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Eur. Court of HR, Ekimdzhiev and Others v. Bulgaria, judgment of 11 January 2022, application no. 70078/12. The case concerned secret surveillance and the system of retention and subsequent accessing of communications data in Bulgaria. The Court found a violation of Article 8 in respect of secret surveillance and a violation of Article 8 in respect of retention and accessing of communication data.

No. 70078/12
11.01.2022

Press release issued by the Registrar

EKIMDZIHIEV AND OTHERS V. BULGARIA

Flaws in legal safeguards and oversight procedures around secret surveillance

Principal facts

The applicants are two Bulgarian nationals, Mihail Tiholov Ekimdzhiev and Aleksandar Emilov Kashamov, who are lawyers, and two non-governmental organisations, the Association for European Integration and Human Rights and the Access to Information Foundation. Mr Ekimdzhiev and Mr Kasamov were born in 1964 and 1971 and live in Plovdiv (Bulgaria) and Sofia respectively. The Association for European Integration and Human Rights was founded in 1998 and is based in Plovdiv. The Access to Information Foundation was founded in 1997 and is based in Sofia.

The applicants asserted that the nature of their activities put them at risk of both secret surveillance and of having their communications data accessed by the authorities under the laws authorising such activity in Bulgaria. They did not allege that they had in fact been placed under surveillance or had had their communications data accessed by the authorities.

Under the main relevant pieces of legislation (the Special Surveillance Means Act 1997 and Articles 172 to 176 of the Code of Criminal Procedure), covert surveillance is legal in Bulgaria. This includes, among other methods, visual surveillance, interception of telephone and electronic communications and eavesdropping. Surveillance techniques can be used for national security or when a "serious intentional offence" is suspected, that is to say an offence with a sentence of more than five years' imprisonment. Examples included terrorism, murder, embezzlement, desertion in wartime and unlawfully dealing in nuclear materials. The most common offences for which they had been used are racketeering and drugs offences.

Surveillance information can be requested and used by bodies under the umbrella of the Ministry of Internal Affairs (such as the police), prosecutors and some other military and security agencies. The presidents of a limited list of courts can issue warrants to carry out the surveillance. The system is overseen mainly by a National Bureau and in addition by a special parliamentary committee.

Under the main relevant pieces of legislation (sections 251b and following of the Electronic Communications Act 2007 and Article 159a of the Code of Criminal Procedure), the retention and subsequent accessing by the authorities of communications data is likewise legal in Bulgaria. All communication service providers in the country are obliged by law to retain such data for all of their users for six months, and the authorities can access the retained data to detect and investigate serious crime and some other law-enforcement purposes. Access warrants can be issued by the presidents of all district courts or judges to whom they delegate that task. The system is overseen by a special parliamentary committee and, in part, by the personal-data-protection authorities.

Decision of the Court

Secret surveillance

The Court accepted that the relevant law was accessible to people such as the applicants in this case. The Court found it established that the grounds for surveillance set out in law met the Convention requirements, with the exception of the term "objects", which was insufficiently clear within the meaning of section 12(1) of the Special Surveillance Means Act 1997. It found that there was a lack of proper judicial oversight over decisions to issue warrants. In terms of storing, accessing and destroying data, the Court found that the lack of clear regulation had led to a situation where secret surveillance data could be used for nefarious purposes. It highlighted that the protection for legal professional privilege was inadequate.

Regarding oversight by the authorities, the Court considered that the specific body's (the National Bureau for Control of Special Means of Surveillance) independence could not be guaranteed, particularly as its members were given prior vetting by an agency whose requests they were meant to oversee, and they didn't seem to be able to secure unfettered access to the relevant places and material. The system of overseeing secret surveillance in Bulgaria as it was currently organised did not appear capable of providing effective guarantees against abusive surveillance. The court noted that the restrictive notification procedures – often the only lawful way in which the people could learn that they had been subjected to surveillance – appeared inadequate, often not making clear, in response to requests, whether there had been no surveillance, rather than just no illegal surveillance. As for the remedy – a civil claim which was dependent on just such notification – it only led to damages and did not appear to be effective.

Ultimately, the Court held that the relevant legislation governing secret surveillance, especially as applied in practice, did not meet the quality-of-law requirement of the Convention and was unable to keep surveillance to only that which was necessary. There had been a violation of Article 8.

Retention and accessing of communication data

Under this heading, the Court noted that the law was accessible, and that it provided that safeguards had to be put in place and data destroyed after a statutory period.

In terms of the process for accessing data, the Court noted that requests did not have to give supporting material, and the decisions themselves did not have to be reasoned. Overall, it did not effectively guarantee that access was granted only when genuinely necessary and proportionate in each case. The Court found that the oversight was too weak to ensure that the retention of communications data and its subsequent accessing was not open to abuse.

In terms of notification, the Government had not provided sufficient information on the new data protection procedures. In the absence of such information, the Court had to consider the notification procedure inadequate. The Court reiterated its above findings concerning the remedies available to the applicants or others in their situation. As the laws governing retention and accessing communications data did not meet the quality-of-law requirement of the Convention, they were incapable of limiting such retention and accessing to what was necessary, leading to a violation of Article 8.

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Eur. Court of HR, Standard Verlagsgesellschaft mbH v. Austria (no. 3), judgment of 7 December 2021, application no. 39378/15. The case concerned court orders for the applicant media company to reveal the sign-up information or registered users who had posted comments on its website, derStandard.at, the website of the newspaper Der Standard. This had followed comments allegedly linking politicians to, among other things, corruption or neo-Nazis, which the applicant company had removed, albeit refusing to reveal the information of the commenters. The Court found in particular that user data did not enjoy the protection of "journalistic sources", and there was no absolute right to online anonymity. However, the domestic courts had not even balanced the interests of the plaintiffs with the interests of the applicant company in keeping its users anonymous so as to help promote the free exchange of ideas and information as covered by Article 10. The Court found a violation of Article 10.

No: 39378/15
07.12.2021

Press release issues by the Registrar

STANDARD VERLAGSGESELLSCHAFT mbH V. AUSTRIA (no.3)

Der Standard should not have been forced to reveal online commenters' personal information

Principal facts

The applicant, Standard Verlagsgesellschaft mbH is a limited liability company based in Vienna. It publishes Der Standard, a newspaper, and runs an online news portal carrying articles and discussion forums on derStandard.at.

When registering as a user on the website, which allows commenting on the articles, individuals had to provide their names and email addresses and optionally their postal addresses. The website made clear that this information would not be seen publicly and that the applicant company would only disclose it if required to do so by law. The discussion forums were partly moderated. Rules were set out for commenting and for moderation. According to the applicant company, it reviewed 6,000 comments per day, deleting many, and it provided user data when it was clear that rights had been infringed.

Comments at issue

In 2012 an article was published on the website concerning, among other things, K.S., who was at that time a leader of Die Freiheitlichen in Kärnten (FPK), a regional political party. More than 1,600 user comments followed, one of which read:

"Corrupt politician-assholes forget, [but] we don't. ELECTION DAY IS PAYDAY!!!!!" (Korrupte PolitArschlöcher vergessen, wir nicht WAHLTAG IST ZAHLTAG!!!!!).

Another read:

"[It was] to be expected that FPOe/K, ...-opponents would get carried away. [That would] not have happened if those parties had been banned for their ongoing Nazi revival." (War zu erwarten, dass FPOe/K, ... -Gegner ueber die Straenge schlagen. Waere nicht passiert, wenn diese Parteien verboten worden waeren wegen ihrer dauernden Nazi-wiederbelebung).

K.S. and the FPK asked for the details of the commenters and the deletion of the comments. The applicant company deleted the comments but refused to reveal that information.

In 2013 an interview with H.K., a then member of the national assembly and general secretary of the Austrian Freedom Party (Freiheitliche Partei Österreichs – FPÖ) was published. The following comment was posted under the article:

"[I]f we did not perpetually misunderstand [the meaning of] freedom of expression and if undermining our constitution and destabilising our form of government were consequently to be made punishable – or at least, if [anti-mafia law] were for once to be applied to the extreme-right scene in Austria – then [H.K.] would be one of the greatest criminals in the Second Republic ..." (würden wir nicht ewig meinungsfreiheit falsch verstehen und wäre das sägen an der verfassung und das destabilisieren unserer staatsform konsequent unter strafe gestellt, oder wäre wenigstens der mafiaparagraf einmal angewendet worden auf die rechtsextreme szene in österreich, dann wäre [H.K.] einer der größten verbrecher der 2ten republik ...)

Again the applicant company deleted the comment but refused to disclose the user information.

Court proceedings

K.S. and the FPK and H.K. initiated separate proceedings against the applicant company with a view to obtaining the user data of the comments' authors in order to institute civil and criminal proceedings against them. In K.S.'s and the FPK's case, the Supreme Court finally ordered the user details to be given to the plaintiffs, holding that as there had been no connection with journalistic activity, there had been no unlawful interference with the applicant company's right to enjoy freedom of the press. The plaintiffs had demonstrated an overriding legal interest in the disclosure of the data. In H.K.'s case, the Supreme Court also ordered the release of the user data, giving much the same reasoning as in the former decision.

Decision of the Court

The applicant company argued that the user data in question constituted journalistic sources and were thus protected by editorial confidentiality in the same way as were data of authors of readers' letters published in a newspaper. It also argued that the Supreme Court had not considered the particular circumstances of the comments and not balanced the competing rights, as required by the Court's case-law.

The Government argued that the applicant company's role as a host provider offering a discussion forum on its website differed from its role as a publisher of articles. As a host provider, pursuant to the E-Commerce Act it had a duty to disclose certain data to individuals who credibly claimed an overriding legal interest.

The Court found that as the commenters had addressed the public and not a journalist, they could not be considered to have been journalistic "sources". However, there was a link between the applicant company's publication of articles and hosting comments on those articles on its news portal. According to the Court, the applicant company's overall function was to further open discussion and to disseminate ideas with regard to topics of public interest, as protected by freedom of the press. The Court also considered that an obligation to reveal user information would have a chilling effect on contribution to debate. It reiterated that the Convention did not provide for an absolute right to online anonymity. However, anonymity had long been a means of avoiding reprisals or unwanted attention. As such, it was capable of promoting the free flow of opinions, ideas and information including, notably, on the Internet. The Court observed that this anonymity would not be effective if the applicant company could not defend it by its own means. Its lifting had therefore interfered with the applicant company's right to freedom of the press. The Court held that that interference had had the legitimate aim of protecting the reputation of others and had been lawful.

The Court pointed out that the cases had not concerned the applicant company's own criminal or civil liability. It considered that the comments at issue had been neither hate speech nor incitement to violence, and had been about two politicians and a political party in a political debate of public interest. It had been the job of the domestic courts in this case to balance the competing interests: they had failed to do so, with the Supreme Court, in particular, giving no reasons as to why the plaintiffs' interests had outweighed those of the applicant company's in keeping its users' identities secret. The Court found that for a balancing exercise in proceedings concerning the disclosure of user data, a prima facie examination may suffice which would however require at least some reasoning and balancing.

The Court considered that the domestic courts had overall failed to balance the rights at issue and had failed to give sufficient reasons to justify the interference with the applicant company's rights. The court orders had thus not been "necessary in a democratic society", and there had therefore been a violation of Article 10 of the Convention.

Eur. Court of HR, Hurbain v. Belgium, judgment of 22 June 2021, application no 57292/16. The case concerned an order to anonymise an article in a newspaper's electronic archive (which referred to a person's involvement in a fatal road accident for which he was subsequently convicted). The domestic court had taken the view that to keep the article online could cause indefinite and serious harm to the driver's reputation, giving him a "virtual criminal record", when he had not only served his sentence after a final conviction but had also been rehabilitated. It had thus found that the most effective way to ensure respect for his private life, without disproportionately affecting Mr Hurbain's freedom of expression, would be to anonymise the article on the newspaper's website by replacing the individual's full name with the letter X. The Belgian courts had weighed up the driver's right to respect for his private life, on the one hand, and Mr Hurbain's freedom of expression, on the other, in accordance with the criteria laid down in the Court's case-law. The Court of Appeal had, in particular, considered the harm sustained by the driver on account of the article being online, having regard to the passage of time (about 20 years) since its original publication and to the fact that its anonymisation on the website of Le Soir would not affect the text of the original article and would be the most effective and proportionate measure, among the various options. The reasons given by the domestic courts had thus been relevant and sufficient, and the measure imposed on Mr Hurbain could be regarded as proportionate to the legitimate aim pursued (right to respect for the driver's private life) and as striking a fair balance between the competing rights at stake.

No: 57292/16
22.06.2022

Press release issued by the Registrar

HURBAIN V. BELGIUM

An order to anonymise the identity of rehabilitated offender in a newspaper's electronic archive does not violate the right to freedom of expression

Principal facts

The applicant, Patrick Hurbain, is a Belgian national who was born in 1959 and lives in Genappe (Belgium). He is the publisher of Le Soir, one of Belgium's leading French-language newspapers.

In a 1994 print edition, an article in Le Soir reported on a car accident that had caused the death of two people and injured three others. The article mentioned the full name of the driver, who was convicted in 2000. He served his sentence and was rehabilitated in 2006.

In 2008 the newspaper created an electronic version of its archives from 1989 onwards (including the above-mentioned article), which became freely available on its website. In 2010 the driver applied to Le Soir, requesting that the article be removed from the newspaper's

electronic archives or at least anonymised. The request mentioned his profession and the fact that the article appeared among the hits when his name was entered in several search engines.

In 2011 the newspaper's legal department refused to remove the article from its archives, but indicated that it had given notice to the administrator of the search engine Google to dereference the article. Before the domestic courts, Mr Hurbain argued that those steps remained pending.

In 2012 the driver sued Mr Hurbain to obtain the anonymisation of the press article about him. In 2013 the court of first instance granted most of the driver's claims. In 2014 the Court of Appeal upheld this judgment. Mr Hurbain then appealed on points of law, but his appeal was dismissed in 2016.

Complaints, procedure and composition of the Court

Relying on Article 10, Mr Hurbain complained that he had been ordered to anonymise the archived version of an article on his newspaper's website.

Decision of the Court

Article 10 (freedom of expression)

The Court observed that the civil judgment against Mr Hurbain ordering him to anonymise the disputed article constituted an "interference" with his rights under Article 10 of the Convention.

It further noted that the interference was "prescribed by law". Belgian law recognised a right to be forgotten as an integral part of the right to respect for private life (Article 8 of the Convention, Article 17 of the International Covenant on Civil and Political Rights and Article 22 of the Belgian Constitution, these being the main provisions relied upon by the Court of Appeal in recognising the driver's right to be forgotten). In addition, Article 1382 of the Civil Code served as a basis for civil actions for alleged abuses of the freedom of the press.

In addition, the interference pursued a legitimate aim within the meaning of Article 10 of the Convention, namely the protection of the reputation and rights of others (in this case, the right to respect for the private life of the driver concerned).

As to whether the interference had been necessary, the Court made the following points, among others. The Court of Appeal had rightly observed that the online article was of no value in terms of newsworthiness; 20 years after the events, the identity of a person who was not a public figure did not enhance the public interest of the disputed article, which merely contributed to a general debate on road safety at a statistical level. With the passage of time, a convicted offender might have an interest in no longer being confronted with his or her offence, to ensure reintegration into society.

As the Court of Appeal had stated, the electronic archiving of an article about the offence must not create a kind of "virtual criminal record" for the person concerned. This was particularly

true where, as in the present case, the individual had served his or her sentence and had been rehabilitated.

The Court of Appeal had pointed out that the driver did not hold any public office. He was a private person unknown to the general public at the time of his request for anonymisation. The facts for which he was convicted had not been the subject of any media coverage, except for the article in question, and the case had not received any media attention either at the time of the accident or when the archived version was posted on the Internet. Furthermore, the driver had not at any time contacted the media to publicise his situation, neither when the article had been published in 1994 nor when it had been posted online in 2008. On the contrary, he had made every effort to stay out of the media spotlight.

Online communications and their content were far more likely than print publications to interfere with the exercise and enjoyment of fundamental rights and freedoms, in particular the right to respect for private life. Thus, the reproduction of material from the print media and of material from the Internet could be governed by different rules. The same applied to the difference between paper archives and digital archives. The scope of the latter was indeed much greater and the consequences for the private life of the named persons all the more serious, causing harm that was further amplified by search engines.

The Court took into account the fact that consulting archives required an active search by entering keywords on the newspaper's archive site. Owing to its location on the website, the disputed article was not likely to attract the attention of Internet users unless they were specifically looking for information about the driver. The Court did not call into question the purpose of giving access to the disputed article, which had not been to propagate information about the driver afresh. It noted, however, that at the time of the driver's request and throughout the domestic proceedings, the archives of the newspaper Le Soir had been available to all free of charge.

As regards the repercussions of the publication, the Court of Appeal had noted that a search on the newspaper's website or on Google, just by entering the individual's first name and surname, immediately brought up the article in question. That court had taken the view that to keep the article online could cause indefinite and serious harm to the driver's reputation. As already pointed out, it had given him a "virtual criminal record", whereas he had not only served his sentence after a final conviction but had also been rehabilitated. The Court took the view that the assessment of the Court of Appeal on this point had not been arbitrary or manifestly unreasonable. With the passage of time, a person should have the opportunity to rebuild his or her life without being confronted with errors of the past by members of the public. Online searches for people by name had become common practice in contemporary society and such searches usually had nothing to do with any criminal proceedings or convictions against the person concerned.

As to the seriousness of the measure imposed on the applicant, the Court of Appeal had found that the most effective way to ensure respect for the driver's private life, without disproportionately affecting Mr Hurbain's freedom of expression, would be to anonymise the article on the newspaper's website by replacing the individual's full name with the letter X.

The Court attached weight to the fact that the nature of the measure imposed had ensured the integrity of the original article, because only the online version would have to be anonymised. Mr Hurbain had been authorised to retain the original print and electronic archives. In other words anyone interested in the original article could still request access to it, even in electronic form. Thus the article itself had not been affected by the measure but merely its accessibility on the newspaper's website.

The Court thus found that the domestic courts had been entitled to conclude that the requirement of proportionality of the interference with Mr Hurbain's right to freedom of expression had been met. The courts had weighed up the driver's right to respect for his private life, on the one hand, and Mr Hurbain's freedom of expression, on the other, in accordance with the criteria laid down in the Court's case-law. In particular, the Court of Appeal had considered the harm sustained by the driver on account of the article being online, having regard to the passage of time (about 20 years) since its original publication and to the fact that its anonymisation on the website of Le Soir would not affect the text of the original article and would be the most effective and proportionate measure, among the various possible options.

The reasons given by the domestic courts had thus been relevant and sufficient, and the measure imposed on Mr Hurbain could be regarded as proportionate to the legitimate aim pursued and as striking a fair balance between the competing rights at stake. There had therefore been no violation of Article 10 in the present case. The Court explained that the conclusion it had reached in the present case could not be interpreted as entailing any obligation for the media to check their archives on a systematic and permanent basis. Without prejudice to their duty to respect private life at the time of the initial publication, when it came to the archiving of articles they would not be required to make such verification, and therefore to weigh up the various rights at stake, unless they received an express request to that effect.

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Eur. Court of HR, Biancardi v. Italy, judgment of 25 February 2022, application no 77419/16. The case concerned the "right to be forgotten". The applicant, a former editor-in-chief of an online newspaper, was found liable in civil proceedings for having kept on his newspaper's website an article reporting on a fight in a restaurant, giving details on the related criminal proceedings. The courts noted in particular that the applicant had failed to de-index the tags to the article, meaning that anyone could type into a search engine the name of the restaurant or its owner and have access to sensitive information on the criminal proceedings, despite the owner's request to have the article removed. The Court shared the Government's point of view that not only Internet search engine providers could be obliged to de-index material but also administrators of newspaper or journalistic archives accessible through the Internet, such as the applicant. It also agreed with the domestic courts' rulings that the prolonged and easy access to information on the criminal proceedings concerning the restaurant owner had breached his right to reputation. The applicant's right to impart information under the Convention had not therefore been breached, and all the more so given that he had not actually been required to

remove the article from the Internet. This was the first case in which the Court had examined whether a journalist's civil liability for not de-indexing information published on the Internet had been compatible with Article 10 of the Convention.

No: 77419/16
25.02.2022

Press release issued by the Registrar

BIANCARDI V. ITALY

Conviction of an editor under the right to be forgotten is not contrary to the Convention

Principal facts

The applicant, Alessandro Biancardi, is an Italian national who was born in 1972 and lives in Pescara (Italy). He was an editor-in-chief of an online newspaper. In March 2008 he published an article concerning a fight, involving a stabbing, in a restaurant. The article mentioned the names of those involved, namely the family – two brothers and their respective sons – who owned the restaurant. It also reported that the reason for the fight had probably been related to a financial quarrel over ownership of a building, and gave details about the family members' house arrest and/or detention.

In September 2010 one of the brothers and his restaurant sent a formal notice to the applicant asking that the article be removed from the Internet, to no avail. He therefore brought a claim in the domestic courts.

In January 2013 the district court ruled that there was no need examine the request for the article to be removed from the Internet, as the applicant had in the meantime de-indexed the article.

It found, however, that the easy access via the Internet to information on the criminal proceedings from March 2008 to May 2011, when the applicant had de-indexed the article, had breached the claimants' right to respect for his reputation. It noted in particular that the applicant's failure to deindex the tags to the article meant that anyone could access the sensitive data on the proceedings by simply inserting the plaintiffs' names in the search engine.

The Supreme Court upheld the first-instance decision on all grounds in June 2016.

Complaints, procedure and composition of the Court

Mr Biancardi alleged that there had been a breach of his right to impart information under Article 10 (freedom of expression) and that the 5,000 euros he had been ordered to pay in

compensation to each claimant had been excessive. The application was lodged with the European Court of Human Rights on 7 December 2016.

Decision of the Court

The Court pointed out that requiring the applicant to permanently remove the article had not been at issue in the domestic courts. The crux of the case was the applicant's failure to de-index the information concerning the restaurant owner and his decision to keep the article easily accessible. Nor had any intervention regarding the anonymisation of the online article been at issue in the case. From that starting point, the Court went on to note that the article had remained online and easily accessible for eight months, despite the claimant's request to remove it.

Furthermore, under the applicable domestic law, the applicant's right to disseminate information decreased over time, whereas the claimant's right to respect for his reputation increased.

Moreover, the information published, relating to criminal proceedings against a private individual, had been sensitive. Lastly, the Court did not consider that the severity of the sanction – civil not criminal liability – and the amount of compensation awarded had been excessive. It therefore concluded that the domestic jurisdictions findings had constituted a justifiable restriction on the applicant's freedom of expression – all the more so given the fact that he had not been obliged to permanently remove the article from the Internet.

Accordingly, there had been no violation of Article 10.

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Eur. Court of HR, Nuh Uzun v. Turkey, judgment of 29 May 2022, application no 49341/18. The case mainly concerned the uploading of the applicants' correspondence, while they were in detention, onto the National Judicial Network Server (Ulusal Yargı Ağı Bilişim Sistemi – "UYAP"). The Court found that the uploading of the correspondence of remand and convicted prisoners onto the UYAP server stemmed directly and specifically from an instruction issued by the Ministry of Justice on 10 October 2016 and reissued on 1 March 2017. It noted that the instruction had been addressed to the public prosecutors and prison authorities. The documents in question were therefore unpublished internal documents which as a matter of principle did not have binding force. In the Court's view, texts of this kind, which were not issued under any rule-making powers, could not be regarded as "law" of sufficient "quality" for the purposes of the Court's case-law. Consequently, the interference with the applicants' right to respect for their private life and correspondence could not be said to have been "in accordance with the law" within the meaning of Article 8 of the Convention.

No: 49341/18
29.05.2022

NUH UZUN V. TURKEY

The uploading of prisoners' correspondence to a judicial IT server while in custody is in violation to Article 8 of the Convention

Principal facts

At the time of the events the applicants (fourteen Turkish nationals) were detained in various Turkish prisons in connection with alleged membership of a terrorist organisation, following the attempted military coup of 15 July 2016. Some of them were subsequently released while others are still in detention.

While in detention, the applicants applied to the competent judicial authorities seeking an end to the practice of monitoring and/or systematically uploading their correspondence – both incoming and outgoing – onto the National Judicial Network Server (Ulusal Yargı Ağı Bilişim Sistemi – "UYAP"). The authorities to which they applied (enforcement judges and assize courts) dismissed their claims, taking the view that the practice in question was compatible with the procedure and the law.

The Constitutional Court subsequently rejected the individual applications lodged by the applicants.

Complaints, procedure and composition of the Court

All the applicants relied on Article 8 of the Convention (right to respect for private life/right to respect for correspondence).

Decision of the Court

Article 8 (right to respect for private life and correspondence)

The Court considered that the applicants' private correspondence was liable to contain personal information falling within the scope of protection of their private life.

In the Court's view, the fact that this private correspondence had been scanned and uploaded onto the UYAP server did indeed constitute interference with the applicants' right to respect for their private life and their correspondence. Where personal data in particular were concerned it was essential to have clear, detailed rules governing the scope and application of such measures, together with minimum safeguards aimed at preserving the integrity and confidentiality of data and procedures for their destruction, in order to provide the persons concerned with sufficient guarantees. In that connection the Court noted that the parties disagreed as to the existence of a legal basis for the interference in question.

The Court observed that at the relevant time the monitoring of the correspondence of remand and convicted prisoners had been provided for by section 68 of Law no. 5275 and regulations 122 and 123 of the Regulations of 20 March 2006. Neither those provisions as in force at the

relevant time, nor any other legislative or administrative provision, contained any reference to the scanning or uploading of prisoners' correspondence onto the UYAP server.

It also noted that the uploading of prisoners' correspondence onto the server stemmed directly and specifically from an instruction issued by the Ministry of Justice on 10 October 2016 and reissued on 1 March 2017. According to the instruction, "with the exception of faxes and letters in sealed envelopes sent by remand and convicted prisoners to their lawyers for defence purposes or for submission to the authorities (in the context of the procedures and principles provided for in the legislative decrees), all letters, faxes and requests which prisoners – in particular those detained in connection with terrorist offences or organised crime – wish to send, or which are sent to them, must be scanned and uploaded onto the UYAP server."

The Government contended that the documents in question were to be regarded as circulars issued by the Ministry of Justice, and thus sufficed to demonstrate that the interference in question had been in accordance with the law. However, the Court noted that they had been addressed to the public prosecutors and prison authorities. It observed that there was nothing in the case file or in the Government's submissions to suggest that the letter of 10 October 2016, sent out again on 1 March 2017, had been made accessible to the public in general or to the applicants in particular.

In the Court's view, the documents of 10 October 2016 and 1 March 2017 had thus been internal unpublished documents containing instructions from the Ministry of Justice to prisons. As a matter of principle, they did not have binding force. Thus, texts of this kind, which were not issued under any rule-making powers, could not be regarded as "law" of sufficient "quality" for the purposes of the Court's case-law, capable of affording adequate legal protection and the legal certainty necessary to prevent arbitrary interference by public authorities with the rights guaranteed by the Convention. Hence, the interference complained of could not be said to have been "in accordance with the law" within the meaning of Article 8 of the Convention. There had therefore been a violation of that provision.

Article 6 (right to a fair trial)

Seven of the applicants complained of a lack of fairness in the proceedings before the domestic authorities (enforcement judge and/or assize court) on account of the non-disclosure of the public prosecutor's opinion. The Court noted, in particular, that the public prosecutors' opinions in the proceedings before the assize courts had been confined to stating that the contested decisions of the enforcement judges were compatible with the procedure and the law. It also observed that the applicants had not demonstrated that they could have adduced any new evidence of relevance for the consideration of their cases in reply to the public prosecutors' opinions. This complaint was therefore inadmissible under Article 35 §§ 3 (b) and 4 of the Convention for lack of significant disadvantage.

Just satisfaction (Article 41)

The Court held, by a majority (6 votes to 1), that the finding of a violation constituted in itself sufficient just satisfaction in respect of the non-pecuniary damage sustained by the applicants.

The Court also held, unanimously, that Turkey was to pay six of the applicants 500 euros (EUR) each in respect of costs and expenses.

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Eur. Court of HR, Adomaitis v. Lithuania, judgment of 18 January 2022, application no. 14833/18. The applicant, Virginijus Adomaitis, was a Lithuanian national who was born in 1968 and lives in the Vilkaviškis region of Lithuania. He was the governor of Kybartai prison. The case concerns a criminal investigation opened into him on suspicion that he had provided, for pay, better conditions for inmates while they were serving their sentences, and that he had also awarded them incentives. For one year, his telephone communications were monitored and intercepted, after which the criminal intelligence investigation was discontinued for lack of incriminating evidence. Nevertheless, the use of the collected information was permitted in disciplinary proceedings, which ultimately led to his dismissal.

Relying on Article 6 § 1 (right to a fair trial), Article 13 and Article 8 (right to respect of private life) of the European Convention on Human Rights, the applicant complains that he did not have access to the material from the secret surveillance, that there was a lack of a precise legal framework indicating how information gathered via covert operations could be used and its lawfulness contested, and he complains of a breach of his right to privacy. No violation of Article 6 § 1 No violation of Article 8

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Eur. Court of HR, Y.G. v. Russia, judgment of 30 August 2022, application no 8647/12. The applicant alleged that his personal data including data concerning health data was unlawfully disclosed through a database being sold in a market. The Court found a violation of Article 8.

No: 8647/12
30.08.2022

Information Note on the Court's case-law 265

Y.G. v. RUSSIA

Authorities' failure to adequately protect confidentiality of applicant's health data and to investigate its disclosure through a database being sold in a market

Facts

The applicant, who is HIV-positive and suffers from hepatitis, purchased a database from a Moscow market containing personal data in respect of more than 400,000 people registered as living in that city and its region, as well as information on people with HIV, AIDS and hepatitis. It also contained a compilation of the applicant's personal data, including his health data. The applicant complained to the Investigative Committee of the Russian Federation ("Investigative Committee") which refused to carry out a pre-investigation inquiry. His judicial complaint against that decision was dismissed.

***Law* – Article 8:**

As the database purchased by the applicant had contained a compilation of his personal data, including his health data, the circumstances of the present case fell within the scope of the applicant's private life protected under Article 8 § 1. Further, the mere storing of data relating to the private life of an individual amounted to an interference within the meaning of Article 8.

It was uncontested that only the authorities had access to most of the data on the database, such as criminal records and preventive measures that had been applied, and that, in the past, in the context of criminal proceedings against the applicant, the investigator in charge had sought information about the applicant's health condition from the Hospital for Infectious Diseases. Although it was in dispute whether the Ministry of the Interior had compiled the database, in the context of the case, there was no explanation other than that the State authorities, who had access to the data in question, had failed to prevent a breach of confidentiality. As a result, that data had become publicly available, thus engaging the responsibility of the respondent State. The circumstances of this major privacy breach had never been elucidated. The Court had repeatedly stressed the importance of appropriate safeguards to prevent the communication and disclosure of health data. The authorities had therefore failed to protect the confidentiality of the applicant's health data, also in breach of the relevant domestic provisions.

Furthermore, whilst in cases concerning alleged privacy violations, a criminal-law remedy was not always required, and civil-law remedies could be seen as sufficient, no civil remedy had been available to the applicant prior to lodging his application with the Court. In addition, the applicant's allegations had concerned the disclosure of his health data, as a part of the compilation of a vast amount of data and had been supported by prima facie evidence. In the face of such a major privacy breach, in practical terms, the applicant acting on his own, without the benefit of the State's assistance in the form of an official inquiry, had no effective means of establishing the perpetrators of these acts, proving their involvement and bringing proceedings against them in the domestic courts. Accordingly, the complaint to the Investigative Committee could not be considered an inappropriate avenue of protection of his rights.

The authorities had never investigated the matter despite the evidence at hand, the existence of a legal framework for prosecuting intrusion into one's private life and the absence of any reasons precluding an investigation.

Consequently, the authorities had failed to comply with their positive obligation to ensure adequate protection of the applicant's right to respect for his private life.

Conclusion: violation (unanimously)

Article 41: EUR 7,500 in respect of non-pecuniary damage.

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Eur. Court of HR, Liebscher v. Austria, judgment of 6 April 2022, application no 5434/17.
The applicant is an Austrian national who was born in 1957 and lives in Vienna. The case concerned a transfer of property after an amicable divorce and the requirement to enter the full divorce settlement containing personal data into the public land register for the transfer to be possible. Relying in particular on Article 8 (right to respect for private and family life) of the European Convention on Human Rights, the applicant complained that the obligation to submit the divorce settlement in its entirety to the land register, where it would be publicly accessible, in order to have the request for the transfer of his ownership share granted, had amounted to a violation of his right to respect for his private life, in particular the protection of his personal data.

Violation of Article 8
Just satisfaction: Costs and expenses: 1,874 euros (EUR)

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Eur. Court of HR, Hájovský v. Slovakia, judgment of 1 July 2021, application no 7796/16. The case concerned a newspaper publication of private information and non-blurred photographs of the applicant taken covertly and under pretences. The Court undertook a balancing test concerning the applicant's right to private life and the defendant's right to freedom of expression and concluded that there had been a violation of Article 8.

No: 7796/16
01.07.2021

Information Note on the Court's case-law 253

Hájovský v. SLOVAKIA

Newspaper publication of private information and non-blurred images of applicant taken covertly and under pretenses

Facts

After publishing an advertisement in a nationwide daily newspaper aimed at finding a surrogate mother, the applicant found himself the subject of a television report by an investigative reporter who had recorded her meetings with him covertly whilst pretending to be a potential surrogate mother. This was followed by the publication, in print and online, of an article entitled "Trade in unborn children", in a popular daily newspaper with national coverage. This described the applicant's story as depicted by the television report, contained information on his private matters as well as photographs of him from the report taken without his consent.

Although, he successfully brought an action for the protection of his personal integrity against Slovak television, the one he brought against the newspaper's publisher was dismissed.

Law

The issue in the instant case was whether the domestic courts had ensured a fair balance between the protection of the applicant's private life and the defendant's right to freedom of expression. The Court thus reviewed, in the light of the case as a whole, whether the decisions taken by the domestic courts pursuant to their power of appreciation had been in conformity with the criteria laid down in its case-law. In particular, it examined the following applicable criteria:

(a) How well-known was the applicant, the applicant's conduct prior to the publication of the article in question and the subject matter

The domestic courts had considered, in particular, that by publishing the advertisement the applicant had decided to enter the public arena and should thus have had expected a greater amount of public attention, especially as his identity had already been revealed in the television report. However, the sole fact that, as an ordinary person, he had made use of an advertisement could not be an argument for reducing the protection that should have been afforded to him under Article 8. He had not been a public or newsworthy figure within the meaning of the Court's case-law, had not sought any public exposure beyond placing the advertisement – this had only revealed his readiness to have recourse to commercial surrogacy while promising confidentiality – nor could he have suspected that by talking to the person who had contacted him as a potential surrogate mother, he had run a risk of being recorded and having his intentions and identity revealed in the media. The assessment of the applicant's prior conduct had therefore been flawed.

As to the subject matter, the article had revealed some details of the applicant's private life. However, as it had also mentioned the involvement of (unnamed) doctors who were to have helped with the assisted reproduction and the falsification of documents, and the lack of legislation regulating that practice, the Court accepted the domestic courts' conclusion that it had been aimed at informing people about the controversial public-interest issue of surrogacy.

(b) The content, form and consequences of the article

The article contained some details about the applicant's background, his intentions and the content about his negotiations with the pretend surrogate mother. It conveyed a message of indignation about the fact that although trafficking of unborn children had been illegal in Slovakia, the applicant could not be punished for his action. The domestic courts had found that it did not contain any harsh or vulgar expressions intending to defame or create scandal about the applicant, and that the critical value judgments contained therein had relied on the information which, albeit insufficiently precise, had been true in substance. Although, the article had portrayed the applicant rather negatively and unfavourably, in the circumstances and in the light of the previous television report, this in itself did not give rise to a breach of his right to respect for his private life.

(c) Contribution to a debate of general interest

The definition of what constituted a subject of general interest depended on the circumstances of the case. In the instant case and assessing the publication as a whole, the article could be considered as having been written as part of a debate which had been likely to be of significant interest to the general public. Although it contained little about the phenomenon of surrogacy in general, it had been published two days after the broadcast of the television report which had, as per the Government, caused a "public storm" and had thus been closely linked in time to those events.

As regards, however, the potential contribution to a public-interest debate of publishing the applicant's photographs, nothing in the article or the case file materials substantiated any general interest reasons for the journalist's decision to include the photographs without taking any particular precautions, such as masking the applicant's face. Given that the applicant had not been known to the public (apart from the television report), there was nothing to suggest that the publication had had any inherent informative value or had been properly and adequately used. Nor had the domestic courts substantiated their conclusion that the publication of the photographs had been necessary for the purposes of news reporting within the meaning of Article 12 § 3 of the Civil Code by any relevant and convincing arguments. Hence, although the article addressed a matter of public interest, the method used for producing the article, notably the publication of large-size photographs of the applicant, could hardly be said to be capable of contributing to any debate on such a matter.

(d) Circumstances in which the photographs were taken

The Court reiterated that the task of imparting information necessarily included "duties and responsibilities", as well as limits which the press had to impose on itself spontaneously. In the present case, the domestic courts appeared to have had attached particular importance to the fact that the applicant's identity had already been revealed in the television report. Admittedly, this was a factor that might be considered in the balancing process and lead to the conclusion of no need to restrict the disclosure of an identity. The fact, however, that information was already in the public domain did not necessarily remove the protection of Article 8 of the Convention especially if the person concerned neither revealed the information nor consented to its disclosure. Thus, notwithstanding that the information in question had already been known to the public, a further dissemination of such "public information" had still to be weighed against the applicant's right to privacy; privacy was also about preventing intrusion.

It was undisputed but also clear from the television report that the reporter had contacted the applicant under pretences and that she had made the recordings with a hidden camera without the applicant being aware of it or having consented to it. The applicant had also not consented to the photographs' publication. As the applicant could not have expected to be recorded or reported on in a public manner and had not voluntarily cooperated with the media, his reasonable expectations as to privacy were significant, although not necessarily conclusive, factor. Further, although it had been an established fact that the material concerning the applicant had been obtained illegally and broadcast in breach of the law, it had not been taken

into account by the domestic courts. Nor had they assessed whether the journalist had acted in good faith, with necessary rigour and taking necessary precautions when disseminating material emanating from another source. The circumstances in which the photographs had been taken should have alerted the journalist and the newspaper's publisher to the need to use that material with caution and not to disseminate it without masking or blurring the applicant's face.

Bearing in mind the above, and more specifically, the flawed assessment of the applicant's prior conduct, the failure to consider the manner in which the photographs had been taken and, most importantly, to assess the contribution to the public-interest debate of broadcasting non-blurred images of the applicant, the domestic courts had not exercised the balancing exercise between the competing rights in line with the Court's case-law criteria. In these circumstances, and notwithstanding the margin of appreciation allowed to the domestic courts in this field, the State had failed to fulfil its positive obligations under Article 8 of the Convention.

***Conclusion*: violation of Article 8 (unanimously)**

Article 41: finding of violation sufficient in respect of non-pecuniary damage.

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Eur. Court of HR, Hassine v. Romania, judgment of 9 March 2022, application no 36328/13. The case concerned administrative proceedings following which the applicant was expelled from Romania on national-security grounds. The Court held that substantial limitations had been imposed on the applicant's procedural rights without the need for those limitations having been examined and duly justified by an independent authority at the national level. The applicant had not been provided with any information about the specific conduct on his part that was capable of endangering national security, or about the key stages in the proceedings.

Application no: 36328/13
09.03.2022

Press release issued by the Registrar of the Court

HASSINE v. ROMANIA

The applicant, who was expelled from Romania on national-security grounds, was denied protection of his procedural rights

Principal facts

The applicant, Amine Hassine, is a Tunisian national who was born in 1982. He stated that he was living in Cluj-Napoca (Romania).

Mr Hassine arrived in Romania in 2007 and settled in Cluj-Napoca. In 2009 he married a Romanian national, with whom he had a child. He obtained a residence permit "on family grounds", which was valid until 2015.

On 6 November 2012 the public prosecutor's office at the Bucharest Court of Appeal applied to that court asking it to declare Mr Hassine an "undesirable person" and to prohibit him from residing in Romania for five years. The public prosecutor's office stated that, according to the information it had received from the Romanian intelligence services, which was classified as secret, there were strong indications that the applicant was engaged in activities capable of endangering national security. In support of the application the prosecutor sent a document to the Court of Appeal that was classified as secret. In a judgment of 9 November 2012 the Court of Appeal declared Mr Hassine an undesirable person in Romania for a five-year period and ordered his placement in administrative detention pending his removal from the country. On the evening of 9 November 2012 Mr Hassine was arrested and taken to the Arad administrative detention centre. On 5 December 2012 he was removed from Romania and sent back to Tunisia.

On 20 November 2012 the applicant's lawyer lodged an appeal with the High Court of Cassation and Justice ("the High Court") against the Court of Appeal judgment of 9 November 2012. As he did not hold an ORNISS certificate – issued by the Office of the national register for State secret information and authorising the holder to access documents classified as secret – the lawyer was unable to consult the classified documents in the case file.

In a judgment of 12 December 2012 the High Court dismissed Mr Hassine's appeal. It held that the Court of Appeal had correctly ruled that the procedure for summoning the parties had been carried out in the proper manner and that the first-instance court had rejected the request for adjournment properly and giving reasons. The proceedings had been conducted with due respect for the adversarial principle, and the measure declaring Mr Hassine an undesirable person on national-security grounds had been taken after verification of compliance with the statutory procedures, and had struck a fair balance between the need to take measures to prevent terrorism and the obligation to respect human rights.

The High Court found that the Court of Appeal had carried out an effective examination of the public prosecutor's application and the documents in the case file classified as secret. The applicant had had access to a court and had been afforded the relevant procedural safeguards. The High Court observed that in its Grand Chamber judgment in Maaouia v. France, the Court had ruled that decisions regarding the entry, stay and deportation of aliens did not concern the determination of civil rights or obligations or of a criminal charge, within the meaning of Article 6 § 1 of the Convention. The High Court noted that under Article 1 § 2 of Protocol No. 7 to the Convention an alien could be expelled where the expulsion was based on reasons of public order or national security.

The measure prohibiting the applicant from entering Romania came to an end in November 2017.

Complaints, procedure and composition of the Court

Relying on Article 5 §§ 1 and 4 (right to liberty and security/right to a speedy review of the lawfulness of detention), the applicant alleged that his placement in administrative detention with a view to his expulsion amounted to an unlawful deprivation of liberty and that he had

had no effective remedy in that regard. Relying on Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens), the applicant complained that he had not been afforded any safeguards against arbitrariness. Lastly, he alleged that the measure taken against him had breached his right to respect for his private and family life under Article 8.

The application was lodged with the European Court of Human Rights on 30 April 2013.

Decision of the Court

Article 5 §§ 1 and 4

The applicant had been deprived of his liberty for a short period prior to his removal from the country. Although he had been represented by a lawyer, he had not contested the administrative detention measure as such in the High Court, but had merely challenged the declaration that he was an undesirable person. The Court therefore found that the applicant had had available to him a remedy by which to complain of the measure, which he had not exercised.

The complaint under Article 5 § 4 was manifestly ill-founded and had to be rejected. The complaint under Article 5 § 1 had to be rejected for failure to exhaust domestic remedies.

Article 1 of Protocol No. 7

The Court observed that under Article 85 § 5 of Emergency Ordinance no. 194/2002 on the status of aliens in Romania, as in force at the relevant time, the data and information, together with the factual grounds underlying the judges' opinion, could not be mentioned in the judgment. The legal provisions in force prohibited the disclosure of information classified as secret to persons who did not hold a certificate authorising them to access documents of that kind. Under the relevant provisions, as noted by the High Court, the applicant had not been entitled to consult the documents in the case file that had been classified as secret. This had resulted in a substantial limitation of the applicant's rights under Article 1 of Protocol No. 7. The Court therefore had to assess the necessity of the restrictions imposed on the applicant's procedural rights and the measures taken by the national authorities to counterbalance those restrictions.

The Court noted that the national courts had held at the outset that the applicant was not entitled to access the case file, without themselves having examined the necessity of restricting his procedural rights. Hence, the applicant had been summoned to appear in the proceedings and the application initiating the proceedings had been attached to the summons. Only the numbers of the legal provisions which, according to the public prosecutor's office, governed the applicant's alleged conduct were referred to in that document, without any mention of the conduct itself. In its judgment the Court of Appeal had reproduced the parts of Law no. 51/1991 which it considered relevant, thus circumscribing the legal framework of the accusations against the applicant, namely an intention to commit acts of terrorism and the aiding and abetting of such acts by any means. No additional information had been provided to the applicant's lawyer.

During the proceedings the applicant had received only very general information about the legal characterisation of the accusations against him, while no specific actions on his part capable of endangering national security were apparent from the file.

The Court also noted that the very short interval before the Court of Appeal had resumed the hearing after rejecting the applicant's request for an adjournment – despite the fact that he lived in a town some distance away from the Court of Appeal – and the decision to examine the case in the applicant's absence, had had the effect of negating the procedural safeguards to which he had been entitled before that court.

Lastly, the Court noted that the applicant had been represented before the High Court by a lawyer of his own choosing who had been unable to access the classified documents in the case file. Given the very limited and general information available to the applicant, he could only base his defence on suppositions, without being able specifically to challenge an accusation of conduct allegedly endangering national security. The public prosecutor's office had produced a classified document before the Court of Appeal. Both that court and the High Court stated that they had based their decisions on that document, but had nevertheless given very general responses in dismissing the applicant's pleas that he had not acted to the detriment of national security. In other words, there was nothing in the file to suggest that the national courts had actually verified the credibility and veracity of the information submitted by the public prosecutor's office.

The Court therefore held that substantial limitations had been imposed on the applicant's procedural rights without the need for those limitations having been examined and duly justified by an independent authority at national level. The applicant had not been provided with any information about the specific conduct on his part that was capable of endangering national security or about the key stages in the proceedings. As to the extent of the scrutiny performed, the Court took the view that the mere fact that the expulsion decision had been taken by independent judicial authorities at a high level did not suffice to counterbalance the limitations that the applicant had sustained in the exercise of his procedural rights.

The Court considered that the limitations imposed on the applicant's enjoyment of his rights under Article 1 of Protocol No. 7 had not been counterbalanced in the domestic proceedings in such a way as to preserve the very essence of those rights. There had therefore been a violation of Article 1 of Protocol No. 7 to the Convention.

Article 8

In view of its findings under Article 1 of Protocol No. 7 to the Convention, the Court held that it was unnecessary to examine the complaint under Article 8 of the Convention.

Just satisfaction (Article 41)

The Court held that Romania was to pay the applicant 5,000 euros (EUR) in respect of non-pecuniary damage and EUR 2,300 in respect of costs and expenses.

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Eur. Court of HR, Sedletska v. Ukraine, judgment of 1 April 2021, application no. 42634/18. The applicant, Nataliya Yuriyivna Sedletska, is a Ukrainian national who was born in 1987 and lives in Kyiv. The case concerned judicial authorisation of the accessing of the phone data of the applicant, a journalist with Radio Free Europe/Radio Liberty, by the investigating authorities, which had threatened the protection of her journalistic sources. Relying in particular on Article 10 (freedom of expression) of the Convention, the applicant complained, of an unjustified interference with the right to protection of journalistic sources.

Violation of Article 10 Just satisfaction: Non-pecuniary damage: EUR 4,500 Costs and expenses: EUR 2,350

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Eur. Court of HR, Naumenko and Sia Rix Shipping v. Latvia, judgment of 23 June 2022, application No 50805/14. A search of an applicant's business premises and the seizure of a large quantity of documents and electronic files during an unannounced operation by the Competition Authority is legal if this interference with the right to privacy is justified.

No 50805/14
23.06.2022

Press release issued by the Registrar

NAUMENKO AND SIA RIX SHIPPING v. LATVIA

Legality and justification of surveillance methods that limit the right to privacy and correspondence

Principal Facts

The applicants are a company based in Latvia and its owner, Andrey Naumenko. They complain that they were subjected to a search in 2014, during which the company's business premises were searched and a large quantity of documents and electronic files were seized.

Against this unannounced operation, which they considered illegal, the applicants brought an action before the Latvian courts. The case was dismissed, so they took the matter to the ECHR.

Naumenko and SIA Rix Shipping v. Latvia (application no. 50805/14) The applicants are SIA RIX Shipping, a limited liability company based in Latvia, and its owner, Andrey Naumenko, a Russian national who was born in 1973 and lives in Riga. The case concerns a dawn raid on 28 January 2014 on the applicant company’s business premises and the seizure of large amounts of documents and electronic files.

A judge of the Riga City Vidzeme District Court had granted the request to carry out the unannounced operation in the context of an investigation into the National Association of Latvian Shipbrokers and Shipping Agents (“the NALSA”) on suspicion of an infringement of competition law. The Competition Authority subsequently fined the NALSA for setting a minimum or fixed price for its members for services rendered by shipping agents.

Relying on Article 8 (right to respect for home and correspondence) of the European Convention on Human Rights, the applicants allege that the search and seizure was unlawful and disproportionate and that procedural safeguards in place were insufficient.

Law - Article 8

On the basis of Article 8 of the Convention, the applicants claimed a violation of their rights to privacy and correspondence. The Court accepts that this search operation constitutes an interference with their rights under Article 8. However, it agrees with the Latvian courts that the interference was in accordance with the law and "pursued a legitimate aim of both the “economic well-being of the country” and the “prevention of crime”. The interference is therefore legally justified.
Furthermore, the Court added that the interference was necessary "in a democratic society" since it was the Latvian judge who requested it and sufficient procedural safeguards were put in place to counterbalance the wide discretionary power conferred on the Competition Authority's officials.

Conclusion

No violation of Article 8 in respect of the second applicant. The Court declared the remainder of the application inadmissible.

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Eur. Court of HR, Algirdas Butkevicius v. Lithuania, judgment of 14 June 2022, application No 70489/17. The case concerned a telephone conversation between Mr Butkevičius and a mayor that was secretly recorded during a pre-trial investigation into possible corruption in connection with territorial planning and was made public at a hearing of the Seimas’s (the Lithuanian Parliament’s) Anti-Corruption Commission. At the time, Mr Butkevičius was the Prime Minister of Lithuania. The Court found that, even if Mr Butkevičius’s reputation had been affected by the disclosure of his telephone conversation, there was no evidence that it had been affected to such an extent that it could count as a disproportionate interference with his rights guaranteed by Article 8 of the Convention.

No 70489/17
14.06.2022

Press release issued by the Registrar

ALGIRDAS BUTKEVICIUS v. LITHUANIA

Recording and disclosing a telephone conversation of a Prime Minister is not an invasion of privacy if the conversation is in the public interest

Principal facts

The applicant, Algirdas Butkevičius, is a Lithuanian national who was born in 1958 and lives in Vilnius (Lithuania).

In 2015 a regional prosecutor's office and the Special Investigations Service were looking into allegations of corruption relating to the process whereby some State territories were to have their status as resorts – and thus protected territories – revoked by a government resolution. During the pre-trial investigation, a court authorised the recording of the telephone conversations of the mayor of one of the resort towns. One of his intercepted conversations took place in August with Mr Butkevičius, the then Prime Minister of Lithuania, when they briefly discussed the planned adoption of the government resolution; others were with Ministers and other State officials. Government Resolution no. 1025 was adopted on 23 September 2015.

Seven weeks later, the Seimas, considering that the correct procedures might not have been followed, instructed its Anti-Corruption Commission to conduct a parliamentary inquiry into the circumstances in which Resolution no. 1025 had been adopted. In February 2016, the pre-trial investigation into possible political corruption was discontinued on the basis that no crime had been committed. The prosecutor informed the commission and sent it the investigation material, but did not specify that it should not be disclosed further.

On 1 March 2016 the Seimas Anti-Corruption Commission held a hearing which was open to the public, during which the commission discussed the pre-trial investigation material. Some 20 journalists were present. That evening an article published by one of them contained extracts from the transcript of the telephone conversation between Mr Butkevičius and the mayor of the resort town. The article suggested that "nearly half of the Government, including the Prime Minister, were dancing to the music played by the mayor." That information was republished by the biggest news portals in the country, as well as aired on television channels.

The following day, Mr Butkevičius lodged a complaint with the Prosecutor General, as did the Minister of the Environment later that week. Mr Butkevičius maintained that, under Lithuanian law, there were strict regulations for the use of pre-trial investigation material, and the unlawful disclosure of such material was punishable. Information collected through criminal-intelligence measures had to be destroyed once the investigation was over. He considered that the telephone conversations had been made public for political gain – to harm him as a person, the Social Democrats Party and the Government.

The prosecutor rejected the complaints, relying on the fact that all the persons – the Prime Minister, the Minister of the Environment, and the mayor of the resort town –, had been public figures and that the professional activities of State and municipal officials were always considered to be public in nature. There had been no reason to organise the commission's hearing as a non-public hearing. Moreover, in sending a copy of the decision to the Anti-Corruption Commission, and in not warning it that the data from the pre-trial investigation file was not to be made public, the prosecutor had not breached the requirements applicable to criminal proceedings and no crime had been committed.

An appeal lodged by Mr Butkevičius was dismissed by the Vilnius City District Court and the Vilnius Regional Court on the ground that, as nothing relating to his private life had been discussed in the conversation, the publication of the transcript could not have infringed his right to respect for his private life. Due to his position as Prime Minister, his work-related activity and his participation in public life, he was a prominent public figure, and the pre-trial investigation and the telephone conversation had concerned a matter of public interest – allegations of corruption in territorial planning. The district courts also found that the members of the Seimas Anti-Corruption Commission had neither been warned not to disclose material from the pre-trial investigation file, nor about their possible criminal liability.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), the applicant complained that the State authorities had breached his right to private life and correspondence by disclosing the telephone conversation to the media. He contended that the State authorities – the prosecutor and the Anti-Corruption Commission – had not properly protected that information as they had been required to by law.

The application was lodged with the European Court of Human Rights on 19 September 2017.

Decision of the Court

The Court reiterated that professional life, even in a public context, could sometimes fall within the scope of private life. However, it gave weight to the fact that, when examining Mr Butkevičius's complaint, the domestic court had referred to the Court's case-law on the protection of private life, and had carefully balanced the competing interests, namely his reputation and honour on the one hand, and the right of the press to report on matters of public interest on the other. It also took into account that the prosecutor, considering that the material gathered during the pre-trial investigation had elements demonstrating possible breaches of other laws, had sent a copy of his decision to the Chief Official Ethics Commission.

The Court took note of the Lithuanian authorities' conclusion that in transferring the material to the Anti-Corruption Commission and in not warning it that the material should not be disclosed, the prosecutor had not breached the rules of criminal proceedings. Seeing no reason to depart from that conclusion, the Court rejected Mr Butkevičius's argument that the information gathered during the pre-trial investigation had not been protected by the

prosecutor, and it noted the Constitutional Court's practice of considering that the activities of State and municipal officials linked to their functions were always of a public nature.

The Court acknowledged Mr Butkevičius's argument that the release into the public domain of his telephone conversation had had an impact on his reputation. It went without saying that reputationrelated criteria played an important role in a politician's life. Be that as it may, he had not pointed to any concrete and tangible repercussions which the media's disclosure of the telephone conversation had had on his private life, all the more so as he had not been convicted of anything and the Chief Official Ethics Commission had established nothing untoward in the conversation.

The Court has already referred to the importance of public scrutiny in cases of possible political corruption. It found that even if Mr Butkevičius's reputation among his colleagues had been dinted by the disclosure of his telephone conversation, there were no factual grounds, let alone evidence, to indicate that it had been affected to a disproportionate degree.

There had therefore been no violation of Article 8 of the Convention.

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Eur. Court of HR, Vasil Vasilev v. Bulgaria, judgment of 16 November 2021, application No 7610/15. The case concerns the interception, recording and transcription of a telephone conversation in 2010 between the applicant and one of his clients, a former Minister of Defence, who was being covertly monitored in connection with a criminal case. Mr Vasilev complained to the prosecuting authorities and brought a claim for damages, arguing that the conversation was covered by lawyer-client privilege and that its recording and transcript should have been destroyed.

No 7610/15
16.11.2021

Press release issued by the Registrar

VASIL VASILEV v. BULGARIA

Lack of specific safeguards sufficient to justify the interception, recording and transcription of a telephone conversation between a lawyer and his client

Principal Facts

The applicant, Vasil Tonchev Vasilev, is a Bulgarian national who was born in 1958 and lives in Sofia. He is a lawyer. Relying on Article 8 (right to respect for private, family life and the home) of the European Convention on Human Rights, Mr Vasilev complains that the covert

recording and transcription of the telephone conversation with his client was unlawful and unnecessary.

He argues in particular that Bulgarian law did not have sufficiently clear rules on the destruction of accidentally intercepted lawyer-client communications. Also relying on Article 6 § 1 (right to a fair trial) of the European Convention, he complains that the proceedings for damages were classified because the evidence admitted had been obtained via secret surveillance. The public was therefore excluded from hearings in the case and the ensuing judgments were not delivered publicly.

Violation of Article 8
Violation of Article 6 § 1 owing to the exclusion of the public from the hearings in proceedings for damages brought by the applicant.
Violation of Article 6 § 1 owing to the absence of publicity of the judgments given in the proceedings for damages brought by the applicant.

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Eur. Court of HR, Willems v. The Netherlands, judgment of 9 November 2021, application No 57294/16. The case concerns the applicant's refusal to provide fingerprints that would be digitised and stored in his passport and in a database. Applying Regulation 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States, as amended by Regulation 444/2009, the Administrative Jurisdiction Division of the Dutch Council of State dismissed as ill-founded the objections which the applicant had raised in this connection. The applicant then complained before the ECHR *inter alia* about a violation of Article 8 of the Convention (right to respect for private life).

In respect of the applicable EU legislation, the Administrative Jurisdiction Division considered, after referring questions to the CJEU for a preliminary ruling, that it left no room for the Member States to use alternatives to the prescribed way of storing the biometric data, nor did it provide for any applicable exceptions to the obligation to provide fingerprints.

In light of this finding, the ECHR recalled the requirements for the presumption of equivalent protection to apply and concluded that they were fulfilled in the present case. As a consequence, there would only be a violation of the Convention in case of a “manifest deficiency” in the protection afforded by it. As such a manifest deficiency had not been shown to exist by the applicant, the Court declared manifestly ill-founded the applicant’s complaint about a violation of Article 8.

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Eur. Court of HR, Särgava v. Estonia, judgment of 16 November 2021, application no 698/19. Violation of Article 8 due to the search of a lawyer's office, home and vehicle and the obtaining of information from his computer and telephone. The Court decided that the information

retrieved from the computer and mobile phone was covered by the lawyer's professional secrecy and its seizure was in violation of Article 8.

No 698/19
16.11.2021

Information note on the Court's case-law 256

Särgava v. Estonia

Lack of sufficient procedural safeguards to protect privileged data covered during the seizure and subsequent examination of a lawyer's laptop and mobile telephone

Principal Facts

The laptop and mobile telephone of the applicant, a lawyer, were seized in his home and car and subsequently examined by the authorities within the framework of criminal proceedings. Appeals by the applicant, to declare unlawful the seizure and not to use material copied from the carriers as evidence in the criminal proceedings were unsuccessful.

The applicant, referring to legal professional privilege and the inviolability of data carriers related to the provision of legal services, complained that the seizure of his laptop and mobile telephone and their subsequent examination had violated his rights under Article 8 of the Convention.

Article 8

The seizure of the applicant's data carriers and their subsequent examination had constituted an interference with his right to respect for his correspondence. The Court left open the question whether domestic law met the requirements of clarity and foreseeability since in any event if did not provide sufficient procedural safeguards to prevent arbitrary or disproportionate interference with legal professional privilege.

Domestic law did not seem to contain any specific procedure or safeguards to address the examination of electronic data carriers and prevent communication covered by legal professional privilege from being compromised. The search warrant had not provided for safeguarding possible privileged material protected by professional secrecy, Moreover, the decision of whether to conduct a keyword-based search (or use any other method of sifting) as well as the choice of relevant keywords (some notably broad in scope) had been left entirely up to the investigative authorities. Domestic law had not granted the applicant any right to be present during the keyword-based search and did not seem to contain any specific rules on the procedure to be followed in the event of an objection to a seizure or content examination with reference to lawyer-client confidentiality.

The Court had no basis on which to decide whether or not lawyer-client confidentiality had actually been compromised in the case at hand. However, the lack of procedural guarantees relating specifically to the protection of legal professional privilege already fell short of the requirements flowing from the criterion that the interference must be "in accordance with the law" within the meaning of Article 8 § 2.

Conclusion

Violation of Article 8, the right to respect for private and family life, home and correspondence.

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Eur Court of HR, Haščák v. Slovakia, judgment of 23 June 2022, application nos: 58359/12, 27787/16 and 67667/16. The case concerned a surveillance operation ("the Gorilla operation") carried out in 2005 and 2006 by the Slovak Intelligence Service and the intelligence material obtained by it. The Court, citing its findings in substantially the same situation of the applicant in Zoltán Varga v. Slovakia, highlighted the deficiencies in the applicable rules and procedures and the lack of external oversight of both the SIS operation and the retention by the SIS of some of the resulting data, and found that both had thus not been in accordance with the law for the Convention purposes.

Application nos: 58359/12, 27787/16 and 67667/16
23.06.2022

Press release issued by the Registrar of the Court

Haščák v. Slovakia

Secret surveillance "Gorilla operation" was not in accordance with the law

Principal facts

The applicant is a Slovak national who was born in 1969 and lives in Bratislava. He is a prominent businessman associated with an influential finance group and a business partner of the applicant in the case of Zoltán Varga v. Slovakia (nos. 58361/12 and 2 others). Two surveillance warrants were issued by the Bratislava Regional Court in the mid-2000s, which had the aim of monitoring by the Slovak Intelligence Service (SIS) of Zoltán Varga and one other person. Mr Haščák submits that the other person was him. The warrants allowed the bugging of Mr Varga's flat – the so-called "Gorilla operation" – resulting in, among other things, audio recordings and transcribed analytical summaries of the activity there. The domestic authorities understood that the audio recording had been destroyed by the SIS in 2008. The summaries were archived by the agency with no one but a court having access.

In 2012 the Constitutional Court ruled on a complaint by Mr Varga, effectively annulling the warrants in so far as they concerned him, finding them to have been unjustified and unlawful and a violation of his fundamental rights. Meanwhile, in 2011, material was anonymously published on the Internet purporting to be an SIS analytical summary of the operation, describing Mr Haščák discussing with others massive corruption in the privatisation of State-owned companies.

In 2018 in the course of an unrelated murder investigation, an audio recording was found, with the Public Prosecution Service making observations in 2021 which may be read as indicating that it was in fact the recording made by the SIS in the course of the Gorilla operation.

In response to the 2012 constitutional judgment of Mr Varga, the applicant attempted numerous legal avenues before judicial, executive as well as parliamentary authorities, among others to have the surveillance material destroyed.

In connection with these matters, a number of investigations were pursued, including suspected corruption (the "Gorilla investigation"). Mr Haščák argues that this investigation has focussed on him, notably given the number of times he has been interviewed in that connection, and related official comment on the matter, but no charge has been forthcoming.

Complaints, procedure and composition of the Court

Relying on Articles 6 § 1 (right to a fair hearing within a reasonable time), 6 § 2 (presumption of innocence) and 8 (right to respect for private and family life/right to respect for correspondence), the applicant complained, in particular, that there had been a lack of effective supervision and review of the implementation of the two surveillance warrants, that the applicable framework provided no protection to individuals randomly affected by surveillance measures, and that the internal rules applicable to the retention of intelligence material were inadequate. The three applications constituting this case were lodged with the European Court of Human Rights between 6 September 2012 and 11 November 2016.

Decision of the Court

Article 8

As to the scope of the case, the Court noted that it involved no complaint of any leak of information by the SIS and no complaint concerning the practical and procedural status of the audio recording retrieved by the investigators in 2018. The Court stated that to a significant extent, Mr Haščák's Article 8 complaints are identical and arise from an identical factual and procedural background to that examined in Zoltán Varga.

The Court therefore applied that case-law to the present case. While there had been a basis in law, the operation had had numerous deficiencies, some of which had been recognised at the domestic level in response to complaints and actions of Mr Varga. Although the domestic

courts made no such findings in the individual case of Mr Haščák, they were relevant to the assessment of his case.

The Court reiterated that, as in Zoltán Varga, when implementing the surveillance warrants the SIS had practically enjoyed discretion amounting to unfettered power, which had not been accompanied by a measure of protection against arbitrary interference, as required by the rule of law.

Furthermore, that situation had been aggravated by the uncontested fact that Mr Haščák had not himself been the target of the surveillance under the first of the two warrants, in the light of his unchallenged argument that the law provided no protection to persons randomly affected by surveillance measures, and by the fundamental uncertainty around the practical and procedural status of the audio recording retrieved in 2018, presumably of SIS provenance.

The Court had previously held in Zoltán Varga that the storing of the analytical material obtained in the surveillance operation had been subject to confidential rules with no external oversight. The retention had therefore not been in accordance with the law.

The Court ruled that that also applied in the present case. The implementation of the two warrants and the retention of the analytical material had thus been in violation of Article 8 of the Convention.

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Eur Court of HR, M.D. and Others v. Spain, judgment of 28 June 2022, application no. 36584/17. The case concerned the compiling of files by the police in Catalonia on judges who had expressed certain views on that region's independence from Spain. Material from the files, including photographs, had been subsequently leaked to the press. The Court found in particular that the mere existence of the police reports, which had not been compiled in accordance with any law, had contravened the Convention. As for the investigation into the leak, the Court found it to have been inadequate owing to the failure to interview a person crucial to the investigation, the Senior Chief of Police of Barcelona. The Court conseuqently decided on a violation of Article 8 ECHR.

No: 36584/17
28.06.2022
Press release issued by the Registrar of the Court

M.D. AND OTHERS V. SPAIN
Police files kept on Catalan judges based on political views constitutes a violation of Article 8 ECHR

Principal facts

The applicants are 20 Spanish nationals. They are serving judges and magistrates in Catalonia (Spain). In February 2014 they, along with 13 other judges, authored a manifesto which set out

their opinion that the Catalan people should have a "right to decide" (that is to say on Catalan independence) under the Constitution and international law.

In March of that year, the newspaper La Razón published an article on their manifesto entitled "The conspiracy of the thirty-three separatist judges". The article included personal details and photographs – taken from the police database – of the applicants.

Following a complaint by the applicants, criminal proceedings were initiated, with the applicants also seeking damages. The complaint was dismissed, with the Investigating Judge no. 15 of Madrid holding that although "... the facts under investigation constitute[d] a criminal offence, … there [were not] sufficient grounds for attributing them to a particular person". They appealed. In response to the appeal, the same investigating judge again could not attribute criminal responsibility, and dismissed it. They appealed again, with the Audiencia Provincial dismissing that appeal in April 2016.

In 2014 the applicants also complained to the Data Protection Agency about the article, naming both the Interior Ministry and La Razón. That was unsuccessful, but on appeal the Audiencia Nacional ordered that a full investigation be carried out, which is apparently still pending. Also in 2014 the Manos Limpias civil service trade union unsuccessfully lodged a complaint and subsequent appeal against the judges who had signed the manifesto with the General Council of the Judiciary.

Complaints, procedure and composition of the Court

Relying on Articles 8 (right to respect for private and family life), 10 (freedom of expression) and 6 § 1 (right to a fair trial), the applicants complained of the police compiling a file on them for no justification, using police photos, which then leaked to the press; of the disciplinary action against them for having expressed their views; and that the investigation into their allegations had been inadequate. The application was lodged with the European Court of Human Rights on 26 April 2017.

Decision of the Court

Article 8

The Court reiterated that Article 8's primary purpose was to prevent interference by the police in the privacy of an individual's private or family life, home or correspondence. However, the Article also entailed an obligation to actively protect the individual from arbitrary interference with their privacy by the authorities. Regarding the police reports, it noted that there was no domestic legal provision authorising the compiling of such reports without some connection to a crime. The reports contained personal data, photographs and certain professional information (partially extracted from the police ID database), and, in some cases, political views. The Court concluded that the mere existence of such police reports had been in violation of Article 8. Concerning the leak and ensuing investigation, the Court stated that it was uncontested that the photos and some other information had been sourced in the police ID database. The domestic authorities had found it established that the Spanish State had been responsible for the leak.

Although statements had been taken from some witnesses, in order to have had an effective investigation of the leak, it would have been necessary to have taken statements from the Senior Chief of Police of Barcelona, to whom the reports had been addressed and who had been responsible for the databases. This had not been done. Owing to its failure to carry out this investigative step, the State had failed to comply with its obligations under Article 8 of the Convention.

Given these findings, there had been a violation of Article 8 of the Convention.

Other articles

The Court held that no sanction or chilling effect could be discerned from the fact that disciplinary proceedings had taken place and had been closed without any sanction having been imposed. It thus concluded that the complaint under Article 10 was inadmissible as manifestly ill-founded as their freedom of expression had been respected. 3 On examination of the facts, the Court considered that it was not necessary to examine the complaints under Article 6 § 1.

Just satisfaction (Article 41)

The Court held that Spain was to pay the applicant 4,200 euros (EUR) in respect of non-pecuniary damage and EUR 3,993 in respect of costs and expenses.

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Eur. Court of HR, Polat v. Austria, judgment of 20 July 2021, application no 12886/16. The case concerned a post-mortem examination of the applicant's son carried out against her will. The Court found in particular that the Austrian authorities had failed to balance the needs of science and the protection of public health against the applicant's rights in carrying out the post-mortem against her will and against her religious convictions, and examining the issue later in the courts. It also found that the failure to disclose to the applicant information regarding the extent of the examination given her specific circumstances had been a violation of her rights.

20.07.2021
No: 12886/16

Press release issued by the Registrar of the Court

POLAT V. AUSTRIA

Post-mortem examination of baby's body against mother's will led to violations of Article 8 ECHR

Principal facts

The applicant, Leyla Polat, is an Austrian national who was born in 1974 and lives in Bregenz (Austria). In 2006 the applicant became pregnant. Doctors indicated to her that the baby was

likely to be born with a disability as a result of Prune-Belly syndrome. She gave birth prematurely on 3 April 2007. Her son, Y.M., died from a cerebral haemorrhage two days later.

Doctors asked the applicant and her husband for permission to carry out a post-mortem examination, in the interests of science. They refused, as they wanted to bury their child in accordance with their Muslim religious beliefs, which required the body to remain unscathed. The treating doctor told them that it would have to be carried out in any case in order to clarify the exact reasons for their son's death.

On 6 April 2007, the post-mortem examination was performed at the Feldkirch Regional Hospital. Practically all the internal organs were removed, along with the urinary tract, with the hollows filled with cotton wool. The boy's body was returned to his parents. The applicant asserted that they had not been informed of the extent of the examination and could not see it as the body had been clothed. Believing the body to be in the correct state for burial, the parents took it to Turkey for interment. During the funeral rites, the state of the body was discovered, leading to a disturbance among those performing the ceremonies and mourners. The boy had to be buried in another village without the religious ritual washing and Islamic ceremony, at additional cost to the parents.

Y.M.'s organs – after an initial denial by the hospital that they had been removed – were returned to the applicant some time later following several requests by her and an intervention by the regional patients ombudsman. She buried them in her son's grave in Turkey.

The applicant took a case against the hospital management company, seeking damages. The Feldkirch Regional Court allowed the initial claim, concluding that there had been no scientific interest in carrying out the post-mortem without the parents' consent in this case. However, the applicant lost on appeal and the Innsbruck Court of Appeal remitted the case.

In the second-round of proceedings expert testimony from medical professionals asserted that the post-mortem examination had been necessary to confirm the diagnosis of Prune-Belly syndrome or to clarify alterations in the belly, lungs and brain that had not been clearly identifiable, or to see the effect of the disease on the organs. It was noted that in the case of post-mortem examinations of foetuses or deceased newborns, the removal and preservation of the organs was indispensable and therefore standard practice. Nevertheless, the first-instance court allowed the claim and awarded damages.

That judgment was overturned on appeal by the Innsbruck Court of Appeal. The hospital was awarded costs of almost 33,000 euros (EUR). The applicant lodged an appeal on points of law, relying on, among other law, Article 9 of the Convention and the Austrian Constitution, requesting a preliminary ruling from the European Court of Justice in the latter connection. The applicant was unsuccessful, with the Supreme Court ruling in 2015 that the post-mortem had been necessary scientifically and had been a legitimate restriction on freedom of religion. They saw the duty to disclose information as a rule to prevent future damage and to protect the patient, which had not been applicable in this case. It held that the specific religious background in the case could not change that assessment.

Complaints, procedure and composition of the Court

Relying on Articles 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion) and 13 (right to an effective remedy), the applicant complained, in particular, that the post-mortem on her son had been carried out without her permission, that the domestic courts had not balanced the issues at play correctly, and that the hospital had failed to comply with its duty to inform her of the extent of the post-mortem and the removal of the inner organs of her deceased son. The application was lodged with the European Court of Human Rights on 29 February 2016.

Decision of the Court

Article 8 and 9 in relation to the post-mortem examination

The Court reiterated that under the Convention there was no absolute right to object to a postmortem taking place. The post-mortem of Y.M. had been carried out in accordance with the law, namely on the basis of section 25 of the Hospital Act and section 12(3) of the Funeral Act. Under those provisions, a post-mortem examination could be carried out against the relatives' wishes in the interests of science and public health, in particular where there were diagnostic doubts. The Court was satisfied that there had been a legitimate interest in carrying out the examination.

However, the Court stated that the applicant's views had not been taken into account when that decision had been made, either by hospital staff or by the domestic courts. It noted in particular that the States ordinarily have a wide discretion in assessing the balance between private and public interests. Specifically with regard to post-mortem examinations against the will of the family, they had to be carried out with maximum respect for the family members' rights. The authorities had therefore failed to balance the competing interests involved, namely the State's obligation to protect public health and the applicant's rights under Articles 8 and 9.

The Court concluded that the decision to perform a post-mortem on the applicant's child against her will and against her religious convictions had been an interference with her "family life" and her right to manifest her religion which had not been justified, leading to violations of the Convention.

Article 8 in relation to the duty to disclose information

The applicant argued that she had not been told that a post-mortem examination would be performed, or the extent of that examination. The Court noted that there appeared to be no law in Austria regulating how much information had to be provided in circumstances such as the applicant's.

It also noted the delicacy of the situation: a mother, who had just lost her child, faced with a postmortem that she objected to, even though she had informed the authorities of the need to have the body as unscathed as possible for the funeral rites. Those specific circumstances had required a high degree of diligence and prudence on the part of the hospital staff when

interacting with the applicant. Even if there was some confusion as to exactly what had been said to the applicant, the Court adjudged that the authorities had not made clear to her the extent of the post-mortem.

Although the Supreme Court had held that not giving information regarding the removal or organs and so forth had been possibly less painful for relatives in such situations, the Court considered that the particularities of the applicant's case had meant that the hospital staff had had a duty to inform her of their removal. They also should have returned the organs to her, rather than keeping them for a considerable period, also since the applicant had pointed out the importance to bury them in her son's grave. In sum, not disclosing the information to the applicant had led to a violation of the Convention.

Other articles

The Court found that it was not necessary to examine the complaints under Article 13.

Just satisfaction (Article 41)

The Court held that Austria was to pay the applicant EUR 10,000 euros (EUR) in respect of nonpecuniary damage and EUR 37,796.92 in respect of costs and expenses.

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Eur. Court of HR, Abdi Ibrahim v. Norway, judgment of 10 December 2021, application no 15379/16.The case concerned the decision by the Norwegian authorities to allow the adoption of a child by a foster family against his mother's wishes. The mother, a Somali national who had moved to Norway, did not ask for her son's return as he had spent a long time with his foster parents, but wished for him to maintain his cultural and religious roots. The Court decided to examine the applicant's wish to have her son brought up in line with her Muslim faith as an integral part of her complaint under Article 8, as interpreted and applied in the light of Article 9 (freedom of religion). Indeed, there had been shortcomings in the overall decision-making process leading to the adoption, which had not given sufficient weight to the mother and child's mutual interest in maintaining ties.

10.12.2021
No: 15379/16

Press release issued by the Registrar of the Court

ABDI IBRAHIM V. NORWAY

Child adoption without taking account of the mother's wishes breached her right to respect for family life

Principal facts

The applicant, Mariya Abdi Ibrahim, is a Somali national born in 1993. Her child, a son born in 2009 in Kenya before she moved to Norway, where she was granted refugee status, was taken into emergency foster care in late 2010. The parent-child centre where the applicant had initially been staying in order to be assisted in caring for her son had advised the welfare services that the child was at risk. He was subsequently placed with a Christian family, although the applicant had argued he should go to either her cousins or to a Somali or a Muslim family. As to contact arrangements, in 2010 mother and child were allowed to meet for two hours, four times per year. This regime was then changed to one hour, six times per year in 2011.

In 2013 the authorities applied to allow the foster family to adopt the child, which would lead to the applicant having no contact rights, and for the applicant's parental rights to be removed for that purpose.

She appealed: she did not ask for the child's return as he had spent a long time with his foster parents to whom he had become attached, but she sought contact so, among other things, he could maintain his cultural and religious roots.

The High Court ruled by a majority in May 2015 to dismiss the applicant's appeal and allow the adoption. The decision was largely based on the child's attachment to his foster home and his negative reaction to contact with the applicant. Moreover, her son was a vulnerable child in need of stability. Adoption would mean that the applicant would not be able to request her son's return in the future and would remove potential conflict between her and the foster parents. The court also examined issues arising from his being adopted by a Christian family, such as ethnicity, culture and religion. Between 2013 and the High Court's decision in 2015 the child and the applicant met twice.

The applicant was refused leave to appeal to the Supreme Court in September 2015.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 17 March 2016.

The applicant complained about the withdrawal of her parental rights and the authorisation for adoption, relying on Article 8 (right to respect for private and family life) and Article 9 (freedom of thought, conscience and religion) of the European Convention on Human Rights. In its Chamber judgment of 17 December 2019, the Court, deciding to consider the applicant's complaints under Article 8 of the European Convention alone, held, unanimously, that there had been a violation of that Article. On 11 May 2020 the Grand Chamber Panel accepted the applicant's request that the case be referred to the Grand Chamber. Before the Grand Chamber she argued in particular that, throughout her case, she had been vocal about her religious identity and her specific wishes for her son's upbringing. The adoption had severed all ties to her religion as the foster family had baptised the child.

She also argued that the Court should indicate to the Government measures to be taken under Article 46 (binding force and enforcement), such as reopening the adoption proceedings. A Grand Chamber hearing on the case was held in the Human Rights Building, Strasbourg, on 27

January 2021. The Governments of the Czech Republic, Denmark and Turkey, as well as the non-governmental organisation AIRE Centre and the child's adoptive parents were granted leave to intervene in the written proceedings as third parties.

Decision of the Court

The principal reason behind the applicant's request to refer her case to the Grand Chamber was that, in the Chamber's decision, all her arguments had been examined under Article 8, rather than in part under Article 9. The Court considered, however, that the applicant's wish to have her son brought up in line with her Muslim faith could be examined as an integral part of her complaint under Article 8, as interpreted and applied in the light of Article 9. It was not necessary to examine separately any alleged failures to comply with Article 9.

The Court went on to note that finding a foster home which corresponded to the applicant's cultural and religious background had not been the only possibility for complying with the applicant's rights under Article 8, as interpreted in the light of Article 9. The domestic courts had taken various interests into account throughout the whole process, and in particular the applicant's son's psychological stability. Moreover, there was a relatively broad agreement in international law that, in such cases, the authorities were not obliged to place a child in a family sharing his/her religious, ethnic, cultural and linguistic identity or that of his/her parents, but that they did have an obligation to take those factors into account. In any case, the authorities had made efforts, although ultimately unsuccessful, to find a foster home culturally similar to the applicant but it had not been possible because of a shortage of foster parents from minority backgrounds.

However, the Court found that the contact arrangements after the applicant's son had been taken into care, culminating in the decision to allow adoption, had failed to take due account of her interest in allowing her son to retain at least some ties to his cultural and religious origins. Indeed, the overall decision-making process leading to the adoption had not been conducted in such a way as to ensure that all of the applicant's views and interests had duly been taken into account. In particular, the key issue in the High Court's decision had been the child's attachment to his foster home and his reaction to contact sessions with the applicant; yet the applicant had had very little contact with her son from the outset.

Furthermore, the High Court had focused on the potential harm of removing the child from his foster parents, rather than on the grounds for terminating all contact with his mother. The High Court had apparently given more importance to the foster parents' opposition to "open adoption", which would have allowed contact, than to the applicant's interest in continuing to have a family life with her child. Nor was the Court convinced by the High Court's emphasis on the need to pre-empt any future challenges by the applicant with regard to the care order or her visiting rights.

The Court therefore considered that it had not been shown that there had been such exceptional circumstances as to justify a complete and definitive severance of the ties between the child and the applicant, or that the overriding requirement behind that decision had been the child's best interests.

The Court was not satisfied that in depriving the applicant of her parental responsibility in respect of X and authorising his adoption by the foster parents, the domestic authorities had attached sufficient weight to the applicant's right to respect for family life, in particular to the mother and child's mutual interest in maintaining their family ties. There had accordingly been a violation of Article 8.

Article 46 (binding force and enforcement)

The Court decided not to indicate any measures, either individual or general, to the Norwegian Government. Individual measures could ultimately entail an interference with the child and his adoptive parent's current family life, and lead to new issues on the merits. As for general measures, the Court noted that the State was making efforts to implement the judgments against it concerning child welfare measures and was in the process of enacting new legislation to address any systemic issues.

Article 41 (just satisfaction)

The Court held, unanimously, that Norway was to pay the applicant 30,000 euros (EUR) in respect of costs and expenses. It dismissed, by 14 votes to three, the remainder of the applicant's claim for just satisfaction.

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Eur Court of HR, Savran v. Denmark, judgment of 7 December 2021, application no 57467/15. The case concerned a Turkish national who had been resident in Denmark for most of his life. He was deported in 2015 following a 2008 expulsion order given for violent crimes he had committed in the 2000s. The Court found, by a majority of 11 votes to 6, a violation of Article 8 (right to respect for private life). It found in particular that the domestic authorities had failed to examine the applicant's individual situation adequately, and the effective permanent re-entry ban had been disproportionate.

07.12.2021
No: 57467/15

Press release issued by the Registrar

SAVRAN V. DENMARK
Deportation of mentally ill Turkish national resident in Denmark following criminal convictions

Principal facts

The applicant, Arıf Savran, is a Turkish national who was born in 1985 and lives in Kütükuşağı (Turkey). In 1991, when he was six years old, the applicant lawfully entered Denmark to live with his father.

After being convicted of aggravated assault committed with other people, which had led to the victim's death, the applicant was in 2008 placed in the secure unit of a residential institution for the severely mentally impaired for an indefinite period. His expulsion with a permanent re-entry ban was ordered. In January 2012 the applicant's guardian ad litem asked that the prosecution review his sentence and the prosecution brought the case before the City Court in December 2013. On the basis of medical reports, Immigration Service opinions and statements by the applicant, the City Court in October 2014 changed Mr Savran's sentence to treatment in a psychiatric department. It also held that despite the severity of his crime it would be inappropriate to enforce the expulsion order.

In particular, the medical experts stressed the need for continued treatment and follow-up in order to ensure his recovery, while the applicant highlighted that all his family were in Denmark, that he could not speak Turkish, only some Kurdish, and that he was worried about the availability of the necessary treatment in Turkey. Following an appeal by the prosecution, the High Court overturned the City Court's judgment in January 2015. It cited in its conclusion information on access to medicines in Turkey in the European Commission's MedCOI medical database and a report from the Foreign Ministry, finding that Mr Savran would be able to continue his treatment in Turkey. It also emphasised the nature and gravity of the crime. Mr Savran was refused leave to appeal to the Supreme Court in May 2015. In 2015 he was deported to Turkey. He alleges that he leads an isolated life there, with inadequate medical care.

Complaints, procedure and composition of the Court

Relying on Articles 3 (prohibition of inhuman and degrading treatment) and 8 (right to respect for private and family life), the applicant complained that, because of his mental health, his removal to Turkey had violated his rights. He also complained about the refusal to revoke the expulsion order, and the implementation of that order entailing as a consequence a permanent re-entry ban.

The application was lodged with the European Court of Human Rights on 16 November 2015. The Court delivered its judgment on 1 October 2019, finding by 4 votes to 3 that there had been a violation of Article 3 of the Convention and that there was no need to examine the applicant's complaint under Article 8 of the Convention. On 12 December 2019 the Danish Government requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 27 January 2020 the panel of the Grand Chamber accepted that request. A hearing was held by video conference in the Human Rights Building, Strasbourg on 24 June 2020. Third-party comments were received from the Netherlands, French, German, Norwegian, Russian, Swiss and United Kingdom Governments, from Amnesty International, a non-governmental organisation, and from the Centre for Research and Studies on Fundamental Rights of Paris Nanterre University (CREDOF).

Decision of the Court

Article 8

The Court reiterated that, in conformity with its normal practice, it would re-examine all aspects of the original application, including the parts under Article 8 which the Chamber had not found inadmissible. It noted that the applicant had arrived in Denmark at the age of six and had been issued with a residence permit. It noted the applicant's family relationships in Denmark, and his arguments that he had been dependent on them, because of his condition, a dependence which, in his view, had constituted "family life". That had been interrupted by his expulsion. It was however unconvinced that there was sufficient evidence of dependence, and his background did not indicate a consistent family relationship. It thus considered that the interference with the applicant's life should be examined as a question of "private" rather than "family" life.

Given this, the Court found that the applicant's removal from the State had been an interference with his private life. That interference had been in accordance with the law and had pursued the legitimate aim of preventing disorder and crime. Turning to the question of the necessity of the removal, the Court reiterated the criteria in its caselaw, in particular Maslov v. Austria. Applying those to the case at hand, the Court found that the applicant was more vulnerable than the average person to be expelled, and that the state of his health had had to be taken into account as one of the balancing factors. It further accepted that the medical aspects of the case had been thoroughly considered by the domestic courts.

The Court was not on the other hand satisfied that the domestic authorities had sufficiently taken into consideration other balancing factors. In particular, whilst the applicant's criminal offence – violent in nature – had undoubtedly been a serious one, no account had been taken of the fact that at the time he had committed the crime he had been, very likely, suffering from a mental disorder, with physically aggressive behaviour one of its symptoms, and that, owing to that mental illness, he had been ultimately exempt from any punishment but instead had been committed to psychiatric care. In the Court's view, these facts had limited the extent to which the respondent State could legitimately rely on the seriousness of the criminal offence to justify his expulsion.

Moreover, the applicant's conduct during the period that elapsed between the offence of which he had been found guilty and his expulsion had been particularly important for the assessment of his risk of reoffending. In that connection, the Court noted that although initially the applicant's aggressive behavioural patterns had persisted, he had made progress during those years. It also noted his ties to Denmark and limited ties with Turkey. Lastly, the Court found, in line with its previous judgments, that the effective permanent re-entry ban imposed on the applicant had been disproportionate. Overall, the domestic authorities had failed to take account of the individual circumstances of the applicant and to balance the issues at stake. There had thus been a violation of his right to respect for private life.

Just satisfaction (Article 41)

The Court considered that the finding of a violation constituted sufficient just satisfaction for the non-pecuniary damage sustained by the applicant. It held that Denmark was to pay the applicant 20,000 euros in respect of costs and expenses.

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Eur Court of HR, Gumenyuk and others v. Ukraine, judgment of 22 July 2021, application no 11423/19. The case concerned judges of the former Supreme Court of Ukraine who were prevented from exercising their functions, without having ever been formally dismissed, because of judicial reform and legislative amendments that took place in 2016. The Court found that the right of access to a court was a fundamental procedural right for the protection of members of the judiciary, and the applicants should, in principle, have been able to go to court with their allegations. In addition, the Court considered that being prevented from exercising as Supreme Court judges since December 2017, despite a Constitutional Court ruling in their favour, had significantly affected their private lives and constituted an interference with their right to respect for private life.

22.07.2021
No: 11423/19

Press release issued by the Registrar of the Court
GUMENYUK AND OTHERS V. UKRAINE
Reform in Ukraine seriously undermined the independence of the judiciary

Principal facts

The applicants are eight Ukrainian nationals who were born between 1954 and 1963 and live in Kyiv. Between 1994 and 2008, the applicants were all elected to posts of judges of the Supreme Court of Ukraine for an indefinite length of time. Following the Maidan protests -- large anti-government demonstrations throughout Ukraine in late 2013 and early 2014 which resulted in the departure of the former President and a change of power in Ukraine, -- amendments to the Constitution of Ukraine regarding the organisation and functioning of the domestic judiciary were adopted by Parliament in June 2016. Simultaneously, a new law on the judiciary and the status of judges ("the Judiciary Act 2016") came into effect on 30 September 2016. The aim of the bill was to optimise the judicial system and to introduce appropriate mechanisms for renewing judicial staff in Ukraine. The Supreme Court was to be the single supreme judicial authority, with powers of cassation, and whose judges were to be appointed on a competitive basis. The Judiciary Act 2016 provided that the judges of the former Supreme Court had the right to participate in the competition for the new Supreme Court.

On 3 October 2016 the plenary of the former Supreme Court challenged the provisions of the Judiciary Act 2016 before the Constitutional Court. It argued, among other things, that its liquidation, preventing judges from exercising their judicial functions, would be contrary to the Constitution. In November 2016 a competition for 120 judges' posts for the new Supreme Court was announced, and 846 candidates participated in it, including 17 of the 21 judges of the former Supreme Court. Seven of the eight applicants sat the competition but not one of them succeeded. The new Supreme Court began functioning on 15 December 2017.

On 18 February 2020, the Constitutional Court found that under the Constitution only one supreme judicial body existed. It also found, in view of the principle of irremovability, that the judges of the "old" Supreme Court should continue performing their functions as judges of the "new" Supreme Court. In June 2020, a draft law was introduced in Parliament proposing that the judges of the former Supreme Court be enrolled as judges in the new Supreme Court. As of June 2021, this law had not yet been adopted and the applicants had not been able to resume their duties as Supreme Court judges.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right of access to court), the applicants complained in particular that they could not challenge their being prevented from exercising their judicial functions as a result of the legislative amendments in 2016. Under Article 8 (right to private life), they complained that not being able to exercise their judicial functions as judges of the Supreme Court amounted to an unlawful and groundless interference with their right to respect for private life. The application was lodged with the European Court of Human Rights on 28 February 2019.

Decision of the Court

Article 8

The Court recognised that the legislative amendments in 2016 and their subsequent implementation had prevented the applicants from exercising their judicial functions as Supreme Court judges without their being formally dismissed. They had been deprived of the opportunity to continue their judicial work and pursue professional and personal development goals. The Court considered that the measures had significantly affected the applicants' private lives, constituting an interference with their right to respect for private life. In this regard, the Court took note of the Constitutional Court's ruling of 18 February 2020 in which it declared that the relevant legislative measures had been unconstitutional. That court found that the judges of the former Supreme Court had to be able to continue to exercise their powers as judges of the new Supreme Court and that making a difference between judges was not consistent with the principle of irremovability of judges which was a constitutional guarantee of their independence. Despite that ruling, the issue of the applicants' resumption of their judicial functions was still under examination by Parliament as of June 2021. Moreover, since December 2017, when the Supreme Court had started to operate, the applicants had not been able to exercise their judicial functions as Supreme Court judges. Accordingly, there had been a violation of Article 8 of the Convention.

Just satisfaction (Article 41)

The Court held that Ukraine was to pay each applicant 5,000 euros (EUR) in respect of non-pecuniary damage.

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Eur. Court of HR, M.A. v. Denmark, judgment of 9 July 2021, application no 6697/18. The case concerned a delay of three years imposed in 2016 pursuant to Danish law on the applicant's right to family reunification owing to his temporary protection status. The Court found in particular that, given the lack of an individualised assessment of the applicant's case and the length of the wait to be able to avail of his right to family reunification, the authorities had failed to strike a fair balance between the needs of the applicant individually and the economic well-being of the country in their assessment of his application to be reunited with his wife.

09.07.2021
No: 6697/18

Press release issued by the Registrar of the Court

M.A. V. DENMARK
Authorities violated Convention with mandatory waiting period for family reunification

Principal facts

The applicant, M.A., is a Syrian national who was born in 1959 and lives in Marstal (Denmark). The applicant fled Syria in January 2015 and requested asylum in Denmark in April of that year. His wife had remained in Syria. On 8 June 2015 the Immigration Service granted him "temporary protection status" (section 7(3) of the Aliens Act) for one year. That status was extended at yearly intervals. However, the authorities did not find that he met the requirements for being granted protection status (section 7(2) of the Aliens Act). The applicant appealed against that decision to the Refugee Appeals Board. The Board upheld the decision not to grant him protection status, stating that the applicant had not been "subjected to specific and personal persecution during his stay in Damascus". That decision was final.

In the meantime, in November 2015, the applicant requested family reunification with his wife. That request was rejected in 2016 as the applicant had not had a residence permit for the previous three years. That decision was upheld by the Immigration Appeals Board. The applicant went to court, complaining that the decision was in breach of his Convention rights. He also claimed that he was being discriminated against vis-à-vis people who had been granted protection. His action was dismissed at two levels of jurisdiction and then finally by the Supreme Court. The latter court stated, in extensive reasoning and with reference to European Court of Human Rights case-law, the following: "Moreover, it appears that the number of newcomers determines whether the subsequent integration becomes successful and that it is necessary to strike the right balance to maintain a good and safe society.

Against this background, the Supreme Court finds that the restriction on the eligibility for family reunification is justified by interests to be safeguarded under Article 8 of the Convention. … the condition that [M.A.] must normally have been resident in Denmark for three years before he can be granted family reunification with his spouse falls within the margin of appreciation enjoyed by the State. … the decision made by the Immigration Appeals Board is not contrary to Article 8 of the European Convention on Human Rights." On 22 October

2018 the applicant reapplied for family reunification. On 29 September 2019 the applicant's wife came to Denmark having been granted a residence permit.

Complaints, procedure and composition of the Court

Relying on Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination), the applicant complained that the authorities' decision to refuse to temporarily grant him family reunification with his wife on the grounds that he had not possessed a residence permit under section 7(3) of the Aliens Act for the previous three years had been in breach of his rights. The application was lodged with the European Court of Human Rights on 30 January 2018. On 7 September 2018 the Danish Government was given notice of the application, with questions from the Court. On 19 November 2019 the Chamber relinquished jurisdiction in favour of the Grand Chamber. A hearing was held on 10 June 2020. Third party submissions were received from the Council of Europe Commissioner for Human Rights, the United Nations High Commissioner for Refugees, the Governments of Norway and Switzerland, and the Danish Institute for Human Rights.

Decision of the Court

Article 8

The Court noted from the outset that the applicant's complaint related to his 4 November 2015 application for family reunification with his wife only. At that time he had had a residence permit under section 7(3) of the Aliens Act for five months. This case concerned thus the deferral for three years of the applicant's right to be granted family reunification. The applicant did not however call into question that a waiting period of one year was "reasonable". The Court also pointed out that it was the first time it had had to consider whether the imposition of a waiting period for granting family reunification to individuals who benefit from subsidiary or temporary protection status was Convention-complaint. The Court reiterated that a State was entitled to control the entry of aliens into its territory and their residence there. The Convention did not guarantee the right of a foreign national to enter or to live in a particular country. The Court also pointed out that the particular immigration status of the individuals requesting family reunification – in particular their rights as beneficiaries of subsidiary protection – and the temporary nature of any refusal owing to a statutory waiting period of a given length, had not been at issue to date in its case-law. It concluded that States have wide discretion in this area, but that the processes set in place must be practical and effective. The core question for the Court was whether the Danish authorities had struck a fair balance between the competing interests of the individual and of the community as a whole. Under Danish law, applicants with "temporary protection status" (section 7(3) of the Aliens Act) had their right to family unification restricted, which was not the case for others who had been given protection by the State (under sections 7(1) or (2)). The Court saw no reason to question the distinction between these two categories. The Court stated that a waiting period of three years was a long time to be separated from family, and that that period did not include the actual decamping, meaning the period would inevitably be longer. This separation would disrupt family life. It accepted that there had been family life between the applicant and his wife. However, it noted that the applicant had not had deep ties with Denmark when he had made the application, having been

in the State only for a matter of months. The Court observed that the sharp fall in the number of asylum seekers in 2016 and 2017 had not prompted Parliament to review the length of the waiting period. The Court did state that the authorities had not had access to case-law relevant to the situation at hand. The Supreme Court had "accepted" that the spouses had faced insurmountable obstacles to cohabiting in Syria, but it had emphasised that the obstacle to their exercise of family life together had only been temporary. It found that the three-year waiting period fell within the State's discretion. The Court however found that the Aliens Act did not allow for individualised assessment of a particular family's case. This had made the applicant's wait for family reunification obligatory. Given this, and the length of the applicant's marriage and the impossibility for him and his wife to live together in Syria, the Court found that the authorities had failed to strike a fair balance between the needs of the individual and the economic well-being of the country. There had accordingly been a violation of the Convention.

Other articles

Given the finding under Article 8, the Court found no need to examine separately the applicant's complaint under Article 14 read in conjunction with Article 8.

Just satisfaction (Article 41)

The Court held that Denmark was to pay the applicant 10,000 euros (EUR) in respect of nonpecuniary damage.

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Eur. Court of HR, Arnar Helgi Larusson v. Iceland, judgment of 31 May 2022, application no 23077/19. case description

31.05.2022
No: 23077/19

Information Note on the Court's case-law 262

Arnar Helgi Lárusson v. Iceland

Discrimination

No discrimination against wheelchair user unable to access two local public buildings, given other considerable measures to improve accessibility: *no violation*

Article 14

Facts – The applicant is paralysed from the chest down and uses a wheelchair for mobility. Before the domestic courts, and together with an association of people with spinal injuries, he brought unsuccessful civil proceedings challenging a lack of wheelchair access in two

buildings housing arts and cultural centres run by his municipality. The plaintiffs appealed up to the Supreme Court without success.

Law – Article 14 in conjunction with Article 8

(a) *Applicability*

In the present case, the situation had to be distinguished from earlier Court case-law where it had found that the lack of wheelchair access had not fallen within the ambit of private life:

– Unlike in *Botta v. Italy*, the accessibility issue in the present case concerned buildings owned and/or operated by and located in the applicant's own municipality;

– Unlike in *Zehnalová and Zehna v. the Czech Republic* (dec.), the applicant had identified a small, clearly defined number of buildings where access was lacking and had explained how the lack of access to each of those buildings had affected his life; and

– Unlike the situation in *Glaisen v. Switzerland* (dec.), the present case did not concern merely one of several similar, privately run cultural venues.

The first building was the municipality's "main arts and cultural centre", and it was not evident that the applicant could access similar cultural and social events and services at other venues in his municipality. Admittedly, the second building was primarily aimed at children and teenagers, but it was nevertheless a public building whose hall was rented out for activities and events, including those which could be attended by children. No other buildings in the municipality had been available which had had an equivalent purpose.

The applicant had thus clearly identified two particular buildings which were publicly owned and/or operated and which appeared to play an important role in local life in his municipality, which was home to fewer than 20,000 inhabitants. The lack of access to the first had hindered the applicant's participation in a substantial part of the cultural activities that his community had to offer, and the lack of access to the second had hindered him from attending birthday parties and other social events with his children.

The Court was conscious of the importance of enabling people with disabilities to fully integrate into society and participate in the life of the community, which had been emphasised by the Council of Europe and led to significant developments in European and international standards. Without access to the physical environment and to other facilities and services open or provided to the public, people with disabilities would not have equal opportunities for participation in their respective societies.

Against that background, and in the light of the circumstances of the case, the matter at issue was liable to affect the applicant's right to personal development and right to establish and develop relationships with other human beings and the outside world. Consequently, the matter fell within the ambit of "private life" within the meaning of Article 8. It followed that Article 14, taken together with Article 8, was applicable.

(b) ***Merits***

In previous cases concerning the rights of people with disabilities, the Court, referring to the UN Convention on the Rights of Persons with Disabilities ("the CRPD"), had found that Article 14 had to be read in the light of the requirements of those texts regarding "reasonable accommodation" – understood as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case" – which people with disabilities were entitled to expect in order to ensure "the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" (Article 2 of the CRPD). Such reasonable accommodation helps to correct factual inequalities which are unjustified, and which therefore amount to discrimination. Those considerations applied equally to the participation of people with disabilities in social and cultural life. In that regard, Article 30 of the CRPD explicitly required States Parties to guarantee to people with disabilities the opportunity to take part on an equal basis with others in cultural life.

The present case had to be considered from the viewpoint of whether or not the national authorities had complied with their positive obligation to take appropriate measures to enable the applicant, whose mobility was impaired due to disability, to exercise his right to private life on an equal basis with others. For that assessment, and taking account of the facts of the case, the test to be applied was limited to examining whether the State had made "necessary and appropriate modifications and adjustments" to accommodate and facilitate persons with disabilities, like the applicant, which, at the same time, did not impose a "disproportionate or undue burden" on the State. The Court proceeded to assess whether the respondent State had fulfilled its duty to accommodate the applicant, as a person with disabilities, in order to correct factual inequalities, applying the above-outlined test.

The Court had not benefitted from a prior assessment by the national courts of the balancing of the competing interests and whether sufficient steps had been taken to accommodate the accessibility needs of people with disabilities, including the applicant. Nevertheless, taking account of the nature and limited scope of its assessment, and the State's wide margin of appreciation, the Court was not convinced that the lack of access to the buildings in question had amounted to a discriminatory failure by the respondent State to take sufficient measures to correct factual inequalities in order to enable the applicant to exercise his right to private life on an equal basis with others.

In that regard, considerable efforts had been made to improve accessibility of public buildings and buildings with public functions in the municipality following a parliamentary resolution in 2011. In deciding on those improvements, the municipality had prioritised improving accessibility to educational and sports facilities, which was neither an arbitrary nor unreasonable strategy of prioritisation, also considering the emphasis which the Court had placed on access to education and educational facilities in its case-law. Further accessibility improvements which had since been made demonstrated a general commitment to work towards the gradual realisation of universal access in line with the relevant international materials. In the circumstances of the present case, imposing on the State a requirement to put in place further measures would have amounted to imposing a "disproportionate or undue burden" on it within the context of its positive obligations established by the Court's case-law to reasonably accommodate the applicant.

The respondent State and municipality had therefore taken considerable measures to assess and address accessibility needs in public buildings, within the confines of the available budget and having regard to the cultural heritage protection of the buildings in question.

In the light of the above, and considering the measures already undertaken, the applicant had not been discriminated against in the enjoyment of his right to respect for private life.

Conclusion: no violation (six votes to one).

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Eur. Court of HR, OOO Memo v. Russia, judgment of 15 March 2022, application no 2840/10. The case concerned a civil defamation suit brought by the Volgograd Region Authority against a
media company which OOO Memo owned. The Court found in particular that although civil defamation proceedings were open to private or public companies to protect their reputation in the marketplace, this could not be the case for a large, taxpayer-funded, executive body like the plaintiff in this case. The proceedings and the consequent interference had therefore not had a "legitimate aim" under the Convention. The European Court of Human Rights held, unanimously, that there had been a violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

15.03.2022
No: 2840/10

Press release issued by the Registrar
OOO MEMO V. RUSSIA

Court rules that civil defamation proceedings by State bodies should only be permitted exceptionally

Principal facts

The applicant, OOO Memo, is a Russian company. It is the owner of Kavkazskiy Uzel (*Кавказский узел* – "The Knot of the Caucasus"), a registered online media outlet which is devoted to the political and human-rights situation in the south of Russia, including Volgograd Region.

In July 2008 Kavkazskiy Uzel published an article in the context of the suspension of the transfer of 5,294,000 Russian roubles in subsidies from Volgograd Region to Volgograd City. It was entitled "[Mr S]: the Mayor's Office of Volgograd fell out with the Volgograd Region Authority over a bus factory".

In October Volgograd Region commenced civil defamation proceedings against the applicant company and the editorial board of Kavkazskiy Uzel, seeking a retraction of the following statements:

(a) "... there are two main reasons for the financial conflict that stemmed from the order of the

Volgograd Region Authority to suspend allocation of subsidies from the regional budget to the City of Volgograd. ... Undoubtedly, the first reason is a political one. It is linked to the [results] of the regional elections [of 2 March 2008]. The second reason is not widely known. It is of a purely economic character."

(b) "Recently the Mayor's Office held an open call for tender to buy buses … Volgograd Region lobbied on behalf of Volzhanin's to help it win the tender, but it was won by another company."

(c) "The officials of the Authority heavily criticised the Mayor's Office, saying, 'How come you did not support the local producer!' It appears to me that the Mayor's Office's refusal to do business with the Volzhanin factory was one of the main reasons of the regional officials' anger."

(d) "... the suspension of allocation of subsidies to the City of Volgograd from the regional budget was an act of revenge for the lost call for tender."

The applicant company argued that the excerpts had been value judgments and that the plaintiff – a public body – should, in any case, expect a higher degree of criticism than a private individual. The first-instance court disagreed, holding that the statements were false and tarnished the Volgograd Region Authority's reputation, and ordering that a retraction to that effect be published, with the operative part of the judgment being published on the company's website. That judgment and the reasoning were upheld by the Moscow City Court on appeal.

A number of other applications are pending before the Court concerning civil defamation proceedings taken by State authorities in Russia.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression), the applicant company complained of an interference with its right to freedom of expression.

The application was lodged with the European Court of Human Rights on 24 December 2009.

Decision of the Court

Article 10

The Court was satisfied that the Volgograd Region Authority – which had legal personality – had been entitled under the law to institute civil defamation proceedings.

Concerning whether the interference with the applicant company's right to free speech had pursued a "legitimate aim", the Court firstly noted that the Volgograd Region Authority is the executive authority of a constituent entity of the Russian Federation. For the Government, the legitimate aim had been "the protection of the reputation and rights of others". The applicant company argued that such an authority could not claim to have a "business reputation".

Although protection of reputation was a right under Article 8 (right to respect for private and family life), the Court noted that an attack on reputation had to be serious enough to warrant protection under that Article. The Court pointed out that protection of a company's reputation

– in the interests of shareholders, employees, and the economy – had also found protection in the Court's case-law.

Regarding public bodies, the Court highlighted that it had found that only in exceptional circumstances could a measure proscribing statements criticising the acts or omissions of an elected body be justified. State executive bodies were essentially different from State-owned companies or other legal entities, as the latter had to compete in the marketplace. Reputation was consequently important for them to attract and retain customers. Executive authorities, on the other hand, were funded by taxpayers. The Court reiterated that allowing State executive bodies to bring defamation proceedings against the media placed a disproportionate burden on the media.

In the current case, the Court held that there could not have been an interest in protecting the Volgograd Region Authority's commercial success which would have potentially justified the legal action; nor were the employees of the organisation harmed by the allegations. The defamation proceedings had thus not pursued a legitimate aim, leading to a violation of Article 10 of the Convention.

Just satisfaction (Article 41)
The applicant company did not make any claims for just satisfaction.

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Eur. Court of HR, C.E. and Others v. France, judgment of 24 March 2022, application nos. 29775/18 and 29693/19. The judgment concerned two cases. The first related to the rejection by the domestic courts of an application for full adoption of a child, made by the biological mother's former partner. The second concerned the domestic courts' refusal to issue a document attesting to a matter of common knowledge (acte de notoriété) recognising a legal parent-child relationship, on the basis of de facto enjoyment of status (possession d'état), between a child and the biological mother's former partner. The European Court of Human Rights held, unanimously, that there had been: no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

24.03.2022
Nos: 29775/18 and 29693/19

Press release issued by the Registrar of the Court

C.E. AND OTHERS V. FRANCE
Refusal to recognise a legal relationship between a child and the biological mother's ex-partner: no violation of Article 8 of the Convention

Principal facts

The applicants C.E., C.B. and M.B. (application no. 29775/18) were born in 1974, 1967 and 2002 respectively. The applicants A.E. and T.G. (application no. 29693/19) were born in 1980 and 2008 respectively. All the applicants live in France. Application no. 29775/18 – On 13

January 2002, at a time when C.E. and C.B. were living as a couple, C.B. gave birth to M.B., who had been conceived "with the help of a friend and donor in France". C.B. was the child's sole legal parent.

The couple separated in 2006. Under an agreement reached with C.B., C.E. has contact rights with the child which entail having her to stay every other weekend and for half the school holidays. C.E. makes monthly maintenance payments to her former partner for the child's everyday care and education.

On 29 July 2015 C.E. lodged an application with the Aix-en-Provence tribunal de grande instance for a full adoption order in respect of M.B. while retaining the legal relationship between the child and C.B. The court rejected the application and the judgment was upheld by the Court of Appeal. In a judgment of 28 February 2018 the Court of Cassation (First Civil Division) dismissed an appeal on points of law by C.E. In the meantime, on 31 May 2016, C.E. and C.B. had applied to the Narbonne tribunal d'instance requesting a document attesting to a matter of common knowledge (acte de notoriété) establishing a legal relationship between C.E. and the child. The request was eventually refused.

Application no. 29693/19 – In May 2006 A.E. entered into a civil partnership with K.G. After having recourse to assisted reproductive technology (ART) abroad, K.G. gave birth to T.G. on 13 November 2008. On 16 March 2010 K.G. applied to the family-affairs judge of the Rennes tribunal de grande instance seeking to exercise joint parental responsibility with A.E. The judge allowed the application. In October 2011 A.E. gave birth to a child. In May 2012 the same court ordered the delegation of parental responsibility on a shared basis between A.E. and K.G. Following the couple's separation the civil partnership was dissolved in October 2014.

On 2 July 2018 A.E. applied to the Rennes tribunal de grande instance requesting it to issue a document attesting to a matter of common knowledge on the basis of de facto enjoyment of status (possession d'état) with regard to T.G. K.G. intervened in the proceedings as a third party. The vicepresident of the court refused the request.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), C.E., M.B. and C.B (application no. 29775/18) alleged a breach of their right to respect for their private and family life on account of the domestic courts' rejection of the application for full adoption of M.B. by C.E., the former partner of C.B., the child's biological mother. In application no. 29693/19 A.E., the former partner of T.G.'s biological mother, and T.G., alleged a breach of the latter's right to respect for private and family life on account of the domestic courts' refusal to issue a document attesting to a matter of common knowledge, establishing a legal relationship between A.E. and T.G. on the basis of their de facto enjoyment of status.

The applications were lodged with the European Court of Human Rights on 20 June 2018 and on 3 June 2019.

Decision of the Court

Article 8

The Court noted that at the time the applicants applied to the domestic courts and the Court, French law had made no provision for a legal parent-child relationship to be established between a minor and the former partner of his or her biological mother without the latter's legal status being affected. The persons concerned could not have recourse to full or simple adoption or to recognition through the effect of their de facto enjoyment of status. The Court observed that in neither case did the Article 8 complaints allege a breach of the applicants' right to respect for private and family life by a public authority. Instead, they related to alleged shortcomings in the French legislation which, according to the applicants, had resulted in the refusal of their requests and undermined effective respect for their private and family life. The Court therefore decided to examine the applicants' complaints from the standpoint of the States Parties' positive obligation to secure to persons within their jurisdiction effective respect for their private and family life, rather than from the perspective of their obligation not to interfere with the exercise of that right.

Right to respect for family life

The Court noted that in both cases, since the couples' separation, and despite the lack of legal recognition of a relationship between the children and their biological mother's former partner, the persons concerned had led a family life comparable to that led by most families after the parents separated. C.E., in agreement with her former partner, exercised contact rights in respect of M.B., while K.G. and A.E. had opted for joint parental responsibility, in accordance with domestic law, and had put shared custody arrangements in place. Furthermore, none of the applicants in either case had reported any difficulties in conducting their family life, and the respondent State had put in place legal instruments enabling the ties between them to be protected. If any problems were to arise they could be remedied on the basis of Article 371-4 of the Civil Code, according to which "if the interests of the child so require, the family-affairs judge shall determine the arrangements concerning the relationship between the child and any other person, whether a relative or not, who has resided in a stable manner with the child and one of the parents, has participated in the child's education, everyday care or accommodation and has developed lasting emotional bonds with him or her." Thus, there was no basis for finding, in the circumstances of the two cases, that the respondent State had failed in its obligation to guarantee the applicants effective respect for their family life. There had therefore been no violation of the right to respect for family life protected by Article 8.

Right to respect for private life

As noted by the Court, at the time the applicants applied to the domestic courts and the Court, French law had made no provision for a legal parent-child relationship to be established between a minor and the former partner of his or her biological mother without the latter's legal status being affected. It therefore had to be determined whether, in the circumstances of the present cases, the absence of such a possibility amounted to a failure by the respondent State to comply with its positive obligation to guarantee the applicants effective respect for their private life. The Court pointed out that it had held, in the context of children born abroad

through a gestational surrogacy arrangement and conceived using the gametes of the intended father, that the child's right to respect for private life required that domestic law provide a possibility of recognition of a legal parent-child relationship not only between the child and the intended father, where he was the biological father, but also, where the legal parent-child relationship with the intended father was recognised in domestic law, with the intended mother, designated in the birth certificate legally established abroad as the "legal mother", even where she was not genetically related to the child. The Court noted that the situations of M.B. and T.G. could not be compared to such a situation as they had not been conceived through gestational surrogacy and their ties to C.E. and A.E. respectively had not previously been established under the law of another country. Firstly, the Court stressed that in situations such as those of the applicants there existed legal instruments in France enabling the relationship between a child and an adult to be recognised. For instance, the child's biological mother could obtain a court order for the exercise of joint parental responsibility with her partner or former partner. While an order of that kind did not entail the establishment of a legal parent-child relationship, it nevertheless allowed the partner or former partner to exercise certain rights and duties associated with parenthood and thus amounted to a degree of legal recognition of the relationship.

T.G.'s biological mother had availed herself of that option, and she and A.E. had exercised joint parental responsibility with regard to T.G. since 2010. While this was not the case with C.E. and C.B., the Court observed that it had not been alleged that C.B. would object to sharing parental responsibility in this way; moreover, this would be inconsistent with the fact that she had agreed to M.B.'s adoption by C.E. Furthermore, where former partners separated or failed to reach agreement, the Court noted that the family-affairs judge could, if the child's interests so required, determine the arrangements concerning his or her relationship with the mother's former partner (Article 371-4 of the Civil Code). This too could be likened to some extent to legal recognition of their relationship. Secondly, the Court noted that since publication of the Bioethics Act of 2 August 2021, female couples who had had recourse to ART abroad before 4 August 2021 had the possibility, for a threeyear period, of jointly recognising a child who had a legal parent-child relationship only with the woman who had given birth; this had the effect of establishing a legal relationship with the other woman. The couple's possible subsequent separation had no implications for the application of this mechanism. It was sufficient for them to have been a couple (married, in a civil partnership or cohabiting) at the time of the ART treatment, and for them to have had recourse to that treatment with the intention of having a child together.

The Court noted that this option was available in the case of T.G., since he had been born as a result of an ART procedure carried out abroad in the context of the plans of K.G., his biological mother, and A.E. to start a family together. Since 4 August 2021 (when T.G. had been approximately 12 years and eight months old), a procedure had existed in French law enabling a legal parent-child relationship to be established between T.G. and A.E. That option had thus become available just three years after their application for a document attesting to a matter of common knowledge.

Thirdly, although under the legislation this procedure was not available in the case of M.B., who had not been conceived through an ART procedure performed abroad, it appeared that her

adoption by C.E. under the simple adoption procedure would now be possible. While that had not been the case when she had still been a minor, as her biological mother would have been deprived of parental responsibility as a result, M.B. had reached the age of majority on 13 January 2020 and a procedure had therefore been available since then enabling a legal mother-child relationship to be established with C.E.

In view of the margin of appreciation left to the respondent State – which, admittedly, was narrower where children's best interests were in issue – the Court considered, with regard to M.B. and T.G.'s right to respect for private life, that a fair balance had been struck between the interests at stake. This applied with even greater force to the right to respect for private life of C.E. and C.B. on the one hand and A.E. and K.G. on the other, as their interests in that regard coincided with those of M.B. and T.G. respectively. The Court therefore held that the respondent State had not failed in its obligation to guarantee effective respect for the applicants' private life. It followed that there had been no violation of Article 8.