to allow tax auditors to make a copy of all data on the server. While B.L.H. agreed to grant access, it refused to supply a copy of the entire server, arguing that it was owned by the second applicant company (Kver) and was also used for information storage by other companies. When Kver in turn opposed the seizure of the entire server, the tax authorities issued a notice that it, too, would be audited. The two companies then agreed to hand over a backup tape of the data of the previous months, but immediately lodged a complaint with the central tax authority and requested the speedy return of the tape, which was sealed pending a decision on their complaint. After being informed by Kver that three other companies also used the server and were affected by the seizure, the tax authorities notified those companies that they would also be audited. One of them, Increased Oil Recovery (I.O.R.), subsequently lodged a complaint with the central tax authority. In June 2004 the central tax authority withdrew the notice that an audit of Kver and I.O.R. would be carried out, but confirmed that B.L.H. would be audited and was obliged to give the authorities access to the server. That decision was upheld by the Supreme Court.

#### **Law – Article 8**

The measure in question constituted an interference with their "home" and "correspondence" for the purpose of Article 8. It was unnecessary to determine whether there had also been interference with the companies' "private life" as none of the employees whose personal e-mails and correspondence were allegedly backed up on the server had lodged a complaint. The Court would, however, take the companies' legitimate interest in ensuring the protection



of the privacy of persons working for them into account when examining whether the interference was justified.

The Court noted firstly that the interference had a basis in national law and the law in question was accessible. The Court was also satisfied that it was sufficiently precise and foreseeable. As the Supreme Court had explained, the tax authorities needed, for reasons of efficiency, relatively wide scope to act at the preparatory stage. That was not to say that the relevant provisions had conferred on the tax authorities an unfettered discretion, as the object of an order to access documents was clearly defined. In particular, the authorities could not require access to archives belonging entirely to other taxpayers. Where, however, as here, the applicant companies' archives were not clearly separated, but "mixed", it was reasonably foreseeable that the tax authorities should not have to rely on the taxpayers' own indications of where to find relevant material, but should have access to all data on the server to appraise the matter for themselves. The Court further found that the interference had pursued the legitimate aim of securing the economic well-being of the country.

Secondly, as to whether the measure had been necessary in a democratic society, there was no reason to call into doubt the Norwegian legislatures. The tax authorities' justification for obtaining access to the server and a backup copy with a view to carrying out a review of its contents on their premises had therefore been supported by reasons that were both relevant and sufficient.

Also, as to proportionality, the procedure had been accompanied by a number of safeguards. One of the applicant companies had been notified of the tax authorities' intention to carry out a tax audit a year in advance, and both its representatives and those of another of the applicant companies had been present and able to express their views. The companies were entitled to object to the measure and had done so and the backup copy had been placed in a sealed envelope and deposited at the tax office pending a decision on their complaint. The relevant legal provisions included further safeguards, furthermore, once the review had been completed, the backup copy would be destroyed.

Finally, the nature of the interference was not of the same seriousness and degree as was ordinarily the case in search and seizure operations carried out under the criminal law. The consequences of a taxpayer's refusal to cooperate were exclusively administrative. Moreover, the measure had in part been made necessary by the applicant companies' own choice to opt for "mixed archives" on a shared server.

**Conclusion:** no violation of Article 8

68. *Eur. Court of HR. Saint-Paul Luxembourg S.A. v. Luxembourg*, judgment of 18 April 2013, application no. 26419/10. The applicant argued that the search and seizure operation carried out at his company's premises had been intrusive. The incident amounted to interference with the applicant company's right to respect for its "home". The Court recognized that the interference had been in accordance with the law and had pursued several legitimate aims but ruled that these measures weren't necessary at this stage of the investigation.

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**no. 26419/10**  
**18.4.2013**

Press release issued by the Registrar

### **SAINT-PAUL LUXEMBOURG S.A. v. LUXEMBOURG**

Order for search and seizure couched in wide term at newspaper – disproportionate to the aim sought to be achieved

#### **Basic Facts**

Domingos Martins, is a journalist for the newspaper *Contacto*, which is edited by the applicant company Saint-Paul Luxembourg S.A.. In December 2008, the applicant company's newspaper published an article under the name of "Domingos Martins". In this article he described the situation of families who had lost the custody of their children, and named some of the persons concerned. In January 2009, the prosecuting authorities opened a judicial investigation concerning the author of the article for a breach of the legislation on the protection of minors and for defamation. In March 2009, an investigating judge issued a search and seizure warrant in respect of the registered office of the applicant company in its capacity as the newspaper's publisher. In May 2009, police officers visited the newspaper's premises. The journalist gave them a copy of the newspaper, a notebook and various documents used in preparing the article, and one of the police officers inserted a USB key in the journalist's computer. All the applications made by the applicant company and the journalist were rejected.

#### **Law – Article 8**

The measure in question constituted an interference with the company's right to respect for its home. The search and seizure operation carried out at the applicant company's premises had been intrusive, notwithstanding the fact that the journalist had cooperated with the police, who could have executed the measure by force had he refused to cooperate.

The interference had been in accordance with the law and had pursued several legitimate aims. Firstly, the prevention of disorder and crime – as the measure had been designed to determine the true identity of a person facing criminal prosecution in the context of a judicial investigation and to elucidate the circumstances of a possible offence. Secondly, the protection of the rights of others, as the article in question had implicated named individuals and reported on a relatively serious matter.

The journalist had written the article under the name "Domingos Martins". The list of officially recognised journalists in Luxembourg did include in relation to the newspaper *Contacto* the name "De Araujo Martins Domingos Alberto". The similarity between the names, the unusual

combination of elements they contained and the link to the newspaper in question made the connection between the author of the article and the person on the list obvious. On the basis of that information, the investigating judge could initially have employed a less intrusive measure than a search in order to confirm the identity of the person who had written the article. The search and seizure operation had therefore not been necessary. The measures complained of had not been reasonably proportionate to the legitimate aims pursued.

**Conclusion:** violation of Article 8

**Law-Article 10**

The measure in question constituted an interference with applicant company's freedom to receive and impart information. The search and seizure operation at the applicant company's registered office had therefore been disproportionate to the aim sought to be achieved.

**Conclusion:** violation of Article 10.

**69. Eur. Court of HR. M.K. v. France, judgment of 18 April 2013, application no. 19522/09. The Court found that the absence of safeguards for collection, preservation and deletion of fingerprint records of persons suspected but not convicted of criminal offences is contrary to Article 8 of the Convention.**

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**no. 19522/09  
18.4.2013**

Press release issued by the Registrar

### **M.K. v. FRANCE**

Procedures for the retention of the data - Absence of safeguards

#### **Facts**

In 2004 and 2005 the applicant was the subject of two investigations concerning the theft of some books. He was acquitted following the first set of proceedings and the second set of proceedings was discontinued. On both occasions his fingerprints were taken and recorded in the fingerprint database. In 2006 the applicant requested the deletion of his prints from the database. His request was granted only in relation to the prints taken during the first set of proceedings. The appeals lodged by the applicant were dismissed.

#### **Law – Article 8**

The measure in question constituted a disproportionate interference with the right to respect for the private life and could not be said to be necessary in a democratic society. The system for retaining the fingerprints of persons suspected of an offence but not convicted, as applied to the applicant in the present case, did not strike a fair balance between the competing public and private interests at stake.

The Court noted, firstly, that the procedures for the gathering and retention of the data has the purpose of the database, notwithstanding the legitimate aim pursued – namely, the detection and prevention of crime – necessarily implied the addition and retention of as many entries as possible. Furthermore, the reason invoked by the public prosecutor for refusing to delete the fingerprints taken during the second set of proceedings had been the need to safeguard the applicant's interests by ensuring that his involvement could be ruled out should someone attempt to assume his identity. Besides the fact that the decree concerning the fingerprints database, unless it was interpreted particularly broadly, contained no express reference to such grounds, accepting the argument as to the supposed protection against potential identity theft by third persons would be tantamount in practice to permitting the storage of data concerning the entire French population, a measure that would clearly be excessive and redundant.

Secondly, in addition to the primary purpose of the database, which was to make it easier to trace and identify the perpetrators of serious crimes and other major offences, the legislation referred to a second purpose, namely “to facilitate the prosecution, investigation and trial of cases before the judicial authority”. It was not stated clearly that this related solely to serious crimes and other major offences. Since the legislation referred also to “persons implicated in criminal proceedings who need to be identified”, it could in practice be applied to all offences, including minor ones, in so far as this would enable the perpetrators of serious crimes and

other major offences to be identified. The present case was thus clearly distinguishable from those relating specifically to serious offences such as organised crime or sexual assault. Furthermore, the decree in question did not make any distinction based on whether or not the person concerned had been convicted by a court or had even been prosecuted.

The Court also noted the provisions of the impugned decree governing the retention of data did not afford the sufficient protection to the persons concerned.

**Conclusion:** violation of Article 8.

**70. Eur. Court of HR, Avilkina and Others v. Russia, judgment of 6 June 2013, application no. 1585/09. The applicants claimed that the unjustified disclosure of confidential medical data relating to the refusal of Jehovah's Witnesses to undergo a blood transfusion, is contrary to Article 8. The order of the disclosure of the applicants' confidential medical information without giving them any notice or opportunity to object or appeal is illegitimate.**

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**no. 1585/09  
6.6.2013**

Press release issued by the Registrar

### **AVILKINA AND OTHERS v. RUSSIA**

Unjustified disclosure of confidential medical data

#### **Basic Facts**

The applicants were the Administrative Center of Jehova's Witnesses in Russia, seated in St. Petersburg, and three private persons, Ms Avilkina, MsDubinina and Zhukova. In 2007, following several complaints against the religious organisation, the Deputy City Prosecutor of St Petersburg asked all medical institutions to report every refusal of a blood transfusion by Jehovah's Witnesses. When the second applicant underwent chemotherapy in a public hospital following a non-blood management treatment plan, her doctors informed the prosecutor's office of her case. Similarly, the fourth applicant's medical records were disclosed to the prosecutor's office after she refused the use of foreign blood for surgical treatment in a state hospital.

#### **Law – Article 8**

The measure in question constituted an interference with the right to respect for the private life. The Court recalls that the protection of personal data, including medical information, was of fundamental importance to the enjoyment of the right to respect for private life. Also, the Court acknowledged that the interests of a patient and the community as a whole in protecting the confidentiality of medical data might be outweighed by the interests of investigating crime and in the publicity of court proceedings. The competent national authorities have a margin of appreciation in this area. However, the applicants were not suspects or accused in any criminal proceedings and the prosecutor was merely conducting an investigation into the activities of a religious organisation in response to complaints received by his office. Nor did the medical facilities where the applicants underwent treatment report any instances of alleged criminal behaviour on the part of the applicants. Likewise, there was nothing to suggest that the fourth applicant's refusal of a blood transfusion was the result of pressure by other adherents of her religious beliefs and not the expression of her true will. There was consequently no pressing social need for requesting the disclosure of the confidential medical information concerning the applicants. In fact, there were other options available to the prosecutor to follow up on the complaints he had received. Despite this, the prosecutor had chosen to order the disclosure of their confidential medical information without giving the applicants any notice or opportunity to object or appeal.

**Conclusion:** violation of Article 8

71. *Eur. Court of HR. Węgrzynowski and Smolczewski v. Poland*, judgment of 16 July 2013, application no. 33846/07. The applicants complained about Court's refusal to order the newspaper to remove an article damaging the applicants' reputation from its Internet archive. The respondent State had complied with its obligation to strike a balance between the rights guaranteed under Article 8 and 10 of the Convention.

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no. 33846/07  
16.7.2013

Press release issued by the Registrar

### **WĘGRZYNOWSKI AND SMOLCZEWSKI v. POLAND**

Newspaper was not obliged to completely remove from its Internet archive article found by a court to be inaccurate

#### **Basic Facts**

The applicants are lawyers who won a libel case against two journalists working for the daily newspaper Rzeczpospolita following the publication of an article. The domestic courts convicted them because the journalists' allegations were largely based on gossip and hearsay. These obligations were complied with. Subsequently, the applicants discovered that the article remained accessible on the newspaper's website. This resulted in fresh proceedings in order for its removal from the website. Their claim was dismissed on the grounds that ordering removal of the article would amount to censorship. However, the court indicated that it would have given serious consideration to a request for a footnote or link informing readers of the judgments in the original libel proceedings to be added to the website article. That judgment was upheld on appeal.

#### **Law – Article 8**

This measure in question respects the right for the private life and reputation. Regarding the first set of proceedings, the Court noted in regards of the first applicant that during the first set of civil proceedings he had failed to make claims regarding the publication of the impugned article on the Internet. The domestic courts had therefore not been able to decide that matter. The applicant had not advanced any arguments to justify his failure to address the issue of the article's presence online during the first set of proceedings, especially in view of the fact that the Internet archive of Rzeczpospolita was a widely known and frequently used resource. As to the second set of proceedings, the Court accepted that it was not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which had in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations. Furthermore, Article 10 of the Convention protects the legitimate interest of the public in access to public Internet archives of the press. Also, the domestic courts pointed out that it would be desirable to add a comment to the article on the newspaper's website informing the public of the outcome of the first set of proceedings. The Court judged that this demonstrated their awareness of how important publications on the Internet could be for the effective protection of individual rights and of the importance of giving full information about judicial decisions concerning a contested article



available on the newspaper's website. The second applicant had not, however, requested the addition of a reference to the judgments in his favour.

**Conclusion:** no violation of Article 8

**72. Eur. Court of HR. Radu v. the Republic of Moldova, judgment of 15 April 2014, application no. 50073/07. The applicant complained about a State-owned hospital's disclosure of medical information to her employer. The proceedings were brought against the hospital and the Police Academy claiming compensation for a breach of her right to private life. The Court found that the interference was not "in accordance with the law" within the meaning of Article 8.**

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**no. 50073/07  
15.4.2014**

Press release issued by the Registrar

### **RADU v. THE REPUBLIC OF MOLDOVA**

Hospital's disclosure of sensitive information about applicant's health to her employer  
breached the Convention

#### **Basic Facts**

The applicant, Liliana Radu, is a Moldovan national who was born in 1969 and lives in Chişinău. The case concerned her complaint about a State-owned hospital's disclosure of medical information about her to her employer. She was a lecturer at the Police Academy and in August 2003, pregnant with twins, was hospitalised for a fortnight due to a risk of her miscarrying. She gave a sick note certifying her absence from work. However, the Police Academy requested further information from the hospital concerning her sick leave, and it replied in November 2003, providing more information about her pregnancy, her state of health and the treatment she had been given. The information was widely circulated at Ms Radu's place of work and, shortly afterwards, she had a miscarriage due to stress. She brought proceedings against the hospital and the Police Academy claiming compensation for a breach of her right to private life, which were ultimately dismissed in May 2007 by the Supreme Court as it considered that the hospital had been entitled to disclose the requested information to Ms Radu's employer. Relying in particular on Article 8 (right to respect for private and family life), Ms Radu complained about the hospital's disclosure of sensitive information about her health to her employer.

#### **Law – Article 8**

It is undisputed between the parties, and the Court agrees, that the disclosure by the CFD to the applicant's employer of such sensitive details about the applicant's pregnancy, her state of health and the treatment received constituted an interference with her right to private life. An interference will contravene Article 8 unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 of that Article, and furthermore is "necessary in a democratic society" in order to achieve the aim. The expression "in accordance with the law" not only necessitates compliance with domestic law, but also relates to the quality of that law. The Court reiterates that domestic law must indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public

authorities so as to ensure to individuals the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society. In fact, the Supreme Court merely stated that the CFD was entitled to disclose the information to the applicant's employer, without citing any legal basis for such disclosure. Even assuming that the Supreme Court had intended to rely on that provision, the Court notes that under section 8 of that Law a doctor would not be entitled to disclose information of a personal nature even to the applicant's employer without her consent. In fact, the Court notes that all the relevant domestic and international law cited above expressly prohibits disclosure of such information to the point that it even constitutes a criminal offence. There are exceptions to the rule of nondisclosure; however, none of them seems to be applicable to the applicant's situation. Indeed, the Government did not show that any such exception was applicable. It follows that the interference complained of was not "in accordance with the law" within the meaning of Article 8. Accordingly, there is no need to examine whether the interference pursued a legitimate aim or was "necessary in a democratic society".

**Conclusion:** Violation of Article 8

**Article 41 (Just Satisfaction)**

EUR 4,500 (non-pecuniary damage) and EUR 1,440 (costs and expenses)

**73. Eur. Court of HR. L.H. v Latvia, judgment of 29 April 2014, application no. 52019/07. The applicant complained about a lack of precision of domestic law that allows public authorities the collection of his medical data. The Court found that the applicable law had failed to indicate with sufficient clarity the scope of discretion conferred on competent authorities and manner of its exercise.**

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**no. 52019/07**  
**29.4.2014**

Press release issued by the Registrar

### **L.H. v. LATVIA**

Collection of applicant's medical data - Lack of precision of domestic law

#### **Basic Facts**

On 16 June 1997 the applicant gave birth in the Cēsis District Central Hospital. During her delivery, the surgeon performed tubal ligation on the applicant without her consent. The applicant filed a civil action in damages against the hospital which was ultimately successful. At the request of the hospital's Director the Inspectorate of Quality Control for Medical Care and Fitness for Work ("MADEKKI") carried out an assessment and evaluation of the medical treatment the applicant had received in his institution.

During the subsequent administrative inquiry, MADEKKI requested and received the applicant's medical files from three different medical institutions and ultimately issued a report concluding that no laws had been violated during the applicant's childbirth. The applicant subsequently challenged the lawfulness of the administrative inquiry undertaken by MADEKKI, but her claim was dismissed, as the Senate of the Supreme Court having found that domestic law authorised MADEKKI to examine the quality of medical care provided in medical institutions at their request.

#### **Law – Article 8**

The measure in question constituted an interference with the private right. The Court found that the applicable law had failed to indicate with sufficient clarity the scope of discretion conferred on competent authorities and the manner of its exercise.

Firstly, the Court had to examine whether the applicable domestic law had been formulated with sufficient precision and whether it afforded adequate safeguards against arbitrariness. In this connection it firstly observed that the applicable legal norms described the competence of MADEKKI in a very general manner and that there did not seem to be a legal basis for a hospital to seek independent expert advice from it in ongoing civil litigation.

Secondly, the domestic law in no way limited the scope of private data that could be collected by MADEKKI during such inquiries, which resulted in it collecting medical data on the applicant relating to a seven-year period indiscriminately and without any prior assessment of whether such data could be potentially decisive, relevant or of importance for achieving whatever aim might have been pursued by the inquiry. Finally, the fact that the inquiry had commenced seven years after the applicant's sterilisation raised doubts as to whether the data collection was "necessary for purposes of medical treatment [or] provision or administration of health care services" as required under domestic law.

**Conclusion:** violation of Article 8

**74. Eur. Court of HR. *Elberte v Latvia*, judgment of 13 January 2015, application no. 61243/08. The case concerned the removal of body tissue from Ms Elberte's deceased husband by forensic experts after his death, without her knowledge or consent. Unknown to Ms Elberte, pursuant to a State-approved agreement, tissue had been removed from her husband's body after her husband's autopsy and sent to a pharmaceutical company in Germany for the creation of bio-implants. She only learned about the course of events two years after her husband's death when a criminal investigation was launched in Latvia into allegations of wide-scale illegal removal of organs and tissues from cadavers. However, domestic authorities eventually did not establish any elements of crime.**

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**no. 61243/08  
13/01/2015**

Press release issued by the Registrar

### **ELBERTE v. LATVIA**

Removal of tissue from a deceased man's body without the knowledge or consent of his wife amounted to degrading treatment

#### **Basic Facts**

The applicant, Dzintra Elberte, is a Latvian national who was born in 1969 and lives in Sigulda (Latvia). On 19 May 2001, Ms Elberte's husband was killed in a car accident. On the following day, his body was transported to the Forensic Centre, where an autopsy was carried out. Ms Elberte first saw her deceased husband when his remains were transported back from the Forensic Centre for the funeral. His legs had been tied together and he was buried that way. About two years later, the Security Police opened a criminal inquiry into the illegal removal of organs and tissue between 1994 and 2003 in Latvia and contacted Ms Elberte, who was told that tissue had been removed from her husband's body prior to the funeral by the experts of the Forensic Centre. Under a State-approved agreement, some of his body tissue had been removed and later sent to a pharmaceutical company in Germany to be modified into bio implants. On 9 October 2003, Ms Elberte was recognised as an injured party. In December 2005 and January 2006, the prosecutors decided to discontinue the inquiry. They accepted that, under the 2004 amendments to the Law on the Protection of the Bodies of Deceased Persons and the Use of Human Organs and Tissues ("the Law"), the Latvian system was one of "presumed consent". According to the Forensic Centre specialists, this meant that "everything which was not forbidden was allowed" as opposed to an "informed consent" system, whereby tissue removal was permissible only when it was expressly allowed by the donor during his or her lifetime or by the relatives. On two occasions, on 24 February 2006 and 3 December 2007, superior prosecuting authorities examined the case-file and concluded that the inquiry should not have been discontinued. They established that the experts at the Forensic Centre had breached provisions of the Law and that the tissue removal had been unlawful. The decision to discontinue was quashed on both occasions and the case file sent back to the Security Police. During the course of the fresh investigation which started in March 2008, it was established that in 1999 tissue had been removed from 152 people; in

2000, from 151 people; in 2001, from 127 people; and in 2002, from 65 people. In exchange for the supply of tissue to the company in Germany, the Forensic Centre had organised the purchase of different medical equipment, instruments, technology and computers for medical institutions in Latvia. On 27 June 2008 a new decision to discontinue the criminal inquiry was adopted, in which it was reiterated that the experts did not have any legal obligation to inform anyone about their right to consent to or refuse organ or tissue removal. Notably, the Law provided for the right of the closest relatives to object to the removal of the deceased person's organs and tissue, but did not impose such an obligation. Consequently, the Forensic Centre experts could not be convicted of breaching an obligation which was not clearly established by law.

### **Law – Article 8**

The Court noted that the issue in question was the right of Ms Elberte to express wishes concerning the removal of her husband's tissue after his death and the domestic authorities' alleged failure to ensure the legal and practical conditions for the exercise of that right.

The Court observed that the very authorities responsible for the enforcement of the applicable law. In particular the Security Police and the supervising prosecutors – had disagreed as to its scope. Such disagreement had inevitably indicated a lack of sufficient clarity. Indeed, although Latvian law set out the legal framework allowing the closest relatives to express consent or refusal in relation to tissue removal, it had not clearly defined the scope of the corresponding obligation or discretion left to experts or other authorities in this respect. The Court noted that the relevant European and international documents on this matter gave particular importance to establishing the relatives' views through reasonable enquiries.

In view of the large number of people from whom tissue removal had been carried out, it had been all the more important that adequate mechanisms had been in place to balance the relatives' right to express their wishes against the experts' broad discretion to decide on such matters. Because of the lack of any administrative or legal regulation, Ms Elberte had been unable to foresee how to exercise her right to express her wishes concerning the removal of her husband's tissue. The Court concluded that the relevant Latvian law lacked clarity and did not have adequate legal safeguards against arbitrariness, in breach of Article 8.

### **Law – Article 3**

The Court found that Ms Elberte's suffering had gone beyond the suffering inflicted by grief following the death of a close family member. Indeed, she had only discovered the nature and amount of tissue that had been removed from her husband's body during the proceedings before the European Court. While it could not be said that she had suffered from any prolonged uncertainty regarding the fate of her husband, she had had to face a long period of uncertainty and distress as to what organs or tissue had been taken, and in what manner and for what purpose.

Moreover, the revelation, following the general inquiry, that body tissue had been removed from hundreds of other persons over a time-span of some nine years had caused additional suffering for

Ms. Elberte. The Court further noted that she had been left for a considerable period of time to anguish over the reasons why her husband's legs had been tied together when his body had been returned to her and that, because no prosecutions had ever been brought, she had been denied redress for a breach of her personal rights relating to a very sensitive aspect of

her private life, namely consenting or objecting to the removal of tissue from her husband's body.

The Court underlined that, in the special field of organ and tissue transplantation, it had been recognised that the human body had to be treated with respect even after death. Indeed, international treaties including the Convention on Human Rights and Biomedicine and the Additional Protocol had been drafted to protect the dignity, identity and integrity of "everyone" who had been born, whether now living or dead. The Court stressed that respect for human dignity formed part of the very essence of the European Convention. Consequently, the suffering caused to Ms Elberte had undoubtedly amounted to degrading treatment contrary to Article 3 of the Convention.

**Conclusion:** violation of Article 8 of the Convention

**Article 41 (Just Satisfaction)**

The Court held that Latvia was to pay Ms Elberte 16,000 euros (EUR) in respect of non-pecuniary damage and EUR 500 in respect of costs and expenses.



**75. Eur. Court of HR. Brunet v France, judgment of 18 September 2014, application no. 21010/10. The applicant complained about his registration in a recorded offences database after criminal proceedings against him were discontinued. The prosecutor rejected definitively the applicant's demand of removal arguing that the law doesn't allow him to. The applicant couldn't reach a real opportunity to ask the removal of his data. The retention could be regarded as a disproportionate breach of the applicant's right to respect for his private life and was not necessary in a democratic society. The State had overstepped its discretion to decide and thus violated Article 8.**

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**no. 21010/10  
18.9.2014**

Press release issued by the Registrar

### **BRUNET v. FRANCE**

French crime database system in breach of Convention for storing information on individuals against whom proceedings have been dropped

#### **Basic Facts**

The applicant, Francois Xavier Brunet, is a French national who was born in 1959 and lives in Yerres (France). On 10 October 2008 Mr Brunet had a violent row with his partner, who filed a complaint with the public prosecutor of Evry. The applicant was taken into police custody. He in turn filed a complaint against his partner for assault, but it was never followed up. He was released and summoned for criminal mediation. On 12 October 2008 Mr Brunet and his partner wrote to the public prosecutor to express their disagreement with the detailed classification of the offence the applicant was said to have committed, as stated in his summons for criminal mediation. The mediation nevertheless went ahead and the proceedings were then discontinued. As a result of the accusation, Mr Brunet was listed in the recorded crimes database (the "STIC" system), which contains information from investigation reports based on files drawn up by officers of the police, gendarmerie and customs. In a letter of 11 April 2009 Mr Brunet asked the public prosecutor to delete his details from the database, arguing that their inclusion was unjustified because his partner had withdrawn her complaint. The public prosecutor rejected his request on the ground that the proceedings had been "discontinued on the basis of a cause other than: no offence ... or insufficiently established offence...". The applicant was informed that no appeal lay against that decision.

#### **Law - Article 8**

The Court observed that the inclusion in the STIC database of data concerning Mr Brunet had constituted an interference with his right to respect for his private life; an interference which was in accordance with the law and which pursued the legitimate aims of the prevention of disorder and crime and the protection of the rights and freedoms of others. It then examined whether that interference met a "pressing social need" and, in particular, whether it was proportionate to the legitimate aim pursued and whether the grounds given by the domestic authorities to justify it appeared "relevant and sufficient".

The Court observed that Mr Brunet had complained about the potential interference with his private and family life because of his inclusion in the database, arguing that, if he and his partner separated and there were proceedings before the family judge, consultation of the database could lead to the rejection of his application for custody of their child. However, as that judge was not one of the officials who had access to the database in question, the Court found that the situation complained of by the applicant was not likely to materialise.

Mr Brunet also complained about the abusive nature of his inclusion in the STIC database. On that

point the Court noted that the information contained in the database was quite intrusive in nature. While that information did not contain the individuals' fingerprints or DNA profile, it consisted of

details on identity and personality, in a database that was supposed to be used for researching crimes. In addition, the retention time of the personal record, 20 years, was particularly lengthy in view of the fact that Mr Brunet had not been found guilty by a court and that the proceedings had

been discontinued. The Court then looked at whether such a retention time was proportionate, taking account of the possibility for the individual concerned to seek early deletion of personal data. In that connection, it noted that the law, as it stood at the relevant time and as currently in force, entitled the public prosecutor to order the deletion of a personal record only in a limited number of situations and, in the case of discontinuance, only if that decision had been justified by insufficient evidence. In rejecting Mr Brunet's request, the public prosecutor of Evry had applied the law strictly. He did not have the power to verify the pertinence of maintaining the information in question in the STIC database in the light of its purpose, or having regard to factual and personality-related elements.

Consequently, the Court took the view that the public prosecutor had no power of discretion to assess the appropriateness of retaining such data, such that his supervision could not be regarded as effective. The Court further noted that at the relevant time no appeal lay against the public prosecutor's decision. Therefore, even though the retention of the information in the STIC database was limited in time, Mr Brunet had not had any real possibility of requesting the deletion of the data concerning him and, in a situation such as his, the envisaged duration of 20 years could in practice be assimilated, if not to indefinite retention, at least to a norm rather than to a maximum limit.

In conclusion, the Court took the view that the State had overstepped its margin of appreciation in such matters, and that the rules for the conservation of records in the STIC database, as applied to Mr Brunet, did not strike a fair balance between the competing public and private interests at stake. Accordingly, the impugned retention could be regarded as a disproportionate interference with Mr Brunet's right to respect for his private life and was not necessary in a democratic society.

**Conclusion:** Violation of Article 8 of the Convention.

#### **Article 41 (Just Satisfaction)**

The Court held that France was to pay the applicant 3,000 euros in respect of non-pecuniary damage.

**76. Eur. Court of HR. *Dragojević v. Croatia*, judgment of 15 January 2015, application no. 68955/11.** The case principally concerned the secret surveillance of telephone conversations of a drug trafficking suspect. The Court found in particular that Croatian law, as interpreted by the national courts, did not provide reasonable clarity as to the authorities' discretion in ordering surveillance measures and it did not in practice – as applied in Mr Dragojević's case – provide sufficient safeguards against possible abuse.

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**No. 68955/11  
15.01.2015**

Press release issued by the Registrar

## **DRAGOJEVIĆ v. CROATIA**

Insufficient reasons given by Croatian courts when ordering telephone tapping of drug-trafficking suspect

### **Basic Facts**

In 2007 the applicant was suspected of involvement in drug-trafficking. At the request of the prosecuting authorities, the investigating judge authorized the use of secret surveillance measures to covertly monitor the applicant's telephone. In 2009 the applicant was found guilty of drug-trafficking and money laundering and sentenced to nine years' imprisonment. His conviction was upheld by the Supreme Court in 2010 and his constitutional complaint was dismissed in 2011.

### **Law - Article 8**

Tapping the applicant's telephone constituted an interference with his rights to respect for his "private life" and "correspondence".

Under domestic law, the use of secret surveillance was subject to prior authorization. However, in the applicant's case the orders issued by the investigating judge were based only on a statement referring to the prosecuting authorities' request and the assertion that "the investigation could not be conducted by other means", without any information as to whether less intrusive means were available. That approach was endorsed by the Supreme Court and the Constitutional Court. In an area as sensitive as the use of secret surveillance the Court had difficulties accepting such interpretation of the domestic law, which envisaged prior detailed judicial scrutiny of the proportionality of the use of secret surveillance measures. The domestic courts' circumvention of this requirement by retrospective justification opened the door to arbitrariness and could not provide adequate and sufficient safeguards against potential abuse.

In the applicant's case, the criminal courts had limited their assessment of the use of secret surveillance to the extent relevant to the admissibility of the evidence thus obtained, without going into the substance of the Convention requirements concerning the allegations of arbitrary interference with the applicant's Article 8 rights. The Government had not provided any information on remedies which could be available to a person in the applicant's situation. Therefore, the relevant domestic law, as interpreted and applied by the domestic courts, was

not sufficiently clear as to the scope and manner of exercise of the discretion conferred on the public authorities, and did not secure adequate safeguards against possible abuse. Accordingly, the procedure for ordering and supervising the implementation of the interception of the applicant's telephone had not complied with the requirements of lawfulness, nor was it adequate to keep the interference with the applicant's right to respect for his private life and correspondence to what was "necessary in a democratic society".

**Conclusion:** violation of Article 8.

**Article 41 (Just Satisfaction)**

EUR 7,500 in respect of non-pecuniary damage.

**77. Eur. Court of HR. Case Yuditskaya and others v. Russia, judgment of 12 February 2015, application no. 5678/06. The applicants alleged, in particular, that there had been no grounds for conducting a search of the premises of their law firm and seizing their computers. The Court concluded that there has been a violation of Article 8 of the Convention.**

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**no. 5678/06  
12.02.2015**

Press release issued by the Registrar

### **YUDITSKAYA AND OTHERS v. RUSSIA**

The Search of the applicants' legal offices and the seizure of their computers: interference with the right to respect for "private life", "home" and "correspondence"

#### **Basic Facts**

The applicants, Dina Yuditskaya, Natalya Yuditskaya, Aleksandr Kichev, Yelena Lavrentyeva and Valeriy Frolovich, are Russian nationals who live in Perm (Russia). The case concerned a search of the law firm for which they work as lawyers.

In May 2005 investigators carried out a search of the premises of the law firm where the applicants work. The search had been authorised by a court in the context of a criminal investigation into bribe-taking by court bailiffs. One lawyer working in the applicants' law firm was suspected of having signed a fictitious legal assistance contract with a State enterprise which was involved in the alleged offence. According to the applicants, they voluntarily handed over all documents sought by the investigators; nevertheless all offices, including those of the applicants who had no relationship with the State enterprise concerned were searched, and all computers were taken away for one week. The applicants' complaint against the search warrant was dismissed by the courts in June 2005. The applicants complained that the search conducted in their office and the seizure of their computers containing privileged information had amounted to a violation of their rights, in particular, under Article 8 (right to respect for private and family life, the home and the correspondence) of the European Convention on Human Rights.

#### **Law- Article 8**

The Court was mindful of the fact that only lawyer I.T. had been suspected of being an accessory to the crime. The applicants were not the subjects of any criminal investigation. Having regard to the above, the Court didn't accept that the search warrant was based on reasonable suspicion. The Court also considers that the search warrant was couched in very broad terms, giving the investigators unrestricted discretion in the conduct of the search. According to the Court's case-law, search warrants have to be drafted, as far as practicable, in a manner calculated to keep their impact within reasonable bounds. The Court considers that the search carried out in the absence of a reasonable suspicion or any safeguards against interference with professional secrecy at the applicants' legal offices and the seizure of their computers went beyond what was "necessary in a democratic society" to achieve the legitimate aim pursued.

**Conclusion:** Violation (unanimously)

**78. Eur. Court of HR. *Haldimann and Others v Switzerland*, judgment of 24 February 2015, application no. 21830/09. Balance between freedom of expression and right to privacy. The applicants complained about their conviction for having recorded and broadcasted an interview of a private insurance broker using a hidden camera. In the video, the broker's face was pixelated and his voice. The Court considered that the interference in the private life of the broker, who had turned down an opportunity to express his views on the interview in question, had not been serious enough to override the public interest in information on malpractice in the field of insurance brokerage. The Court found, by majority, that there had been a violation of the freedom of expression.**

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**no. 21830/09  
24.02.2015**

Press release issued by the Registrar

### **HALDIMANN AND OTHERS v. SWITZERLAND**

Conviction of journalists for an interview using a hidden camera infringed their freedom of expression

#### **Basic Facts**

The applicants, Ulrich Mathias Haldimann, Hansjörg Utz, Monika Annemarie Balmer and Fiona Ruth Strebel, are Swiss nationals who were born in 1953, 1950 and 1969 and live in Uster, Zurich,

Bäretswil and Nussbaumen respectively. They are journalists. In February 2003 Ms Balmer, the editor of "*Kassensturz*", a weekly TV programme on consumer protection, which has been a regular feature on Swiss German television (SF DRS) for many years, prepared a documentary on sales of life insurance products, against a background of public discontent with the practices used by insurance brokers. She agreed with the editor responsible for the programme, Mr Utz, and Mr Haldimann, the editor-in-chief of SF DRS, to record interviews between customers and brokers, using a hidden camera to highlight insurance broker malpractice. Ms Strebel, an SF DRS journalist posing as a customer, met with an insurance broker from company X on 26 February 2003. Two hidden cameras were placed in the room in which the interview was to take place, transmitting the recording of the conversation to a neighbouring room in which Ms Balmer and an insurance specialist had taken up position. At the end of the interview Ms Balmer entered the room, introduced herself and explained to the broker that he had been filmed. The broker said that he had suspected as much, and refused to comment when invited to do so by the editor. On 25 March 2003 sequences from the recording were broadcast on the "*Kassensturz*" programme, with the broker's face and voice disguised.

On 5 November 2007 Mr Haldimann, Mr Utz and Ms Balmer were convicted of having made a recording using a hidden camera and given penalties of 15 day-fines of 350 Swiss Francs (CHF), CHF 200 and CHF 100 respectively, while five day-fines of CHF 30 were imposed on Ms Strebel. The applicants appealed to the Federal Court, which ruled that, while

acknowledging the major public interest of securing information on practices in the insurance field, which was liable to be weightier than the individual interests at issue, the journalists could have used a different approach less damaging to the broker's private interests. By a judgment of the High Court of the Canton of Zürich of 24 February 2009, the applicants were acquitted of the charge of violating the secret or private domain by means of a film camera, and their penalties were reduced slightly to 12 day-fines for the first three applicants and four day-fines for Ms Strebel.

### **Law – Article 10**

The Court reiterated its case-law on attacks on the personal reputations of public figures and the six criteria which it had established in order to weigh freedom of expression against the right to private life: contributing to a debate of general interest, ascertaining how well-known the person being reported on is and the subject of the report/documentary, that person's prior conduct, the method of obtaining the information, the veracity, content, form and repercussions of the report/documentary, and the penalty imposed. The Court applied those criteria to the present case, but took account of its specificity: the person concerned, that is to say the broker, was not a wellknown public figure, and the documentary in question had not been geared to criticising him personally but to denouncing specific commercial practices. The Court first of all observed that the subject of the documentary produced, i.e. the low-quality advice offered by private insurance brokers, and therefore the inadequate protection of consumers' rights, was part of a very interesting public debate. The Court secondly noted that, even if the broker might reasonably have believed that the interview was strictly private, the documentary in question had focused not on him personally but on specific commercial practices used within a particular professional category.

The Court further asserted that the applicants deserved the benefit of the doubt in relation to their desire to observe the ethics of journalism as defined by Swiss law, citing the example of their limited use of the hidden camera. The safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest was subject to the proviso that they were acting in good faith and on an accurate factual basis and provided "reliable and precise" information in accordance with the ethics of journalism. The Court noted in this respect that the veracity of the facts as presented by the applicants had never been contested.

As regards the manner in which the documentary had been broadcast and the broker presented, the

Court observed that the recording had been broadcast in the form of a report which was particularly negative in as far as the broker was concerned, using an audio-visual media which was often much more immediate and powerful in effect than the written press. However, a decisive factor was that the applicants had disguised the broker's face and voice and that the interview had not taken place on his usual business premises.

The Court thus held that the interference in the private life of the broker, who had decided against expressing an opinion on the interview, had not been serious enough to override the public interest in receiving information on the alleged malpractice in the field of insurance brokerage.

Lastly, the Court considered that despite the relative leniency of the penalties of 12 day-fines and four day-fines respectively, the criminal court sentence had been liable to discourage the media from expressing criticism, even though the applicants had not been prevented from broadcasting their documentary.



**Conclusion:** Violation of Article 10.

**Article 41 (Just Satisfaction)**

Since the applicants had not submitted any claim for just satisfaction, the Court considered that there was no need to grant any compensation on this count.

**79. Eur. Court of HR. Case of Zaichenko v. Ukraine, judgment of 26 February 2015, application no. 45797/09.. The applicant complained about his involuntary psychiatric confinement and the unlawful collection of information about him by the police in that context. The Court concluded a violation of Article 8.**

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**no. 45797/09**  
**26.02.2015**

Press release issued by the Registrar

**ZAICHENKO V. UKRAINE (NO.2)**

Collection of information about the applicant by the police without his consent: Alleged violation of Article 8

**Basic Facts**

On 23 July 2009 a judge of the Chervonogvardiyskyy District Court of Dnipropetrovsk examined a report by the Dnipropetrovsk Regional Administrative Court of the same date concerning an administrative offence of contempt of court committed by the applicant. According to the report, the applicant had submitted to the latter court numerous applications containing insulting and abusive statements about the judges. The Chervonogvardiyskyy Court, ordered an in-patient forensic psychiatric examination of the applicant with a view to establishing whether he could be held legally accountable. The judge relied on Article 20 of the Code of Administrative Offences and Article 21 of the Psychiatric Assistance Act. The applicant was taken by the police from the hearing room to the Chervonogvardiyskyy District Police Station, where he was held for about three hours. After that the police handcuffed him and took him to the Dnipropetrovsk Regional Psychiatric Hospital. On the following day, 24 July 2009, the applicant was discharged from the hospital without any documents having been issued concerning his psychiatric condition. On 4 August 2009 the President of the Chervonogvardiyskyy Court instructed the police to collect the information on the applicant's personality required for the Psychiatric Hospital to establish his mental state. The police were instructed, in particular, to collect any documentation relating to psychiatric treatment or drug therapy received by the applicant, plus character references for the applicant from his relatives, neighbours and colleagues.

On 14 August 2009 the Dnipropetrovsk Regional Court of Appeal dismissed the applicant's appeal against the ruling of the Chervonogvardiyskyy Court of 23 July 2009 without examining it. It noted that the contested ruling concerned a procedural issue and was not amenable to appeal. On 8 October 2009 the expert commission delivered its report, according to which, "given the complexity of the case and lack of clarity of the clinical picture", it was impossible to establish a diagnosis and to give an expert conclusion regarding the applicant's psychiatric state. It was therefore recommended that he undergo a repeated examination. On the same date the applicant was discharged from the hospital without having received the expert report. According to him, one of the experts had assured him that he was in good mental health. During the applicant's hospitalisation some money was allegedly stolen from his flat. Furthermore, upon his return home he allegedly discovered a briefcase there containing personal documents belonging to a person unknown to him. The applicant

complained to the police about the burglary. On 19 November 2009 the Chervonogvardiyskyy Court ordered, on the basis of the material in the case file, that the applicant undergo another forensic psychiatric examination. The applicant unsuccessfully attempted to challenge that decision on appeal. It is not known whether the examination took place or what conclusions it reached. On 16 December 2009 a criminal investigation was begun into the applicant's allegation of burglary. Its outcome is unknown. On 29 July 2010 the Chervonogvardiyskyy Court found the applicant guilty of contempt of court on account of a letter he had written to that court of 20 July 2010 containing what the court regarded as insulting, indecent and abusive statements. The applicant was sentenced to fifteen days' administrative detention, which was to be calculated from 29 July 2010. As noted in the ruling, it could be challenged on appeal. It is not known whether the applicant appealed or whether he served the detention.

### **Law- Article 8**

The Court has held in its case-law that the collection and storage of information relating to an individual's private life or the release of such information come within the scope of Article 8 § 1. The Court further reiterates that the wording "in accordance with the law" requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of Article 8. The Court is mindful of the criticism of that provision by the Constitutional Court, which concerned the insufficient statutory regulation of the collection, storage, use and dissemination of information about individuals, in particular, about their mental state, as well as the absence of any procedures for the protection of individuals' rights against the unlawful interference of psychiatric services in their private life. The above considerations were sufficient for the Court to conclude that the impugned interference in the applicant's private life was unlawful. The Court therefore finds that there has been a violation of Article 8 of the Convention in this regard.

**Conclusion:** violation (unanimously)

**80. Eur. Court of HR. Case of M.N. and Others v. San Marino, judgement of 7 July 2015, application no. 28005/12. The applicants complained about the decision ordering the seizure of banking documents relating to them, alleging that they did not have effective access to court to complain about it and that it interfered with their private life and correspondence.**

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**no. 28005/12**  
**7.07.2015**

Press release issued by the Registrar

### **M.N. AND OTHERS V. SAN MARINO**

Banking data, irrespective of whether it contains sensitive information, is protected under the Convention

#### **Basic Facts**

The applicants, S.G, M.N, C.R., and I.R., are Italian nationals who live in Italy. In the context of criminal proceedings in Italy in 2009 against several people (not including the applicants) on suspicion of a number of offences – including conspiracy, money laundering, embezzlement, tax evasion and fraud – the Italian prosecutors asked the San Marino authorities for assistance. Following that request, the San Marino first-instance tribunal issued a search and seizure decision in respect of all banks, fiduciary institutions and trust companies in San Marino.

Banking data relating to the applicants were thus seized and copied in the course of the operation. The applicants were notified about the measure applied to them about one year after the adoption of the search and seizure decision. The applicants then lodged a complaint before the judge of criminal appeals against the decision to seize documents related to them. In February and June 2011, respectively, that judge declared their complaints inadmissible, as the applicants had no standing to institute such proceedings, and noting that any breach of the rights of a person concerned by the investigation as a result of the execution of the relevant court decision had to be raised before the Italian courts. The applicants' appeals against that decision before the third-instance judge were rejected on different dates in 2011.

#### **Law – Article 8**

The Court declared the complaints of S.G, C.R., and I.R. inadmissible for non-exhaustion of domestic remedies and/or non-compliance with the six-month rule, which allows the Court to only consider matters within a period of six months from the final decision at national level.

The Court decided to examine the complaints of the remaining applicant, M.N., solely under Article 8 of the Convention, first of all dismissing the Government's argument that Article 8 was not applicable in the circumstances of the case as, in their view, the case-law to-date did not protect the confidentiality of materials relating to banking and fiduciary relationships.

The Government notably argued that no searches had taken place in M.N.'s home or work place and

that the documents in question, which had simply been submitted, copied for information purposes and returned, were not personal or of an intimate nature.

The Court, on the other hand, considered that there was no doubt that banking documents amounted to personal data concerning an individual, irrespective of whether or not they contained sensitive information. Such information could also concern professional dealings and there was no reason to justify excluding activities of a professional or business nature from the notion of “private life”. In addition, the right to respect for one’s correspondence was also engaged since the seizure: order had covered letters and e-mails exchanged between M.N. and third parties, which had been in the bank’s possession. The Court recalled in that connection that Article 8 protected the confidentiality of all exchanges between individuals for the purposes of communication. Moreover, it was of no consequence that the original documents remained with the bank. The copying and subsequent storage of information retrieved from bank statements, cheques, fiduciary dispositions and e-mails had therefore amounted to an interference with both M.N.’s “private life” and “correspondence”.

That interference had been prescribed by law, namely Article 29 of the Bilateral Convention on Friendship and Good Neighbourhood between Italy and San Marino of 1939 and the relevant laws which provided for an exception to the right of banking secrecy in the context of criminal proceedings, and pursued the legitimate aims of, among other things, prevention of crime and the economic well-being of the country.

However, the Court found that there had been a lack of procedural safeguards to contest the interference with M.N.’s “private life” and “correspondence”, notably the fact that he had had no means available to him under national law to challenge the measure to which he had been subjected. Given that M.N. had not been charged with any financial wrongdoing, nor was he the owner of the banking institutes, he had no standing under San Marino law to contest the seizure and copying for storage purposes of his banking data. Indeed M.N., who was not an accused person in the original criminal procedure, had been at a significant disadvantage as compared to the accused in those proceedings or to the possessor of the banking or fiduciary institutes, all of whom had been entitled to challenge the search and seizure decision. As a result, M.N. had not enjoyed the effective protection of national law.

On that account M.N., not being an “interested person” within the meaning of the domestic law as interpreted by the domestic courts, had been denied the “effective control” to which citizens were entitled under the rule of law and which would have restricted the interference in question to what had been “necessary in a democratic society”. The Court therefore held that there had been a violation of Article 8 in respect of M.N. Given that finding, the Court held that there was no need to examine M.N.’s further complaint under Article 6 § 1 about being denied access to court concerning the constitutional legitimacy of the interpretation given to the law.

#### **Article 41 (Just Satisfaction)**

The Court held that San Marino was to pay M.N. 3,000 euros (EUR) in respect of non-pecuniary damage and EUR 15,000 for costs and expenses.

81. *Eur. Court of HR. Case of Sõro v. Estonia*, judgment of 3 September 2015, application no. 22588/08. The applicant alleged that the publication, thirteen years after the restoration of Estonian independence, of information about his service in the former State security organisations (KGB) had violated his right to respect for his private life. The Court rules that such a passage of time must have decreased any threat the applicant could have initially posed to the new democratic system. The Court concluded that the applicant's right to respect for his private life was subject to a disproportionate interference.

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**no. 22588/08**  
**03.09.2015**

Press release issued by the Registrar

### **SÕRO v. ESTONIA**

Publication of information about prior employment as driver with former security services:  
respect for private life

#### **Basic Facts**

From 1980 to 1991 Mr Sõro was employed as a driver by the Estonian branch of the Committee for State Security of the USSR (the KGB). In February 2004 the Estonian Internal Security Service presented him with a notice according to which he had been registered under the national legislation on "Disclosure of Persons who Have Served in or Co-operated with Security Organisations or Intelligence or Counterintelligence Organisations of Armed Forces of States which Have Occupied Estonia" ("the Disclosure Act"). Under the Disclosure Act, which had entered into force in 1995, the persons concerned were to be registered and information about their service or cooperation with the security or intelligence organisations was to be made public unless they had made a confession about it to the Estonian Internal Security Service within a year from the Act's entry into force.

The notice received by Mr Sõro stated that an announcement about his past employment would be published in an appendix to the State Gazette. It stated that the person concerned had the right to have access to the documents proving his or her links to the security or intelligence organisations and to contest that information before the Estonian Internal Security Service or the courts. According to Mr Sõro, his request to be shown the material gathered in respect of him was not met.

The Estonian Government contested that allegation. In June 2004 the announcement about Mr Sõro's having worked for the Committee for State Security as a driver was published in the appendix to the State Gazette, both in its printed version and on the Internet. He subsequently complained to the Chancellor of Justice, who, in a report to Parliament, concluded that the Disclosure Act was unconstitutional, in particular because information on all employees of the security and intelligence organisations was made public irrespective of whether they had merely performed technical tasks not related to the main functions of the organisations. However, the Parliament's constitutional law committee disagreed with this assessment and the Chancellor of Justice did not bring constitutional review proceedings.

In 2006, Mr Sõro lodged a complaint before the administrative court, asking for the text published in the Gazette to be declared unlawful and, in particular, to delete the word “occupier” (in the reference to States having occupied Estonia). He noted in particular that he had never been accused of or provided with any evidence showing that he had participated in the forceful occupation of the Estonian territory. He asserted that he had only worked for the Committee for State Security as a driver and did not know anything about gathering information. Moreover, as a result of the publication of the announcement he had lost his work and he had been a victim of groundless accusations by other people. The administrative court dismissed his complaint, noting in particular that he had failed to contest the notice with which he had been presented. That decision was upheld by the appeal court and, in February 2008, the Supreme Court declined to hear Mr Sõro’s appeal.

### **Law – Article 8**

The Court considered that the publication of information about Mr Sõro’s employment as a driver of the KGB had affected his reputation and therefore constituted an interference with his right to respect for his private life. The lawfulness of that interference – which had been based on the Disclosure Act – was not in dispute between the parties. The Court also considered that the interference had pursued a legitimate aim for the purpose of Article 8, namely the protection of national security and public safety, the prevention of disorder and the protection of the rights and freedoms of others.

As regards the question of whether the measure had been proportionate to the aims pursued, the Court observed that in a number of previous cases against other countries concerning similar measures it had criticised the lack of individualisation of those measures. Such considerations also applied in Mr Sõro’s case. The Court noted that the Disclosure Act did not make any distinction between different levels of past involvement with the KGB. It was true that under the applicable procedure Mr Sõro had been informed beforehand of the text of the announcement to be published, and given the possibility to contest the factual information it contained. However, there was no procedure to evaluate the specific tasks performed by individual employees of the former security services in order to assess the danger they could possibly pose several years after the end of their career in those institutions. The Court was not convinced that there was a reasonable link between the legitimate aims sought by the Act and the publication of information about all employees of the former security services, including drivers, as in Mr Sõro’s case, regardless of the specific function they had performed in those services.

Furthermore, while the Disclosure Act had come into force three and a half years after Estonia had declared its independence, publication of information about former employees of the security services had stretched over several years. In Mr Sõro’s case, the information in question had only been published in 2004, almost 13 years after Estonia had declared its independence. The Court considered that any threat which the former servicemen of the KGB could initially have posed to the new democracy must have considerably decreased with time. There had been no assessment of the possible threat posed by Mr Sõro at the time the announcement was published.

Finally, although the Disclosure Act itself did not impose any restrictions on Mr Sõro’s employment, according to his submissions he had been derided by his colleagues and had been forced to quit his job. The Court considered that even if such a result was not sought by the Act it nevertheless testified to how serious the interference with Mr Sõro’s right to respect

for his private life had been. In the light of those considerations the Court concluded that this interference had been disproportionate to the aims pursued

**Conclusion:** violation of Article 8.

**Article 41 (Just Satisfaction)**

The Court held that Estonia was to pay Mr Sõro 6,000 euros (EUR) in respect of non-pecuniary damage and EUR 1,444.74 in respect of costs and expenses.

**Separate opinions**

Judge Pinto de Albuquerque expressed a concurring opinion; Judges Hajiyev, Laffranque and Dedov expressed a joint dissenting opinion. These opinions are annexed to the judgment.



**82. Eur. Court of HR. *Bremner v. Turkey*, judgment of 13 October 2015, application no. 37428/06. Television broadcast showing non-blurred images of an individual obtained using a hidden camera while meeting someone to offer free Christian literature wasn't justified by general-interest. The State overpassed its margin of appreciation and violated Article 8.**

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**no. 37428/06  
13.10.15**

Press release issued by the Registrar

### **BREMNER v. TURKEY**

Television broadcast showing non-blurred image of an individual obtained using a hidden camera entailed a violation of his privacy

#### **Basic Facts**

Mr Bremner, who was a correspondent for an Australian newspaper at the relevant time, also worked for a Christian bookshop. On 24 June 1997 he appeared in a television documentary which, according to its presenter, concerned covert activities conducted in Turkey by “foreign pedlars of religion”.

A meeting was filmed using a hidden camera in a restaurant in the presence of Mr Bremner, A.N. and a group of friends of the latter who supposedly wished to learn more about Christianity. A second meeting took place in a flat and was also filmed using a hidden camera. The programme’s presenter then entered the room with a camera and a microphone. She claimed to have heard about the meeting and wanted to join in and interview Mr Bremner about his activities. She asked him why he was promoting his Christian beliefs on a voluntary basis and covertly. Mr Bremner replied that his activity was not covert, but that he had responded to an invitation from A.N.

According to Mr Bremner, the programme’s presenter was accompanied by police officers who took him into police custody after the discussion and he was released the next day after giving a statement.

On 25 June 1997 the public prosecutor brought proceedings against Mr Bremner for insulting God and Islam. On 28 April 1998 the criminal court found him innocent, taking the view that no offence had been made out.

Mr Bremner sued the presenter and producers of the programme, claiming damages. His claim was dismissed by the District Court on the ground that there had been an interest in informing the public. The Court of Cassation quashed that judgment, noting that the dispute concerned a conflict between freedom of expression on the one hand and personality rights on the other. It observed that freedom of the press was not unlimited. It took the view that Mr Bremner had not committed any illegal act, that he had simply exercised his rights to freedom of expression and freedom of conscience. His right to respect for his private life had been doubly breached, first at the time of the filming with a hidden camera and secondly when the documentary was broadcast with expressions such as “pedlar of religion” or “bigotry”.

After the case had been referred back to it, the District Court decided not to follow the Court of Cassation's reasoning and upheld the initial judgment. The case was then automatically referred to the plenary civil divisions of the Court of Cassation, which endorsed the initial judgment by 35 votes to 11. The judges took the view that the footage in question did not concern details of Mr Bremner's private life but was part of a documentary on a topical issue of interest to public opinion.

Mr Bremner also claimed that he had subsequently been forced by his landlord to leave the flat that he had been renting, allegedly on security grounds, and that he had ultimately been removed by the authorities to Bulgaria.

### **Law – Article 8**

The Court observed that the documentary concerned religious proselytising, which was undeniably a matter of general interest. It noted that the programme had been critical and that offensive terms such as “pedlar of religion” had been used. It found that this expression was a value judgment and, as such, was not susceptible of proof. The Court found, however, that the documentary did not contain any gratuitous personal attacks and did not amount to hate speech.

As regards the method used, the Court was of the view that a technique as intrusive and as damaging to private life must in principle be used restrictively. The Court was not unaware that, in certain cases, the use of hidden cameras might prove necessary for journalists when information was difficult to obtain by any other means. However, that tool had to be used in compliance with ethical principles and with restraint.

As regards the balance between the right to freedom of expression on the one hand and the right to respect for private life on the other, the Court observed that Mr Bremner had not placed himself in the public arena except for the fact that he had published an advertisement, which could not have led him to suspect that he might be the subject of public criticism. He thought that he was merely meeting a group of individuals interested in Christianity.

As to the contribution allegedly made by the broadcasting of Mr Bremner's image to a debate in the general interest, the Court did not find any general-interest justification for the journalists' decision to broadcast his image without blurring it. In view of the fact that Mr Bremner was not famous, there was nothing to suggest that the broadcasting of his image would be newsworthy or useful.

In addition, the Court noted that none of the domestic courts seemed to have assessed the degree of contribution of the broadcasting of Mr Bremner's image, without blurring it, to a debate in the general interest. The Court took the view that the Turkish authorities had not struck a fair balance between the competing interests. The manner in which they had dealt with the case had not afforded Mr Bremner adequate and effective protection of his right to his own image and therefore to respect for his private life.

**Conclusion:** violation of Article 8

### **Law – Articles 6, 9 and 10**

The Court found Mr Bremner's complaints inadmissible under Articles 6 and 10, and his Article 9 complaint was inadmissible for failure to exhaust domestic remedies.

### **Article 41 (Just Satisfaction)**

The Court held that Turkey was to pay the applicant 7,500 euros in respect of non-pecuniary damage.

**83. Eur. Court of HR. R.E v. United Kingdom, judgment of 27 October 2015, application no. 62498/11. Covert surveillance of a detainee's consultations with his lawyer violates Article 8 since these consultations benefit from a strengthened protection. However, consultations with the person appointed to assist the detainee, as a vulnerable person, following his arrest do not benefit from this protection; Article 8 is not violated on this grievance.**

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**no. 62498/11  
27.10.15**

Press release issued by the Registrar

### **R.E v. UNITED KINGDOM**

Legal safeguards regarding covert surveillance of a detainee's consultations with his lawyer were insufficient at the time of his custody

#### **Basic Facts**

The Regulation of Investigatory Powers Act 2000 (RIPA) and the Covert Surveillance Code of Practice permits, in certain circumstances, the covert surveillance between detainees and their legal advisor, their medical advisor and, in the case of vulnerable detainees, their "appropriate adult".

Between 15 March 2009 and 8 May 2010 Mr R.E. was arrested and detained on three occasions in connection with the murder of a police officer believed to have been killed by dissident Republicans. During the first two detentions his solicitor received assurances from the Police Service of Northern Ireland (PSNI) that his consultations with Mr R.E. would not be subject to covert surveillance. Mr R.E. was arrested for the third time on 4 May 2010. On this occasion, the PSNI refused to give an assurance to Mr R.E.'s solicitor that their consultations would not be subject to covert surveillance.

Mr R.E. sought permission to apply for judicial review of this decision. In particular, he alleged that the grounds upon which the authorisation of such surveillance would be appropriate were not sufficiently clearly defined and that the guidance concerning the securing and destruction of legally privileged information was not sufficiently clear or precise. On 6 May 2010 he was granted permission to apply for judicial review and the court directed that any subsequent consultations with his solicitor and his medical advisor should not be subject to covert surveillance. Mr R.E. was released without charge on 8 May 2010.

Mr R.E.'s application for judicial review was dismissed in September 2010. The court held that RIPA and the Covert Surveillance Code of Conduct were clearly defined and sufficiently detailed and precise. The Supreme Court refused Mr. R.E.'s application for permission to appeal in April 2011.

#### **Law – Article 8 (concerning legal consultations)**

The Court reiterated the reasoning in its judgment in the case of Kennedy v. the United Kingdom concerning interception of communications. In that judgment the Court held that the domestic law provisions (part I of RIPA) covering the nature of the offences which could give

rise to interception, the categories of persons liable to be the subject of interception and the provisions dealing with duration, renewal and cancellation of interception measures had been sufficiently clear.

The Government argued that Mr R.E.'s case should be distinguished from the Kennedy case on the ground that the covert surveillance had been less intrusive than the interception of communications and that therefore the required level of safeguards should be less strict.

However, the Court considered that the surveillance of a legal consultation constituted an extremely high degree of intrusion into a person's right to respect for his or her private life and correspondence and consequently the same stringent safeguards should be in place to protect individuals from arbitrary interference with their Article 8 rights as in the case of interception of communications, such as a telephone call between a lawyer and a client.

The Court noted that, as in the Kennedy case, the domestic provisions with regard to covert surveillance (Part II of RIPA) had been sufficiently clear in terms of the nature of the offences which could give rise to such measures, the categories of persons liable to be the subject of surveillance and the provisions dealing with duration, renewal and cancellation of surveillance measures. Furthermore, guidelines to ensure that arrangements were in place for the secure handling, storage and destruction of material obtained through covert surveillance had been implemented by the Northern Ireland Police Service on 22 June 2010.

However, at the time of Mr. R.E.'s detention in May 2010, those guidelines were not yet in force. The Court was not therefore satisfied that the relevant domestic law provisions in place at the time provided sufficient safeguards for the protection of material obtained by covert surveillance, notably as concerned the examination, use and storage of the material obtained, the precautions to be taken when communicating the material to other parties, and the circumstances in which recordings could or had to be erased or the material destroyed.

**Conclusion:** violation of Article 8 as concerned Mr R.E.'s complaint about the covert surveillance of his legal consultations.

**Article 8 (concerning consultations between detainees and their "appropriate adults")**

As concerned the surveillance of "appropriate adult"-detainee consultations, the Court held that, unlike legal consultations, they were not subject to legal privilege and therefore a detainee would not have the same expectation of privacy. The Court was satisfied that the relevant domestic provisions, insofar as they related to the possible surveillance of consultations between detainees and "appropriate adults", were accompanied by "adequate safeguards against abuse", notably as concerned the authorisation, review and record keeping.

**Conclusion:** no violation of Article 8 with regard to this part of Mr R.E.'s complaint.

**Article 41 (Just Satisfaction)**

The Court held that the United Kingdom was to pay Mr R.E. EUR 1,500 in respect of non-pecuniary damage and EUR 15,000 in respect of costs and expenses.

**84. Eur. Court of HR, Brito Ferrinho Bexiga Villa-Nova v. Portugal, judgment of 1 December 2015, application no. 69436/10. The case concerned access to the bank accounts of a lawyer charged with tax fraud. The Court found that consultation of the lawyer's bank statements had amounted to an interference with her right to respect for professional confidentiality, which fell within the scope of private life.**

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**no. 69436/10  
01.12.2015**

Press release issued by the Registrar

### **BRITO FERRINHO BEXIGA VILLA-NOVA V. PORTUGAL**

Tax authorities' consultation of lawyer's bank accounts amounted to an interference with her right to respect for private life

#### **Basic Facts**

While inspecting the accounts of Ms De Brito Ferrinho Bexiga Villa-Nova's law firm, the tax authorities noted that she had not paid value-added tax on fees collected in 2005 and 2006 which had been paid into her personal bank account. The tax authorities accordingly asked her to produce her personal bank statements, which she refused to do on grounds of professional confidentiality and bank secrecy. The prosecutor's office attached to the Faro Court opened an investigation for tax fraud. On 18 September 2009 Ms Brito Ferrinho Bexiga Villa-Nova was charged.

In an application of 30 October 2009 the prosecuting authorities requested the criminal investigating judge to lodge an interlocutory application for professional confidentiality to be lifted. In an order of 6 November 2009 the investigating judge requested the Evora Court of Appeal to authorise the lifting of professional confidentiality and bank secrecy. He observed that professional confidentiality was not absolute and could not preclude the overarching principles of administration of justice and ascertainment of the material truth. On 12 January 2010 the Court of Appeal ordered the lifting of professional confidentiality and bank secrecy on the grounds that the public interest should prevail over private interests. Ms Brito Ferrinho Bexiga Villa-Nova appealed. The Supreme Court declared her appeal inadmissible. In an order of 29 July 2011 the prosecutor's office attached to the Faro Court discontinued the criminal proceedings instituted against the applicant for tax fraud.

#### **Law – Articles 6, 8 and 13**

The Court held that the consultation of Ms Brito Ferrinho Bexiga Villa-Nova's bank statements had constituted an interference with her right to respect for professional confidentiality, which fell within the scope of private life. That interference had had a legal basis (Article 135 of the Code of Criminal Procedure) and pursued a legitimate aim, namely, the prevention of crime within the meaning of Article 8 § 2 of the Convention.

The Court observed that the proceedings for lifting the professional confidentiality binding on Ms Brito Ferrinho Bexiga Villa-Nova in her capacity as a lawyer had admittedly been conducted before a judicial body, but without the applicant's participation. Ms Brito Ferrinho

Bexiga Villa-Nova had not become aware that professional confidentiality and bank secrecy had been lifted with regard to her bank statements until she had been served with the Evora Court of Appeal's judgment of 12 January 2010. She had not therefore been involved in the proceedings at any time and had thus been unable to submit her arguments.

The Court observed that domestic law contained a provision that the Lawyers Association had to be consulted in proceedings to have professional confidentiality lifted. In the present case, however, the Lawyers Association had clearly not been consulted. Even if, under the domestic law, an opinion from the Lawyers Association would not have been binding, the Court considered that an opinion from an independent body should have been sought in the present case because the information requested had been covered by professional confidentiality.

With regard to an "effective control" to challenge the disputed measure, the Court noted that Ms Brito Ferrinho Bexiga Villa-Nova's appeal to the Supreme Court challenging the Evora Court of Appeal's decision had not been examined on the merits as the Supreme Court had considered that the applicant did not have any possibility of appealing against that judgment. The Court found that the simple fact that the applicant's appeal was declared inadmissible by the Supreme Court did not satisfy the requirement of an "effective control" laid down in Article 8 of the Convention. Accordingly, Ms Brito Ferrinho Bexiga Villa-Nova had not had any remedy by which to challenge the measure complained of.

Having regard to the lack of procedural guarantees and effective judicial control of the measure complained of, the Court considered that the Portuguese authorities had failed to strike a fair balance in the present case between the demands of the general interest and the requirements of the protection of the applicant's right to respect for her private life. Accordingly, there had been a violation of Article 8 of the Convention.

#### **Article 41 (Just Satisfaction)**

The Court held that Portugal was to pay the applicant 3,250 euros (EUR) in respect of non-pecuniary damage and EUR 463.98 in respect of costs and expenses.

**85. Eur. Court of HR, G.S.B. v. Switzerland, judgment of 22 December 2015, application no. 28601/11. The case concerned the transmission to the US tax authorities of the applicant's bank account details in connection with an administrative cooperation agreement between Switzerland and the USA. The Court noted that the applicant had had access to several effective and genuine procedural safeguards in order to contest the transmission of his bank details and to secure protection against arbitrary implementation of agreements concluded between Switzerland and the US.**

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**no. 28601/11  
22.12.2015**

Press release issued by the Registrar

### **G.S.B. V. SWITZERLAND**

Implementing a mutual assistance agreement in tax matters between Switzerland and the United States did not breach the Convention

#### **Basic Facts**

In 2008 the US tax authorities (Internal Revenue Service - IRS) had discovered that thousands of US taxpayers held bank accounts in the Swiss bank UBS SA which had not been declared to their national authorities. Being exposed to a risk of criminal proceedings, UBS concluded an "agreement to suspend criminal prosecution" with the US Justice Department. Proceedings were discontinued in return for the payment of a transaction amount of 780 million US dollars.

On 19 February 2009 the IRS brought civil proceedings to order UBS to hand over the identities of its 52,000 US customers and a number of data on the accounts held by the latter. Switzerland was concerned that the dispute between the US authorities and UBS might give rise to a conflict between Swiss and US law should the IRS obtain that information, and the civil proceedings were therefore suspended pending extra-judicial reconciliation.

With a view to identifying the taxpayers in question, the Government of the Swiss Confederation and the United States concluded an agreement entitled "Agreement 09".

On 31 August 2009 the IRS sent the Federal tax authority (AFC) a request for administrative cooperation with a view to obtaining information on the US taxpayers who had been authorised to open bank accounts with UBS.

On 1 September 2009 the AFC decided to instigate an administrative cooperation procedure and invited the bank UBS to supply detailed files on the customers mentioned in the appendix to Convention 09.

By judgment of 21 January 2010 the Federal Administrative Court allowed an appeal against an AFC decision, resulting in the invalidation of all decisions issued by the AFC on the basis of Convention 09. The entry into force of that judgment called into question the implementation of Convention 09. In order to avoid such a situation, on 31 March 2010, following fresh negotiations with the United States, the Federal Council concluded a "Protocol



modifying the Agreement between Switzerland and the United States” known as “Protocol 10”. The provisions of that Protocol were incorporated into Agreement 09, and the consolidated version of Agreement 09 as amended by the Protocol 10 is referred to as “Convention 10”.

On 19 January 2010 UBS transmitted the applicant’s file to the AFC. In its final decision of 7 June 2010 the AFC stated that all the conditions had been met for affording administrative cooperation to the IRS and for ordering the requested documents to be handed over to the latter. On 8 December 2010 the applicant appealed to the Federal Administrative Court against that decision. The latter Court set aside the 7 June 2010 decision, finding that the applicant’s right to be heard had not been respected. It referred the case back to the AFC. In its final decision of 4 November 2010 the AFC held that all the conditions had been met for affording administrative cooperation to the IRS and for ordering UBS to forward the requested documents. The applicant appealed to the Federal Administrative Court, which, adjudicating at last instance, found that Convention 10 was binding upon the Swiss authorities, which did not have to verify the conformity of that text to Federal law of previous conventions. The Federal Administrative Court dismissed the applicant’s appeal.

On 24 March 2011 the applicant lodged a public-law appeal with the Federal Court on the ground that the considerations set out in the impugned judgment were relevant to criminal-law cooperation but not to administrative cooperation. The Federal Court declared that appeal inadmissible, with reference to a previous judgment to the effect that appeals against decisions which the AFC had given in pursuance of agreements concluded with the US did indeed relate to administrative cooperation.

On 14 December 2012 the applicant’s bank account details were transmitted to the US tax authorities.

### **Law – Article 8**

As regards the legal basis for the measure, the Court reiterated that Agreement 09 and Protocol 10 had been negotiated and concluded by the Federal Council, approved by the Federal Parliament and then ratified by the Government in accordance with the procedure for concluding treaties set out in constitutional law. Inasmuch as the applicant submitted that the AFC’s decision of 1 September 2009 lacked any basis in law because Parliament had not yet approved Agreement 09 at the time, the Court agreed with the Government that the AFC had only taken the decision so that it could assess whether the conditions for affording cooperation had been met. At all events, the immediate implementation of Agreement 09 on a provisional basis had been confirmed by the Government at the time of its approval, and that of Protocol 10 had been confirmed by the Federal Parliament on 17 June 2010.

As regards the foreseeability of the impugned measure, the Court reiterated that the European Convention of Human Rights should be interpreted in line with the general principles of international law. Indeed, under the 1969 Vienna Convention on the Law of Treaties regard should be had to “any relevant rules of international law applicable in the relations between the parties”. In the present case the Court considered relevant the Federal Court’s and the Government’s argument that Article 28 of the Vienna Convention allows the parties to an international treaty to go against the principle of non-retroactivity and provide for the consideration of acts or facts which occurred before the treaty in question entered into force.

In the present case the Federal Court had settled case-law to the effect that provisions on administrative and criminal-law cooperation requiring third parties to provide specific

information were procedural in nature and consequently applied, in principle, to all present or future proceedings, including those relating to tax periods predating their adoption. The applicant, assisted by a lawyer, could not reasonably have been unaware of that judicial practice. He therefore could not validly submit to the Court that the interference had occurred in a manner which he could not have foreseen. The impugned measure could therefore be regarded as being “prescribed by law”.

As regards the legitimacy of the aim pursued by the measure, in the knowledge that the banking sector is an economic branch of great importance to Switzerland, the Court held that the impugned measure formed part of an all-out effort by the Swiss Government to settle the conflict between the bank UBS and the US tax authorities. The measure might validly be considered as conducive to protecting the country’s economic well-being. The Court accepted the Government’s argument that the US tax authorities’ allegations against Swiss banks were liable to jeopardise the very survival of UBS, a major player in the Swiss economy employing a large number of persons. Therefore, given Switzerland’s interest in finding an effective legal solution in cooperation with the US, it had pursued a legitimate aim within the meaning of Article 8 § 2 of the Convention.

As regards whether the measure had been “necessary in a democratic society”, the Court noted that the Federal Administrative Court had ruled that the conditions set out in Article 8 for any interference with private or family life had been met in the instant case. The major economic interests at stake for the country and the Swiss interest in being able to honour its international undertakings had taken precedence over the individual interests of the persons concerned by the measure.

With particular regard to the applicant’s situation, it should be noted that only his bank account details, that is to say purely financial information, had been disclosed. No private details or data closely linked to his identity, which would have deserved enhanced protection, had been transmitted. His bank details had been forwarded to the relevant US authorities so that they could use standard procedures to ascertain whether the applicant had in fact honoured his tax obligations, and if not, to take the requisite legal action.

Finally, the Court observed that the applicant had benefited from various procedural safeguards. He had been able to lodge an appeal with the Federal Administrative Court against the AFC’s 7 June 2010 decision. The latter court had subsequently set aside the said decision on the grounds of violation of the applicant’s right to a hearing. The AFC had invited the applicant to transmit any comments he might have, of which right the applicant had availed himself. On 4 November 2010 the AFC had given a fresh decision finding that all the conditions had been met for affording administrative cooperation. The applicant had subsequently lodged a second appeal with the Federal Administrative Court, which dismissed it. The applicant had consequently benefited from several effective and genuine procedural guarantees to challenge the disclosure of his bank details and obtain protection against the arbitrary implementation of agreements concluded between Switzerland and the United States.

It follows that there had been no violation of Article 8 of the Convention.

#### **Article 14 in conjunction with Article 8**

The Court found, essentially on the same grounds as those mentioned above in support of the absence of violation of Article 8, that the applicant had not suffered discriminatory treatment for the purposes of Article 14 in conjunction with Article 8. It added that the

applicant had provided no evidence to permit an assessment of whether his treatment would have been any different in another Swiss bank.  
Therefore, there had been no violation of Article 14 in conjunction with Article 8 of the Convention

**86. Eur. Court of HR. Roman Zakharov v. Russia, judgment of 4 December 2015, application no. 47143/06. The applicant is a user of mobile phone complaining of system of secret surveillance without effective domestic remedies. Although the applicant cannot prove that his own conversations have been surveyed, the mere existence of the legislation allowing it restricts the liberty of communicating. The Court concluded that domestic legal provisions governing the interception of communications did not provide adequate and effective guarantees and thus violate Article 8**

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**no. 47143/06**  
**04.12.15**

Press release issued by the Registrar

### **ROMAN ZAKHAROV v. RUSSIA**

Arbitrary and abusive secret surveillance of mobile telephone communications in Russia

#### **Basic Facts**

The applicant, Roman Zakharov, is the editor-in-chief of a publishing company and subscribed to the services of several mobile network operators. In December 2003 Mr Zakharov brought judicial proceedings against three mobile network operators, the Ministry of Communications, and the Department of the Federal Security Service for St Petersburg and the Leningrad Region, complaining about interference with his right to privacy of his telephone communications. He maintained that, under the relevant national law – namely, the Operational-Search Activities Act of 1995 (the OSSA), the Code of Criminal Procedure of 2001 (the CCrP) and, more specifically, Order no. 70 issued by the Ministry of Communications which requires telecommunications networks to install equipment enabling law-enforcement agencies to carry out operational-search activities – the mobile operators had permitted unrestricted interception of all telephone communications by the security services without prior judicial authorisation. He asked the district court in charge to issue an injunction to remove the equipment installed under Order no. 70, and to ensure that access to telecommunications was given to authorised persons only.

The Russian courts rejected Mr Zakharov's claim. In a judgment upheld in April 2006, the district court found, in particular, that he had failed to prove that his telephone conversations had been intercepted or that the mobile operators had transmitted protected information to unauthorized persons. Installation of the equipment to which he referred did not in itself infringe the privacy of his communications.

#### **Law – Article 8**

The Court found that Mr Zakharov was entitled to claim to be a victim of a violation of the European Convention, even though he was unable to allege that he had been the subject of a concrete measure of surveillance. Given the secret nature of the surveillance measures provided for by the legislation, their broad scope (affecting all users of mobile telephone communications) and the lack of effective means to challenge them at national level (see point 6 below), the Court considered that it was justified to examine the relevant legislation

not from the point of view of a specific instance of surveillance, but in the abstract. Furthermore, the Court considered that Mr Zakharov did not have to prove that he was even at risk of having his communications intercepted. Indeed, given that the domestic system did not afford an effective remedy to the person who suspected that he or she was subjected to secret surveillance, the very existence of the contested legislation amounted in itself to an interference with Mr Zakharov's rights under Article 8.

It was not in dispute between the parties that interception of mobile telephone communications had had a basis in Russian law, namely the OSAA, the CCrP, the Communications Act and Orders issued by the Ministry of Communications (in particular Order no. 70), and pursued the legitimate aims of the protection of national security and public safety, the prevention of crime and the protection of the economic well-being of the country.

However, the Court concluded that the Russian legal provisions governing interception of communications did not provide for adequate and effective guarantees against arbitrariness and the risk of abuse.

In particular, the Court found shortcomings in the legal framework in the following areas:

**1. The circumstances in which public authorities are empowered to resort to secret surveillance measures**

Notably, Russian legislation lacks clarity concerning some of the categories of people liable to have their telephones tapped, namely a person who may have information about an offence or information relevant to a criminal case or those involved in activities endangering Russia's national, military, economic or ecological security. For example, as concerns the latter category, the OSAA leaves the authorities an almost unlimited degree of discretion in determining which events or acts constitute such a threat and whether that threat is serious enough to justify secret surveillance;

**2. The duration of secret surveillance measures**

Notably the provisions on the circumstances in which secret surveillance measures must be discontinued do not provide sufficient guarantees against arbitrary interference. Regrettably, the requirement to discontinue interception when no longer necessary is only mentioned in the CCrP and not in the OSAA. This means in practice that interception of communications in criminal proceedings have more safeguards than interceptions in connection with activities endangering Russia's national, military, economic or ecological security;

**3. The procedures for destroying and storing intercepted data**

In particular, the domestic law permits automatic storage for six months of clearly irrelevant data in cases where the person concerned has not been charged with a criminal offence and, in cases where the person has been charged with a criminal offence, it is not sufficiently clear as to the circumstances in which the intercepted material will be stored and destroyed after the end of a trial;

**4. The procedures for authorising interception**

The authorisation procedures are not capable of ensuring that secret surveillance measures are ordered only when necessary. Most notably, Russian courts do not verify whether there is a reasonable suspicion against the person for whom interception has been requested or examine whether the interception is necessary and justified. Thus, interception requests are often not accompanied by any supporting materials, judges never request the interception agency to submit such materials and a mere reference

to the existence of information about a criminal offence or activities endangering national, military, economic or ecological security is considered to be sufficient for the interception to be authorised.

Furthermore, the OSAA does not contain any requirements concerning the content either of the request for interception or of the interception authorisation, meaning that courts sometimes grant interception authorisations which do not mention a specific person or telephone number to be tapped, but authorise interception of all telephone communications in the area where a criminal offence has allegedly been committed, and on occasions without mentioning the duration of the authorised interception. Furthermore, the non-judicial urgent procedure provided by the OSAA (under which it is possible to intercept communications without prior judicial authorisation for up to 48 hours) lacks sufficient safeguards to ensure that it is used sparingly and only in duly justified cases.

Moreover, a system, such as the Russian one, which allows the secret services and the police to intercept directly the communications of each and every citizen without having to show an interception authorisation to the communications service provider, or to anyone else, is particularly prone to abuse. This system results in particular in the secret services and the police having the technical means to circumvent the authorisation procedure and intercept communications without obtaining prior judicial authorisation. The need for safeguards against arbitrariness and abuse appears therefore to be particularly great in this area;

#### **5. The supervision of interception**

As it is currently organised, supervision of interception does not comply with the requirements under the European Convention that supervisory bodies be independent, open to public scrutiny and vested with sufficient powers and competence to exercise effective and continuous control. Firstly, it is impossible for the supervising authority in Russia to discover interception carried out without proper judicial authorisation as Order no. 70 prohibits the logging or recording of such interception. Secondly, supervision of interception carried out on the basis of proper judicial authorisations is entrusted to the President, Parliament and the Government, who are given no indication under Russian law as to how they may supervise interception, as well as the competent prosecutors, whose manner of appointment and blending of functions, with the same prosecutor's office giving approval to requests for interceptions and then supervising their implementation, may raise doubts as to their independence. Thirdly, the prosecutors' powers and competences are limited: notably, information about the security services' undercover agents and their tactics, methods and means remain outside their scope of supervision. Fourthly, supervision by prosecutors is not open to public scrutiny: their semi-annual reports on operational search measures are not published or otherwise accessible to the public. Lastly, the effectiveness of supervision by prosecutors in practice is open to doubt, Mr Zakharov having submitted documents illustrating prosecutors' inability to obtain access to classified materials on interception and the Government not having submitted any inspection reports or decisions by prosecutors ordering the taking of measures to stop or remedy a detected breach in law;

#### **6. Notification of interception of communications and remedies available**

Any effectiveness of the remedies available to challenge interception of communications is undermined by the fact that they are available only to persons who

are able to submit proof of interception. Given that a person whose communications have been intercepted in Russia is not notified at any point and does not have an adequate possibility to request and obtain information about interceptions, unless that information becomes known to him as a result of its use in evidence in eventual criminal proceedings, that burden of proof is virtually impossible to satisfy.

The Court noted that those shortcomings in the legal framework appear to have had an impact on the actual operation of the system of secret surveillance which exists in Russia. The Court was not convinced by the Government's argument that all interceptions in Russia were performed lawfully on the basis of a proper judicial authorisation. The examples submitted by Mr Zakharov in the domestic proceedings<sup>3</sup> and in the proceedings before the European Court of Human Rights<sup>4</sup> indicated the existence of arbitrary and abusive surveillance practices, which were apparently due to the inadequate safeguards provided by law.

In view of those shortcomings, the Court found that Russian law did not meet the "quality of law" requirement and was incapable of keeping the interception of communications to what was "necessary in a democratic society".

### **Conclusion: violation of Article 8**

#### **Law – Other Articles**

Given the findings under Article 8, in particular with regard to the notification of interception of communications and available remedies, the Court held that it was not necessary to examine Mr Zakharov's complaint under Article 13 separately.

#### **Article 41 (Just Satisfaction)**

The Court held, by 16 votes to one, that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by Mr Zakharov. It further held that Russia was to pay Mr Zakharov 40,000 euros (EUR) in respect of costs and expenses.

#### **Separate Opinions**

Judge Ziemele expressed a dissenting opinion and Judge Dedov expressed a concurring opinion which are annexed to the judgment.

**87. Eur. Court of HR. Szabó and Vissy v. Hungary, judgment of 12 January 2016, application no. 37138/14. The Court recognised that situations of extreme urgency in the fight against terrorism could arise in which a requirement for prior judicial control would run the risk of losing precious time. However, judges must be able to control surveillance measures post factum. The Court decided that the domestic law did not provide an effective judicial-control mechanism and did not provide sufficiently precise, effective and comprehensive safeguards on the ordering, execution and potential redressing of surveillance measures.**

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**no. 37138/14  
12/01/16**

Press release issued by the Registrar

### **SZABÓ AND VISSY v. HUNGARY**

Hungarian legislation on secret anti-terrorist surveillance does not have sufficient safeguards against abuse

#### **Basic Facts**

The applicants worked for a non-governmental watchdog organisation (Eötvös Károly Közpolitikai Intézet) which voices criticism of the Government.

A specific Anti-Terrorism Task Force was established within the police force as of 1 January 2011. Its competence is defined in section 7/E of Act no. XXXIV of 1994 on the Police, as amended by Act no. CCVII of 2011. Under this legislation, the task force's prerogatives in the field of secret intelligence gathering include secret house search and surveillance with recording, opening of letters and parcels, as well as checking and recording the contents of electronic or computerized communications, all this without the consent of the persons concerned.

In June 2012 the applicants filed a constitutional complaint arguing that the sweeping prerogatives in respect of secret intelligence gathering for national security purposes under section 7/E (3) breached their right to privacy. The Constitutional Court dismissed the majority of the applicants' complaints in November 2013. In one aspect the Constitutional Court agreed with the applicants, namely, it held that the decision of the minister ordering secret intelligence gathering had to be supported by reasons. However, the Constitutional Court held in essence that the scope of national security-related tasks was much broader than the scope of the tasks related to the investigation of particular crimes, thus the differences in legislation between criminal secret surveillance and secret surveillance for national security purposes were not unjustified.

#### **Law – Article 8**

Firstly, the Court noted that the Constitutional Court, having examined the applicants' constitutional complaint on the merits, had implicitly acknowledged that they had been personally affected by the legislation in question. In any case, whether or not the applicants – as staff members of a watchdog organisation – belonged to a targeted group, the Court



considered that the legislation directly affected all users of communication systems and all homes. Moreover, the domestic law does not apparently provide any possibility for an individual who suspected that their communications were being intercepted to lodge a complaint with an independent body. Considering these two circumstances, the Court was of the view that the applicants could therefore claim to be victims of a violation of their rights under the European Convention. Furthermore, the Court was satisfied that the applicants had exhausted domestic remedies by bringing to the attention of the national authorities – namely the Constitutional Court – the essence of their grievance.

The Court found that there had been an interference with the applicants' right to respect for private and family life as concerned their general complaint about the rules of section 7/E (3) (and not as concerned any actual interception of their communications allegedly taking place). It was not in dispute between the parties that that interference's aim was to safeguard national security and/or to prevent disorder or crime and that it had had a legal basis, namely under the Police Act of 1994 and the National Security Act. Furthermore, the Court was satisfied that the two situations permitting secret surveillance for national security purposes under domestic law, namely the danger of terrorism and rescue operations of Hungarian citizens in distress abroad, were sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities were empowered to resort to such measures.

However, the Court was not convinced that the Hungarian legislation on "section 7/E (3) surveillance" provided safeguards which were sufficiently precise, effective and comprehensive in as far as the ordering, execution and potential redressing of such measures were concerned.

Notably, under "section 7/E", it is possible for virtually any person in Hungary to be subjected to secret surveillance as the legislation does not describe the categories of persons who, in practice, may have their communications intercepted. The authorities simply have to identify to the government minister responsible the name of the individual/s or the "range of persons" to be intercepted, without demonstrating their actual or presumed relation to any terrorist threat.

Furthermore, under the legislation, when requesting permission from the Minister of Justice to intercept an individual's communications, the anti-terrorism task force is merely required to argue that the secret intelligence gathering is necessary, without having to provide evidence in support of their request. In particular, such evidence would provide a sufficient factual basis to apply such measures and would enable an evaluation of their necessity based on an individual suspicion regarding the targeted individual. The Court reiterated that any measure of secret surveillance which did not correspond to the criteria of being strictly necessary for the safeguarding of democratic institutions or for the obtaining of vital intelligence in an individual operation would be prone to abuse by authorities with formidable technologies at their disposal.

Another element which could be prone to abuse is the duration of the surveillance. It was not clear from the wording of the law whether the renewal of a surveillance warrant (on expiry of the initial 90 days stipulated under the National Security Act) for a further 90 days was possible only once or repeatedly.

Moreover, these stages of authorisation and application of secret surveillance measures lacked judicial supervision. Although the security services are required, when applying for warrants, to outline the necessity of the secret surveillance, this procedure does not guarantee an assessment of whether the measures are strictly necessary, notably in terms of

the range of persons and the premises concerned. For the Court, supervision by a politically responsible member of the executive, such as the Minister of Justice, did not provide the necessary guarantees against abuse. External, preferably judicial control of secret surveillance activities offers the best guarantees of independence, impartiality and a proper procedure.

As concerned the procedures for redressing any grievances caused by secret surveillance measures, the Court noted that the executive did have to give account of surveillance operations to a parliamentary committee. However, it could not identify any provisions in Hungarian legislation permitting a remedy granted by this procedure to those who are subjected to secret surveillance but, by necessity, are not informed about it during their application. Nor did the twice yearly general report on the functioning of the secret services presented to this parliamentary committee provide adequate safeguards, as it was apparently unavailable to the public. Moreover, the complaint procedure outlined in the National Security Act also seemed to be of little relevance, since citizens subjected to secret surveillance measures were not informed of the measures applied. Indeed, no notification – of any kind – of secret surveillance measures is foreseen in Hungarian law. The Court reiterated that as soon as notification could be carried out without jeopardising the purpose of the restriction after the termination of the surveillance measure, information should be provided to the persons concerned.

In sum, given that the scope of the measures could include virtually anyone in Hungary, that the ordering was taking place entirely within the realm of the executive and without an assessment of whether interception of communications was strictly necessary, that new technologies enabled the Government to intercept masses of data easily concerning even persons outside the original range of operation, and given the absence of any effective remedial measures, let alone judicial ones, the Court concluded that there had been a violation of Article 8 of the Convention.

**Conclusion:** violation of Article 8

### **Law – Other Articles**

Given the finding relating to Article 8, the Court considered that it was not necessary to examine the applicants' complaint under Article 6 of the Convention.

Lastly, the Court reiterated that Article 13 could not be interpreted as requiring a remedy against the state of domestic law and therefore found that there had been no violation of Article 13 taken together with Article 8.

### **Article 41 (Just Satisfaction)**

The Court held that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants. It awarded 4,000 for costs and expenses.

### **Separate Opinion**

Judge Pinto de Albuquerque expressed a separate opinion which is annexed to the judgment.

88. *Eur. Court of HR, Y.Y. v. Russia*, judgment of 23 February 2016, application no. 40378/06. The applicant complained that the St Petersburg Committee for Healthcare had collected and examined her medical records and those of her children and forwarded its report containing the results of its examination, to the Ministry of Healthcare without her consent. The Court found a violation of Article 8 because the actions in dispute did not constitute a foreseeable application of the relevant Russian law.

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*no. 40378/06*  
23.02.2016

### Y.Y. v. RUSSIA

The disclosure of medical data to public bodies without the applicant's consent constitute a violation of the Convention

#### Basic Facts

In April 2003 the applicant gave birth prematurely to twins at a maternity hospital in St Petersburg. The first twin died nine hours after her birth. The second twin, who was transferred to a resuscitation and intensive therapy unit at one of the St Petersburg children's hospitals twenty hours after his birth, survived. The applicant was of the opinion that her daughter would also have survived had she been promptly transferred to a resuscitation and intensive therapy unit at a children's hospital. The applicant's mother sent three telegrams to the President of the Russian Federation, lamenting of the shortcomings in the emergency medical services provided.

The telegrams were forwarded to the Ministry of Healthcare of the Russian Federation for examination, asking the Committee for Healthcare to examine the allegations and take the necessary action. The Committee ordered an examination, carried out on the basis of the applicant's and the twins' medical records, which were obtained from the maternity hospital and the children's hospital. The results of the examination were set out in a report, which mainly concerned the development and treatment of the twin who had died.

On the same day, the Committee forwarded to the Ministry a copy of its reply to the applicant's mother and informed the Ministry that, according to the conclusion of a commission formed by the maternity hospital, the reasons for the applicant's premature delivery had been her compromised obstetric-gynaecological history – in particular, seven artificial abortions – and her urogenital mycoplasmosis infection.

It appears that a request by the applicant for a copy of the report was refused, and that that refusal was the subject of separate proceedings brought by the applicant against the Committee. In the course of those proceedings, on 30 November 2004, the applicant received a copy of the report and the Committee's letter to the Ministry of 5 September 2003. On 25 February 2005 she brought new proceedings against the Committee, seeking a declaration that its actions had been unlawful in that it had collected and examined her medical records and those of her children, and had communicated the report containing her personal information to the Ministry without obtaining her consent, but all her attempts were dismissed, or no violation was found.

## **Law – Article 8**

The Court reiterates that personal information relating to a patient belongs to his or her private life. The protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community.

The Court has previously found that the disclosure – without a patient's consent – of medical records containing highly personal and sensitive data about a patient, including information relating to an abortion, by a clinic to the Social Insurance Office, and therefore to a wider circle of public servants, constituted an interference with the patient's right to respect for private life. The disclosure of medical data by medical institutions to a prosecutor's office and to a patient's employer, and the collection of a patient's medical data by an institution responsible for monitoring the quality of medical care were also held to have constituted an interference with the right to respect for private life.

In the present case, the applicant's medical records and those of her children were collected and examined by the Committee for Healthcare at the St Petersburg City Administration, acting at the request of the Ministry of Healthcare of the Russian Federation prompted by the complaints of the applicant's mother. The report prepared by the Committee and sent to the Ministry contained information from those records, in particular, information of a private and sensitive nature about the applicant, including the number of her previous pregnancies not resulting in deliveries. At no stage of that process was the applicant's consent sought or received. It follows that the actions in dispute constituted an interference with the applicant's right to respect for private life. It remains to be ascertained whether the interference was justified in the light of paragraph 2 of Article 8.

The Court observes that the Committee did not rely on any provision of domestic law in carrying out the actions in dispute. In the ensuing judicial review proceedings it was found that those actions had complied with Article 61 of the Basic Principles of Public Health Law, a federal law which provided for the guarantee of non-disclosure of confidential medical information without a patient's consent. The decisive question is to what extent the actions in dispute were foreseeable by the applicant.

The Court notes that the guarantee, as formulated in Article 61 of the Basic Principles of Public Health Law, contained an exhaustive list of exceptions to the general rule of non-disclosure of confidential medical information without a patient's consent. The Court further notes that, in finding that the Committee's actions in collecting, examining and disclosing the applicant's medical data to the Ministry did not violate the confidentiality of the applicant's medical data, the domestic courts relied on the general duty of the Committee to provide the Ministry with detailed information in reply to the latter's requests. In so doing, they failed to refer to any provisions of domestic law on which their finding could have been based.

The Court further notes that the definition of confidential medical information in Article 61 was substance- and not form-based. Therefore, the domestic courts' distinguishing of the

disclosure of medical records per se from the disclosure of information derived from medical records had no regard to the content of the information disclosed and lacked any legal basis. In view of the foregoing considerations, the Court concludes that, despite having the formal option to seek judicial review of the Committee's actions, the applicant did not enjoy the minimum degree of protection against arbitrariness on the part of the authorities. The actions in dispute did not constitute a foreseeable application of the relevant Russian law. The interference with the applicant's right to respect for private life was therefore not in accordance with the law within the meaning of Article 8 § 2 of the Convention. That being so, the Court is not required to determine whether this interference pursued a legitimate aim and, if so, whether it was proportionate to the aim pursued.

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

Russia is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement: EUR 5,000, plus any tax that may be chargeable, in respect of non-pecuniary damage; EUR 1,425, plus any tax that may be chargeable to the applicant, in respect of costs and expenses.

89. *Eur. Court of HR, Šantare and Labazņikovs v. Latvia*, judgment of 31 March 2016, application no. 34148/07. The applicants complained that covert interception of their mobile phone conversations, which were subsequently used during their trial, had not been carried out in compliance with Article 8 of the Convention. The Court found a violation of Article 8.

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*no. 34148/07*  
31.03.2016

### ŠANTARE AND LABAZŅIKOVŠ V. LATVIA

The interception of the applicants' mobile phone conversations was not guaranteed adequate judicial review and safeguards against arbitrariness

#### Basic Facts

The Bureau for the Prevention and Combating of Corruption ("the KNAB") received information concerning allegedly unlawful activities of officials of the State Pharmacy Inspectorate. The KNAB launched operational proceedings. In the context of those proceedings the second applicant was summoned to the KNAB to give statements about the activities of certain State officials supervising pharmaceutical matters in Latvia. An operational measure – the interception of the second applicant's telephone conversations – had been authorised until 12 May 2005.

Upon being summoned by the KNAB, on 12 April 2005 the second applicant went to its offices, where he was questioned by two investigators, H. and J. Initially, he refused to cooperate and instead asked J. questions about his duties. On 13 April 2005 the second applicant arranged a meeting with J. away from the KNAB's offices. On the KNAB's behalf, the meeting was organised as an undercover operation, and prior authorisation from a specially authorised prosecutor of the Prosecutor General's Office was obtained. On 13 and 14 April 2005 three meetings took place between the second applicant and J. During the second meeting, which was video and audio recorded by J., the second applicant offered J. a bribe in the amount of 50,000 Latvian lati (LVL) and monthly payments of LVL 1,000 in return for the cessation of any investigative activities concerning his business and the State officials connected with it. During the meeting the second applicant paid J. LVL 18,000 as a first instalment.

Meanwhile, the second applicant called the first applicant. He asked her to withdraw cash from the company's account. Their phone conversations were intercepted and recorded. The next day, the second applicant arranged another meeting, during which he gave the investigator LVL 27,000. On the same day he was arrested by KNAB officers.

After the second applicant's meeting with J., the KNAB instituted criminal proceedings for bribery. The second applicant was charged as a suspect. The KNAB asked for the recordings to be included in the criminal case file. On 2 June 2005 the Office of the Prosecutor brought a charge of aiding and abetting against the first applicant, and a charge of bribery against the second applicant.

On 31 October 2006 the appellate court adopted a judgment which upheld the prosecutor's appeal and quashed the disputed parts of the lower court's judgment. The appellate court

found the first applicant guilty, giving her a suspended sentence of one year's imprisonment. It also revoked the suspension of the second applicant's prison sentence and he was taken directly to prison from the courtroom. In an appeal on points of law the first applicant argued that the tapped phone conversations should not have been admitted as evidence, as they had been obtained without proper authorisation. The second applicant submitted, inter alia, that the appellate court had not assessed the lawfulness of the phone tapping and had ignored the fact that the criminal case had contained no reference to any authorisation to carry out the above activity as prescribed by Article 176 of the Code of Criminal Procedure. In this regard, he also submitted that the appellate court had consequently failed to observe that interference in a person's private life should be in accordance with the law, as required by Article 8 of the Convention. On 19 January 2007 the Senate of the Supreme Court dismissed the appeal on points of law in open court.

### **Law – Article 8**

The Court considers, and this is not disputed, that the covert interception of the applicants' telephone conversations amounted to an interference within the meaning of Article 8 of the Convention. In examining whether the interference was justified in the light of paragraph 2 of Article 8, the Court has to assess whether the authorities acted "in accordance with the law", pursuant to one or more legitimate aims, and whether the impugned measure was "necessary in a democratic society".

With regard to the parties' disagreement as to whether the contested surveillance measure had any basis in domestic law, the Court observes that, according to the ruling of the Senate of the Supreme Court on 19 January 2007, the interception of the applicants' telephone conversation was carried out under section 17 of the Law on Operational Activities, and not under the provisions of the Criminal Procedure Code, as erroneously alleged by the applicants. In the absence of an arbitrary interpretation, the Court considers that the interception of the applicants' phone conversations had a legal basis in domestic law and that the legal basis was accessible to the applicants.

During the appellate court hearing and in their appeal on points of law both applicants raised in essence the objection that the criminal case-file contained no reference to a judicial decision authorising interception of their telephone conversations. In response, the Riga Regional Court submitted a general conclusion about the admissibility of evidence, whereas the Senate of the Supreme Court's assessment was limited to referring to the legal provision governing the impugned surveillance measure. The Court notes that the Government has furnished a document prepared by the Supreme Court on 27 July 2012 according to which the contested operational measure had been authorised on 10 March 2005.

However, the Court cannot speculate as to whether the information furnished by the Government attested to the existence of a written authorisation in the form of a decision. Neither the appellate court nor the cassation court mentioned a reference number of the decision authorising the interception of the applicants' telephone conversations, a name of the judge who had adopted the decision or an entry number in the register of judicially authorised operational investigations. It cannot be seen from the case materials that the domestic courts had had access to the classified materials in the operation investigation file, and whether they had indeed verified that the judicial authorisation was part of that file.

In these circumstances the Court concludes that, in the course of their criminal proceedings, the applicants could not verify whether the interference with their rights under Article 8 of the Convention had been carried out on the basis of a prior judicial authorisation. The domestic

courts did not, contrary to the provisions of the domestic law, provide for an effective judicial review of the lawfulness of the contested measure and failed to serve as additional safeguards against arbitrariness within the meaning of Article 8 § 2 of the Convention.

**Conclusion:** violation of Article 8 of the Convention.

**Article 41 (Just Satisfaction)**

The respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts: EUR 1,500, plus any tax that may be chargeable, in respect of non-pecuniary damage to each applicant; EUR 800 to the second applicant, in respect of costs and expenses, plus any tax that may be chargeable to him.



90. *Eur. Court of HR, Cevat Özel v. Turkey*, judgment of 7 June 2016, application no. 19602/06. The applicant complained about the surveillance of his communications and the absence of notification. The Court recognised that the measures of surveillance could be lawful but the absence of notification impeded the applicant to ensure his rights. The Court thus concluded the violation of Article 8.

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no. 19602/06  
7/06/2016

### CEVAT ÖZEL v. TURKEY

The surveillance of the applicant's communications and the absence of notification entailed a violation of the Convention

#### Basic Facts

The applicant is a lawyer. He was born in 1948 and lives in Istanbul. By letter of 17 September 2004, the Istanbul Security Directorate requested the public prosecutor to request judicial authorization for the surveillance of eight mobile telephone numbers, including the applicant's. The letter indicated that information had been obtained that said persons were in contact with K.U. and M.H.U., wanted for, inter alia, organized crime, banking code offense and embezzlement.

K.U. and M.H.U were fleeing abroad and a red notice had been issued by Interpol about them. They are the former shareholders of a multitude of companies as well as a private bank, Imarbank, whose activities had been stopped for malpractices.

On the same day, at the request of the public prosecutor, the 8th Chamber of the Assize Court of Istanbul in charge of the criminal case against the said persons granted permission to listen to the communications of the telephone numbers in question, for a period limited to three months. This decision indicated, among the grounds, that these numbers were used for contacts with those used by K.U. and M.H.U. It covered the surveillance of the eight telephone numbers in question, including that of the applicant.

Furthermore, in the context of the same investigation and by decisions of 8 July 2004, 27 September 2004 and 12 October 2004, the 8th Chamber of the Istanbul Assize Court had also authorized the surveillance of ten other phone numbers and a mobile phone indicated by its number called "IMEI".

By letter of 17 December 2004, the Istanbul Public Prosecutor ordered the Istanbul Security Directorate to stop the execution of the surveillance measure in question in respect of the applicant's telephone number, as well as several other numbers. On an unspecified date, these recordings were destroyed. No notification to the applicant took place. In 2005, while examining a file at the clerk's office of the Seventh Chamber of the Assize Court of Istanbul, the Applicant saw this last letter containing the prosecutor's instructions to stop the wiretaps.

On 18 April 2005, relying on Article 573 of the Code of Civil Procedure governing the personal liability of judges in cases of flagrant error, the applicant lodged an action for compensation against the three members of the 8th Chamber of the Istanbul Assize Court. He alleged in particular in a very detailed argument that their decision was contrary to the laws in force; according to him, Act 4422 on the fight against criminal conspiracies, on which the decision

was based, only limited the organized crimes for which such a measure could be applied and the case in question did not respond to any of these incriminations.

By a decision of 8 November 2005, the 4th Civil Division of the Court of Cassation, the competent body in this respect, dismissed the applicant. It stated that it had been established that the judges in question were responsible for the criminal case against K.U., Y.U. and MHU, accused in the "Imarbank" case of several violations of Law No. 4422, including those allowing telephone tapping, that the said persons were fugitives, and that the applicant "had been their counsel in one of their companies after retiring from their position as public prosecutor ". It added that the security management had asked for authorization to carry out the surveillance measure and that the public prosecutor had given her consent, had addressed the competent court and that thus all the acts were in conformity with the law and the procedure.

By the same decision, the applicant was also ordered to pay each of the three judges 1,000 Turkish liras (TRY) pursuant to Article 576 of the Code of Civil Procedure providing for the award of a "reasonable allowance" to judges in cases where such an action against them would be rejected.

By a decision of 15 March 2006, the general assembly of civil chambers of the Court of Cassation upheld this decision.

### **Law – Article 8**

The Court observes that it is not disputed that the wiretapping of the applicant constitutes an interference with his right to respect for his private life and his correspondence guaranteed by Article 8 § 1 of the Convention. The main question is therefore whether the interference was justified under Article 8 § 2, in particular if it was "prescribed by law" and "necessary in a democratic society", in pursuit of one of the goals set out in this paragraph.

The Court observes that the monitoring measure in this case was implemented in the framework of a judicial inquiry pursuant to Article 2 of Act No. 4422 on the fight against criminal conspiracy; legislation was therefore put in place. However, the Court reiterates that the notion of "law" also covers "the quality" of the law: the law must define the scope and modalities of the exercise of the discretion to apply the law.

In this context, the Court notes that the parties' observations differ on both the interpretation of the legal basis of the measure in question and the necessity or applicability of the measure in respect of the applicant. Nevertheless, noting above all, in the interests of procedural economy and good administration of justice, that the legislation applied at the time was abolished as a result of the judicial reforms, the Court considers that it is not called upon to examine these arguments for the following reason.

In the present case, the Court reiterates that, when surveillance has ceased, the question of post-notification of surveillance measures is indissolubly linked to the question of the effectiveness of judicial remedies and thus to the existence of effective safeguards against abuse of supervisory powers. In principle, the person concerned cannot, in principle, retrospectively challenge the lawfulness of the measures taken without his knowledge, unless he is advised to do so.

34. The Court has already said that it may not be possible in practice to require ex post notification in all cases. The activity or danger that a set of surveillance measures aims to combat may persist for years, even decades, after the removal of these measures. Post-notification to each individual affected by a measure now taken would undermine the long-term goal that originally motivated the surveillance. In addition, such notification could help to

reveal the working methods of the intelligence services, their fields of activity and even, where appropriate, the identity of their agents. Therefore, the lack of subsequent notification to persons affected by secret surveillance measures, as soon as the latter is removed, can not in itself justify the conclusion that the interference was not "necessary in a democratic society" because it is precisely this lack of information that ensures the effectiveness of the measure constituting the interference. However, it is desirable to notify the person concerned after the lifting of surveillance measures as soon as the notification can be given without compromising the purpose of the restriction.

In the present case, although the law in question provided for the destruction of the data, it contained no indication of the notification of the measure to the person concerned. It follows that, according to the legislation in force at the material time, unless criminal proceedings were instituted against the subject of the interception and the intercepted data were used as evidence, or less than an indiscretion, it is unlikely that the person concerned could ever have learned that his communications had been intercepted. Nor has the Government demonstrated the existence of a regulation or practice, or indicated reasonable grounds for the failure to notify the applicant of the measure, which was an essential obstruction of the possibility of bringing an action.

Thus, there were no adequate and effective safeguards against possible abuse of the State's supervisory powers over wiretapping authorized by a court in the context of the judicial inquiry concerning the applicant.

This element is sufficient for the Court to conclude that the law in force at the material time and applied in the applicant's case did not have the required quality. The telephone tapping with the applicant was therefore not "prescribed by law."

**Conclusion:** violation of Article 8

#### **Article 41 (Just Satisfaction)**

The respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the State defendant, at the rate applicable on the date of settlement: EUR 7,500, plus any tax that may be chargeable, in respect of non-pecuniary damage; EUR 5,000, plus any amount that may be chargeable to the applicant as a tax, for costs and expenses.

91. *Eur. Court of HR, Karabeyoğlu v. Turkey*, judgment of 7 June 2016, application no. 30083/10. The applicant alleged that the monitoring of his communications and those of his wife and two children had been arbitrary and illegal, that his professional and personal reputation had been damaged as a result, and complained that he and his family had been denied the right of access to a court because of the failure of the Ministry of Justice to send him the documents concerning the phone-tapping operations. The Court found no violation of Article 8 as regards the telephone tapping in connection with the criminal investigation, but found a violation as regards the use in disciplinary proceedings of the information obtained by means of telephone tapping, and of Article 13 (right to effective remedy).

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**no. 30083/10**  
**07.06.2016**

Press release issued by the Registrar

### **KARABEYOĞLU v. TURKEY**

Unlawful use of information obtained by means of telephone tapping in disciplinary proceedings against a public prosecutor

#### **Basic Facts**

The applicant, Hamdi Ünal Karabeyoğlu, is a Turkish national who was born in 1955 and lives in Usak (Turkey). In 2007 the Istanbul public prosecutor's office initiated a criminal investigation into a criminal organisation known as Ergenekon, whose presumed members were suspected of having engaged in activities aimed at undermining the political regime and bringing about a military coup. On 23 March 2008 the premises of a political party were searched in the context of the investigation. The documents and items seized included information about the private lives of a number of judges and prosecutors and their relations with certain individuals and entities.

On 14 August 2008 the public prosecutor sought permission from the Judicial Inspection Board to initiate an investigation into the judges and prosecutors concerned, including Mr Karabeyoğlu. Permission was granted on 5 September 2008, and various procedural steps were taken by inspectors from the Ministry of Justice. On 14 October 2008 the Istanbul Assize Court authorised the monitoring for a three-month period of five telephone numbers registered in Mr Karabeyoğlu's name. On 3 November 2008 the monitoring of three of the five numbers was discontinued on the grounds that they were being used by other people. On 15 January 2009 the order for the monitoring of the two numbers used by Mr Karabeyoğlu was extended. On 19 January 2009, after examining the results of the first stage of the phone-tapping operation, the inspectors forwarded the records to the public prosecutor with responsibility for organised crime, who gave a decision not to prosecute on 28 December 2009, holding that it could not be concluded from the evidence obtained that the judges and prosecutors concerned had provided the Ergenekon organisation with assistance and support. On 31 December 2009 the phone-tapping records were destroyed by the public prosecutor's office in

accordance with the decision not to prosecute. On 5 January 2010 the devices on which the recordings had been made were also destroyed by the same office.

On 31 December 2009 the public prosecutor sent Mr Karabeyoğlu a note informing him of the decision not to prosecute and the destruction of the material obtained during the surveillance operation. Mr Karabeyoğlu was also informed in a letter from the Ministry of Justice dated 12 March 2010 that a disciplinary investigation in respect of him had been discontinued on 5 March 2010 and that the evidence obtained by means of telephone tapping had been destroyed on 11 March 2010.

## **Law – Article 8**

### The criminal investigation

The Court considered that the monitoring of Mr Karabeyoğlu's telephone lines had interfered with the exercise of his right to respect for his private life and correspondence. The interference had been in accordance with domestic law<sup>2</sup> and had been subject to a set of restrictive conditions. The Court also noted that the legislation had been accessible and foreseeable as to its effects, since Turkish law laid down strict conditions for the imposition of surveillance measures and the processing of the information thus obtained and defined with sufficient clarity the scope and manner of exercise of the discretion conferred on the authorities in relation to telephone tapping. The Court thus found no indication that the legislation had been breached, and concluded that Mr Karabeyoğlu had enjoyed the minimum degree of protection required by the rule of law in a democratic society.

As to whether the interference had been necessary, the Court observed that Mr Karabeyoğlu had been placed under surveillance on the grounds that he was suspected of belonging to the Ergenekon criminal organisation or providing it with assistance and support. It noted that the authorities had reached that degree of suspicion after discovering evidence during a search. The Court also considered that there was no indication that the criminal case file in the domestic proceedings had not contained sufficient information to satisfy an objective observer that Mr Karabeyoğlu might have committed the offence for which he had been placed under surveillance. In addition, it found that there was no evidence that the interpretation and application of the relevant legislation in the present case had been so arbitrary or manifestly unreasonable as to render the measure in question unlawful. Furthermore, it noted in particular that both Article 135 of the Code of Criminal Procedure (CCrP) and the relevant rules and regulations contained various clauses aimed at limiting the effects of surveillance measures to the greatest extent possible and ensuring that they were implemented in accordance with the law, any breaches being punishable by imprisonment.

Accordingly, the Court found that the monitoring of Mr Karabeyoğlu's telephone lines had been ordered on the basis of suspicions that could be regarded as objectively reasonable and that the measure had been implemented in accordance with the relevant legislation. In particular, the telephone tapping had been authorised by a court with a view to preserving national security and preventing disorder; the rules and regulations containing strict conditions for the implementation of the measure had been scrupulously observed; the information obtained had been processed in compliance with the legal requirements; the information had been destroyed within the statutory time-limits after the public prosecutor had decided not to prosecute; and Mr Karabeyoğlu had been sent a note within the required time-limit informing him of the procedure undertaken and the measure applied, and had also been sent a copy of the material in the file relating to him.

The Court concluded that the interference with Mr Karabeyoğlu's right under Article 8 § 1 of the Convention had been necessary in a democratic society in the interests of national security and for the prevention of disorder and crime. It therefore held that there had been no violation of Article 8 of the Convention as regards the telephone tapping in relation to the criminal investigation.

#### The disciplinary investigation

The Court observed that the material obtained during the monitoring of Mr Karabeyoğlu's telephone lines had also been used in the disciplinary proceedings against him, thus entailing a breach of domestic law, in particular Article 22 of the Constitution and Article 135 of the CCrP, which listed the cases in which surveillance measures could be applied and made no mention of disciplinary investigations. Furthermore, Article 137 §§ 3 and 4 of the CCrP provided that information obtained as a result of a surveillance measure was to be destroyed once the investigation had been completed. The Court observed in this connection that although, following the decision of 31 December 2009 not to prosecute, the prosecutor in charge of the criminal investigation had destroyed the recordings in question on 31 December 2009 and 5 January 2010, a copy had indisputably remained in the possession of the judicial inspectors, who had used the relevant material in the context of the disciplinary investigation opened in respect of Mr Karabeyoğlu and had not destroyed it until 11 March 2010. In the Court's view, the relevant legislation had thus been breached in two respects: the information had been used for purposes other than the one for which it had been gathered and had not been destroyed within the 15-day statutory time-limit after the criminal investigation had ended.

The Court observed that these aspects were specifically covered by provisions of Turkish criminal law that appeared to afford adequate protection of the right to private life in the context of the case under examination: Article 138 of the Criminal Code provided for a term of imprisonment in the event of failure by public officials to destroy data within 15 days after the end of the investigation where this requirement applied, and Article 139 of the Criminal Code provided that a prosecution could be brought even in the absence of a criminal complaint. Nevertheless, there was no indication in the present case that any such investigation had been opened on that account, or that Mr Karabeyoğlu had had any other means of redress available. The Court therefore found that during the disciplinary investigation in respect of Mr Karabeyoğlu, none of those provisions had been observed by the national authorities.

Accordingly, the Court concluded that the interference with the exercise of Mr Karabeyoğlu's right to respect for his private life had not been "in accordance with the law", as required by Article 8 § 2 of the Convention, as far as the disciplinary investigation was concerned. The Court thus held that there had been a violation of Article 8 as regards the use in the disciplinary investigation of information obtained by means of the monitoring of Mr Karabeyoğlu's telephone lines.

#### **Law – Article 13**

The Court noted that the Government had not produced any examples to show that in a case of this kind it was possible to challenge a failure to comply with the conditions laid down in domestic law regarding surveillance measures, or any examples of the review of the use in the context of a separate procedure – in this case a disciplinary investigation – of information obtained as a result of a surveillance measure performed during a criminal investigation. The Court therefore found that no institution was empowered to review the compatibility of the

surveillance measure with the Convention requirements, with a view to granting appropriate relief to Mr Karabeyoğlu if necessary.

The Court thus concluded that Mr Karabeyoğlu had not had a domestic remedy available for securing a review of whether the interference with his right to respect for his private life was compatible with the Convention requirements, whether in relation to the criminal or the disciplinary investigations. It therefore found a violation of Article 13 of the Convention.

**Conclusion:** violation of Article 8 (with regards to the use in disciplinary proceedings of the information obtained by means of telephone tapping) and of Article 13.

**Article 41 (just satisfaction)**

The Court held that Turkey was to pay Mr Karabeyoğlu 7,500 euros (EUR) in respect of non-pecuniary damage.

92. *Eur. Court of HR, Versini-Campinchi and Crasnianski v. France*, judgment of 16 June 2016, application no. 49176/11. The case concerned the interception, transcription and use in disciplinary proceedings against her of conversations which the applicant, who is a lawyer, had had with one of her clients. The Court held that as the transcription of the conversation between the applicant and her client had been based on the fact that the contents could give rise to the presumption that the applicant had herself committed an offence, and the domestic courts had satisfied themselves that the transcription did not infringe her client's rights of defence, the fact that the former was the latter's lawyer did not suffice to constitute a violation of Article 8 of the Convention in the applicant's regard.

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**no. 49176/11**  
**16.06.2016**

Press release issued by the Registrar

### **VERSINI-CAMPINCHI AND CRASNIANSKI v. FRANCE**

No violation of the Convention on account of transcription of telephone conversation between a lawyer and her client giving rise to the presumption that the lawyer had participated in an offence

#### **Basic Facts**

Following the death of a number of people suspected of having been contaminated after eating meat from cattle infected with bovine spongiform encephalopathy, a judicial investigation was opened in December 2000. The company Districoupe – a subsidiary of the Buffalo Grill chain of restaurants supplying the meat – was suspected of breaching the embargo on the importation of beef meat from the United Kingdom, a county affected by a major outbreak of the disease. Mr Versini-Campinchi, a lawyer, was instructed to defend the interests of Mr Picart, managing director of Districoupe and chairman of Buffalo Grill's supervisory board. Ms Crasnianski, also a lawyer, assisted him on the case.

On instructions issued by the investigating judge on 2 December 2002, Mr Picart's telephone line was tapped. Telephone conversations between Mr Picart and the applicants were intercepted and transcribed. Mr Picart was placed in police custody on 17 December 2002, and charged on 18 December 2002 along with three other people.

On 12 May 2003, having been requested to rule on the lawfulness of the phone-tapping records in question, the investigation chamber of the Paris Court of Appeal annulled the transcript of a conversation of 24 January 2003 between Mr Picart and Mr Versini-Campinchi on the grounds that it concerned the exercise of Mr Picart's rights of defence and could not support a presumption that the lawyer had participated in an offence. It refused to annul the other transcripts, however, considering that the contents were capable of disclosing a breach of professional confidentiality and contempt of court by Mr Versini-Campinchi and Ms



Crasnianski. In a judgment of 1 October 2003 the Court of Cassation dismissed an appeal on points of law lodged by Mr Picart.

Meanwhile, on 27 February 2003, the public prosecutor at the Paris Court of Appeal had sent a letter to the Chairman of the Paris Bar asking him to initiate disciplinary proceedings against the applicants. On 21 March 2003 the Chairman had instituted disciplinary proceedings against Ms Crasnianski for breach of professional confidentiality. However he had discontinued the proceedings against Mr Versini-Campinchi regarding the contents of the conversation of 14 January 2003. Before the Bar Council the applicants sought to have the transcript of the phone-tapping record of 17 December 2002 removed from the evidence in the case on the grounds that it was illegal. On 16 December 2003 the Bar Council, sitting as a disciplinary board, rejected their request. On the merits, the Bar Council found that Ms Crasnianski's comments recorded on 17 December 2002 infringed Article 63-4 of the Code of Criminal Procedure and breached the obligation of professional confidentiality incumbent on her as a lawyer. Observing that she had acted on the instructions of Mr Versini-Campinchi, the Council found that they had acted jointly. The Bar Council imposed an order on Mr Versini-Campinchi debaring him from exercising the profession of lawyer for two years, suspended for 21 months, and debarred Ms Crasnianski from exercising the profession for one year suspended.

### **Law – Article 8**

The Court observed that the interception, recording and transcription of the telephone conversation of 17 December 2002 between Mr Picart and Ms Crasnianski amounted to an interference with their right to respect for their private life and their correspondence. That interference had continued in Ms Crasnianski's case by the use of the transcript of that conversation in disciplinary proceedings against her.

The legal basis of the interference in question was contained in Articles 100 et seq. of the Code of Criminal Procedure, with the interception, recording and transcription of the conversation having been carried out further to authorisation by an investigating judge – on the basis of those provisions – to tap the telephone line. The consequence of that, by definition, was that conversations with third parties would be listened to and thus utterances by persons who were not targeted by the measure ordered by the judge would also be intercepted.

The Court reiterated that it had accepted that Articles 100 et seq. of the Code of Criminal Procedure met the required standard of “quality of the law”. It observed, however, that those provisions did not cover the situation of persons whose utterances had been intercepted in the course of tapping another person's telephone. In particular, they did not provide for the possibility of using the intercepted utterances against the author in the context of a different set of proceedings from those in which the telephone tapping had been ordered.

The Court noted, however, that the Court of Cassation had already ruled at the relevant time that, as an exception, a conversation between a lawyer and his or her client overheard while carrying out a lawful investigative measure could be transcribed and added to the file where it appeared that the contents could give rise to a presumption that the lawyer was participating in an offence. Admittedly, it was only in a judgment delivered on 1 October 2003 – in the context of the present case – that the Court of Cassation had expressly indicated that the same was true where the offence did not relate to the case being examined by the investigating judge. The Court held, however, that in the light of Articles 100 et seq. of the Code of Criminal Procedure and the case-law of the Court of Cassation, Ms Crasnianski, a

legal practitioner, could have foreseen that Mr Picart's telephone was likely to be tapped pursuant to those provisions, that those utterances which gave rise to a presumption of her participation in an offence could be recorded and transcribed – despite her status as a lawyer – and that she ran the risk of being prosecuted. She could have foreseen that disclosing information covered by professional confidentiality would expose her to proceedings under Article 226-13 of the Criminal Code. She could also have foreseen that a breach of that kind would expose her to disciplinary proceedings before the Bar Council, which could take action, *inter alia*, on the request of the public prosecutor. The Court therefore accepted that the interference in question had been in accordance with the law.

The Court had already had the opportunity to specify<sup>4</sup> that as it had been done in the context of criminal proceedings, the interception, recording and transcription of Mr Picart's telephone communications in accordance with the judge's instructions of 2 December 2002 had pursued one of the aims provided for in Article 8, namely, "prevention of disorder". The Court found that the same was true of the use of the transcript of the telephone conversation of 17 December 2002 in the context of disciplinary proceedings brought against Ms Crasnianski for breach of professional confidentiality.

The telephone tapping and the transcription in question had been ordered by a judge and carried out under the latter's supervision, a judicial review had taken place in the context of the criminal proceedings brought against Mr Picart and Ms Crasnianski had obtained a review of the lawfulness of the transcription of the recording in the context of the disciplinary proceedings brought against her. The Court considered that, even if she had not been able to apply to a judge to have the transcription of the telephone communication of 17 December 2002 annulled, in the specific circumstances of the case there had been effective scrutiny capable of limiting the interference complained of to that which was necessary in a democratic society.

With regard to the fact that on 17 December 2012 Ms Crasnianski had been communicating with Mr Picart in her capacity as a lawyer, the Court had previously observed in its earlier case-law<sup>5</sup> that whilst legal professional privilege was of great importance for both the lawyer and his or her client and for the proper administration of justice and was one of the fundamental principles on which the administration of justice in a democratic society was based it was not, however, inviolable. It primarily imposed certain obligations on lawyers and the lawyer's defence role formed the very basis of legal professional privilege.

The Court observed that French law very clearly provided that respect for the rights of the defence required that telephone conversations between a lawyer and his client remained confidential, and prohibited the transcription of such conversations, even those overheard while carrying out a lawful investigative measure. There was only one exception to that: transcription was possible where it was established that the contents of a conversation could give rise to a presumption that the lawyer himself was participating in an offence. Moreover, Article 100-5 of the Code of Criminal Procedure expressly established that, on pain of nullity, communications with a lawyer relating to the exercise of the rights of the defence could not be transcribed.

According to the Court, that approach, which was compatible with its case-law, was tantamount to finding that, as an exception, legal professional privilege, the basis of which was respect for the client's rights of defence, did not preclude the transcription of an exchange between a lawyer and his client in the context of lawful interception of the client's telephone conversations where the contents of that exchange gave rise to a presumption that the lawyer himself was participating in an offence, and in so far as the transcription did not

affect the client's defence rights. The Court accepted that as that exception to the principle of confidentiality of communications between a lawyer and his client was restrictively worded, it contained an adequate safeguard against abuse.

The Court reiterated that what was important in this context was that the client's rights of defence were not adversely affected, that is, that the utterances transcribed were not used against him in the proceedings. In the present case the investigation chamber had annulled certain other transcripts on the ground that the conversations recorded had concerned the exercise of Mr Picart's defence rights. The reason for refusing to annul the transcript of 17 December 2002 was that it had found that Ms Crasnianski's utterances were capable of disclosing a breach of professional confidentiality on her part, and not because they had amounted to evidence against her client.

As the transcription of the conversation of 17 December 2002 between Ms Crasnianski and Mr Picart had been based on the fact that the contents gave rise to a presumption that Ms Crasnianski had herself committed an offence, and the domestic courts had been satisfied that the transcription did not infringe Mr Picart's defence rights, the Court held that the fact that Ms Crasnianski was Mr Picart's lawyer did not suffice to find a violation of Article 8 of the Convention in her regard. A lawyer was particularly well qualified to know where the limits of lawfulness were and to realise that, where applicable, his communications with his client were capable of giving rise to a presumption that he had himself committed an offence. This was particularly true where the utterances themselves were capable of amounting to an offence, such as a breach of professional confidentiality.

Accordingly, the interference in question was not disproportionate to the legitimate aim pursued – "prevention of disorder" – and could be regarded as "necessary in a democratic society" within the meaning of Article 8 of the Convention.

**Conclusion:** no violation of Article 8.

93. *Eur. Court of HR, Vukota-Bojić v. Switzerland*, judgment of 18 October 2016, application no. 61838/10. The applicant complained that the surveillance by the insurance company had been in breach of her right to respect for private life, and that it should not have been admitted in the proceedings that resulted in the reduction of her disability pension. The Court held that the secret surveillance ordered had interfered with the applicant's private life. However, the surveillance had not been prescribed by law, it had failed to regulate with clarity when and for how long surveillance could be conducted, and how data obtained by surveillance should be stored and accessed. There had therefore been a violation of Article 8.

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**no. 61838/10**  
**18.10.2016**

Press release issued by the Registrar

### **VUKOTA-BOJIĆ v. SWITZERLAND**

Unlawful surveillance by an insurance company of a road accident victim breached her right to privacy

#### **Basic Facts**

In August 1995, Ms Vukota-Bojić was struck by a motorcycle and fell on her back. She was initially diagnosed with cervical trauma and possible cranial trauma, and underwent several medical examinations which resulted in conflicting reports about her ability to work. On the basis of these reports, Ms Vukota-Bojić's insurer decided her entitlement to daily allowances should cease from April 1997. This decision was overturned by the Social Insurance Court of Zurich, which ordered further investigations to be carried out. These reports concluded that Ms Vukota-Bojić had brain dysfunction and that this had been caused by her accident. Meanwhile, on 21 March 2002, the local social security authority had granted Ms Vukota-Bojić a full disability pension. On 14 January 2005, the insurer decided once again that Ms Vukota-Bojić's insurance-related benefits should cease.

After this decision was also overturned by the Social Insurance Court, the insurer invited Ms Vukota-Bojić to undergo a further medical evaluation. She refused, which prompted the insurer to conduct secret surveillance on Ms Vukota-Bojić to establish her condition. The surveillance was carried out by private investigators on four different dates, lasting several hours each time. Investigators followed Ms Vukota-Bojić in public places over long distances. A surveillance report was prepared.

As a result of the report, the insurer confirmed its decision that Ms Vukota-Bojić's insurance-related benefits should cease. In April 2007, a neurologist appointed by the insurer, Dr H., released an anonymous expert opinion which concluded that Ms Vukota-Bojić was only incapacitated by 10%. The insurer decided to grant Ms Vukota-Bojić daily allowances and a pension at this rate.

Ms Vukota-Bojić appealed the insurer's decision, but on 29 March 2010, the Federal Court held that the insurer had been justified in asking Ms Vukota-Bojić to complete a further medical examination, that its surveillance of her had been lawful and that Dr H.'s report was

persuasive on the issue of her entitlement to benefits. Ms Vukota-Bojić lodged a request with the court to clarify its decision, but this was dismissed.

### **Law – Article 8**

The Court held that the surveillance arranged by the insurer amounted to a violation of Ms Vukota-Bojić's right to a private life. First, the court noted that, since the insurer had been operating a state insurance scheme and was regarded in domestic law as a public authority, its actions could be imputed to the state. Furthermore, while the surveillance had been conducted in public places only, the fact that the investigators had acted systematically, had compiled a permanent record on Ms Vukota-Bojić and that the information had been requested to help resolve an insurance dispute meant that Article 8 § 1 was engaged and Ms Vukota-Bojić's private life had been interfered with.

Moreover, that interference had not been "prescribed by law" as required by Article 8 § 2. While Swiss legislation did empower insurance companies to take "necessary investigative measures" and collect "necessary information" where an insured person had not been forthcoming with information, these provisions were insufficiently precise. In particular, they did not indicate when and for how long surveillance could be conducted, or include safeguards against abuse, such as procedures to be followed when companies are storing, accessing, examining, using, communicating or destroying information. This created a risk of unauthorised access to and disclosure of information.

The surveillance of Ms Vukota-Bojić had therefore been in breach of Article 8.

### **Law – Article 6**

The Court held that there had been no infringement of Article 6, in regard to the admission of evidence in court obtained by the surveillance, as well as Dr H.'s expert opinion based on that information. The proceedings, when taken as a whole, had been conducted in a fair manner. Ms Vukota-Bojić had had an opportunity to challenge the admissibility of the surveillance report and related evidence, and the Federal Court had given a reasoned decision as to why they should be admitted. Furthermore, the surveillance information and Dr H.'s opinion had not been the only evidence relied upon to support the Federal Court's decision, as the court had also emphasised the existence of other conflicting medical reports.

### **Just satisfaction (Article 41)**

The Court held that Switzerland was to pay the applicant 8,000 euros (EUR) in respect of non-pecuniary damage and EUR 15,000 in respect of costs and expenses.

**94. Eur. Court of HR, Bašić v Croatia, judgment of 25 October 2016, application no. 22251/13. The applicant complained that the secret surveillance of his telephone conversations, subsequently used as evidence during his trial, had been in violation of the guarantees of Articles 8 and 6 § 1 of the Convention. The Court found a violation of Article 8.**

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**no. 22251/13  
25.10.2016**

### **BAŠIĆ v. CROATIA**

The use of secret surveillance of the applicant's telephone conversations as evidence in his trial breached the Convention

#### **Basic Facts**

On 26 November 2007 the State Attorney's Office for the Suppression of Corruption and Organised Crime asked an investigating judge of the Zagreb County Court to authorise the tapping the telephone conversations of the applicant and several other individuals on the grounds of their suspected participation in organised drug trafficking, customs evasion, and the abuse of power and authority. On 27 November 2007 the investigating judge granted the request and issued an order for the use of secret surveillance measures. In the course of the investigation, the investigating judge issued several further secret surveillance orders to the same effect. In addition to the phone tapping, the investigating judge also authorised the covert monitoring of the suspects.

On the basis of the evidence obtained by the secret surveillance measures, on 2 July 2008 the police lodged a criminal complaint against the applicant and five other persons with the Slavonski Brod County State Attorney's Office in connection with suspected drug trafficking and customs evasion. On 4 July 2008 the investigating judge opened an investigation in respect of the applicant and the other suspects in connection with suspected drug trafficking. She also ordered the applicant's pre-trial detention.

On 25 November 2008 the applicant and four other persons were indicted by the Slavonski Brod County Court on charges of drug trafficking. On 12 June 2009 the applicant asked to exclude from the proceedings the evidence obtained by means of secret surveillance as being unlawfully obtained. He argued that the secret surveillance had been carried out on the basis of orders which had been issued contrary to the relevant domestic law and practice of the Constitutional Court in that they contained no reasoning justifying the use of secret surveillance. At a hearing on 18 June 2009 the Slavonski Brod County Court dismissed the applicant's request as unfounded.

A further hearing was held on 29 September 2009 at which the applicant reiterated his request for the exclusion of the evidence obtained by secret surveillance as being unlawfully obtained. The applicant further contended that his exact location at the moment of the alleged commission of the offence at issue should be established by obtaining the location tracking data of the mobile phone which he had allegedly used. The trial bench dismissed the applicant's request as unfounded and decided to continue with the examination of evidence.

Further hearings were held on 2 and 19 February 2010 at which the trial bench examined the secret surveillance recordings. The applicant reiterated his request for an expert telecommunications report to establish the location of his mobile phone at the moment of the alleged offence. The defence also challenged the credibility of a police report concerning the applicant's surveillance, expressing doubts as to the reasons why there were no recordings accompanying that report.

By a judgment of 1 March 2010 the Slavonski Brod County Court found the applicant guilty as charged and sentenced him to five years' imprisonment. As to the applicant's arguments concerning the alleged unlawfulness of the secret surveillance orders, that court held that the orders had outlined reasons for believing that the applicant had probably participated in the commission of the offence at issue and that the investigation could not have been conducted by other means.

On 21 April and 6 July 2010, the applicant lodged an appeal against the first-instance judgment with the Supreme Court, but his appeal was dismissed. The applicant subsequently lodged a complaint with the Constitutional Court complaining that his right to respect for private life and confidentiality of correspondence guaranteed by the Constitution had been breached by the unlawful and unjustified secret surveillance, and that his right to a fair trial had been breached by the use of the evidence thereby obtained in the criminal proceedings against him. On 11 July 2012 the Constitutional Court dismissed the applicant's constitutional complaint as unfounded.

### **Law – Article 8**

The Court notes in the case at hand that the investigating judge's order concerning the use of secret surveillance measures was based on a request for the use of such secret surveillance by the competent State Attorney's Office and included the statutory phrase that "the investigation could not be conducted by other means, or would be extremely difficult". It did not, however, provide adequate reasoning as to the particular circumstances of the case and in particular reasons why the investigation could not be conducted by other, less intrusive, means.

The Court found in the Dragojević case that the lack of reasoning underlying the investigating judge's order, accompanied by the practice of the domestic courts in circumventing such lack of reasoning by retrospective justification of the use of secret surveillance, was not in compliance with the relevant domestic law and did not therefore in practice secure adequate safeguards against various possible abuses. The Court thus considered that such practices were not compatible with the requirement of lawfulness nor were they sufficient to keep the interference with an applicant's right to respect for his private life and correspondence to what was "necessary in a democratic society", as required under Article 8.

The Court finds that the same considerations as arose in the Dragojević case are applicable in the case at hand. It sees no reason to depart from this case-law in the present case.

**Conclusion:** violation of Article 8

### **Law – Article 6 § 1**

The applicant had also complained that evidence obtained by means of secret surveillance had been used in the criminal proceedings against him, thereby casting doubts on the fairness of his trial.

The first question to be examined in this context is whether the applicant was given the opportunity of challenging the authenticity of the evidence and opposing its use. The Court notes that the applicant was given, and effectively used, such an opportunity. The domestic courts examined his arguments on the merits and provided reasons for their decisions. The fact that the applicant was unsuccessful at each step does not alter the fact that he had an effective opportunity to challenge the evidence and oppose its use.

With regard to the quality of the evidence in question, the Court notes that the applicant's main objection to the use of the evidence obtained by means of secret surveillance concerned the formal use of such information as evidence during the proceedings. He never contested the authenticity of the recordings reproduced at the trial and all the defence's doubts as to the accuracy of the recordings were duly examined and addressed by the trial court.

As regards the objections voiced by the defence, the trial court in particular questioned the police officers in charge of the operation in order to clarify the circumstances of the case and provided a reasoned decision setting out its findings as to the manner in which the recordings had been obtained and documented. These findings were also examined and confirmed by the Supreme Court, which considered that all the relevant circumstances of the case had been properly established by the first-instance court.

Given that it is primarily for the domestic courts to decide on the admissibility of evidence, on its relevance and the weight to be given to it in reaching a judgment, the Court finds nothing here that casts any doubts on the reliability and accuracy of the evidence in question. In view of the above, Court considers that there is nothing to substantiate the allegation that the applicant's defence rights were not properly complied with in respect of the evidence adduced or that its evaluation by the domestic courts was arbitrary. Thus, no violation of Article 6 § 1 was found.

#### **Article 41 (Just Satisfaction)**

The respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amount, to be converted into Croatian kunas (HRK) at the rate applicable at the date of settlement: EUR 7,500, plus any tax that may be chargeable, in respect of non-pecuniary damage.



95. *Eur. Court of HR, Figueiredo Teixeira v. Andorra*, judgment of 8 November 2016, application no. 72384/14. The case concerned the storage and communication to the judicial authority of data from telephone calls made by the applicant, who was suspected of the serious offence of drug trafficking. The Court found in particular that since the impugned interference was prescribed in national law, a person holding a prepaid mobile phone card could reasonably have expected those provisions to be applied in his case. Furthermore, the criminal procedure provided a wide range of safeguards against arbitrary actions. Hence, no violation of Article 8 was found.

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**no. 72384/14**  
**08.11.2016**

Press release issued by the Registrar

### **FIGUEIREDO TEIXEIRA v. ANDORRA**

Use of personal telephone data by an investigating judge did not breach the Convention

#### **Basic Facts**

Mr Figueiredo Teixeira, who was suspected of the serious offence of drug trafficking, was arrested on 5 December 2011. The judge (*batlle*) responsible for the criminal investigation asked Andorra Telecom to hand over a list of incoming and outgoing calls from two telephone numbers pertaining to Mr Figueiredo Teixeira over the period from 15 August to 4 December 2011, and to inform him of the identities of subscribers holding the numbers set out in the list. Mr Figueiredo Teixeira filed an application to set aside that decision, alleging that he had sustained a breach of his right to the secrecy of his communications. On 22 November 2012 the *batlle* dismissed that application. Mr Figueiredo Teixeira then brought urgent proceedings for termination of the consequences of the allegedly unlawful use of the data gathered and for the destruction of the documents in question. The duty *batlle* and then the Higher Court of Justice dismissed his appeal.

Subsequently, relying on the constitutional rights to a fair trial, to respect for private life and to the secrecy of communications, he lodged an *empara* appeal with the Constitutional Court. By a judgment notified on 19 March 2014 that court dismissed the appeal. The Constitutional Court found that the storage of customers' data was provided for under Andorra Telecom's general terms and conditions of sale, which had, in principle, been accepted when the customer had subscribed to the telephone company's services. It also cited Articles 47 and 87 of the Code of Criminal Procedure authorising the investigating judge to adopt the requisite measures in the framework of an investigation, including, under certain circumstances, requesting the interception of telephone calls.

By judgment of 29 September 2015 Mr Figueiredo Teixeira was sentenced to a four-year prison term (including two years unsuspended) for the serious offence of sale and possession of large quantities of drugs for commercial purposes. The Higher Court of Justice upheld the

impugned judgment. That court rejected Mr Figueiredo Teixeira's request to stay the execution of the unsuspended prison term on the basis of Rule 39 of the Rules of Court.

### **Law – Article 8**

The primary question in the present case was whether the interference, that is to say the storage and communication to a court of the applicant's personal data, had been sufficiently foreseeable.

Assessing whether the interference was prescribed by law, the Court observed that although a holder of a prepaid telephone card could reasonably have inferred from the Decree of 19 September 1996 on the establishment and modification of telephone rates, published on 25 September 1996, that his personal data had in fact been stored, it emphasised in particular that the impugned interference was covered in Andorran law by Article 87 of the Code of Criminal Procedure and Law No. 15/2003.

As regards whether the effects of the current regulations were sufficiently foreseeable, the Court noted that Article 87 of the Code of Criminal Procedure in force at the relevant time had detailed the conditions under which interference with the right to respect for private life was authorised. In particular, Article 87 § 5 of the Code of Criminal Procedure had required the courts to give a reasoned decision explaining the necessity and proportionality of the measure and mentioning the evidence obtained and the seriousness of the offence under investigation. The Court considered that the Order of 30 August 2012 had complied with those requirements, particularly in view of the requirements of the investigation, the seriousness of the offence in question (drug trafficking) and the practicalities of the intrusion into the applicant's private sphere.

The Court emphasised that the Andorran procedure provided a wide range of safeguards against arbitrary actions. These included the involvement of a judge (*battle*) to grant prior authorisation for the measure, exclusively applicable to very serious offences; a statutory time-limit on the measure; and finally, the fact that the applicant could at any time contest the lawfulness of evidence gathered during proceedings.

The Court emphasised that section 5 of Law No. 15/2003 on the protection of personal data clearly excluded from its scope the processing of data relating to the prevention of criminal offences. Along similar lines, section 16 provided that the subject data could not oppose the communication of his or her personal data on the basis of a judicial decision.

As regards the application of these concurrent rules to the situation of the applicant holding a prepaid card, the Court observed that the aforementioned rules drew no distinction between mobile telephone contract holders and prepaid card users. The Court therefore took the view that it was reasonable to consider, in line with the prosecution submissions during the *empara* appeal and reprinted by the Constitutional Court, that those laws and statutes were applicable to both types of telephone services.

The Court held that the application of domestic law to the present case had been sufficiently foreseeable for the purposes of Article 8 § 2 of the Convention.

As regards whether the interference had pursued a legitimate aim, the Court had no doubt as to the fact that the impugned interference, which had been geared to combating drug trafficking, had pursued one of the legitimate aims listed in the second paragraph of Article 8 of the Convention, that is to say the prevention of crime. As regards the proportionality of the measure, the Court pointed out that the impugned interference had been authorised for a shorter period than that originally requested by the police. Moreover, the offences charged had been committed at most six months before the period covered by the impugned measure.

The Court considered that the Andorran authorities had thus respected “proportionality between the effects of the use of special investigation techniques and the objective that has been identified”, and that they had used an unintrusive method to “enable the offence to be detected, prevented or prosecuted with adequate effectiveness”.

**Conclusion:** no violation of Article 8

**96. Eur. Court of HR, Surikov v. Ukraine, judgment of 26 January 2017, application no. 42788/06.** The applicant complained that his employer had arbitrarily collected, retained, and used sensitive, obsolete and irrelevant data concerning his mental health in considering his application for promotion, and had unlawfully and unfairly disclosed this data to the applicant’s colleagues and to a civil court during a public hearing. The Court found a violation of Article 8.

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**no. 42788/06**  
**26.01.2017**

### **SURIKOV v. UKRAINE**

The collection, retention and use of sensitive health data by an employer in considering a promotion and the disclosure of such data to colleagues and during a public hearing violated the Convention

#### **Basic Facts**

The applicant was employed as a worker by the Tavrida State Publishing House (hereafter “Tavrida”). In June 1997 the applicant asked N., the director of Tavrida, to place him on the reserve list for promotion to an engineering position corresponding to his qualifications. Having received no follow-up, in 2000 the applicant applied for the second time. On 6 March 2000 this application was refused. On an unspecified date in 2000 the applicant appealed to the Central District Court of Simferopol (hereinafter “the Central District Court”) seeking, in particular, to oblige his employer to consider him for an engineering position.

During the proceedings, the defendant company submitted that its refusal was connected to the state of the applicant’s mental health. In particular, as was apparent from the information retained on the applicant’s personnel file, in 1981 he had been declared unfit for military service in peacetime in accordance with Article 5b of the then applicable 1973 Diseases and Handicaps Schedule issued by the Ministry of Defence of the Union of Soviet Socialist Republics (“the USSR”). In the summer of 1997 the human resources department had obtained from the military enlistment office a certificate stating that the applicant had indeed been dispensed under Article 5b, which read as follows: “psychosis and psychotic disorders connected to organic cerebral lesions with residual moderately manifested deviations in the mental sphere”. The defendant company further noted that as the applicant had not provided any subsequent information concerning his state of health, his appointment to an engineering position – which implied managerial responsibilities and supervision of other employees –

was considered unwarranted. A copy of the certificate issued by the military enlistment office was provided to the court for examination during the public hearings.

B., the applicant's supervisor questioned by the court during the trial, submitted that the applicant had been a diligent employee. However, in his view he lacked the necessary personal skills to occupy a position with managerial responsibilities. In particular, occasionally the applicant had been involved in conflicts with his colleagues. All of them, when questioned by B., had suggested that they did not want to have the applicant as their supervisor. In view of the above and with regard being had to the reasons for the applicant's dispensation from military service, in B.'s view the management had been correct in refusing the applicant's application for promotion. On 17 August 2000 the court rejected the applicant's claim.

In 2002 Tavrida referred the applicant for a medical examination "with a view to determining [his] fitness for employment" as an engineer. On 5 September 2002 the applicant obtained a certificate signed by six medical specialists, including a psychiatrist and a neurologist from the local polyclinic attesting to his fitness for employment as an engineer. In August 2003 the applicant was appointed as a foreman and in April 2006 as an engineer-technologist.

19. In October 2000 the applicant instituted civil proceedings against Tavrida seeking damages and apologies from its management for his purported defamation resulting from the dissemination of information concerning the medical grounds for his dispensation from military service. He alleged, in particular, that the defendant company had had no right to enquire of the enlistment office in 1997 about the grounds for his dispensation, to use this information in deciding on his promotion and to disseminate it to his direct supervisor and other colleagues, as well as to communicate it to the court in the framework of the civil dispute.

On 23 January 2001 the Central District Court rejected the applicant's claim as lacking legal basis. In particular, it noted that labour law did not prohibit employers from enquiring of military enlistment offices about their employees' military service records. On 28 March 2001 the Supreme Court of the ARC quashed this judgment and remitted the case for a fresh consideration.

On 23 July 2003 the Central District Court took a fresh decision rejecting the applicant's claims, referring, again, to Article 7 of the Civil Code and having found that there was nothing unlawful either in Tavrida's or its director's personal conduct with respect to the processing of the disputed information. Without referring to any legal provisions, the court noted that the director had been authorised to know the reasons for the applicant's dispensation from military service, as this information had been a part of the personnel record compiled and kept by employers in the ordinary course of business. The applicant unsuccessfully appealed to the Supreme Court.

In July 2006 the applicant instituted civil proceedings challenging, in particular, the lawfulness of the actions of N., K. and B. with respect to the processing of his health data. The challenge was dismissed on various appeals, including with the Supreme Court.

### **Law – Article 8**

The Court notes that the information at stake in the present case concerned an indication that in 1981 the applicant had been certified as suffering from a mental health related condition. The Court concludes that such information by its very nature constitutes highly sensitive personal data regardless of whether it was indicative of a particular medical diagnosis. Collection, storage, disclosure and other types of processing of such information fall therefore within the ambit of Article 8. Having established that the case at hand concerned an interference with Article 8, the Court proceeded to evaluate whether it could be justified.

As regards the lawfulness of the disputed interference, as follows from the Government's submissions, the collection and retention of the disputed data was effected on the basis of section 34 of the Military Service Act and the provisions of Instruction no. 165. Use of this data for deciding on the applicant's promotion was, in turn, based on Articles 2 and 153 of the Labour Code. The Court notes that none of the foregoing provisions was expressly referred to in the relevant domestic courts' judgments. However, in the light of the available materials, and notably, the Government's observations, the Court is prepared to accept that collection, storage, and other use of the applicant's mental health had some basis in domestic law.

Insofar as quality, in particular, foreseeability of the applicable law may be concerned, the Court observes that there was apparently considerable disagreement among the various judges involved in the adjudication of the applicant's claims as to the scope and meaning of the applicable legal acts, which resulted in numerous remittals of his case for reconsideration. It appears that this disagreement may have been connected to a structural problem in domestic law.

The Court notes that the Government has not commented on the aims of the disputed interference. Based on the available materials, the Court considers that the measures complained of could be effected for various legitimate aims, notably protection of national security, public safety, health, and the rights of others, in particular of the applicant's co-workers.

The Court notes that at the time of the events giving rise to the present application, Ukraine was not a member of the Data Protection Convention or any other relevant international instrument. However, at the same time, its national legislation contained a number of safeguards similar to those which were included in these legal acts. Relevant provisions can be found, notably, in the Information Act of 1992 and various acts pertaining to confidentiality of medical information. However, it appears that these safeguards remained largely inoperative in the applicant's case, both during the processing of his personal data by his employer, and during the examination of his relevant claims by the domestic courts.

The Court next notes that the aforementioned legislative framework essentially resulted in a quasi-automatic entitlement for any employer, whether public or private, to obtain and retain sensitive health-related data concerning any employee dispensed from military service on medical grounds. The Court notes that it is not in a position to substitute itself for the competent domestic authorities in deciding on the modalities of keeping the military duty registers. However, the Court reiterates that core principles of data protection require the retention of data to be proportionate in relation to the purpose of collection and envisage limited periods of storage. In line with this, the Court considers that delegating to every employer a public function involving retention of sensitive health-related data concerning their employees can only be justified under Article 8 if such retention is accompanied by particularly strong procedural guarantees for ensuring, notably, that such data would be kept strictly confidential, would not be used for any other purpose except that for which it was collected, and would be kept up-to-date. It follows that applicable law, as interpreted and applied by the domestic courts in the present case, permitted storage of the applicant's health-related data for a very long term and allowed its disclosure and use for purposes unrelated to the original purpose of its collection. The Court considers that such broad entitlement constituted a disproportionate interference with the applicant's right to respect for private life. It cannot be regarded necessary in a democratic society.

The Court recognises that employers may have a legitimate interest in information concerning their employees' mental and physical health, particularly in the context of assigning them

certain job functions connected to specific skills, responsibilities or competences. However, it underlines once again that collection and processing of the relevant information must be lawful and such as to strike a fair balance between the employer's interests and the privacy-related concerns of the candidate for the relevant position.

In this connection, the Court takes note of the applicant's arguments that by the time his health data originating in 1981 was used for deciding on his promotion (1997 and 2000) it was quite old. In addition to that, as it did not indicate the specific nature of the applicant's medical condition diagnosed at that time, it was also incomplete for the purposes of deciding whether or not he could be entrusted with the requested position. It is also notable that in 2002 the applicant was referred by his employer for a medical examination with a view to determining his fitness for the position he sought to occupy. Having obtained a positive conclusion, he was placed on a reserve list and subsequently promoted to his satisfaction. The Court has not been provided with any reasons why this option for determining the applicant's medical fitness could not have been used any earlier.

In the light of the considerations advanced in paragraphs 92 and 93 above, the Court finds that the use of the disputed data for deciding on the applicant's promotion and its unrestricted disclosure to various third parties in this context were not necessary in a democratic society.

**Conclusion:** violation of Article 8

**Article 41 (Just Satisfaction)**

The respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, EUR 6,000, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable

97. *Eur. Court of HR, Matanović v. Croatia*, judgment of 4 April 2017, application no. 2742/12. The case concerned a complaint about entrapment, secret surveillance measures and the non-disclosure and use of the evidence thus obtained. Mr Matanović, the applicant, was convicted of corruption in 2009. His conviction was essentially based on evidence obtained via telephone tapping following a covert operation involving an informant. The Court found that there had been no violation of Article 6 § 1 as concerned Mr Matanović's complaint of entrapment, a violation of the same Article with as concerned the non-disclosure of certain evidence in the criminal proceedings against Mr Matanović, and a violation of Article 8 because the procedure for ordering and supervising the tapping of Mr Matanović's telephone had not been lawful.

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no. 2742/12  
04.04.2017

Press release issued by the Registrar

### **MATANOVIĆ v. CROATIA**

Croatian official was not incited to commit corruption, but his defence rights were restricted in the criminal proceedings against him

#### **Basic Facts**

The applicant, Josip Matanović, is a Croatian national who is currently serving an 11-year prison sentence in Lepoglava (Croatia) for corruption offences.

The allegations of corruption against Mr Matanović, a vice-president of the Croatian Privatisation Fund, were first made in April 2007 by J.K., the representative of an investment project in the Zadar region. J.K., who had contacted Mr Matanović as an official of the Fund, reported to the State Attorney's Office that Mr Matanović had requested a bribe in order to ensure the realisation of his project. The Attorney's office then asked an investigating judge for authorisation to use secret surveillance measures against Mr Matanović, including tapping of his telephone, covert surveillance and the use of J.K. as an informant. The judge allowed the request under the Code of Criminal Procedure, indicating in his order that the investigation into the offences by other means would either be impossible or extremely difficult.

Following the covert operation, Mr Matanović was arrested and detained, then indicted in February

2008. He was convicted in May 2009 on several counts of taking bribes, facilitating bribe-taking and abusing his power and authority to support certain investment projects and privatisations. The first instance court relied extensively on the secret surveillance recordings and in particular on those concerning the first meeting arranged after J.K. had agreed to become an informant. At this meeting Mr Matanović had explained to J.K. how much was expected in payment and that it was usual practice to remunerate for lobbying.

Mr Matanović appealed to the Supreme Court, complaining that the secret surveillance measures had not been lawful, that he had been entrapped and that relevant evidence had not been disclosed to the defence. However, the Supreme Court, finding these complaints ill-founded, upheld his conviction of bribe-taking and abuse of power and authority. As

concerned the non-disclosure of evidence complaint in particular, the Supreme Court held that the defence had been provided with transcripts of the secret surveillance recordings (whether they had been used to convict Mr Matanović or not); but found that it had no right to have access to other material concerning individuals who were not eventually accused in the proceedings. The Constitutional Court subsequently endorsed these findings.

### **Law – Article 8**

The Court stressed that the relevant Croatian law, namely the Code of Criminal Procedure, as interpreted by the national courts, had not been clear as to the authorities' discretion to order surveillance measures. Nor had this law in practice – as applied in Mr Matanović's case – provided sufficient safeguards against possible abuse; the investigating judge had simply referred to the statutory phrase that the investigation could not be conducted by other means, without indicating why the investigation could not be conducted by other, less intrusive, measures. The procedure for ordering and supervising the tapping of Mr Matanović's telephone had not therefore been lawful, in violation of Article 8.

### **Law – Article 6 § 1 (as concerned the plea of entrapment)**

The Court noted that it was clear from the documents in the case file that Mr Matanović had been involved in corruption. It also found that, on balance, the prosecuting authorities, rather than initiating that criminal activity, had "joined" it. First, there was nothing to suggest that J.K. had been acting for the prosecuting authorities in the initial contact with Mr Matanović; J.K. was a representative for an investment project and in that capacity contacted Mr Matanović as the official of the privatisation fund. Moreover, the prosecuting authorities had only instructed J.K. to act as an informant once J.K. had reported his allegations about Mr Matanović. Indeed, it was clear from the recording of the two men's conversation during their first meeting after J.K. had agreed to become an informant – relied on by the first-instance court – that it was Mr Matanović who had full control of the corruption: it was he who had instructed J.K. on how to proceed with the bribes and he who had explained the reasons why it was justified. The prosecuting authorities' investigation had therefore essentially been passive and remained within the bounds of undercover work, rather than inciting Mr Matanović to commit offences he would not have otherwise committed. Accordingly, there had been no violation of Article 6 § 1 as concerned the plea of entrapment.

### **Law – Article 6 § 1 (as concerned the non-disclosure and use of evidence obtained via secret surveillance)**

Mr Matanović's complaints concerning the unfairness of the proceedings related to his impaired access to three main categories of evidence obtained by the use of secret surveillance measures. The first category of evidence concerned the surveillance recordings which had been submitted into evidence by the prosecution and had been relied upon for Mr Matanović's conviction. The second category of evidence concerned recordings of the secret surveillance of Mr Matanović and the other accused, which had been included in the case file but not relied upon for his conviction. The third category of evidence was made up of the recordings, obtained through secret surveillance in the context of the same case but concerning other individuals who had not eventually been accused in the proceedings. Those recordings had not been relied upon for Mr Matanović's conviction, nor had they been included in the case file or disclosed to the defence.



There was nothing allowing the Court to conclude that Mr Matanović had been prevented from adequately preparing his defence as concerned the surveillance recordings used as evidence for his conviction. Transcripts of the recordings, prepared by an independent and impartial expert, had been made available to the defence as from Mr Matanović's indictment. Although he had not been given copies of the actual recordings, they had been played back at trial and he had been given ample opportunity to compare the transcripts to the played material and have any discrepancies clarified. Moreover, Mr Matanović had never challenged the authenticity of the recordings or contested that the conversations had actually taken place. Therefore, the Court found no unfairness in the proceedings in this respect.

As concerned the recordings included in the case file but not used for Mr Matanović's conviction, the Court noted that he had not made any specific argument as to the possible relevance of this second category of evidence at any point during the domestic proceedings. It could not therefore be concluded that any restriction on his access to these particular recordings had been sufficient to breach the right to a fair trial.

However, the defence was denied access to a third category of evidence which had been obtained through secret surveillance in the context of the same case but which concerned individuals who were not eventually accused in the proceedings. That decision had been made by the prosecuting authorities without providing the defence with the opportunity to participate in the decision-making process. Indeed, there was no procedure under domestic law to assess the relevance of the evidence obtained by the prosecuting authorities and the necessity of its disclosure. Mr Matanović had therefore been prevented from establishing whether the evidence in the prosecution's possession that had been excluded from the file could have reduced his sentence or put into doubt the scope of his alleged criminal activity. Nor had the domestic courts provided convincing reasons, based on a balancing of the relevant interests, that would justify the restriction on Mr Matanović's defence rights. The Supreme Court had simply dismissed the complaint on the grounds that he had no right of access to such recordings. The Court found that such a position, allowing the prosecuting authorities to assess what might or might not be relevant to the case, without any further procedural safeguards, was contrary to the requirements of Article 6 § 1.

In view of this deficient procedure for the disclosure of evidence and the resulting restrictions on the defence rights, the Court concluded that the proceedings against Mr Matanović, taken as a whole, had been unfair, in violation of Article 6 § 1.

#### **Article 41 (Just Satisfaction)**

The Court held, by four votes to three, that Croatia was to pay Mr Matanović 1,500 euros (EUR) in respect of non-pecuniary damage and EUR 2,500 for costs and expenses.

#### **Separate Opinions**

Judges Lemmens, Gričco and Ravarani expressed a joint dissenting opinion on Article 41. Judges Lemmens and Karakaş each expressed a concurring opinion. These opinions are annexed to the judgment.

98. *Eur. Court of HR, Trabajo Rueda v. Spain*, judgment of 30 May 2017, application no. 32600/12. The applicant complained that the police seizure and inspection of his computer had amounted to an interference with his right to respect for his private life and correspondence. The Court deemed that the police seizure of the computer and inspection of the files which it contained, without prior judicial authorisation, had not been proportionate to the legitimate aims pursued and had not been “necessary in a democratic society”.

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**no. 32600/12**  
**30.05.2017**

Press release issued by the Registrar

### **TRABAJO RUEDA v. SPAIN**

Granting police access to computer files containing child pornography material without prior judicial authorisation, in a non-emergency situation, violated the owner’s right to respect for his private life

#### **Basic Facts**

On 17 December 2007 Mr Trabajo Rueda brought his computer to a computer shop to have a defective data recorder replaced. The technician duly replaced the part and tested it by opening a number of files, whereupon he noticed that they contained child pornography material. On 18 December 2007 he reported the facts to the authorities and handed over the computer to the police, who examined its content and passed it on to the police computer experts. The investigating judge was then informed of the ongoing police inquiries.

On 20 December 2007 Mr Trabajo Rueda was arrested on his way to the computer shop to pick up his computer. In May 2008 he was sentenced to four years’ imprisonment by the Seville Audiencia provincial for possession and circulation of pornographic images of minors. Mr Trabajo Rueda invited the court to declare the evidence null and void on the grounds that his right to respect for his private life had been infringed by the fact that the police had accessed the content and archives of his computer, but this request was dismissed. Mr Trabajo Rueda appealed on points of law and lodged an amparo appeal with the Constitutional Court, both of which remedies proved unsuccessful.

#### **Law – Article 8**

First of all, the Court held that the fact of accessing files in Mr Trabajo Rueda’s personal computer and subsequently convicting him had amounted to an interference by the authorities with the applicant’s right to respect for his private life, noting that that interference was prescribed by domestic law, namely legal texts<sup>3</sup> combined with the interpretative case-law of the Constitutional Court establishing the rule that prior judicial authorisation was required where an individual’s private life was likely to be infringed, except in emergencies, in which case subsequent judicial scrutiny was possible.

Secondly, the Court noted that the impugned interference had pursued the legitimate aim of “prevention of crime” and “protection of the rights of others”, emphasising that “sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims” and that “children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives”.

Thirdly, the Court found that the seizure and inspection of the computer files by the police as effected in the present case had been disproportionate to the legitimate aims pursued and had therefore not been “necessary in a democratic society”. The Court pointed out that it was difficult, in the present case, to assess the urgency of the situation requiring the police to seize the files from Mr Trabajo Rueda’s personal computer and to access their content, bypassing the normal requirement of prior judicial authorisation, given that there was no risk that the files would disappear, and that the computer had been seized and placed in safekeeping by the police and was not connected to Internet. The Court therefore failed to see why waiting the relatively short time to secure prior judicial authorisation before examining Mr Trabajo Rueda’s computer would have impeded the police investigation into the impugned facts. Consequently, it found a violation of Article 8 of the Convention.

**Conclusion:** violation of Article 8

**Article 41 (just satisfaction)**

The Court held, unanimously, that the finding of a violation in itself constituted sufficient just satisfaction for any non-pecuniary damage sustained by Mr Trabajo Rueda.

**Separate opinion**

Judge Dedov expressed a separate opinion, which is annexed to the judgment.

99. *Eur. Court of HR, Bogomolova v. Russia*, judgment of 20 June 2017, application no. 13812/09. The case concerned the use of a minor’s image without parental authorisation. The Court found a violation of Article 8, stating in particular that the domestic courts had failed to examine whether the applicant had given her consent for the publication of the photograph, focusing instead on the authorisation she had given that her son be photographed. The Court also highlighted the false impressions and inferences which could be drawn from the context of the photograph.

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**no. 13812/09**  
**20.06.2017**

Press release issued by the Registrar

### **BOGOMOLOVA v. RUSSIA**

Right to private and family life of a mother and her minor son infringed when his photo was published without authorisation

#### **Basic Facts**

In November 2007, a photograph of the applicant’s son was published on the cover of a booklet prepared by the Municipal Centre for Psychological, Medical and Social Services. 200 copies of the booklet, entitled “Children need a family”, were circulated to inform the community about the role of the Centre in both protecting orphans and assisting families hoping to adopt.

Ms Bogomolova brought civil proceedings to complain that she, together with her son, had suffered damage to her honour, dignity and reputation. She claimed that the use of the photograph had given the impression that she had abandoned her son and that this had affected her reputation not only as a mother, but also as a schoolteacher. Furthermore, her son had become a victim of mockery amongst his peers following his appearance on the booklet.

The courts dismissed her claims however, finding that the photograph had been taken with her authorisation and that she had not placed any restrictions on its use.

#### **Law – Article 8**

The Court recalled that a person’s image constituted one of the chief attributes of his or her personality and that the right to protect this image was thus an essential component of personal development. As such, Article 8 presupposed the right to control the use of one’s image, including the right to refuse its publication.

In the present case the Court accepted that the publication of the photograph came within the scope of Ms Bogomolova’s and her son’s “private life” within the meaning of Article 8. The Court observed that, in taking their decision to dismiss Ms Bogomolova’s claims, the domestic courts had established that the photograph had been taken with her authorisation and that she had not placed any restrictions or conditions on its use. However, they had failed to examine whether she had given her consent to the publication of the photograph.

Moreover, the context of the photograph could have given the false impression that the child pictured had been abandoned by his parents. This or any other inference which could be drawn from the photo could have prejudiced public perception of the familial bond that Ms Bogomolova shared with her son.

The Court therefore held that there had been a violation of Article 8 of the Convention.

**Conclusion:** violation of Article 8

**Article 41 (just satisfaction)**

The Court held that Russia was to pay Ms Bogomolova 130 euros (EUR) in respect of pecuniary damage, EUR 7,500 in respect of non-pecuniary damage and EUR 100 for costs and expenses.

100. Eur. Court of HR, *Aycaguer v France*, judgment of 22 June 2017, application no. 8806/12. The case concerned the applicant's refusal to undergo biological testing, the result of which was to be included in the national computerised DNA database (FNAEG). The Court found a violation of Article 8, noting that no appropriate action had been taken on the reservation by the Constitutional Court regarding the constitutionality of FNAEG and that there was no provision for differentiating the period of storage depending on the nature and gravity of the offences committed. Secondly, the Court ruled that the regulations on the storage of DNA profiles in the FNAEG did not provide the data subjects with sufficient protection.

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**no. 8806/12**  
**22.06.2017**

Press release issued by the Registrar

### **AYCAGUER v. FRANCE**

A conviction for refusing to be included in the national computerised DNA database is contrary to the right to respect for private life

#### **Basic Facts**

On 17 January 2008 Mr Aycaguer took part in a protest organised by an agricultural trade union and a mutual-based land alliance on the occasion of a professional meeting in the *département of Pyrénées-Atlantiques*. This event was held in a tense political and trade-union context. At the end of the meeting scuffles broke out between the demonstrators and the gendarmerie

Mr Aycaguer was placed in police custody and brought before the Bayonne Criminal Court, charged with intentional violence not entailing total unfitness for work against a public servant person and using or threatening to use a weapon, in this instance an umbrella. Mr Aycaguer was sentenced to two months' imprisonment, suspended.

On 24 December 2008, following a request from the prosecutor's office, Mr Aycaguer was ordered to undergo biological testing, on the basis of Articles 706-55 and 706-56 of the Code of Criminal Procedure. On 19 May 2009 he was summoned to appear before the criminal court for failing to provide a biological sample and on 27 October 2009 the Bayonne *tribunal de grande instance* ordered him to pay a fine of 500 euros. The Pau Court of Appeal upheld that judgment. Mr Aycaguer lodged an appeal on points of law, which was dismissed.

#### **Law – Article 8**

The Court pointed out that the mere fact of storing data on a person's private life amounted to an interference within the meaning of Article 8. DNA profiles contained a huge amount of unique personal data.

From the outset the Court specified that it was fully aware that in order to discharge their duty to protection of the public, the national authorities had to maintain databases which very effectively helped to suppress and prevent specific offences, and in particular sex offences, which was why the FNAEG had been set up.

The Court noted that Mr Aycaguer had not so far been included in the FNAEG because he had refused to undergo biological testing as required by law and that he had been convicted on that basis.

Although the interference was prescribed by French law and pursued a legitimate aim, it should be noted that pursuant to Article R. 53-14 of the Code of Criminal Procedure, the duration of storage of DNA could not exceed forty years in the case of persons convicted of offences which the Government considered to display “a specific degree of seriousness”. The Court noted that those “forty years” in principle constituted a maximum period which should have been adjusted by a separate decree. Since no such decree was ever issued, the forty-year period is, in practice, treated as equivalent to a norm rather than a maximum.

The Court went on to observe that on 16 September 2010 the Constitutional Council issued a decision to the effect that the provisions relating to the impugned computer file were in conformity with the Constitution, subject inter alia to “determining the duration of storage of such personal data depending on the purpose of the file stored and the nature and/or seriousness of the offences in question”. The Court noted that, to date, appropriate action had been taken on that reservation. It observed that no differentiation was currently provided for depending on the nature and/or seriousness of the offence committed, despite the major disparity in the situations potentially arising, as witness the case of Mr Aycaguer. The latter’s actions had occurred in a political and trade union context and merely concerned hitting unidentified gendarmes with an umbrella. Such offences were very different from other very serious offences such as sex offences, terrorism, crimes against humanity or trafficking in human beings.

As regards the deletion procedure, this only applied to suspects, not convicted persons such as Mr Aycaguer. The Court considered, however, that convicted persons too should be entitled to apply for the deletion of their stored data.

The Court further considered that, owing to its duration and the lack of a possibility of deletion, the current regulations on the storage of DNA profiles in the FNAEG did not provide the data subject with sufficient protection and therefore did not strike a fair balance between the competing public and private interests.

Lastly, the Court found that the respondent State overstepped its margin of appreciation in this sphere. Mr Aycaguer’s conviction for having refused to undergo biological testing the result of which was to be included in the FNAEG amounted to a disproportionate infringement of his right to respect for private life, and therefore could not be deemed necessary in a democratic society.

There had therefore been a violation of Article 8 of the Convention.

**Conclusion:** violation of Article 8

**Article 41 (just satisfaction)**

The Court held that France was to pay the applicant 3,000 euros (EUR) in respect of non-pecuniary damage and EUR 3, 000 in respect of costs and expenses.

101. *Eur. Court of HR, Dagregorio and Mosconi v. France*, judgment of 22 June 2017, application no. 65714/11. The applicants considered that their conviction for refusing to undergo biological testing amounted to a disproportionate interference with their right to respect for their private life and their physical integrity. Relying on Article 14 (prohibition of discrimination) read in conjunction with Article 8, they alleged discrimination, emphasising that only individuals suspected or convicted of a certain category of criminal offence were subject to biological testing. Under Article 11 (freedom of assembly and association), they alleged that there has been a violation of their trade-union freedom. Lastly, under Article 14 in conjunction with Article 11, they submitted that the authorities should not have treated them in the same way as the persons targeted by the legislature when the FNAEG had been set up. The Court unanimously declared the application inadmissible.

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no. 65714/11  
22.06.2017

Press release issued by the Registrar

### **DAGREGORIO AND MOSCONI v. FRANCE**

Two trade unionists convicted for having refused to undergo biological testing for inclusion in a DNA database should have lodged an appeal on points of law

#### **Basic Facts**

Following the takeover of the *Société nationale Corse Méditerranée* (SNCM) by a financial operator, the SNCM's crews, including Mr Dagregorio and Mr Mosconi in their capacity as representatives of the Union of Corsican Workers, occupied and immobilised the vessel "Pascal Paoli".

On 2 December 2009 the Marseilles Criminal Court imposed suspended sentences on Mr Dagregorio and Mr Mosconi, of one year's and six month's imprisonment respectively, for the apprehension, kidnapping, illegal restraint or unlawful detention of several individuals and usurpation of the command of a vessel.

On the basis of Articles 706-54 and 706-56 of the Code of Criminal Procedure (CCP), Mr Dagregorio and Mr Mosconi were ordered to report for biological testing, intended to identify their DNA. This information was to be included in the national computerised DNA database (FNAEG). Mr Dagregorio and Mr Mosconi refused.

On 19 October 2010 the Bastia Criminal Court sentenced them to one month's imprisonment. The Bastia Court of Appeal upheld the judgments, finding that "the public authority's interference in the exercise of the right to respect for private life provided for by the French legislature in accordance with Articles 706-54 to 706-56 of the CCP is not contrary to the provisions of Article 8 of the European Convention on Human Rights". Varying the sentence on the basis that the offences of which Mr Dagregorio and Mr Mosconi had been convicted in 2009 had not been committed for base motives or in an ordinary criminal context, the Appeal



Court fined them one thousand euros. Mr Dagregorio and Mr Mosconi did not lodge an appeal on points of law, on the basis that there was no chance of such an appeal succeeding.

**Law – Article 8**

The Court noted, in particular, that on 16 September 2010 the Constitutional Council, to which the Court of Cassation had referred a request for a preliminary ruling on constitutionality, had given a decision to the effect that Articles 706-54 to 706-56 of the Code of Criminal Procedure were in conformity with the Constitution, albeit setting out an interpretative reservation. The Constitutional Council had held that it was incumbent on the legislature to make the duration of storage of the personal data in question proportional to the nature and/or seriousness of the offences in question.

The Court deduced that Mr Dagregorio and Mr Mosconi could have appealed to the Court of Cassation for a ruling on the application of the impugned provisions, taking into account the interpretative reservation set out by the Constitutional Council. That reservation referred to an obligation to ensure proportionality in appraising the duration of storage of personal data. However, the applicants had lodged no such appeal.

It transpired that at the material time, following the judgments of the Bastia Court of Appeal, before the time-limit on lodging an appeal on points of law had expired, the Court of Cassation had not yet adjudicated on the question in issue in the light of the interpretative reservation set out by the Constitutional Council. The applicants therefore failed to demonstrate that their remedy had reasonably appeared inadequate and ineffective.

In the Court's opinion, in the absence of any judicial precedent applicable to the applicants' situation, there was doubt as to the effectiveness of an appeal on points of law owing to a decision given by the Constitutional Council: it was therefore a point which should have been submitted to the Court of Cassation. The mere fact of harbouring doubts as to the prospects of a given appeal succeeding was not sufficient reason for omitting to use the remedy in question.

The application had to be rejected for non-exhaustion of domestic remedies.

**Conclusion:** application inadmissible

**102. Eur. Court of HR, Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, judgment of 27 June 2017, application no. 931/13. After two companies had published the personal tax information of 1.2 million people, the domestic authorities ruled that such wholesale publication of personal data had been unlawful under data protection laws, and barred such mass publications in future. The companies complained to the European Court of Human Rights that the ban had violated their right to freedom of expression. The Court held that the ban had interfered with the companies' freedom of expression. However, it had not violated Article 10 because it had been in accordance with the law, it had pursued the legitimate aim of protecting individuals' privacy, and it had struck a fair balance between the right to privacy and the right to freedom of expression. However, the Court did find a violation of Article 6 § 1 (right to a fair hearing within a reasonable time), due to the excessive length of the proceedings**

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**no. 931/13  
27.06.2017**

Press release issued by the Registrar

### **SATAKUNNAN MARKKINAPÖRSSI OY AND SATAMEDIA OY v. FINLAND**

Banning the mass publication of personal tax data in Finland did not violate the right to freedom of expression

#### **Basic Facts**

The applicant companies, Satakunnan Markkinapörssi Oy and Satamedia Oy, are Finnish limited liability companies based in Kokemäki (Finland). Both companies published the newspaper Veropörssi, which reported on taxation information.

In 2003 the second applicant company, together with a telephone operator, started an SMS-service permitting people to obtain taxation information from a database. The database had been created using information already published in 2002 in Veropörssi on 1.2 million persons' income and assets (amounting to a third of all taxable persons in Finland).

In April 2003 the Data Protection Ombudsman brought administrative proceedings concerning the manner and extent of the applicants' processing of taxation data. The Data Protection Board dismissed the Ombudsman's case on the grounds that the applicant companies were engaged in journalism and so were entitled to a derogation from the provisions of the Personal Data Act. However, the case subsequently came before the Supreme Administrative Court, which in September 2009 found that the publication of the whole database could not be considered as journalistic activity but as the processing of personal data, which the applicant companies had no right to do. The court quashed the earlier decisions and referred the case back to the Data Protection Board. In November 2009 the board forbade the applicant companies from processing taxation information to the extent that they had done in 2002 and from passing such data to the SMS-service. This decision was ultimately upheld by the Supreme Administrative Court in June 2012.

## **Law – Article 10**

The Court held that there had been an interference with the applicant companies' right to impart information under Article 10, arising from the prohibition on them processing and publishing taxation data. However, the Court held that there had been no violation of Article 10, because the interference had been "in accordance with the law", it had pursued a legitimate aim, and it had been "necessary in a democratic society".

In regard to the question of whether the interference had been "in accordance with the law", the Court held that it had had a legal basis in sections 2(5), 32 and 44(1) of the Personal Data Act. It had been sufficiently foreseeable for the applicant companies that their activities would be considered unlawful under that legislation, and that such a mass collection and wholesale dissemination of data would not be covered by the law's derogation for journalistic purposes.

In regard to the question of whether the interference had pursued a legitimate aim, the Court held that the interference had clearly been made in order to protect "the reputation or rights of others", a legitimate aim under Article 10 § 2. The protection of privacy had been at the heart of the data protection legislation, and the Data Protection Ombudsman's actions against the companies had been based on concrete complaints from individuals claiming that their privacy had been infringed.

The core question before the Court was whether the interference had been "necessary in a democratic society". When addressing this issue, the Court was required to assess whether the domestic authorities had appropriately balanced the right to respect for private life and the right to freedom of expression. The Court concluded that a fair balance had been struck, and that the domestic authorities had given due consideration to the relevant principles and criteria set down in the Court's case law. In particular, the Court agreed with the conclusion of the Supreme Administrative Court, that the publication of the taxation data in the manner and to the extent described did not contribute to a debate of public interest, and that the applicants could not in substance claim that the publication had been carried out for a solely journalistic purpose within the meaning of the relevant law.

Furthermore, the Court noted that the applicants' collection, processing and dissemination of data had been conducted on a bulk basis, in a way that impacted on the entire adult population. Compiling the data had involved circumventing the normal channels used by journalists to obtain such information, as well as the checks and balances established by the authorities to regulate access to it. The applicants' dissemination of the data had made it accessible in a manner and to an extent which had not been intended by the legislator.

Though Finnish law had made personal taxation information publicly accessible, data protection legislation had also established significant limits to this accessibility. The parliamentary review of such legislation in Finland had been both exacting and pertinent, a process reflected at the EU level. In such circumstances, the Finnish authorities had enjoyed a wide margin of appreciation in deciding how to strike a fair balance between the competing rights of privacy and expression relating to the use of the data. The Court also took into consideration the fact that most countries in Europe do not grant public access to personal tax information and the Finnish legislation is somewhat exceptional in this regard. Furthermore, the decisions of the authorities had not put a total ban on the applicant companies' publication of taxation data, but had merely required them to make such publications in a manner consistent with Finnish and EU data protection laws.

In light of these considerations, the Court found that the Finnish authorities had acted within their margin of appreciation, and that the reasons relied upon for their interference with the

applicants' freedom of expression had been both relevant and sufficient to show that it had been "necessary in a democratic society". There had therefore been no violation of Article 10.

**Law – Article 6 § 1 (right to a fair hearing within a reasonable time)**

Noting that the domestic proceedings had lasted between February 2004 and June 2012, the Court held that – even taking into account the legal complexity of the case – the length of proceedings had been excessive and had failed to meet the reasonable time requirement, in violation of Article 6 § 1.

**Article 41 (just satisfaction)**

The Court found no evidence of any pecuniary or non-pecuniary damage resulting from the violation, but held that Finland was to pay the applicant companies 9,500 euros in respect of costs and expenses.

103. *Eur. Court of HR, Terrazzoni v. France*, judgment of 29 June 2017, application no. 33242/12. The case concerned the use, in the context of disciplinary proceedings against a judge, of the transcript of a telephone conversation that had been intercepted by chance in criminal proceedings in which the judge had not been involved. The Court found no violation of Article 8, as the interference complained of had been in accordance with the law and had been aimed at establishing the truth both in relation to the initial criminal proceedings against F.L. and in relation to the ancillary criminal proceedings concerning the judge. The Court concluded that there had been effective scrutiny capable of limiting the interference in question to what was necessary in a democratic society.

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*no. 33242/12*  
29.06.2017

Press release issued by the Registrar

### **TERRAZZONI v. FRANCE**

The use of a transcribed telephone conversation for disciplinary purposes was subject to effective judicial scrutiny and did not entail a breach of the Convention

#### **Basic Facts**

The applicant, Dominique Terrazzoni, is a French national who was born in 1962 and lives in Toulon. She was appointed as a judicial officer by a decree of 14 December 1988. In July 2000 she took up a position at the Toulon District Court, and then became a judge at the Toulon *tribunal de grande instance* (TGI) in January 2008.

On 6 September 2008, pursuant to letters rogatory issued by an investigating judge of the Nice TGI in connection with a criminal investigation concerning drugs offences, a telephone conversation was intercepted between Ms Terrazzoni and F.L., an individual known to the police and the owner of the line being tapped.

Having been informed of the content of that conversation, the Principal Public Prosecutor at the Aix-en-Provence Court of Appeal alerted the public prosecutor at the Marseilles TGI and the President of the Aix-en-Provence Court of Appeal. The latter summoned Ms Terrazzoni to appear before him on 29 October 2008. He informed her of the telephone tapping, summarised the content of her remarks and questioned her about the nature of her relations with F.L., the content of their conversation and the proceedings which they had mentioned.

The President informed the Judicial Services Department of the Ministry of Justice of Ms Terrazzoni's conduct. On 7 November 2008 the Minister of Justice requested the National Legal Service Commission (CSM) to suspend Ms Terrazzoni temporarily from duty. By decision of 18 December 2008 the CSM temporarily suspended Ms Terrazzoni from her duties at the Toulon TGI pending a final decision in the disciplinary proceedings. Ms Terrazzoni lodged an appeal on points of law which was declared inadmissible by the *Conseil d'État*.

On 20 February 2009 the Justice Minister referred Ms Terrazzoni's case to the CSM. Ms Terrazzoni submitted grounds of nullity in relation to the administrative disciplinary proceedings, concerning in particular the conduct of the administrative investigation and the admissibility in evidence of the tapped telephone conversation.

On 5 May 2010 the CSM imposed on Ms Terrazzoni the penalty of compulsory retirement. By decree of 30 August 2010 the French President ordered Ms Terrazzoni's removal from office. In February 2011 the Director of Judicial Services dismissed an appeal lodged by Ms Terrazzoni. The Conseil d'État declared inadmissible an appeal on points of law by Ms Terrazzoni against the CSM's decision.

### **Law – Article 8**

The Court observed that the interference in question had been “in accordance with the law” within the meaning of Article 8 § 2 of the Convention. In the light of Articles 100 et seq. of the Code of Criminal Procedure, Ms Terrazzoni could have foreseen that her remarks were liable to be intercepted when the conversations of one of her contacts were being monitored. If those remarks gave grounds to suppose that she had been involved in an offence, they could be transcribed and the resulting record could be used in the context of criminal or disciplinary proceedings.

As to the purpose and necessity of the interference, the Court considered that it had been aimed at establishing the truth both in relation to the initial criminal proceedings against F.L. and in relation to the ancillary criminal proceedings concerning Ms Terrazzoni. The interference had therefore pursued the aim of preventing disorder. The continuation of the interference by means of the use of the conversation in question in the context of the disciplinary proceedings against Ms Terrazzoni had pursued the same legitimate aim.

The Court observed that in the present case the interception complained of had resulted from the tapping of F.L.'s telephone line rather than that of Ms Terrazzoni. The fact that Ms Terrazzoni was a judge had not been known at the time. The special procedural safeguards to which she claimed entitlement had subsequently been applied as soon as her status had been discovered. The Court saw no evidence in the present case of abuse of process or of any abuse consisting in tapping F.L.'s telephone as an indirect means of listening in on Ms Terrazzoni's conversations.

The Court noted that the telephone tapping had been ordered by a judge and carried out under the latter's supervision and that the conversation of 6 September 2008 had been transcribed subsequently in connection with a preliminary investigation, at the request of a judge and under his supervision.

While there was no basis for finding that the telephone tapping had been reviewed by the courts in the context of the criminal proceedings against F.L., the Court noted that Ms Terrazzoni had been given an opportunity to present her account of the telephone conversation in question to the President of the Aix-en-Provence Court of Appeal, and on several subsequent occasions to the Judicial Services Inspectorate in the context of the administrative investigation, to an investigator in the criminal proceedings and, lastly, to the rapporteur appointed by the CSM in the context of the disciplinary investigation.

The Court further noted that Ms Terrazzoni had been notified of the letters rogatory ordering the tapping of F.L.'s telephone. These had enabled the CSM to conclude that the tapping operation had been carried out in the course of criminal proceedings not involving Ms Terrazzoni and that the evidence had been added to the case file in the proper manner and had been the subject of adversarial argument. Lastly, in the context of Ms Terrazzoni's appeal

on points of law, the Conseil d'État had examined her ground of appeal concerning the lawfulness of the telephone tapping and had considered that it was not such as to warrant admitting the appeal.

**Conclusion:** no violation of Article 8.

**104. Eur. Court of HR, *Mustafa Sezgin Tanrikulu v Turkey*, judgment of 18 July 2017, application no. 27473/06. The applicant complained that the Turkish Court's decision authorising the interception of his communications had been unlawful and in violation of Article 8 of the Convention because of its indiscriminate nature. The Court found a violation of Article 8.**

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**no. 27473/06  
18.07.2017**

### **MUSTAFA SEZGIN TANRIKULU v. TURKEY**

The authorisation of interception of the applicant's communications was not 'in accordance with the law', giving rise to a violation of the Convention

#### **Basic Facts**

The applicant, who was born in 1963, is a member of the Turkish Parliament. At the time of the events giving rise to the present application he was the president of the Diyarbakır Bar Association. On 2 June 2005 the daily newspaper *Hürriyet* reported statements by a senior intelligence officer, who claimed that the National Intelligence Agency of Turkey ("MİT") had been intercepting the telephone conversations and email correspondence of a number of people on the basis of approximately ninety court decisions over the previous ten years. The intelligence officer stated that the surveillance had been continuous until March 2005, when the MİT had stopped it in order to wait for the entry into force of the new Criminal Code. However, when a bomb attack had occurred in March in Kuşadası, killing a police superintendent, the MİT had gone to the Sixth Division of the Diyarbakır Assize Court ("the Diyarbakır Assize Court") to seek permission for the interception of communications.

In a decision dated 6 May 2005, relying on Article 22 of the Constitution and sections 2, 4, 11 and 16 of Law no. 4422, the Diyarbakır Assize Court had granted the MİT permission to monitor and examine all electronic communications in order to identify and arrest terrorist suspects with international connections as well as to collect evidence and to prevent crime by having early intelligence of it. The MİT had obtained permission to intercept all domestic or international telephone calls and communications provided between 8 April and 30 May 2005 by national telecommunications company Türk Telekom, private mobile network operators and Internet providers and to obtain information contained in SMS, MMS, GPRS and fax communications, as well as caller IDs, correspondents' IP addresses and all other communication-related information.

On 6 June 2005, after reading the article, the applicant filed a criminal complaint with the Diyarbakır Principal Public Prosecutor's Office against the judge, S.T., who had delivered the Assize Court decision in question, the public prosecutor, the MİT agents who had sought permission to monitor and examine communications, and the MİT agents who had implemented the decision. Relying on a number of newspaper and online articles, the applicant alleged that S.T. had decided that the records of all domestic and international electronic communications between 8 April and 30 May 2005 should be given to the MİT by the telecommunications companies. The judge had made that decision in complete disregard



of the legislation then in force and without carrying out any research or requiring proof. The impugned decision had been of a very general nature since it had not included the names of any suspects or indicated the date, location or address of people whose communications would be intercepted. As a consequence, any person, including himself, who had used a landline or mobile telephone to communicate between the above-mentioned dates, had been a victim of the impugned decision.

On 20 June 2005 the Diyarbakır Principal Public Prosecutor decided to disjoin the case concerning the MİT officials and to register it separately because the prosecution of MİT officials required the Prime Minister's permission. On 30 September 2005 the Diyarbakır Principal Public Prosecutor decided not to prosecute the MİT officials who had implemented the Diyarbakır Assize Court's decision. He decided that the MİT officials had merely implemented the court's decision when intercepting and examining communications and that the implementation of court decisions was required by law and did not constitute a crime. In any event, there was no evidence that the telecommunications companies had given any records to the MİT officials or that they had monitored communications over the Internet. The Public Prosecutor also referred to a decision by the Ankara Principal Public Prosecutor not to prosecute over the same issue (decision no. 2005/35575, 17 June 2005) in relation to a number of other complaints brought against the Diyarbakır Assize Court's decision.

On 25 October 2005 the applicant filed an objection with the Siverek Assize Court against the above decision, alleging that the Diyarbakır Public Prosecutor had failed to carry out an investigation into his complaints concerning an alleged violation of his rights guaranteed by Articles 8 and 13 of the Convention. On 30 November 2005 the Siverek Assize Court dismissed the applicant's objection.

### **Law – Article 8**

In Roman Zakharov, the Court clarified the conditions for a claim by an applicant that he or she was the victim of a violation occasioned by the mere existence of secret surveillance measures, or legislation permitting such measures. Firstly, the Court will take into account the scope of the legislation permitting the secret surveillance measures by examining whether the applicant could possibly be affected by it, either because he or she belongs to a group targeted by the contested legislation or because the legislation directly affects all users of communication services by instituting a system where any person can have his or her communications intercepted. Secondly, the Court will take into account the availability of remedies at the national level and will adjust the degree of scrutiny depending on the effectiveness of such remedies.

In the present case, the Court observes at the outset that the applicant did not complain in general about the existence of legislation allowing secret surveillance measures. The basis of the applicant's complaint was the specific decision by the Diyarbakır Assize Court to allow the interception of the communications of anyone in Turkey. Furthermore, for the reasons set out above, the Turkish law in force at the material time did not provide for effective remedies for a person who suspected that he or she had been subjected to secret surveillance measures outside criminal proceedings as a result of domestic court decisions authorising such measures. In view of the above, the applicant can claim to be a victim of the contested surveillance measures, which constituted an interference with Article 8.

The Court reiterates that the basis of the applicant's complaint is related to the Diyarbakır Assize Court's specific decision giving permission for the interception of the communications of everyone in Turkey. The Court notes in that respect that the Government argued that the

measure in question had been based on Law no. 4422. The applicant contested that argument by submitting that the impugned decision had been manifestly contrary to the conditions set out in the provisions of Law no. 4422 and the principles developed in the Court's case-law. The Court has to examine whether the impugned decision of the Sixth Division of the Diyarbakır Assize Court complied with the conditions set forth in Law no. 4422. That assessment is necessary in order to determine whether Law no. 4422 could be relied upon as a legal basis in the present case.

In that connection, the Court first observes that Law no. 4422 required that an interception authorisation had to, where the authorities had such information, specify the persons who are suspected of committing crimes listed in that law. The Court further observes that under Section 10 of the Regulation for the Implementation of Law No. 4422, the monitoring or interception of communications had to be authorised in respect of a specific person. It appears therefore that the decision had to include at least one specific name or elements allowing for the identification of a person in order to meet the above-mentioned requirement. The Court points out once again that the Diyarbakır Assize Court sought to authorise the interception of the communications of everyone in the Republic of Turkey. The decision therefore mentioned no specific names or any addresses, telephone numbers or other relevant information. In other words, the impugned decision was not limited to people suspected of the criminal offences listed in Law no. 4422.

Secondly, the Court notes that section 2 of Law no. 4422 required that authorisation for interception be given only when there were strong indications of a crime set out in that provision. However, the impugned decision did not contain any findings or any other indicators in that regard. Rather, it simply made reference to the criminal offences or activities listed in Law no. 4422 and did not specify which factors had been taken into account for the authorities' determining that there were strong indications those crimes had been committed, which is an indispensable element for granting an interception authorisation.

Thirdly, the Court notes that Law no. 4422 provided that interception take place only when the identification or arrest of a perpetrator and the collection of evidence was not possible by any another means. In other words, the interception authorisation had to show that other methods of collecting evidence were not possible. However, the Court observes that the impugned decision did not include any explanation as to why and in what way more lenient measures would have been ineffective for the aims sought to be achieved. No actual details were provided based on the specific facts of the case and the particular circumstances indicating a probable cause to believe that the aims in question could not be achieved by other, less intrusive, means. Having regard to the above considerations, the Court is of the view that the impugned decision did not satisfy the very basic requirements laid down by Law no. 4422. It therefore rejects the Government's argument that Law no. 4422 constituted a legal basis for the Diyarbakır Assize Court's decision.

Notwithstanding the above findings, the Court will further examine whether the MİT had the authority to intercept telephone communications at the material time. On that point, the Court starts by noting that Turkish law distinguishes two types of interception of electronic communications. The first is preventive interception, which is conducted before the commission of a crime and which is now regulated by section 6 of Law no. 2937. The second is the interception of electronic communications during an investigation or prosecution conducted in relation to a crime, which is regulated by Article 135 of the Code of Criminal Procedure, although at the time of the impugned decision it was governed by Law no. 4422.

That said, the Court observes that neither Law no. 4422 nor any other legislation regulated the MIT when it came to the preventive interception of telephone communications at the material time. On the basis of the foregoing, the Court concludes that the interception order in the instant case was not “in accordance with the law” within the meaning of Article 8 § 2 of the Convention.

**Conclusion:** violation of Article 8

### **Article 41 (Just Satisfaction)**

The respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention,, the following amount, to be converted into the currency of the respondent State at the rate applicable at the date of settlement: EUR 1,200 plus any tax that may be chargeable to the applicant, in respect of costs and expenses

**105. Eur. Court of HR, Bărbulescu v. Romania, judgment of 5 September 2017, application no. 61496/08. The case concerned the decision of a private company to dismiss an employee after monitoring his electronic communications and accessing their contents, and the alleged failure of the domestic courts to protect his right to respect for his private life and correspondence. The Court concluded that the national authorities had not adequately protected Mr Bărbulescu's right to respect for his private life and correspondence. They had consequently failed to strike a fair balance between the interests at stake.**

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**no. 61496/08**  
**05.09.2017**

Press release issued by the Registrar

### **BĂRBULESCU v. ROMANIA**

Monitoring of an employee's electronic communications amounted to a breach of his right to private life and correspondence

### **Basic Facts**

The applicant was employed as a sales engineer and at his employer's request, for the purpose of responding to customers' enquiries, he created an instant messaging account using Yahoo Messenger. He already had another personal Yahoo Messenger account. His employer's internal regulations prohibited the use of company resources for personal purposes, a rule of which the applicant was aware. The applicant was informed that his Yahoo Messenger communications had been monitored and that there was evidence that he used the internet for personal purposes, in breach of the internal regulations. He was subsequently informed that the employer had also monitored the content of his communications, providing evidence that the applicant's correspondence included personal messages to his brother and fiancée. Consequently, the applicant was dismissed from work.

The applicant argued that an employee's telephone and email communications were covered by the notion of 'private life' and 'correspondence' within the meaning of art 8 ECHR, submitting that his dismissal was unlawful and that by monitoring his communications and accessing their contents without his knowledge, the employer had infringed criminal law. In addition to his allegedly unfair dismissal, the applicant claimed he had been subject to harassment from his colleagues by virtue of the disclosure of the content of his correspondence to those involved in the dismissal procedure.

Mr Bărbulescu challenged his employer's decision before the courts, complaining that the decision to terminate his contract was null and void as his employer had violated his right to

correspondence in accessing his communications in breach of the Constitution and Criminal Code. His complaint was unsuccessful. Relying in particular on Article 8 (right to respect for private and family life, the home and correspondence) of the European Convention on Human Rights, Mr Bărbulescu complained that his employer's decision to terminate his contract after monitoring his electronic communications and accessing their contents was based on a breach of his privacy and that the domestic courts failed to protect his right to respect for his private life and correspondence.

### **Law – Article 8**

The Court confirmed that Article 8 was applicable in Mr Bărbulescu's case, concluding that his communications in the workplace had been covered by the concepts of "private life" and "correspondence". It noted in particular that, although it was questionable whether Mr Bărbulescu could have had a reasonable expectation of privacy in view of his employer's restrictive regulations on internet use, of which he had been informed, an employer's instructions could not reduce private social life in the workplace to zero. The right to respect for private life and for the privacy of correspondence continued to exist, even if these might be restricted in so far as necessary.

While the measure complained of, namely the monitoring of Mr Bărbulescu's communications which resulted in his dismissal, had been taken by a private company, it had been accepted by the national courts. The Court therefore considered that the complaint was to be examined from the standpoint of the State's positive obligations. The national authorities had been required to carry out a balancing exercise between the competing interests at stake, namely Mr Bărbulescu's right to respect for his private life, on the one hand, and his employer's right to take measures in order to ensure the smooth running of the company, on the other.

As to the resulting question of whether the national authorities had struck a fair balance between those interests, the Court first observed that the national courts had expressly referred to Mr Bărbulescu's right to respect for his private life and to the applicable legal principles. Notably the Court of Appeal had made reference to the relevant European Union Directive<sup>2</sup> and the principles set forth in it, namely necessity, purpose specification, transparency, legitimacy, proportionality and security. The national courts had also examined whether the disciplinary proceedings had been conducted in an adversarial manner and whether Mr Bărbulescu had been given the opportunity to put forward his arguments.

However, the national courts had omitted to determine whether Mr Bărbulescu had been notified in advance of the possibility that his employer might introduce monitoring measures, and of the nature of such measures. The County Court had simply observed that employees' attention had been drawn to the fact that, shortly before Mr Bărbulescu's disciplinary sanction, another employee had been dismissed for using the internet, the telephone and the photocopier for personal purposes. The Court of Appeal had found that he had been warned that he should not use company resources for personal purposes.

The Court considered, following international and European standards<sup>3</sup>, that to qualify as prior notice, the warning from an employer had to be given before the monitoring was initiated, especially where it entailed accessing the contents of employees' communications. The Court concluded, from the material in the case file, that Mr Bărbulescu had not been informed in advance of the extent and nature of his employer's monitoring, or the possibility that the employer might have access to the actual contents of his messages.

As to the scope of the monitoring and the degree of intrusion into Mr Bărbulescu's privacy, this question had not been examined by either of the national courts, even though the

employer had recorded all communications of Mr Bărbulescu during the monitoring period in real time and had printed out their contents.

Nor had the national courts carried out a sufficient assessment of whether there had been legitimate reasons to justify monitoring Mr Bărbulescu's communications. The County Court had referred, in particular, to the need to avoid the company's IT systems being damaged or liability being incurred by the company in the event of illegal activities online. However, these examples could only be seen as theoretical, since there was no suggestion that Mr Bărbulescu had actually exposed the company to any of those risks.

Furthermore, neither of the national courts had sufficiently examined whether the aim pursued by the employer could have been achieved by less intrusive methods than accessing the contents of Mr Bărbulescu's communications. Moreover, neither court had considered the seriousness of the consequences of the monitoring and the subsequent disciplinary proceedings, namely the fact that – being dismissed – he had received the most severe disciplinary sanction. Finally, the courts had not established at what point during the disciplinary proceedings the employer had accessed the relevant content, in particular whether he had accessed the content at the time he summoned Mr Bărbulescu to give an explanation for his use of company resources.

Having regard to those considerations, the Court concluded that the national authorities had not adequately protected Mr Bărbulescu's right to respect for his private life and correspondence and that they had consequently failed to strike a fair balance between the interests at stake.

**Conclusion:** violation of Article 8.

#### **Article 41 (just satisfaction)**

The Court held that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by Mr Bărbulescu.

#### **Separate Opinions**

Judge Karakaş expressed a partly dissenting opinion. Judges Raimondi, Dedov, Kjølbros, Mits, Mourou-Vikström and Eicke expressed a joint dissenting opinion. These opinions are annexed to the judgment.