



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

## Guide on the case-law of the European Convention on Human Rights

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### Social rights

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## Note to readers

This Guide is part of the series of Case-Law Guides published by the European Court of Human Rights (hereafter “the Court”, “the European Court” or “the Strasbourg Court”) to inform legal practitioners about the fundamental judgments and decisions delivered by the Strasbourg Court. This particular Guide analyses and sums up the case-law on a wide range of provisions of the European Convention on Human Rights (hereafter “the Convention” or “the European Convention”) relating to social rights. It should be read in conjunction with the case-law guides by Article, to which it refers systematically.

The case-law cited has been selected among the leading, major, and/or recent judgments and decisions.\*

The Court’s judgments and decisions serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (*Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25, and, more recently, *Jeronovičs v. Latvia* [GC], no. 44898/10, § 109, 5 July 2016).

The mission of the system set up by the Convention is thus to determine, in the general interest, issues of public policy, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (*Konstantin Markin v. Russia* [GC], 30078/06, § 89, ECHR 2012). Indeed, the Court has emphasised the Convention’s role as a “constitutional instrument of European public order” in the field of human rights (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 156, ECHR 2005-VI, and more recently, *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 110, 13 February 2020).

Protocol No. 15 to the Convention recently inserted the principle of subsidiarity into the Preamble to the Convention. This principle “imposes a shared responsibility between the States Parties and the Court” as regards human rights protection, and the national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the rights and freedoms defined in the Convention and the Protocols thereto (*Grzęda v. Poland* [GC], § 324)

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\* The case-law cited may be in either or both of the official languages (English and French) of the Court and the former European Commission of Human Rights (hereafter “the Commission”). Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation “(dec.)” indicates that the citation is of a decision of the Court and “[GC]” that the case was heard by the Grand Chamber. Chamber judgments that were not final when this update was published are marked with an asterisk (\*).

## Introduction

1. Whilst the European Convention on Human Rights sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation, there being no watertight division separating that sphere from the field covered by the Convention (*Airey v. Ireland*, 1979, § 26; *Stec and Others v. the United Kingdom* (dec.) [GC], 2005, § 52). Through its case-law, the Court has interpreted various Articles of the Convention as giving rise to certain rights which can be considered to be of a social nature.
2. Furthermore, certain rights protected under the Convention and its Protocols are also regulated, sometimes with greater detail, under the European Social Charter (1961 Charter, or Revised Charter, adopted in 1996) including trade union rights, the prohibition of forced labour, the right to education or the prohibition of discrimination. Both treaty systems are complementary and interdependent.
3. This Case-law Guide summarises and analyses the jurisprudence of the Court concerning social rights. The Guide covers issues such as health, labour rights, trade union rights, social benefits and pensions as well as certain emerging issues such as housing, rights of specific vulnerable groups etc. The relevant cases are numerous and concern a significant number of substantive provisions of the Convention. This Guide focuses on different thematical issues and on how they relate to various Convention Articles.

## I. Health<sup>1</sup>

### Article 3 of the Convention

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

### Article 8 of the Convention - Right to respect private and family life

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

### A. Scope

4. Although the right to health is not as such among the rights guaranteed by the Convention or its Protocols, Contracting States are under a positive obligation to take appropriate measures to protect the life and health of those within their jurisdiction (*Vavříčka and Others v. the Czech Republic* [GC], § 282), although matters of healthcare policy are in principle within the margin of appreciation of the domestic authorities, who are best placed to assess priorities, use of resources and social needs

<sup>1</sup> See also, the *Case-Law Guide on Article 2 of the European Convention on Human Rights*, the *Case-Law Guide on Article 8 of the European Convention on Human Rights*, the *Case-Law Guide on Environment* and the *Case-Law Guide on Prisoners’ Rights*, and for a social dimension on health-related issues concerning migrants see also the Chapter below on ‘Specific vulnerable groups’.

(*Vavříčka and Others v. Czech Republic* [GC], 2021, §§ 274 and 285). The Court’s case-law covers a wide range of health-related themes: these are addressed below, each section covering, as relevant, issues of scope and applicability of the relevant Convention provision.

## B. Reproductive Health<sup>2</sup>

5. While the Convention does not recognise a right to become a parent, the Court has held that it cannot ignore the emotional hardship suffered by those whose desire to become parents has not been or could not be fulfilled (*Paradiso and Campanelli v. Italy* [GC], 2017, § 215). Like the notion of private life, the notion of family life also incorporates the right to respect for decisions to become, or not to become, a parent in the genetic sense (*Dickson v. the United Kingdom* [GC], § 66; *Evans v. the United Kingdom* [GC], §§ 71-72). Accordingly, the right of a couple to make use of medically assisted procreation comes within the ambit of Article 8, as an expression of private and family life (*S.H. and Others v. Austria* [GC], § 82).

6. Nevertheless, the Court has recognised that States must in principle be afforded a wide margin of appreciation regarding matters which raise delicate moral and ethical questions on which there is no consensus at European level, such as medically assisted reproduction and surrogate motherhood (*S.H. and Others v. Austria*, §§ 94-97; *Menesson v. France*, 2014, §§ 78-79; *Paradiso and Campanelli v. Italy* [GC], 2017, §§ 182-184 and 194). However, where a particularly important facet of an individual’s identity is at stake, the margin allowed to the State will be restricted (*Menesson v. France*, 2014, §§ 77 and 80). This is particularly so in cases involving children, in which other essential aspects of their private life, beyond their identity, come into play, such as the environment in which they live and develop as well as the persons responsible for meeting their needs and ensuring their welfare (*Advisory Opinion No. P16-2018-001*, 2019, § 45).

7. The Court has also considered that Article 8 could not be interpreted as conferring a right to abortion but that, where it is sought for reasons of health and/or well-being, it may come within its scope (*A, B and C v. Ireland* [GC], 2010, § 214). Legislation regulating the interruption of pregnancy touches not only upon the private life of the woman because, whenever a woman is pregnant, her private life becomes closely connected with the developing foetus. Thus, the woman’s right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child (*Tysiac v. Poland*, 2007, § 106; *A, B and C v. Ireland* [GC], 2010, § 213).

### 1. Medically Assisted Procreation

8. Given the fast-moving medical and scientific developments in this sphere, the Court is increasingly faced with questions relating to various forms of medically assisted procreation.

9. In *Dickson v. the United Kingdom* [GC], 2007, the Court has considered issues of medically assisted procreation in a prison context. The applicants wished to conceive a child while the husband was still serving a prison sentence, arguing that conception would not otherwise be possible in view of the husband’s earliest release date and the wife’s age, but they were refused access to artificial insemination facilities. While holding that this was an area in which the States enjoyed a wide margin of appreciation as the Convention had not yet been interpreted as obliging them to make provision for conjugal visits, the Court found that the policy as structured at the material time effectively excluded any real weighing of the competing individual and public interests and prevented the required assessment of the proportionality of a restriction in any individual case. The absence of such an assessment had to be seen as falling outside any acceptable margin of

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<sup>2</sup> See also, sub-section ‘Reproductive Rights’ under chapter ‘Private Life’ and sub-section ‘Medically assisted procreation/right to become genetic parents’ under chapter ‘Family Life’ of the *Case-Law Guide on Article 8 of the European Convention on Human Rights*.

appreciation so that a fair balance had not been struck between the competing public and private interests involved (§§ 82-85).

10. The Court examined the need for consent to use fertilised eggs in *Evans v. the United Kingdom* [GC], 2007. The applicant had stored her eggs fertilised by her then partner for future insemination. After their relationship ended, the partner withdrew his consent to the continued storage or the implantation of the embryos. The applicant complained that domestic law had permitted her former partner effectively to prevent her from ever having a biological child. The Court noted that keeping human embryos in frozen storage gave rise to the possibility of allowing a lapse of time between the creation of the embryo and its implantation. It was therefore legitimate and desirable for a State to set up a legal scheme which took that possibility of delay into account. When she consented to have her eggs fertilised, the applicant knew that, as a matter of law, her partner would be free to withdraw his consent to implantation at any moment. Given the wide margin of appreciation accorded to the respondent State, the Court did not consider that the applicant's right to respect for her decision to become a parent in the genetic sense should be accorded greater weight than her former partner's right to respect for his decision not to have a genetically-related child with her (§§ 83-92).

11. Moreover, in *S.H. and Others v. Austria* [GC], 2011, the Court examined complaints concerning the prohibition under domestic law on the use of donor sperm and egg gametes for *in vitro* fertilisation (heterologous procreation techniques). The Court considered that concerns based on moral considerations or on social acceptability must be taken seriously in a sensitive domain like artificial procreation. However, they were not in themselves sufficient reasons for a complete ban on specific artificial procreation techniques: notwithstanding the wide margin of appreciation afforded to the Contracting States, the legal framework devised for this purpose had to be shaped in a coherent manner allowing the different legitimate interests involved to be adequately taken into account (§ 100).

12. In finding that the respondent State had not exceeded the wide margin of appreciation afforded to it at the relevant time, the Court gave particular weight to the fact that the legislation under consideration had not completely ruled out other methods of assisted procreation as it had allowed the use of homologous procreation techniques (*in vitro* fertilisation using gametes from persons married to each other or living together as man and wife). Moreover, it had sought to avoid possible conflicts between biological and genetic parents in the wider sense by trying to reconcile, on the one hand, the wish to make medically assisted procreation available and, on the other, the existing unease among large sections of society as to the role and possibilities of modern reproductive medicine. The fact that the law prohibited sperm and egg donation for the purposes of *in vitro* fertilisation without at the same time forbidding sperm donation for *in vivo* fertilisation was another matter of significance in the balancing of the respective interests since it showed the careful and cautious approach adopted by the legislature in seeking to reconcile social realities with its approach of principle in this field (*Ibid.*, §§ 103-107 and 112-116).

## 2. Surrogacy

13. In *Mennesson v. France*, 2014, the Court examined complaints concerning the registration of a foreign birth certificate and recognition of the legal parent-child relationship in respect of a child born from a gestational surrogacy arrangement abroad. The parents and children were all applicants before the Court. In relation to the parents, the Court acknowledged an interference with their family life on various levels, but did not find a violation thereof, noting that there had not been any insurmountable practical difficulties that prevented the applicants from exercising their right to respect for family life. They had been able to settle in France shortly after the birth of the children, to live there together in circumstances which, by and large, were comparable to those of other families, and there was nothing to suggest that they were at risk of being separated by the authorities because of their situation (§§ 87 and 92-94).



14. In examining the ‘private life’ complaint of the applicant children, the Court accepted that France might well wish to discourage its nationals from having recourse abroad to a reproductive technique prohibited in the country. However, the effects of the refusal to recognise a parent-child relationship between children conceived in this way were not limited to the intended parents, but extended to the situation of the children themselves. Observing that such a relationship had been legally recognised in another country but not in the respondent State, the Court considered that a contradiction of that nature, especially when one of the intended parents was also the children’s biological father, undermined the children’s identity within society. There was therefore a serious issue as to the compatibility of that situation with the children’s best interests, which had to guide any decision concerning them. Given the importance of biological parentage as a component of each individual’s identity, the Court found that it was not in the children’s best interests to deprive them of a legal tie of this nature when both the biological reality of that tie was established and the children and the parent concerned sought its full recognition. Given the implications of this serious restriction in terms of the identity of the applicant children and their right to respect for private life, as well as the importance to be attached to the child’s best interests, the Court held that their rights under Article 8 had been breached (*Mennesson v. France*, 2014, §§ 96-101; compare and contrast to the Court’s stance in *Paradiso and Campanelli v. Italy* [GC], 2017, §§ 185-216, concerning the separation of the applicant parents and a child born abroad as a result of a ‘non-traditional surrogacy arrangement’ where there was no biological link between the parents and the child).

15. Consequently, the Court has found that where a child is born through a gestational surrogacy arrangement abroad, in a situation where he or she was conceived using the eggs of a third-party donor, and the intended mother is designated in a birth certificate legally established abroad as the ‘legal mother’, the child’s right to respect for his or her private life requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother (*Advisory Opinion No. P16-2018-001*, 2019, § 46). Regarding the child’s best interests, the Court has confirmed its conclusions in the case of *Mennesson v. France*, 2014. In addition, it has noted that a refusal to recognise the legal parent-child relationship with the intended mother gave rise to other important considerations affecting the child’s best interests, such as the risk of denial of access to their intended mother’s nationality; the increased difficulty for them to remain in their intended mother’s country of residence; their right to inherit under the intended mother’s estate may be impaired; their continued relationship with her could be at risk if the intended parents were to separate or the intended father were to die; and the lack of protection should their intended mother refuse to take care of them or cease doing so. The Court has also noted that the child’s best interests entailed the legal identification of the persons responsible for raising him or her, meeting his or her needs and ensuring his or her welfare, as well as the possibility for the child to live and develop in a stable environment (*ibid.*, §§ 40-42; see also, *Valdís Fjölnisdóttir and Others v. Iceland*, 2021, §§ 71-75, concerning the non-recognition of the parental link with a non-biological child born abroad *via* surrogacy, while preserving the family life bond through foster care; *S.-H. v. Poland* (dec.), 2021, §§ 68-76, concerning the inability to obtain Polish nationality by descent by children born through surrogacy in USA to a same-sex couple residing in Israel, where the legal parent-child link is recognised).

16. The choice of means by which to achieve recognition of the legal relationship between the child and the intended mother falls within the State’s margin of appreciation. However, once the relationship between the child and the intended mother has become a practical reality, the procedure laid down to establish recognition of the relationship in domestic law must be capable of being implemented promptly and efficiently, in accordance with the child’s best interests (*Advisory Opinion No. P16-2018-001*, 2019, §§ 53-55). The Court has stressed that it is in the child’s interests in such a situation for the uncertainty surrounding the legal relationship with his or her intended mother to be as short-lived as possible, noting that until that relationship is recognised, the child is in a vulnerable position (*ibid.*, § 49).

### 3. Abortion

17. The Court has approached the issue of abortion on a case by case basis without making a general statement as to whether/in which circumstances States should or should not allow legal abortion within their territories.

18. The Court has held that a timely procedure should guarantee to a pregnant woman at least the possibility to be heard in person and to have her views considered, in order to limit or prevent damage to a woman's health which might be occasioned by a late abortion. The absence of such preventive procedures may amount to the failure of the State to comply with its positive obligations under Article 8 of the Convention (*Tysiac v. Poland*, 2007, §§ 117-118). The *Tysiac* case concerned the refusal to perform a therapeutic abortion despite risks of a serious deterioration of the mother's eyesight and the Court found that, owing to a lack of procedural safeguards, it had not been demonstrated that the domestic law, as applied in the applicant's case, contained any effective mechanism capable of determining whether the conditions for obtaining a lawful abortion had been met. The applicant had suffered severe distress and anguish when contemplating the possible negative consequences of her pregnancy and upcoming delivery for her health (§§ 119-130).

19. In *A, B and C v. Ireland* [GC], 2010, the Court examined complaints about having to travel abroad for an abortion for health and/or well-being reasons owing to a statutory prohibition (criminal law) on abortions in Ireland. While not underestimating the serious impact of the impugned restriction, particularly so on the first applicant given her impoverished circumstances (an unemployed single mother with four young children placed in foster care, fearing that having another child would jeopardise her chances of regaining custody after sustained efforts on her part to overcome an alcohol-related problem), the Court was satisfied that by not allowing abortion for health and/or well-being reasons Ireland had not overstepped the broad margin of appreciation afforded to it in protecting the profound moral values of its people. In particular, the Court had regard to the fact that the relevant legislation enabled women to obtain information about services abroad, to travel for an abortion and to obtain necessary post-abortion medical care in Ireland. There had therefore not been a violation of Article 8 of the Convention (§§ 239-241).

20. In *P. and S. v. Poland*, 2012, a 14-year-old victim of rape wished to terminate her pregnancy, but the local public hospitals refused to perform an abortion. Thereafter the applicant experienced serious pressure from various groups including medical professionals, journalists, a priest and anti-abortion activists. She was eventually taken in secret for an abortion in another hospital some 500 kilometres from her home.

21. The Court found that the events surrounding the determination of the applicant's access to legal abortion had been marred by procrastination and confusion. The applicant and her mother, the second applicant, had been given misleading and contradictory information and had not received appropriate and objective medical counselling that had given due regard to their views and wishes. No set procedure had been available by which they could have had their views heard and properly taken into consideration with a modicum of procedural fairness (§ 108). In relation to the mother, the Court considered that the difference in the situation of a pregnant minor and that of her parents did not obviate the need for a procedure for the determination of access to a lawful abortion whereby both parties could be heard and their views fully and objectively considered and for a mechanism for counselling and for reconciling conflicting views in the minor's best interests. In this regard the Court noted that the interests and life prospects of the mother of a pregnant minor girl were also involved in the decision whether to carry the pregnancy to term or not, as the emotional family bond made it natural for the mother to feel deeply concerned by issues arising out of reproductive dilemmas and choices to be made by the daughter (§ 109). All of the foregoing difficulties in the practical implementation of the right to obtain a lawful abortion led the Court to conclude that the authorities had failed to comply with their positive obligation to secure to the applicants' rights under Article 8 (§ 112).

22. Moreover, relying on such conclusions, the Court also found a violation of Article 3 of the Convention, noting that despite the applicant's great vulnerability, a prosecutor's certificate confirming that her pregnancy had resulted from unlawful intercourse and medical evidence that she had been subjected to physical force, the applicant had been subjected to considerable pressure by various medical professionals not to have an abortion. No proper regard had been given to her young age or to her views and feelings (*P. and S. v. Poland*, 2012, §§ 161-169). In addition, the Court found that the applicant's placement in a juvenile shelter was not compatible with Article 5 § 1 of the Convention, noting that its essential purpose was to prevent a minor in a situation of considerable vulnerability from having recourse to abortion (*ibid.*, §§ 148-149).

#### 4. Pre-natal screening/testing

23. In *R.R. v. Poland*, 2011, the Court examined complaints about the lack of access to prenatal genetic tests resulting in the applicant's inability to have an abortion on grounds of a foetal abnormality. The Court noted that the applicant had been in a situation of great vulnerability. As a result of the procrastination of the health professionals in providing access to genetic tests, the applicant, who was pregnant, had had to endure six weeks of painful uncertainty concerning the health of her foetus and, when she eventually obtained the results of the tests, it was already too late for her to make an informed decision on whether to continue the pregnancy or to have recourse to a legal abortion. The Court found a violation of Article 3 (*R.R. v. Poland*, 2011, §§ 159-162).

24. In *Costa and Pavan v. Italy*, 2012, the Court came to a similar conclusion under Article 8 of the Convention with regard to the prohibition of embryo screening under medically-assisted procreation techniques, when artificial procreation and termination of pregnancy on medical grounds were allowed. The case concerned a couple who were healthy carriers of cystic fibrosis and wanted, with the help of medically-assisted procreation and genetic screening, to avoid transmitting the disease to their offspring. In finding a violation of Article 8, the Court noted the inconsistency in Italian law that denied the couple access to embryo screening but authorised medically assisted termination of pregnancy if the foetus showed symptoms of the same disease. The Court concluded that the interference with the applicants' right to respect for their private life and family life had been disproportionate (§§ 60-71).

25. Moreover, the Court has found a violation of Article 8 in its procedural aspect where the domestic courts failed to fully investigate the applicant's claim that she had been denied adequate and timely medical care in the form of a pre-natal medical test which would have indicated the risk of her foetus having a genetic disorder and would have allowed her to choose whether to continue the pregnancy (*A.K. v. Latvia*, 2014, §§ 93-94).

#### 5. Sterilisation

26. The Court has noted that sterilisation constitutes a major interference with a person's reproductive health status. As it concerns one of the essential bodily functions of human beings, it bears on manifold aspects of the individual's personal integrity including his or her physical and mental well-being and emotional, spiritual and family life (*V.C. v. Slovakia*, 2011, § 106). Consequently, in cases concerning sterilisation the Court has taken into account the effects thereof on the applicant's private and social life as part of its assessment of the threshold of severity required under Article 3.

27. In *V.C. v. Slovakia*, 2011, the Court examined a complaint of a Roma woman who was sterilised during delivery, for which she had been asked to give her consent in writing two and a half hours after she had been brought to hospital, when she had been in the process of established labour and in a supine position. The Court found that such an approach was paternalistic in that it offered the patient no alternative option but to agree with the doctors, in disregard of her autonomy of moral choice, and that the sterilisation procedure had grossly interfered with the reproductive capability of

the applicant, who at the time was at a very young age (§§ 111-116). In particular, the Court noted that due to her infertility the applicant had experienced difficulties in her relationship with her partner, which had subsequently led to her divorce. Furthermore, owing to her inability to have children, she had been ostracised by the Roma community and had suffered serious medical and psychological after-effects, which included the symptoms of a false pregnancy requiring treatment by a psychiatrist. Accordingly, there had been a violation of Article 3 (§§ 118-120; see also, *N.B. v. Slovakia*, 2012, §§ 74-81, *I.G. and Others v. Slovakia*, 2012, §§ 120-124).

28. Moreover, the Court found that due to the absence of legal safeguards giving special consideration to the reproductive health of the applicant as a Roma woman, the respondent State had failed its positive obligation under Article 8 to secure a sufficient measure of protection enabling her to effectively enjoy her right to respect for her private and family life. The Court noted that the issue of sterilisation and its improper use had particularly affected vulnerable individuals, such as Roma women, due to the widespread negative attitudes towards the relatively high birth rate in the Roma community compared to other parts of the population, often expressed as worries about an increased proportion of the population living on social benefits. In addition, with regard to the reference in the applicant's medical record to her ethnic origin, the Court observed a certain mindset on the part of the medical staff as to the manner in which the medical situation of a Roma woman should be managed, which did not suggest that special care was exercised to ensure that the full and informed consent of such a patient was obtained before any sterilisation was contemplated, or that the patient was involved in the decision-making process to a degree permitting her interests to be effectively protected (§§ 145-155; see also, *N.B. v. Slovakia*, 2012, §§ 92-99, *I.G. and Others v. Slovakia*, 2012, §§ 141-146).

### C. Vaccination

29. The Court has established in its case-law that compulsory vaccination, as an involuntary medical intervention, represents an interference with the right to respect for private life within the meaning of Article 8 of the Convention (*Solomakhin v. Ukraine*, 2012, § 33, with further references).

30. In *Vavříčka and Others v. Czech Republic* [GC], 2021, the Court examined complaints concerning the statutory duty to vaccinate children against diseases well known to medical science, non-compliance with which had led to a refusal to be enrolled in preschools, finding there had not been a violation of Article 8. In deciding whether the impugned measures were “necessary in a democratic society”, the Court emphasised, among other considerations, the State's obligation to place the best interests of the child, and also those of children as a group, at the centre of all decisions affecting their health and development (§§ 287-288). The Court referred to the general consensus as to the vital importance of vaccinations for protecting populations against diseases that may have severe effects on individual health and that, in the case of serious outbreaks, may cause disruption to society (§ 300).

31. Furthermore, while accepting that the exclusion of the applicants from preschool meant the loss of an important opportunity for young children to develop their personalities and to begin to acquire important social and learning skills in a formative pedagogical environment, the Court found that these were the direct consequences of the choice made by their respective parents to decline to comply with a legal duty, the purpose of which is to protect health, in particular in that age group. In this context, the Court observed that the applicants were not deprived of all possibility of personal, social and intellectual development, even at the cost of additional, and perhaps considerable, effort and expense on the part of their parents (*Vavříčka and Others v. Czech Republic* [GC], 2021, §§ 306-307).

## D. Health information<sup>3</sup>

32. The protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. Consequently, domestic law must afford appropriate safeguards to prevent any communication or disclosure of personal health data which may be inconsistent with the guarantees in Article 8 of the Convention (*Z v. Finland*, 1997, § 95; *L.L. v. France*, 2006, § 44). It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community (*Z v. Finland*, 1997, § 95).

33. The Court has found the above considerations especially valid as regards protection of the confidentiality of information about a person's HIV infection. The disclosure of such data may dramatically affect his or her private and family life, as well as his or her social and employment situation, by exposing him or her to opprobrium and the risk of ostracism. For this reason it may also discourage persons from seeking diagnosis or treatment and thus undermine any preventive efforts by the community to contain the pandemic (*Z v. Finland*, 1997, § 96).

34. The case of *Biriuk v. Lithuania*, 2008, concerned an article published on the front page of Lithuania's biggest daily newspaper about an alleged AIDS threat in a remote part of Lithuania. The Court took particular note of the fact that the applicant lived in a village, as opposed to a city, which increased the impact of the publication on the possibility that her illness would be known by her neighbours and her immediate family, thereby causing public humiliation and exclusion from village social life (§ 41). In *C.C. v. Spain*, 2009, concerning the publication of the applicant's full identity in a judgment delivered in relation to his HIV-positive status, the Court found that - given the domestic court's possibility of restricting access to the judgment or using the applicant's initials and bearing in mind the need for special protection of the confidentiality of information concerning HIV infection, the divulgence of which could have devastating effects on the private and family lives of those concerned and on their social and professional situation - the publication of the applicant's full name in connection with his state of health had not been justified by any pressing need (§§ 36-41).

35. Moreover, in *P. and S. v. Poland*, 2012, the Court found a violation of Article 8 on account of the disclosure to the general public of personal and medical information about an unwanted pregnancy of a rape victim who was a minor and about the refusal to carry out an abortion. The Court considered that such disclosure could not be justified by the media interest in the case, and therefore did not pursue a legitimate aim (§ 133).

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<sup>3</sup> See also, *Case-Law Guide on Data Protection of the European Convention on Human Rights*.



## E. Expulsion of seriously-ill persons

36. In cases concerning the expulsion of aliens who were seriously ill, the Court has emphasised that they could not, in principle, claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the returning State (*D. v. the United Kingdom*, 1997, § 54; *N. v. the United Kingdom* [GC], 2008, § 42). However, it has held that in “very exceptional circumstances” and taking into account compelling humanitarian considerations at stake, the implementation of a decision to remove a seriously-ill person could be in violation of Article 3 of the Convention (*ibid.*).

37. In *D. v. the United Kingdom*, 1997, concerning a decision taken by the United Kingdom authorities to expel to St Kitts an alien who was suffering from AIDS, the Court considered that the applicant’s removal would expose him to a real risk of dying under most distressing circumstances and would amount to inhuman treatment. It found that the case was characterised by “very exceptional circumstances”, owing to the fact that the applicant suffered from an incurable illness and was in the terminal stages, that there was no guarantee that he would be able to obtain any nursing or medical care in St Kitts or that he had family there willing or able to care for him, or that he had any other form of moral or social support (§§ 52-54). Nevertheless, the Court has reiterated in its subsequent case-law that it will maintain a high threshold in such cases (*N. v. the United Kingdom* [GC], 2008, § 43; see §§ 46-51, in which the Court, in a similar factual scenario to the case of *D. v. the United Kingdom*, 1997, did not find a violation of Article 3 as it held that the case did not disclose “very exceptional circumstances” and the humanitarian considerations were not equally compelling. While the quality of that applicant’s life, and her life expectancy, would have been affected if returned, the applicant was not critically ill at the time and the rapidity of the deterioration of her health and the extent to which she would have been able to obtain access to medical treatment, support and care, was subject to a certain degree of speculation).

38. In *Paposhvili v. Belgium* [GC], 2016, concerning the proposed deportation of a Georgian national suffering from a serious illness to his country of origin in the face of doubts as to the availability of appropriate medical treatment there, the Court provided detailed guidance regarding the “very exceptional cases” which may raise an issue under Article 3 in these types of cases. It clarified that it should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy (§ 183). As to whether those conditions were satisfied in a given situation, the Court stressed that the national authorities were under an obligation under Article 3 to establish appropriate procedures allowing an examination to be carried out of the applicants’ fears, as well as an assessment of the risks they would face if removed (§§ 184-85).

39. Applying this approach to the facts of the particular case, the Court concluded that, in the absence of any assessment by the domestic authorities of the risk facing the applicant in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia, his removal would have constituted a violation of Article 3 (*Paposhvili v. Belgium* [GC], 2016, §§ 200-207). In addition, the Court concluded that the removal of the applicant without an assessment by the authorities of the degree to which the applicant was dependent on his family as a result of the deterioration of his state of health under Article 8 of the Convention, would have equally constituted a violation of that provision (*ibid.*, §§ 223-226).

40. In *Savran v. Denmark* [GC], 2021, concerning the expulsion of the applicant diagnosed with paranoid schizophrenia, the Court confirmed the *Paposhvili* threshold test, noting that it offered a comprehensive standard taking due account of all the considerations that are relevant for the purposes of Article 3 in this context, and that it is applicable irrespective of the nature (physical or

mental) of the illness in consideration (§§ 133 and 137-139). It found that it is only after the test has been met, and thus Article 3 considered applicable, that the returning State's compliance with its obligations under this provision, as set out in *Paposhvili*, can be assessed (§ 135). On the facts of this particular case, the Court found that the applicant's removal to Turkey had not exposed him to a risk reaching the high threshold required for Article 3 to be applicable. Schizophrenia, though a serious mental illness, could not in itself be regarded as sufficient in this regard. While the worsening of his psychotic symptoms was likely to result in "aggressive behaviour" and "a significantly higher risk of offences against the person of others", those effects could not be described as "resulting in intense suffering" for the applicant himself. In particular, no risk had been shown of the applicant harming himself (§§ 141-148).<sup>4</sup>

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<sup>4</sup> See also, *Case-Law Guide on Immigration of the European Convention on Human Rights*, §§ 54-55.

## II. Labour Rights

### Article 2 of the Convention

“1. Everyone’s right to life shall be protected by law...”

### Article 4 of the Convention – Prohibition of slavery and forced labour

“1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this article the term ‘forced or compulsory labour’ shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of [the] Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.”

### Article 6 § 1 of the Convention – Right to a fair trial

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. ...”

### Article 7 of the Convention - No punishment without law

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

### Article 8 of the Convention - Right to respect private and family life

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

### Article 9 of the Convention - Freedom of thought, conscience and religion

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or



private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

### Article 10 of the Convention – Freedom of expression

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

### Article 14 of the Convention – Prohibition of discrimination

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

### Article 1 of Protocol No. 1 – Right to property

"1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

## A. Applicability of the Convention to employment

41. The Court has reiterated that employment disputes concerning dismissals, including those in the civil service, will generally fall under the civil head of Article 6 of the Convention according to the *Vilho Eskelinen* test (*Vilho Eskelinen and Others v. Finland* [GC], 2007, § 62; *Denisov v. Ukraine* [GC], 2018, §§ 51-52).

42. Moreover, whereas no general right to employment can be derived from Article 8, the notion of "private life", as a broad term, does not exclude in principle activities of a professional or business nature (*Oleksandr Volkov v. Ukraine*, 2013, §§ 165-167; *Denisov v. Ukraine* [GC], 2018, §115). The Court has considered that restrictions on an individual's professional life may fall within Article 8 where they have repercussions on the manner in which he or she constructs his or her social identity by developing relationships with others (*Fernández Martínez v. Spain* [GC], 2014, §§ 109-110).

43. In *Denisov v. Ukraine* [GC], 2018, the Court established two ways in which a private life issue would usually arise in employment-related scenarios: (i) because of the underlying reasons for the impugned measure (the *reason-based* approach); or (ii) because of the consequences for private life (the *consequence-based* approach) (§ 115). If the *consequence-based* approach is at stake, Article 8

is applicable only where these consequences are very serious and affect the applicant’s private life to a very significant degree (*ibid.*, § 116).

44. The Court adopted the *consequence-based* approach in *Denisov v. Ukraine* [GC], 2018, a case concerning the dismissal of a judge from his position of president of a court, to find that the measure complained of did not have serious negative consequences for the aspects constituting the applicant’s “private life”, namely: (i) his “inner circle”; (ii) his opportunities to establish and develop relationships with others; or (iii) his reputation. It therefore found that Article 8 was not applicable (§§ 120-134). A different conclusion was reached by the Court in *Polyakh and Others v. Ukraine*, 2019, concerning dismissals of public officials from their posts altogether, by adopting the same approach (§§ 207-211).

45. In *Yilmaz v. Turkey*, 2019, adopting the *reason-based* approach, the Court held that Article 8 was applicable to the refusal to appoint a teacher to a post abroad as the underlying reasons for refusing to appoint him were based solely on information about his private life - his wife wore a veil and gender segregation was practised at the couple’s home (§ 41).

46. Furthermore, the right to freedom of expression under Article 10 also applies to the workplace, but the Court has stressed that, at the same time, employees have a duty of loyalty, reserve and discretion to their employer, civil servants in particular (*Guja v. Moldova* [GC], 2008, § 70; *Kudeshkina v. Russia*, 2009, § 93, concerning judges).

47. In determining the existence of an interference with Article 10 the Court has considered, in cases involving dismissals from the judiciary, whether there was a causal link between the dismissal and the applicant’s exercise of his freedom of expression. In so doing, the Court has assessed the facts of the case and the sequence of events in their entirety (*Baka v. Hungary* [GC], 2016, §§ 143-152). A similar approach has been adopted in instances involving access to employment in the public service (*Cimperšek v. Slovenia*, 2020, §§ 56-59).

48. Moreover, the Court has dealt with cases concerning forced labour and servitude under Article 4 of the Convention (*Siliadin v. France*, 2005, §§ 113-129; *C.N. and v. v. France*, 2012, §§ 70-79 and 88-94). The concept of “forced or compulsory labour” of Article 4 has been interpreted by the Court with reference to the definition provided under Article 2 § 1 of the ILO Forced Labour Convention no. 29 of 1930, according to which “forced or compulsory labour” means “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered him or herself voluntarily” (*Siliadin v. France*, 2005, §§ 115-116; *C.N. and v. v. France*, 2012, § 71; *S.M. v. Croatia* [GC], 2020, §§ 281-282).

49. The Court has underlined that not all work exacted from an individual under the threat of a “penalty” amounts to “forced or compulsory labour”, and that other factors that must be taken into account include the type and amount of work involved. Accordingly, the Court has distinguished between “forced labour” and a helping hand which can reasonably be expected of family members or people sharing accommodation (*C.N. and v. v. France*, 2012, §§ 74-75). In relation to servitude, the Court has found that it corresponds to an aggravated form of forced or compulsory labour, the distinguishing feature being the victim’s feeling that their condition is permanent and that the situation is unlikely to change (*ibid.*, §§ 91-92).

50. In addition, the Court has noted in its case-law that exploitation through work is one of the forms of exploitation covered by the definition of human trafficking, which under the Court’s well-established case-law falls within the scope of Article 4 of the Convention (*Rantsev v. Cyprus and Russia*, 2010, (§§ 272-282; *Chowdury and Others v. Greece*, 2017, § 93). Where an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer themselves for work voluntarily. A victim’s prior consent is not sufficient to exclude his work being classified as ‘forced labour’, the determination of which is a factual question which must be examined in the light of all the relevant circumstances of a case (*ibid.*, § 96). In *Chowdury and Others*

case, concerning the employment for seasonal work of irregular migrant workers, the Court considered that due to the applicants' situation of vulnerability as irregular migrants without resources and at risk of being arrested, detained and deported, and to their employers' threats, violence and refusal to pay wages, even assuming they had offered themselves for work voluntarily at the time of recruitment, their employment clearly amounted to forced labour and human trafficking (§§ 97-101).

## B. Access to work

### 1. Convictions and similar measures

51. States are generally considered to have a legitimate interest in excluding certain offenders from a profession (*Thlimmenos v. Greece* [GC], 2000, § 47). However, the Court distinguishes between certain types of convictions. In *Thlimmenos* case, the Court considered that, unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise the profession of chartered accountant. Excluding the applicant from this profession on the ground that he was an unfit person was not justified, also in view of the fact that he had already served a prison sentence for his acts (§ 47). The Court found a violation of Article 14 taken in conjunction with Article 9 of the Convention.

52. The imposition of disqualifications to exercise certain professions on an individual by virtue of bankruptcy may violate the provisions of Article 8 of the Convention in view of the modalities of its imposition and the conditions before discharge could be obtained (*Albanese v. Italy*, 2006, §§ 63-66, in which the applicant's disqualification had not come as a result of a judicial decision, but as an automatic consequence of entry in the bankruptcy register, the removal from which was conditional upon proof of "effective and consistent good conduct" for at least five years following termination of the bankruptcy proceedings).

53. In *Gouarré Patte v. Andorra*, 2016, a lifetime ban from the profession of doctor was found to be in violation of Article 7 when a new and more lenient criminal code established that the duration of ancillary penalties could not exceed that of the most severe main penalty (a prison sentence which, in this case, had not been served) and expressly recognised the retrospective application of the more favourable criminal law (§ 35). On the other hand, no violation of Article 8 was found by the Court in restricting access to the profession of advocate to an applicant, a former police investigator with a criminal conviction for abuse of office, noting in particular the high moral requirements of work in the justice system and the values of dignity, integrity and respect for the fair administration of justice applicable to an advocate (*Jankauskas v. Lithuania (no. 2)*, 2017, §§ 77-83).

### 2. Previous employment

54. As a matter of principle, States have a legitimate interest in regulating employment conditions in the public service. A democratic State is entitled to require civil servants to show loyalty to the constitutional principles on which the State is founded (*Naidin v. Romania*, 2014, § 49). Restrictions on employment in public office may be considered as pursuing the legitimate aim of protecting national security, public safety and the rights and freedoms of others (*ibid.*, § 51). Accordingly, measures restricting career prospects solely in the public domain have been considered proportionate in view of the high degree of responsibility of such posts and potential employment prospects in the private sector (*Naidin v. Romania*, 2014, §§ 54-55, concerning the barring of a former collaborator of the political police from public-service employment).

55. In contrast, however, the Court has held that such requirements are not equally applicable to employment in the private sector. In *Sidabras and Džiautas v. Lithuania*, 2004, the Court found that the imposition of employment restrictions on former KGB employees in various branches of the private sector for reasons of a lack of loyalty to the State cannot be justified under Article 14 of the

Convention taken in conjunction with Article 8, regardless of the private company's importance to the State's economic, political or security interests (§§ 57-58; see also *Rainys and Gasparavičius v. Lithuania*, 2005, § 36; *Žičkus v. Lithuania*, 2009, §§ 31-32).

### 3. National Security

56. States are generally considered to enjoy a wide margin of appreciation in processing personal information when assessing the suitability of candidates for employment in posts of importance for national security (*Leander v. Sweden*, 1987, § 59). A personnel control system in the interests of national security is compliant with Article 8, as long as it contains necessary safeguards against abuse (*ibid.*, § 67).

57. A similar conclusion was reached in *Regner v. the Czech Republic* [GC], 2017, concerning the lack of access in judicial review proceedings to classified information on the basis of which the applicant's security clearance enabling him to hold a post as deputy to the first Vice-Minister of Defence had been revoked. With regard to the existence of a right, and hence the applicability of Article 6 § 1, the Court noted that the applicant's ability to carry out his duties and obtain a new post in the civil service was conditional on his being authorised to access classified information. The link between the decision to revoke the applicant's security clearance and the loss of his duties and his employment was therefore more than tenuous or remote, granting him a right to challenge the lawfulness of that revocation before the courts (§§ 118-119).

58. As to the applicant's rights in accordance with the principles of adversarial proceedings and equality of arms under Article 6 § 1, the Court observed that the domestic courts had duly exercised the powers of scrutiny available to them in such proceedings, both regarding the need to preserve the confidentiality of the classified documents and regarding the justification for the decision revoking the applicant's security clearance (*Regner v. the Czech Republic* [GC], 2017, § 154). They had considered that the disclosure of the classified information could have had the effect of disclosing the intelligence service's working methods, revealing its sources of information or leading to attempts to influence possible witnesses. In addition, the information contained specific, comprehensive and detailed information on the basis of which the domestic courts were satisfied as to its relevance for determining whether the applicant posed a national security risk (*ibid.*, §§ 155-156). Therefore, having regard to the proceedings as a whole, the nature of the dispute and the margin of appreciation enjoyed by the national authorities, the Court considered that the restrictions placed on the applicant's rights were offset in such a manner that the fair balance between the parties was not affected to such an extent as to impair the very essence of the applicant's right to a fair trial (§ 161).

### 4. Political opinions / Religious beliefs

59. Taking account of one's political opinions and activities in determining whether he/she meets the necessary qualifications for access to the civil service is not in contravention with that individuals' Article 10 rights (*Kosiek v. Germany*, 1986, § 39). However, the extent to which certain views are not compatible with a post should be reasoned (*Lombardi Vallauri v. Italy*, 2009, §§ 47-49).

60. In *Lombardi Vallauri v. Italy*, 2009, the Court held that the refusal of a teaching post due to alleged heterodox views of the applicant, without an explanation of the actual content of these views and how they impacted the post under consideration, coupled with the lack of an effective and adequate judicial review of the applicant's right to freedom of expression under Article 10, was in contravention with this provision (§§ 54-56). The Court has attached particular weight on the latter procedural aspect of Article 10 in similar cases. In *Cimperšek v. Slovenia*, 2020, concerning the refusal to award the title of court expert to the applicant due to his criticising State authorities in his blog and to his letters of complaint for postponing the oath ceremony, the Court found a violation of Article 10 in particular due to the absence of any assessment as to whether a fair balance was struck

between the applicant’s right to freedom of expression under Article 10 against the public interest allegedly pursued by the impugned decision (§§ 67-70).

61. Furthermore, regarding Article 8 rights, the Court found a violation of the Convention in *Yılmaz v. Turkey*, 2019, where an appointment to a post abroad was refused to a teacher based on the fact that his wife wore a veil outside work and that gender segregation was practised at the couple’s home. While the Court admitted that security investigations may be necessary to identify the fulfilment of specific requirements for appointments of public service, it failed to see how the fact that the applicant’s wife wore a veil and the way he behaved at home could run counter to public-interest imperatives or the needs of the teaching and educational services (§ 47). In *Fernández Martínez v. Spain* [GC], 2014, however, the Court did not find a violation of Article 8 regarding the refusal to renew the contract of a teacher of Catholic religion and morals after he had publicly revealed his position as a “married priest”. In particular, the Court had regard to the heightened duty of loyalty owed by the applicant to the Church, which the applicant had knowingly and voluntarily accepted by virtue of his employment, and the publicity created of the applicant’s situation which he had accepted. The discrepancy between the ideas that had to be taught and the teacher’s personal beliefs had severed the bond of trust between him and the Church (§§ 123-153).

62. In relation to rights under Article 9 of the Convention, the Court has placed particular importance on the principle of secularism and neutrality in the public service, granting a wide margin of appreciation to member states. In the context of public hospital service, the State is entitled to require that employees refrain from manifesting their religious beliefs when carrying out their duties, in order to guarantee equality of treatment for the individuals concerned and exclude any doubts of patients as to the impartiality of those treating them (*Ebrahimian v. France*, 2015, §§ 64-65). In *Ebrahimian* case, concerning the refusal to renew the contract of a social worker in a public hospital due to her wearing a headscarf, the Court found that the respondent State had not exceeded its margin of appreciation in finding that it was impossible to reconcile the applicant’s religious beliefs and the obligation not to manifest them, and subsequently in deciding to give priority to the requirement of State neutrality and impartiality. The interference with the applicant’s Article 9 rights was thus regarded as proportionate to the aim pursued (*ibid.*, §§ 65-72). In a different setting, however, concerning the suspension of an airline employee for wearing a cross at work in breach of the company’s uniform code, the Court found that the domestic courts, in balancing the competing rights under consideration, had failed to sufficiently protect the applicant’s Article 9 rights by placing too much weight on the employer’s wish to project a certain corporate image. The Court noted, in particular, the principles of pluralism and diversity in the context of religious freedom, as well as the discreet nature and minimal impact of the religious symbol in consideration (*Eweida and Others v. the United Kingdom*, 2013, §§ 93-95).

63. Moreover, the revelation of an individual’s religious beliefs, or lack thereof, in circumstances where that person is obliged to take such action when taking an oath of office has been held to be in breach of Article 9 the Convention (*Alexandridis v. Greece*, 2008, § 38).

## C. Dismissals

64. The Court has dealt with cases concerning dismissals of employees from the point of view of a State’s negative obligations (dismissals of employees in the public sector) and a State’s positive obligations under the Convention (dismissals of employees in the private sector).

### 1. Religious beliefs

65. By having in place a system of labour courts, as well as constitutional jurisdiction competent to control the latter’s decisions, a State has in principle fulfilled its positive obligations towards citizens in the area of labour law, an area in which disputes may affect the rights of the persons concerned under Article 9 of the Convention (*Siebenhaar v. Germany*, 2011, § 42). In *Siebenhaar* case,



concerning the dismissal of the applicant from her job in a kindergarten run by a Protestant parish due to her activities in another religious community, the Court found that the labour courts had undertaken a thorough balancing exercise regarding the interests involved. Their findings that the dismissal had been necessary to preserve the Church's credibility and that the applicant should have been aware of the incompatibility of her activities with her workplace were reasonable (§§ 43-47).

66. In *Eweida and Others v. the United Kingdom*, 2013, a Christian employee who was working for a local public authority was dismissed for refusing to register same-sex civil partnerships due to her religious beliefs about marriage. The Court, recalling the wide margin of appreciation of States in striking a balance between competing Convention rights, held that the local authority's policy aimed at securing the rights of others which are also protected under the Convention and the measures adopted were therefore proportionate, and not in violation of Article 14 taken in conjunction with Article 9 (§ 106).

67. The Court has dealt with similar issues also in the context of Article 8 of the Convention:

- *Obst v. Germany*, 2010, §§ 43-53, in which the dismissal for adultery of the applicant, who held a senior position in a Mormon Church, was considered reasonable in view of the duties of loyalty of the applicant in preserving the credibility of the Church; see also, *Schüth v. Germany*, 2010, §§ 71-75, for a different outcome in relation to Article 8 concerning an organist and choirmaster in a Catholic parish).
- *Travaš v. Croatia*, 2016, §§ 87-115, concerning the dismissal of a religious education teacher following his divorce and re-marriage (non-violation of Article 8 by applying the same principles as in *Fernández Martínez v. Spain* [GC], 2014, §§ 123-153, see above under *Access to Work*).

## 2. Political affiliation

68. The Court has considered that, in the absence of judicial safeguards, a legal system which allows dismissal from employment solely on account of the employee's membership of a political party carries with it the potential for abuse (*Redfearn v. the United Kingdom*, 2012, § 55). The domestic courts should be allowed to pronounce on whether or not, in the circumstances of a particular case, the interests of the employer should prevail over the Article 11 rights asserted by the employee (*ibid.*, § 56).

69. In *Redfearn v. the United Kingdom*, 2012, the applicant, dismissed as a bus driver due to his affiliation to a political party, was unable to challenge his dismissal due to a legal provision that barred claims for unfair dismissal for persons employed under one year. While accepting the social and economic reasons for the imposition of such a period, the Court noted that several exceptions applied to the rule for dismissals on grounds such as race, sex and religion, but no additional protection was afforded to employees who were dismissed on account of their political opinion or affiliation (§§ 53-54). The Court held that the respondent State had failed its positive obligation under Article 11 to take reasonable and appropriate measures to protect employees, including those with less than one year's service, from dismissal on grounds of political opinion or affiliation, either through the creation of a further exception to the one-year qualifying period or through a free-standing claim for unlawful discrimination on grounds of political opinion or affiliation (§ 57; see also, to similar effect, *Vogt v. Germany* [GC], 1995, §§ 57-61, concerning the dismissal of a school teacher for her active membership in the DKP (German Communist Party)).

## 3. Sexual orientation

70. The Court has found dismissals from the military on grounds of sexual orientation to be incompatible with the Convention in several cases, stressing particularly the lack of convincing and weighty reasons for this interference with the applicants' right to respect for their private lives

(*Smith and Grady v. the United Kingdom*, 1999, §§ 94-105; *Lustig-Prean and Beckett v. the United Kingdom*, 1999, §§ 87-98; *Perkins and R. v. the United Kingdom*, 2002, § 38).

#### 4. Health

71. In *I.B. v. Greece*, 2013, a HIV-positive employee was dismissed as a result of the pressure exerted by colleagues due to his disease and their fears for their own health. The Court held that the applicant had been discriminated against on the basis of his health, noting that the domestic court had failed to adequately weigh the competing interests of the applicant and those of the employer, in particular due to the lack of a scientifically proven reason as to how the applicant's illness could affect the other employees or the smooth operation of the company (§§ 86-88).

#### 5. Whistleblowing<sup>5</sup>

72. The Court has considered that a civil servant, in the course of his work, may become aware of secret information, whose divulgence or publication corresponds to a strong public interest. In such circumstances, the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace may enjoy protection (*Guja v. Moldova* [GC], 2008, § 72). In the *Guja* case, the applicant civil servant was dismissed for leaking evidence of governmental interference in the administration of criminal justice to the press. The Court, after weighing up the different interests involved - including good faith, public interest in the disclosure and the severity of the sanction - came to the conclusion that the interference with the applicant's right to freedom of expression, in particular the right to impart information, was not "necessary in a democratic society" and therefore in violation of Article 10 (§§ 80-97).

The Court has dealt with similar issues in other factual scenarios:

- *Kudeshkina v. Russia*, 2009, §§ 85-102, concerning the dismissal of a judge for making critical statements about the Russian judiciary;
- *Matúz v. Hungary*, 2014, §§ 36-51, concerning the dismissal of a journalist following the publication of a book criticising his employer, a State television company;
- *Gawlik v. Liechtenstein*, 2021, §§ 73-87, concerning the dismissal of a doctor from a public hospital for lodging a criminal complaint accusing a colleague of active euthanasia, without verifying the accuracy of the information disclosed.

73. The Court, while admitting that the duty of loyalty may be more pronounced in the event of civil servants and employees in the public sector, held that the same principles and criteria established in *Guja v. Moldova* [GC], 2008, also apply to an employee in the private sector (*Heinisch v. Germany*, 2011, § 64). In *Heinisch* case, concerning the dismissal of a nurse for lodging a criminal complaint alleging shortcomings in the care provided by a private employer, the Court weighed the employee's right to signal illegal conduct or wrongdoing on the part of his or her employer against the employer's right to protection of its reputation and commercial interests to find that the applicant's dismissal had been disproportionate and thus in violation of Article 10 (§§ 71-95; see also, to similar effect, *Herbai v. Hungary*, 2019, §§ 39-52, concerning the dismissal of a bank employee following the publication of articles on a website).

#### 6. Offensive publications in the workplace

74. The case of *Palomo Sánchez and Others v. Spain*, 2011, concerned the dismissal of the applicants who were employees of a company (as well as members of a trade union) for the publication of

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<sup>5</sup> See also, section 'Protection of whistle-blowers' under chapter 'Specific protection for whistle-blowers and for reporting on alleged irregularities by public officials' of the *Case-Law Guide on Article 10 of the European Convention on Human Rights*.

offensive cartoons and articles targeting other employees of the same company. While acknowledging that the facts of the case were also closely related to freedom of association, notably in connection to the protection of personal opinions as one of the objectives of freedom of assembly and association, the Court found it more appropriate to examine the case under Article 10 read in the light of Article 11, noting that the applicants' complaints mainly concerned their dismissal for the publications in question and that their trade-union membership had not played a decisive role in the matter (§ 52).

75. The Court held that there had not been a violation of Article 10 (interpreted in light of Article 11), finding that the domestic courts had carried out an in-depth examination of the circumstances of the case and a detailed balancing of the competing interests at stake, stressing in particular the protection of the reputation of others and the requirement of mutual trust in labour relations (§§ 74-79). In this respect, the Court considered that an attack on the respectability of individuals by using grossly insulting or offensive expressions in the professional environment was, on account of its disruptive effects, a particularly serious form of misconduct capable of justifying severe sanctions (§ 76).

## 7. Trade union activity

76. In *Straume v. Latvia*, 2022, the Court examined a complaint by a representative of a trade union about a series of disadvantages imposed on her in the workplace, culminating in her dismissal, in response to her having signed (along with other members of the board of a trade union) a letter of complaint by that trade union to the applicant's employer. The Court found that the domestic courts had failed to apply the requisite convention standards in their assessment by disregarding the trade union context of the case. In particular, the Court considered that the letter of complaint sent by the trade union to the applicant's employer represented a legitimate trade union activity, guaranteed under Article 11 of the Convention, with the aim of protecting the labour-related interests of its members. In addition, the Court considered that the repercussions on the applicant were exceptionally harsh, with undeniable consequences for her private and professional life, and made her individually responsible for the trade union's decision to communicate the grievances of its members. Accordingly, it found a violation of Article 11 of the Convention, read in the light of Article 10 (§§ 103-113).

77. In contrast, in *Barış and Others v. Turkey* (dec.), 2021, concerning the dismissal of employees on account of their involvement in a strike organised outside a trade-union context, the Court held that the protection under Article 11 only extends to strike action insofar as it is organised by trade union bodies and effectively considered as forming part of trade union activity. The applicants' complaints regarding their dismissal under Article 11 were therefore declared incompatible *ratione materiae* with the provisions of the Convention (§§ 45-55).

## 8. Judges

78. In its case-law under Article 6, the Court has noted the growing importance attached by international and Council of Europe legal instruments, as well as the case-law of international courts, to procedural fairness in cases involving the removal or dismissal of judges (*Baka v. Hungary* [GC], 2016, § 121).

79. In *Oleksandr Volkov v. Ukraine*, 2013, concerning the dismissal of a judge, the Court found several violations of Article 6, *inter alia*, on account of the failure to ensure the independence and impartiality of the bodies determining the applicant's case (see also, *Denisov v. Ukraine* [GC], 2018, §§ 66-82), the absence of a limitation period for imposing a disciplinary penalty and defective procedures in taking the dismissal decision in view of the principle of legal certainty, and the non-fulfilment of the requirement of a "tribunal established by law" by the domestic administrative court deciding the case (§§ 103-156). In addition, the Court found that the applicant's dismissal had



unlawfully interfered with his right to respect for his private life under Article 8, in that the measure was not compatible with domestic law and the latter also failed to satisfy the requirements of foreseeability and provision of appropriate protection against arbitrariness (*Oleksandr Volkov v. Ukraine*, 2013, §§ 171-187).

80. On the other hand, in *Xhoxhaj v. Albania*, 2021, concerning the dismissal of a judge following a vetting process in light of a comprehensive judicial reform, the Court came to the conclusion of non-violation with regard to similar complaints in relation to Article 6 (§§ 280-353) and Article 8 (§§ 402-414), noting *inter alia* the extraordinary and *sui generis* nature of the judicial reform undertaken in the country (§§ 297, 299, 404, 412).

## 9. Access to court / effective judicial review

81. In *Baka v. Hungary* [GC], 2016, the Court found that the applicant's inability to have the premature termination of his mandate as president of the Supreme Court reviewed by an ordinary tribunal or other body exercising judicial powers was in breach of his right of access to a court, as guaranteed by Article 6 § 1 of the Convention (§§ 121-122). The applicant's dismissal had been the result of legislation at constitutional level that deprived him of any possibility of seeking judicial review, which the Court considered to be doubtful as to its compatibility with the rule of law (§§ 117 and 121; see also, *Grzęda v. Poland* [GC], 2022, §§ 345-346, for the application of similar procedural safeguards in the context of the removal of a judge from a judicial council while he still remained a serving judge). The Court also found a violation of Article 10 of the Convention in this case on account of, *inter alia*, the absence of effective and adequate safeguards against abuse as regards the measures that interfered with the applicant's right to freedom of expression (§§ 174-176). Indeed, the Court has found, in other similar cases, that the procedural guarantees in disciplinary sanctions (such as dismissals) constitute an important part of the protection of freedom of expression under Article 10 (*Kudeshkina v. Russia*, 2009, §§ 96-97, concerning the removal from office of a judge following critical statements about the judiciary).

82. A failure by a domestic court to conduct an in-depth, thorough examination of an applicant's arguments following dismissal and to give reasons for dismissing the latter's challenges has been found by the Court to violate the right to a fair trial within the meaning of Article 6 § 1 of the Convention (*Pişkin v. Turkey*, 2020, § 151). The *Pişkin* case concerned the dismissal of an employee of a public institute under an emergency legislative decree on account of his alleged links with a terrorist organisation. While the domestic courts theoretically had jurisdiction to assess the dispute between the applicant and the authorities, they did not examine the questions of law and fact presented before them. Such shortcomings in the judicial review of the applicant's complaints and in the reasoning of the judicial decisions amounted to a violation of Article 6 § 1 of the Convention (§§ 141-150).<sup>6</sup>

83. In this connection, the Court has also found that effective judicial review, as a fundamental principle of the rule of law, must prevail even in exceptional circumstances such as a state of emergency. Accordingly, effective judicial review should be carried out by domestic courts following termination of employment contracts, despite the legitimacy of emergency legislative decrees in a state of emergency, and particularly so if these acts did not contain any clear or explicit wording excluding the possibility of judicial supervision (*Pişkin v. Turkey*, 2020, §§ 152-153).

84. In addition, in *Pişkin v. Turkey*, 2020, the lack of effective judicial review of the applicant's dismissal also led the Court to finding a violation of Article 8 of the Convention in that the applicant had not benefitted from the minimum degree of protection against arbitrary interference required by this provision. The Court stressed once again that, even when national security is at stake,

<sup>6</sup> The Court made reference to Article 24 of the European Social Charter (revised) (The right to protection in cases of termination of employment) under Relevant International Materials (§ 53).

measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence (§§ 223-229). Indeed, a thorough and in-depth analysis of the interests at stake by domestic courts has been an important aspect in the Court's evaluation of the 'necessary in a democratic society' component under Article 8 of the Convention (*Fernández Martínez v. Spain* [GC], 2014, §§ 147-151; *Travaš v. Croatia*, 2016, §§ 108-113).

85. Moreover, while the Court has recognised in its case-law the importance of State immunity under international law, the grant of such immunity is not absolute and it must be proportionate and not impair the essence of the right of access to a court under Article 6 § 1 of the Convention. In *Cudak v. Lithuania* [GC], 2010, concerning a domestic court's refusal due to State immunity to hear the claim of an embassy employee following her dismissal, the Court found a violation of Article 6 § 1, observing in particular that the main duties performed by the applicant, a switchboard operator, were not related to the exercise of governmental authority or the protection of the sovereign interests of the state – functions which ought to have called for state immunity (§§ 69-75; see also *Sabeh El Leil v. France* [GC], 2011, §§ 55-68).

## D. Gender Equality<sup>7</sup>

86. The advancement of gender equality is a major goal in the member States of the Council of Europe and very weighty reasons must be put forward before a difference of treatment could be regarded as compatible with the Convention (*Konstantin Markin v. Russia* [GC], 2012, § 127; *Jurčić v. Croatia*, 2021, § 65). In cases of a difference of treatment based on sex, the margin of appreciation afforded to the State is narrow and the principle of proportionality does not merely require that the measure chosen should in general be suited to the fulfilment of the aim pursued, but it must also be shown that it was necessary in the circumstances (*Emel Boyraz v. Turkey*, 2014, § 51).

87. In *Schuler-Zraggen v. Switzerland*, 1993, an assumption adopted by a domestic court on the basis of which, based on experience of everyday life, married women give up their jobs when their first child is born, was found to breach Article 14 of the Convention, taken together with Article 6 § 1 (§§ 64-67). The Court held that the domestic court had, without any reasonable and objective justification, adopted such an assumption and not attempted to probe the validity of it by weighing arguments to the contrary (§ 67). In *García Mateos v. Spain*, 2013, concerning the refusal to reduce the working hours of a mother who had custody of her son, the Court also found a violation of Article 14, in conjunction with Article 6 § 1, given the failure by the domestic courts to enforce a judgment acknowledging gender discrimination against a working mother, or to provide compensation to redress such a violation (§§ 45-49).

88. The Court has accepted that there may be legitimate requirements for certain occupational activities depending on their nature or the context in which they are carried out (*Emel Boyraz v. Turkey*, 2014, § 54). However, the reasons for dismissing a female security officer for being less capable than male staff just because the work included working night shifts and in rural areas, and using firearms and physical force under certain conditions, did not justify the difference in treatment between men and women (*ibid.*).

89. In relation to pregnancy, the Court has held that only women could be treated differently on such grounds, and for this reason, such a difference in treatment would amount to direct discrimination on grounds of sex if it was not justified (*Napotnik v. Romania*, 2020, § 77). In *Napotnik* case, concerning the termination of the applicant's diplomatic posting abroad after she had announced her second pregnancy, the Court found that such termination was necessary for maintaining the functional capacity of the embassy's consular section where she worked and

<sup>7</sup> See also *Case-Law Guide on Article 14 of the European Convention on Human Rights*.

ultimately the protection of the rights of others (nationals in need of consular assistance). There was therefore no violation of Article 1 of Protocol No. 12 of the Convention (§§ 78-87).<sup>8</sup>

90. However, in *Jurčić v. Croatia*, 2021, the Court found that the refusal to grant an employment-related benefit to a pregnant woman who had undergone *in vitro* fertilisation shortly before taking up a new job amounted to direct discrimination on grounds of sex and was therefore in breach of Article 14, taken in conjunction with Article 1 of Protocol No. 1 to the Convention (§§ 76-85). In particular, the Court stressed that a woman’s pregnancy as such could not be considered fraudulent behaviour and that a State’s financial obligations during a woman’s pregnancy could not constitute sufficiently weighty reasons for a difference in treatment on the basis of sex, referring in this regard to the relevant standards of the ILO<sup>9</sup> (§§ 73 and 84). The Court underlined that the introduction of maternity protection measures was essential to uphold the principle of equal treatment of men and women in employment and that, as a matter of principle, the protection afforded to a woman during pregnancy could not be dependent on whether her presence at work during maternity was essential for the proper functioning of her employer or by the fact that she was temporarily prevented from performing the work for which she had been hired (§ 76). In addition, the implications made by the domestic courts that due to her pregnancy the applicant was unfit to take up employment, and that women in general should not work or seek employment during pregnancy, were considered by the Court as further evidence that the applicant had been discriminated against on the basis of her sex and had been the subject of gender stereotyping (*ibid.*, §§ 76-78 and 83).

## E. Reduction in remuneration/pensions of public servants as a result of austerity measures<sup>10</sup>

91. The Court has reiterated that States Parties to the Convention enjoy quite a wide margin of appreciation in regulating their social policy. Accordingly, since regulating State expenditure and revenue will commonly involve consideration of political, economic and social issues, the Court considers that State authorities are, in principle, better placed to choose the most appropriate means of achieving this and will respect their judgment unless it is manifestly without reasonable foundation. This margin is even wider when the issues involve an assessment of the priorities as to the allocation of limited State resources. In addition, the Court must be satisfied that a “fair balance” has been struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (*Koufaki and Adedy v. Greece* (dec.), 2013, §§ 31-32 and 42; *Da Silva Carvalho Rico v. Portugal* (dec.), 2015, §§ 37-38).

92. In *Koufaki and Adedy v. Greece* (dec.), 2013, concerning the reduction in remuneration, benefits, bonuses and retirement pensions of public servants due the economic and financial crisis the country was facing, the Court considered that the adoption of the impugned measures was justified by the existence of an exceptional crisis as well as proportionate as it did not risk exposing the applicant to subsistence difficulties incompatible with Article 1 of Protocol No. 1 (§§ 37 and 44-46). A similar stance was taken by the Court in instances involving the reduction in benefits payable to public-sector pensioners as a result of austerity measures undertaken to reduce public spending and achieve medium-term economic recovery (*Da Conceição Mateus and Santos Januário v. Portugal* (dec.), 2013, §§ 23-29; *Da Silva Carvalho Rico v. Portugal* (dec.), 2015, §§ 40-46).

<sup>8</sup> The Court made reference to Articles 8 (the right of employed women to protection of maternity), 20 (the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex) and 27 (the right of workers with family responsibilities to equal opportunities and equal treatment) of the European Social Charter (revised) under Council of Europe material (§ 39).

<sup>9</sup> International Labour Organisation’s (ILO) Maternity Protection Convention 2000 (No. 183).

<sup>10</sup> See also, section ‘Austerity measures’ under chapter ‘Specific issues’ of the *Case-Law Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights*.

## F. Labour exploitation / human trafficking<sup>11</sup>

93. In cases concerning labour exploitation and human trafficking, the Court has mostly had to deal with States Parties' positive obligations under Article 4. Such positive obligations are threefold: firstly, an obligation to put in place a legislative and administrative framework providing real and effective protection of the rights of victims of human trafficking; secondly, an obligation to take operational measures to protect actual or potential victims of treatment contrary to Article 4; and thirdly, a procedural obligation to effectively investigate alleged trafficking offences (*S.M. v. Croatia* [GC], 2020, § 306; *Chowdury and Others v. Greece*, 2017, §§ 86-89).

94. In *Chowdury and Others v. Greece*, 2017, the Court considered that the applicants' employment as seasonal agricultural workers amounted to forced labour and human trafficking having regard to their precarious situation as illegal migrant workers and their harsh working conditions - long working hours, constant threat by armed employers, lack of pay, etc. (§§ 94-101). The Court found that the respondent State had fulfilled its positive obligation to put in place a legislative framework to combat human trafficking, but had failed to take sufficient operational measures to prevent the impugned situation of human trafficking, protect the applicants from the treatment to which they were subjected, and to conduct an effective investigation into the offences and to punish those responsible for the trafficking, thus violating Article 4 § 2 of the Convention (*ibid.*, §§ 103-128).

95. In *Siliadin v. France*, 2005, a foreign minor without residence papers was placed against her will into a situation of dependence that forced her to work without rest and payment, which according to the Court's assessment amounted to forced labour and servitude within the meaning of Article 4 of the Convention (§§ 113-129). The Court found a violation of Article 4 by virtue of the lack of effective protection of the criminal law in force which had led to the non-conviction of the perpetrators of the acts to which the applicant had been subjected (*ibid.*, §§ 145-149; see also *C.N. and v. v. France*, 2012, §§ 105-108).

96. In *S.M. v. Croatia* [GC], 2020, concerning exploitation of prostitution, the Court clarified that the notion of "forced or compulsory labour" under Article 4 aims to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they are related to the specific human-trafficking context (§ 303). It found a violation of the respondent State's procedural obligation under Article 4 in view of significant flaws in the domestic authorities' procedural response to the arguable claim and *prima facie* evidence that the applicant had been subjected to treatment contrary to Article 4, human trafficking and/or forced prostitution (§§ 333-347).

97. In addition, the prosecution of victims, or potential victims, of trafficking may be at odds with the State's duty under Article 4 to take operational measures to protect them where they are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual has been trafficked. In these circumstances, the authorities should have the victim, or potential victim, assessed promptly by individuals trained and qualified to deal with victims of trafficking, an assessment to be based on the criteria identified in the United Nations *Palermo Protocol* and the Council of Europe Anti-Trafficking Convention (*V.C.L. and A.N. v. the United Kingdom*, 2021, §§ 159-160)<sup>12</sup>.

98. The case of *V.C.L. and A.N. v. the United Kingdom*, 2021, concerned the prosecution of Vietnamese minors working in cannabis factories. Despite a credible suspicion that they were potential victims of labour exploitation and human trafficking when they were discovered, charges against them were pursued even after being subsequently recognised as victims of trafficking. The

<sup>11</sup> See also *Case-Law Guide on Article 4 of the European Convention on Human Rights*.

<sup>12</sup> The Court also referred, under relevant international law and practice (§§ 97-101), to ILO standards on forced labour, such as the ILO Forced Labour Convention, its 2014 Protocol, ILO indicators of forced labour, and the ILO Worst Forms of Child Labour Convention and Recommendation, 1999.

Court considered that the State authorities had failed to fulfil their positive obligation under Article 4 to take operational measures to protect the applicants, either initially as potential victims of trafficking, and subsequently, as persons recognised to be victims of trafficking (§§ 163-183). Moreover, the failure to investigate whether the applicants were victims of trafficking before they were charged and convicted of drugs-related offences was found by the Court to have affected the overall fairness of the criminal proceedings against them, in violation of Article 6 § 1 of the Convention (§§ 194-210).

99. Furthermore, in *Lacatus v. Switzerland*, 2021, concerning the imprisonment of a poor and vulnerable Roma woman for unintrusive begging on the street, the Court, while acknowledging the importance of combating human trafficking and the exploitation of individuals, expressed doubts as to whether penalising the victims of these networks for begging was an effective measure. In this regard, it referred to a report of the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) concerning Switzerland, which had found that the criminalisation of begging placed the victims of forced begging in a situation of heightened vulnerability (§§ 111-112). In view of the foregoing, and also having regard, *inter alia*, to the severity of the sanction and the applicant's vulnerable situation where begging was her only means of subsistence, the Court found that the penalty imposed on the applicant had not been proportionate and thus in breach of Article 8 of the Convention (§§ 107-115).

## G. Occupational injuries/health

100. The Court has been called upon to examine cases concerning injuries/poor health sustained by applicants as a result of the particularities of their employment. In *Burdov v. Russia*, 2002, the applicant was awarded compensation for his poor health resulting from exposure to radiation during his participation in emergency operations at the Chernobyl nuclear plant. The Court found violations of Article 6 § 1 and Article 1 of Protocol No. 1 on account of the prolonged non-enforcement of court decisions ordering the award of payments to the applicant, rejecting the argument of lack of funds as a justification for such an omission (§§ 35-38 and 40-42).

101. Moreover, in some cases the Court has found a violation of the right of access to court under Article 6 § 1 of the Convention in relation to limitation periods for health-related claims when the victim could not be considered to have been aware of the injury/disease for purposes of calculating such period of time:

- In *Eşim v. Turkey*, 2013, the applicant's claim was held to be out of time as the limitation period of five years was considered to have started when the applicant (conscript in the army) had been injured in the course of a clash with a group of terrorists, irrespective of the fact that he had not been made aware of his injury throughout this period, in violation of Article 6 § 1 (§§ 22-27); and
- In *Howald Moor and Others v. Switzerland*, 2014, concerning a claim for compensation held to be time-barred for an asbestos-related disease to which the victim had been exposed during the course of his work, the limitation period was considered to have deprived the applicants of their opportunity to assert their claims before a court as diseases such as those caused by asbestos could not be diagnosed until many years after the triggering events (§§ 74-80).

102. The Court has held that, under certain circumstances, a positive obligation under Article 8 of the Convention may arise for a State to provide an effective and accessible procedure enabling access to all relevant and appropriate information that would allow an assessment of any risks to health to which an individual may have been exposed during his/her period of employment (*Roche v. the United Kingdom* [GC], 2005, § 162). In *Roche* case, the applicant, who suffered from several health problems which he suspected to have been caused by his participation in gas tests during his time in the British Army, sought access to his service records for information. The Court held that by



not providing an effective and accessible procedure to the applicant to have access to all relevant and appropriate information that would allow him to assess any risk to which he had been exposed during his participation in the tests, the respondent State had failed to fulfil its positive obligation under Article 8 (§§ 166-167).

103. Health and safety considerations for certain professions may also concern a State's positive obligation, under Articles 2 and 8, to *provide* essential information enabling individuals to assess risks to their health and lives, including with regard to occupational risks (*Vilnes and Others v. Norway*, 2013, § 235; *Brincat and Others v. Malta*, 2014, § 102). In *Vilnes and Others*, concerning former divers who had suffered damage to their health due to their professional activities, the Court found a violation of Article 8 on account of the failure by State authorities to ensure that the applicants received essential information on the use of decompression tables used in diving operations, enabling them to assess the risks to their health and safety. Noting the State authorities' role in authorising diving operations and in protecting the safety of such operations, the Court found it reasonable that they should have taken the precaution of ensuring that diving companies observed full transparency about the diving tables used (§§ 236-244).

104. A similar conclusion was reached by the Court in the case of *Brincat and Others v. Malta*, 2014, which concerned damage to health, and death in one occasion, of employees of a Government-run ship repair yard caused by prolonged and intensive exposure to asbestos during their employment. The Court held that not only had the State authorities failed to provide any information about the risks associated to such exposure during their careers, but had also failed to satisfy their positive obligations to legislate or take other practical measures under Articles 2 and 8. Accordingly, the Court found a violation of Article 2 in relation to the death of one of the applicants and a violation of Article 8 in respect of the remaining applicants (§§ 103-117).

### III. Trade Unions' Rights<sup>13</sup>

#### Article 9 of the Convention - Freedom of thought, conscience and religion

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

#### Article 11 of the Convention - Freedom of assembly and association

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

#### Article 14 of the Convention – Prohibition of discrimination

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

#### Article 1 of Protocol No. 1 – Right to property

"1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

#### A. Scope

105. Trade-union freedom, as a special aspect of freedom of association under Article 11, is an essential element of social dialogue between workers and employers, and hence an important tool in achieving social justice and harmony (*Sindicatul "Păstorul cel Bun" v. Romania* [GC], 2013, §§ 130). In view of the sensitive nature of the social and political issues involved in achieving a proper balance between the respective interests of labour and management, and given the wide degree of divergence between domestic systems in this field, Contracting States enjoy a wide margin of appreciation as to how the freedom of trade unions to protect the occupational interests of their members may be secured (*Sørensen and Rasmussen* [GC], 2006, § 58; *Manole and "Romanian Farmers Direct" v. Romania*, 2015, § 60).

<sup>13</sup> See also *Case-Law Guide on Article 11 of the European Convention on Human Rights*.

106. Throughout its case-law, the Court has built up a non-exhaustive list of the constituent elements of the right to organise, including the right to form or join a trade union, the prohibition of closed-shop agreements, and the right of a trade union to seek to persuade the employer to hear what it has to say on behalf of its members (*Sindicatul “Păstorul cel Bun” v. Romania* [GC], 2013, § 135; *National Union of Belgian Police v. Belgium*, 1975, §§ 38-39<sup>14</sup>). The right to bargain collectively with the employer has in principle, except in very specific cases, become one of the essential elements of the right to form and join trade unions for the protection of one’s interests (*Demir and Baykara v. Turkey* [GC], 2008, §§ 145 and 154<sup>15</sup>; *Sindicatul “Păstorul cel Bun” v. Romania* [GC], 2013, § 135).

107. This list is non-exhaustive and subject to evolution depending on particular developments in labour relations. The Court will take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values (*Demir and Baykara v. Turkey* [GC], 2008, §§ 85 and 146; *Manole and “Romanian Farmers Direct” v. Romania*, 2015, § 67). It would be inconsistent with this method for the Court to adopt in relation to Article 11 an interpretation of the scope of freedom of association of trade unions that is much narrower than that which prevails in international law (*National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, 2014, § 76).

108. However, the Court has held that trade union freedom does not secure any particular treatment of trade union members by the State, such as, for example, the right to retroactivity of benefits resulting from a new collective agreement (*Schmidt and Dahlström v. Sweden*, 1976, § 34, the Court noting that such a right was also not encompassed under the European Social Charter).

## B. Trade union registration

109. While there is no guarantee of a particular treatment by the State under the Convention, the Court has held that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members’ interests (*Sindicatul “Păstorul cel Bun” v. Romania* [GC], 2013, § 134; *National Union of Belgian Police v. Belgium*, 1975, §§ 38-39). The Court has held that the applicability of the right to form a trade union under Article 11 of the Convention will depend on the employment relationship of the union’s members (*Sindicatul “Păstorul cel Bun” v. Romania* [GC], 2013, § 141). In assessing the existence of the said employment relationship, the Court will focus on the actual duties, performance and remuneration of the worker, notwithstanding how the relationship is characterised in any arrangement that may have been agreed between the parties (*ibid.*, § 142).

110. In *Sindicatul “Păstorul cel Bun”*, concerning the refusal to register a trade union for clergy members of the Romanian Orthodox Church for failure to comply with the requirement of obtaining the archbishop’s permission, the Court found that, despite the special religious features in the relationship between members of the clergy and the church, the daily activities and tasks of clergy members entailed many of the characteristics of an employment relationship, thus falling within the scope of Article 11 of the Convention (§§ 143-148). The Court found no violation of Article 11 in this case, considering that by refusing the application to register the trade union the authorities had simply applied the principle of the autonomy of religious communities and declined to become involved in the organisation and operation of the Romanian Orthodox Church, thereby observing their duty of denominational neutrality under Article 9 of the Convention (§§ 164-166).

111. A similar conclusion was reached by the Court in *Manole and “Romanian Farmers Direct” v. Romania*, 2015, concerning the refusal to register a group of self-employed farmers as a trade

<sup>14</sup> The Court also referred to Article 6 § 1 of the 1961 European Social Charter in coming to this conclusion.

<sup>15</sup> In § 149, the Court drew attention to Article 6 § 2 of the European Social Charter (revised) which affords to all workers, and to all trade unions, the right to bargain collectively.



union. In finding no violation of Article 11, the Court noted in particular the fact that under domestic legislation the applicants had the right to form professional associations to protect their members' interests in dealings with the public authorities, or join other existing trade unions for that matter (§§ 69 and 72-75).<sup>16</sup>

112. Most of the trade-union freedom cases considered by the Court have concerned employees and, more broadly, persons in an “employment relationship”. In *Yakut Republican Trade-Union Federation v. Russia*, 2021, concerning an order to the applicant, a trade-union federation, to oust a grassroots union of working prisoners because of a statutory ban on the unionisation of prisoners, the Court was called upon to determine whether, for the purpose of trade union activity, prison work could be equated with “ordinary employment”. The Court reiterated that prison work differed from the work performed by ordinary employees in that it served the primary aim of rehabilitation and resocialisation, was aimed at reintegration and was obligatory (§§ 43-44). Furthermore, while the Court confirmed that no occupational group was excluded from the scope of Article 11, it referred to the lack of sufficient consensus between the Council of Europe member States as regards the rights of prisoners to join and form trade unions to find that, in the circumstances of the case, the order to expel the union of working inmates had not exceeded the wide margin of appreciation available to the national authorities in this sphere. It was therefore considered necessary in a democratic society within the meaning of Article 11 § 2 (§§ 45-48).

### C. Right to join or not join a trade union

113. Article 11 of the Convention also encompasses a negative right of association, a right not to be forced to join an association. Although an obligation to join a particular association may not always be contrary to the Convention, a form of such an obligation which strikes at the very substance of the freedom of association guaranteed by Article 11, will constitute an interference with that freedom (*Sørensen and Rasmussen v. Denmark* [GC], 2006, § 54, and *Young, James and Webster v. the United Kingdom*, 1981, § 55, concerning “closed shop” agreements making employment dependent on trade union membership). In the case of *Sørensen and Rasmussen*, in finding a violation of Article 11 on account of the failure by the respondent State to protect the applicants' negative right to trade union freedom, the Court referred, in particular, to the conclusions of the European Committee of Social Rights that the maintenance of closed-shop agreements infringed Article 5 of the 1961 Social Charter (“right to organise”) (§§ 72 and 75-77).

114. The protection afforded by Article 11 does not extend only to those situations where the requirement to join a trade union is imposed after the recruitment of the individual or following the issue of a licence. An individual cannot be considered to have renounced his negative right to freedom of association in situations where, in the knowledge that trade union membership is a precondition of securing a job, he accepts an offer of employment notwithstanding his opposition to the condition imposed (*Sørensen and Rasmussen v. Denmark* [GC], 2006, § 56). Acceptance of trade union membership as one of the terms of employment does not significantly alter the element of compulsion inherent in having to join a trade union against one's will (*ibid.*, § 59). Dismissal of a person as a result of his refusal to comply with the requirement to become a member of a particular trade union is a serious form of compulsion, striking at the very substance of the freedom of choice inherent in the negative right to freedom of association protected by Article 11 of the Convention (*ibid.*, § 61).

115. Moreover, Article 11 includes a right not to be discriminated against for choosing to avail oneself of the right to be protected by a trade union. There is therefore an obligation on States, under Articles 11 and 14 of the Convention, to set up a judicial system that ensures real and effective protection against anti-union discrimination (*Danilenkov and Others v. Russia*, 2009,

<sup>16</sup> The Court had regard to the relevant international instruments, and in particular the ILO Conventions (§§ 68 and 71).

§§ 123-124, where the domestic judicial authorities had refused to entertain the applicants' complaints on the grounds that the existence of discrimination on the grounds of union membership could only be established in criminal proceedings; see also *Zakharova and Others v. Russia*, 2022, §§ 35 and 42).

116. In *Zakharova and Others v. Russia*, 2022, concerning the reduction of working hours and repeated attempts to dismiss the applicants on account of their trade union membership, the Court referred to the applicants as belonging to a protected group (as members and leaders of a trade union) who had suffered adverse actions on the part of their employers. On the facts of the case, the Court established that there was a *prima facie* case of discrimination against the applicants on the grounds of their trade union membership and related activities, which the State authorities had failed to address with proper attention in order to ensure real and effective protection of the applicants from anti-union actions (§ 42). Accordingly, there had been a violation of Article 14 of the Convention taken together with Article 11. In addition, the Court clarified that in circumstances such as these, where the applicants had demonstrated a *prima facie* case of discrimination, the burden of proof was to be shifted to the respondent State, and the employer, who had to demonstrate the existence of legitimate grounds for the applicants' dismissal (*ibid.*, §§ 36 and 43).<sup>17</sup>

117. Conversely, Article 11 cannot be interpreted as imposing an obligation on associations or organisations to admit whosoever wishes to join. Where associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership (*Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*, 2007, § 39<sup>18</sup>). Such was the case in *Associated Society of Locomotive Engineers and Firemen (ASLEF)*, where a trade union was prevented from expelling a member on the ground of the latter's membership of a political party advocating views incompatible with its own, in violation of Article 11 of the Convention (§§ 47-53; see also, to similar effect, *Vlahov v. Croatia*, 2022, §§ 66-74, concerning the criminal conviction of a trade union representative for refusing to admit would-be members to join the trade union).

## D. Right to collective bargaining

118. The Court has held that Article 11 of the Convention safeguards a trade union's freedom to protect the occupational interests of its members by collective action, the conduct and development of which the Contracting States must both permit and make possible (*Demir and Baykara v. Turkey* [GC], 2008, § 140). It affords members of a trade union the right for their union to be heard with a view to protecting their interests and requires national law to enable trade unions, in conditions not at variance with Article 11, to strive for the protection of their members' interests (*ibid.*, § 141). In *Demir and Baykara*, the Court reflected on its previous case-law which had considered the right to bargain collectively and to enter into collective agreements as not constituting an inherent element of Article 11 and not indispensable for the effective enjoyment of trade union freedom (§§ 140-146). Having regard to, *inter alia*, developments in international labour law, including ILO Conventions and the European Social Charter<sup>19</sup>, it held that the right to bargain collectively with the employer had, in principle, become one of the essential elements of the "right to form and to join trade unions for the

<sup>17</sup> In reaching its conclusion, the Court relied on the position of the European Committee of Social Rights regarding the need to alleviate the burden of proof for plaintiffs in discrimination cases, and of the ILO regarding the need to shift the burden of proof to the respondent.

<sup>18</sup> In §§ 22-24 the Court referred to the conclusions of the European Committee of Social Rights in relation to Article 5 of the 1961 European Social Charter.

<sup>19</sup> In §§ 147-149 the Court referred to the provisions of the ILO Convention No. 98 concerning the Right to Organise and to Bargain Collectively 1949, the ILO Convention No. 151 concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service 1978, and Article 6 § 2 of the European Social Charter (which Türkiye had not accepted) and the meaning attributed to it by the European Committee of Social Rights.

protection of [one’s] interests” set forth in Article 11 of the Convention, it being understood that States remained free to organise their system so as, if appropriate, to grant special status to representative trade unions (§§ 147-154).

119. Relying on the recognition by these international law instruments of the right for civil servants to bargain collectively, the Court in *Demir and Baykara* found that the annulment with retroactive effect of a collective agreement entered into by the applicants’ union and the refusal of the applicants’ right, as municipal civil servants, to bargain collectively, had not been justified and had therefore not been ‘necessary in a democratic society’ within the meaning of Article 11 § 2 of the Convention (§§ 164-170).

120. Nevertheless, the Court has noted that the right to collective bargaining has not been interpreted as including a “right” to a collective agreement (*National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, 2014, § 85), or a right for a trade union to maintain a collective agreement on a particular matter for an indefinite period (*Swedish Transport Workers Union v. Sweden* (dec.), 2004).

121. In *Association of Civil Servants and Union for Collective Bargaining and Others v. Germany*, 2022, the Court considered that the national legislation, rendering conflicting collective agreements concluded by minority trade unions inapplicable, did not breach Article 11, having regard to the respondent State’s margin of appreciation in the area, the limited scope of the restriction and the weighty aim of securing the proper functioning of the system of collective bargaining in the interests of both employees and employers (§§ 69-75).

122. Furthermore, a State’s positive obligations under Article 11 do not extend to providing for a mandatory statutory mechanism for collective bargaining (*Unite the Union v. the United Kingdom* (dec.), 2016, §§ 65-66). In reaching this conclusion, in *Unite the Union*, concerning the alleged inability of a trade union to engage in collective bargaining in the agricultural sector, the Court noted the absence of an established consensus among the member States of the Council of Europe in this area, thereby warranting a wide margin of appreciation to the respondent State. European and international instruments, including the European Social Charter, also did not support the view that a State’s positive obligations under Article 11 extended to providing for a mandatory statutory mechanism for collective bargaining (§§ 61-63).

123. The Court has considered the right to collective bargaining also from the perspective of Article 1 of Protocol No. 1 in instances where collective agreements confer property rights such as pension entitlements (*Aizpurua Ortiz and Others v. Spain*, 2010, §§ 39-40). In *Aizpurua Ortiz and Others*, a case concerning a collective bargaining agreement modifying the applicants’ rights to a supplementary retirement pension acquired under an earlier collective agreement, the Court considered that the modification based on the subsequent collective agreement, validated by the domestic courts, had pursued an aim in the general interest, namely to secure the company’s finances, to protect employment and to ensure respect for the right to collective bargaining. It further found that it had not been disproportionate, noting that it had not abolished the applicants’ entitlements, but had replaced them with the payment of a lump sum instead (§ 53).

## E. Right to strike

124. The Court’s case-law demonstrates that, while the right to strike is not an essential element of trade union freedom, strike action is clearly protected by Article 11 of the Convention (*National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, 2014, § 84, with further references). In its case-law, the Court has considered the right to strike to be an important aspect of freedom of association and of the right to form a trade union and for that trade union to be heard and to bargain collectively, supported by relevant international instruments, among which the European Social Charter (*Ognevenko v. Russia*, 2018, § 70, referring to Article 6 § 4 of the ESC

(revised)). However, the Court has held that strike action is, in principle, protected under Article 11 of the Convention only insofar it is organised by trade union bodies and effectively considered as forming part of trade union activity. The Court has not accepted this protection to extend to members of a trade union or to non-members (*Barış and Others v. Turkey* (dec.), 2021, § 45<sup>20</sup>).

125. While restrictions may be imposed on the right to strike of workers providing essential services to the population, a complete ban requires solid reasons from the State to justify its necessity (*Ognevenko v. Russia*, 2018, §§ 72-73). In *Ognevenko* case, concerning the dismissal of a train driver following his participation in a strike due to a blanket ban on strikes imposed by law for certain categories of railway workers, the Court considered, by reference to an existing international approach,<sup>21</sup> that transport in general, and railway transport in particular, did not constitute an essential service. In addition, the Court held that negative economic consequences caused by the strike could not amount to a sufficient reason justifying a complete ban on the right to strike (*ibid.*). Accordingly, the dismissal constituted a disproportionate restriction of the applicant's right to freedom of association under Article 11 (*ibid.*, § 84).

126. In addition, secondary action (strike action against a different employer aimed at exerting indirect pressure on the employer involved in the industrial dispute) also constitutes part of trade-union activity and a statutory ban on such action interferes with a trade union's rights under Article 11 (*National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, 2014, §§ 76-78)<sup>22</sup>. In the case of *National Union of Rail, Maritime and Transport Workers*, concerning the statutory ban on taking secondary industrial action against an employer not a party to a labour dispute, the Court found that the interference with the applicant union's right to freedom of association was not unjustified, noting in particular that the applicant union had already been able to exercise the essential elements of this right with the principal employer, such as representing its members, negotiating with the employer on behalf of its members who were in dispute with the employer and in organising a strike of those members at their place of work. Given these factors, and also in consideration of the sensitive area of legislative policy in question which related to the social and economic strategy of the respondent State, the latter enjoyed a wide margin of appreciation, broad enough to encompass the existing statutory ban on secondary action which, in the circumstances of this case, did not amount to a disproportionate restriction on the applicant union's right under Article 11 (§§ 85-89 and 99-105).

127. Interestingly in this case, with reference to the negative assessments on the impugned ban on secondary action that had been made against the respondent State by the relevant monitoring bodies of the ILO and European Social Charter, the Court observed that, in contrast to these two bodies, its task was not to review the relevant domestic law in the abstract, but to determine whether the manner in which it actually affected the applicant infringed the latter's rights under Article 11 of the Convention. Accordingly, the Court considered that the negative assessments, which had been made by the ILO Committee of Experts and the European Committee of Social Rights, were not of such persuasive weight to the Court's approach for determining whether the operation of the statutory ban on secondary strikes in this case remained within the range of

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<sup>20</sup> In § 46, the Court noted that, according to the case-law of the European Committee of Social Rights, the fact of restricting the right to call strikes to trade unions was also in conformity with Article 6 § 4 of the European Social Charter (revised), provided that forming a trade union was not subject to excessive formalities.

<sup>21</sup> In § 72 the Court referred to both the findings of the ILO Committee of Freedom of Association (section 587 of the ILO's Digest of decisions and principles) and the European Committee of Social Rights (in its Digest of the case-law of 1 September 2008).

<sup>22</sup> In § 76 the Court noted that secondary action is recognised and protected as part of trade-union freedom under the ILO Convention No. 87 (Freedom of Association and Protection of the Right to Organise Convention 1948), as developed by the ILO Committees on the basis of Articles 3 and 10 of the Convention, and Article 6 § 4 of the 1961 European Social Charter, as interpreted by the European Committee of Social Rights.

permissible options open to the national authorities under Article 11 of the Convention (*National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, 2014, § 98).

## F. Trade unions' rights in the public sector

128. Under Article 11 § 2, lawful restrictions may be imposed on the exercise of trade-union rights by members of the armed forces, of the police or of the administration of the State. However, the Court has stressed that the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association (*Tüm Haber Sen and Çınar v. Turkey*, 2006, § 35).

129. In *Tüm Haber Sen and Çınar v. Turkey*, 2006, concerning the dissolution of a trade union formed by civil servants and public-sector contract workers, the Court held that the measure imposed had not met a "pressing social need" in that it was merely based on the fact that "the legislation did not provide for such a possibility" (§ 36). The Court considered two main arguments in favour of a strict interpretation of the limitation on civil servants' entitlement to form trade unions: firstly, such a right was envisaged by the International Labour Organisation Convention no. 87, which had been ratified by Turkey, albeit not yet implemented in domestic legislation; and secondly, the European Committee of Social Rights had interpreted Article 5 of the European Social Charter, which afforded all workers the right to form trade unions, as applying to civil servants as well (§§ 37-39). Accordingly, the Court found that the respondent State had failed to comply with its obligation to secure the enjoyment of the rights enshrined in Article 11 of the Convention (§ 40).

130. The Court has confirmed, by reference to various international instruments and practice, that civil servants have the right to join trade unions and that "members of the administration of the State" cannot be excluded from the scope of Article 11 of the Convention. At most, national authorities are entitled to impose "lawful restrictions" on those members, in accordance with Article 11 § 2 (*Demir and Baykara v. Turkey* [GC], 2008, §§ 96-108). Furthermore, the Court has considered that municipal civil servants, who are not engaged in the administration of the State as such cannot in principle be treated as "members of the administration of the State" and, accordingly, be subjected on that basis to a limitation of their right to organise and to form trade unions. Such was the case in *Demir and Baykara*, in which the Court considered that the applicants could legitimately rely on Article 11 of the Convention (*ibid.*). In the circumstances of the case (the failure to recognise the right of the applicant municipal civil servants to form a trade union) the Court found a violation of Article 11, as such restrictions were considered not to have been 'necessary in a democratic society' within the meaning of Article 11 § 2. The Court referred, *inter alia*, to both universal and regional instruments on the subject (§§ 120-127).

131. However, a blanket ban on forming or joining a trade union by military personnel encroaches on the very essence of their freedom of association and is as such prohibited by the Convention (*Matelly v. France*, 2014, §§ 71-75).

132. Moreover, in relation to the right to strike of public servants, the Court has held that, although restrictions to such a right might concern certain categories of civil servants, this restriction should not extend to all civil servants, or to employees of State-run commercial or industrial enterprises (*Enerji Yapı-Yol Sen v. Turkey*, 2009, § 32). Consequently, in *Enerji Yapı-Yol Sen*, concerning disciplinary penalties imposed on public servants for taking part in a strike, a circular drafted in general terms, completely depriving all public servants of the right to strike, was held by the Court as not answering to a "pressing social need", therefore constituting a disproportionate interference with the applicant union's effective enjoyment of the rights enshrined in Article 11 of the Convention (§§ 32-34). A similar conclusion was reached by the Court in the cases of:

- *Dilek and Others v. Turkey*, 2007, concerning civil sanctions imposed on public-sector workers who had taken part in union action (§§ 72-74); and



- *Kaya and Seyhan v. Turkey*, 2009, concerning disciplinary sanctions imposed on teachers for participation in a strike (§§ 30-32);

133. While *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain*, 2015, concerned the refusal to allow police officers to go on strike, the Court did not find a violation of Article 11 (§ 43). It noted that the legislation restricting the right to strike did not apply to all public servants but was imposed exclusively on members of the State security forces, as guarantors of public safety (§ 37). The Court considered that the more stringent requirements imposed on them did not exceed what was necessary in a democratic society, in so far as those requirements served to protect the State’s general interests and in particular to ensure national security, public safety and the prevention of disorder, principles set forth in Article 11 § 2 of the Convention (§ 38)<sup>23</sup>.

## IV. Social benefits and pensions<sup>24</sup>

### Article 8 of the Convention - Right to respect private and family life

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

### Article 14 of the Convention – Prohibition of discrimination

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

### Article 1 of Protocol No. 1 – Right to property

- “1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

## A. General Considerations

### 1. Scope

134. Principles which apply generally in cases concerning Article 1 of Protocol No. 1 are equally relevant when it comes to welfare benefits (*Andrejeva v. Latvia* [GC], 2009, § 77). It has noted that many individuals are, for all or part of their lives, completely dependent for survival on social

<sup>23</sup> In § 40, the Court also agreed with the Committee of Ministers’ conclusion that the restriction on the right to strike for the police was not in contravention with the European Social Charter.

<sup>24</sup> See also, the *Case-Law Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights*, the *Case-Law Guide on Article 8 of the European Convention on Human Rights* and the *Case-Law Guide on Article 14 of the European Convention on Human Rights*. For cases concerning social rights in relation to housing benefits and disability benefits, see the Chapters below on ‘Housing’ and ‘Specific vulnerable groups’ respectively.

security and welfare benefits. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable (*Stec and Others v. the United Kingdom* (dec.), 2005, § 51).

135. The Court has, nevertheless, stressed that Article 1 of Protocol No. 1 does not create a right to acquire property and places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a Contracting State has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements. In cases where the applicant has been denied all or part of a particular benefit, the Court has applied the relevant test as to whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question. In addition, while under no obligation to do so, if a State decides to create a benefits scheme, it must do so in a manner which is compatible with Article 14 (*Stec and Others v. the United Kingdom* (dec.), 2005, §§ 54-55; *Andrejeva v. Latvia* [GC], 2009, § 77; *Stummer v. Austria* [GC], 2011, §§ 82-83; *Efe v. Austria*, 2013, §§ 45-46).

136. The Court has generally considered measures relating to parental allowances and/or other welfare family benefits as coming within the scope of Article 8 of the Convention (*Dhahbi v. Italy*, 2014, § 41, with further references therein). While there is no right to a parental allowance under Article 8, nor a positive obligation on States to such financial assistance, the Court has found that measures, which enable one of the parents to stay at home to look after the children, promote family life and necessarily affect the way in which it is organised (*Petrovic v. Austria*, 1998, §§ 26-27; *Konstantin Markin v. Russia* [GC], 2012, § 130). In this regard, the Court has held that through the grant of a parental leave allowances, States demonstrate their respect for family life within the meaning of Article 8 of the Convention; such measures therefore falling within the scope of that provision (*Petrovic v. Austria*, 1998, § 29). Moreover, while under no obligation to do so, the Court has held that if a State decides to create a scheme of parental benefits under Article 8, it must do so in a manner which is compatible with Article 14 of the Convention (*ibid.*, §§ 26-29; *Konstantin Markin v. Russia* [GC], 2012, § 130). In some instances, the Court has also considered complaints concerning family welfare benefits as falling within the scope of Article 1 of Protocol No. 1 (*Zeïbek v. Greece*, 2009, §§ 37-40; *Efe v. Austria*, 2013, § 46).

137. Furthermore, the Court has considered the possibility of extending accident and sickness insurance cover to cohabiting partners as a measure intended to improve the private and family situation of the principally insured person, thereby falling within the ambit of Article 8 (*P.B. and J.S. v. Austria*, 2010, §§ 33-35, concerning same-sex partners).

138. The Court has examined complaints concerning pensions or pension rights mainly under Article 1 of Protocol No. 1 (alone, or in conjunction with Article 14) (*Carson and Others v. the United Kingdom* [GC], 2010, §§ 63-65; *Stummer v. Austria* [GC], 2011, §§ 81-86; *Fábián v. Hungary* [GC], 2017, §§ 60-64; *Moskal v. Poland*, 2009, §§ 41-46). However, the Court has not ruled out that measures concerning social pensions, such as an orphan's pension, could come within the scope of Article 8 to the extent that it renders impossible the normal development of the family and private life of a minor (*Domenech Pardo v. Spain* (dec.), 2001). In *Moskal v. Poland*, 2009, the Court found a complaint concerning the termination of an early retirement pension to also fall within the scope of Article 8, noting that the pension was a social security benefit aimed at enabling parents to stop working in order to look after their seriously sick children, which had constituted the basis of the applicant's family budget in this case, and the termination of which had therefore entailed severe consequences for the quality and enjoyment of the applicant's family life (§ 93).

139. In some cases, the Court has considered complaints concerning an entitlement to a survivor's pension as falling both within the ambit of Article 8 and Article 1 of Protocol No. 1 to the Convention (*Şerife Yiğit v. Turkey* [GC], 2010, §§ 55-59 and 93-98; *Aldeguer Tomás v. Spain*, 2016, §§ 72-77).

140. Moreover, in *Budina v. Russia* (dec.), 2009, where the applicant complained that her pension was too small to enable her to survive, the Court did not exclude the possibility that State responsibility might be engaged under Article 3 in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity. It considered that such a matter was not *per se* incompatible *ratione materiae* under Article 3 and examined the applicant's economic circumstances, including also the amount of the applicant's State-paid retirement pension, as a whole, to determine whether her situation would fall within the prohibition of degrading treatment. It found this not to be the case.

## 2. Margin of Appreciation

141. The Court will generally allow a wide margin when it comes to general measures of economic or social strategy (*Luczak v. Poland*, 2007, § 48; *Andrejeva v. Latvia* [GC], 2009, § 83). Because of their direct knowledge of their society and its needs, the national authorities are, in principle, better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (*Stec and Others v. the United Kingdom* [GC], 2006, § 52; *Carson and Others v. the United Kingdom*, 2010, § 61). The Court has considered that for any welfare system to be workable, the State may have to use broad categorisations to distinguish between different groups in need (*Runkee and White v. the United Kingdom*, 2007, § 39).

142. In *Luczak v. Poland*, 2007, the Court found that the creation of a particular social security scheme for farmers, that is heavily subsidised from the public purse and provides cover to those admitted to it on more favourable terms than a general social security scheme, could be regarded as pursuing an economic or social strategy falling within the State's margin of appreciation (§ 52).

143. However, the Court has stressed that very weighty reasons need to be put forward for a difference of treatment based exclusively on the grounds of nationality or sex to be considered compatible with the Convention (*Gaygusuz v. Austria*, 1996, § 42; *Luczak v. Poland*, 2007, § 48; *Zeibek v. Greece*, 2009, § 46; *P.B. and J.S. v. Austria*, 2010, § 38). In addition, it has held that even where weighty reasons have been advanced for excluding an individual from a social security scheme, such exclusion must not leave him in a situation in which he is denied any social insurance cover, whether under a general or a specific scheme, thus posing a threat to his livelihood (*Luczak v. Poland*, 2007, § 52).

144. While the justification of a difference in treatment based exclusively on nationality requires "very weighty reasons", thus indicating a narrow margin, the Court has clarified the application of this principle in a field where a wide margin is, and must be, granted to the State in formulating general measures (notably of economic and social policy). In particular, even the assessment of what may constitute "very weighty reasons" for the purposes of the application of Article 14 may have to vary in degree depending on the context and circumstances (*Savickis and Others v. Latvia* [GC], 2022, § 206). In the case of *Savickis and Others*, concerning the exclusion of employment periods accrued in other former USSR States for the State pension calculation for permanently resident non-citizens (in contrast to Latvian citizens), the Court carried out its assessment against the background of a wide margin of appreciation and, in the end, concluded that the grounds relied upon by the Latvian authorities could be deemed to amount to "very weighty reasons" (§§ 207-221).



## B. Parental/Family benefits

145. In *Weller v. Hungary*, 2009, the Court found that the exclusion of natural fathers from an entitlement to receive a maternity benefit, when mothers, adoptive parents and guardians were entitled to it, amounted to discrimination on grounds of parental status, in breach of Article 14 of the Convention in conjunction with Article 8. In particular, the Court noted that the wide range of entitled persons proved that the allowance was aimed at supporting new-born children and the whole family raising them, and not only at reducing the hardship of giving birth sustained by the mother (§§ 30-35). Similarly, in *Topčić-Rosenberg v. Croatia*, 2013, concerning the difference in treatment of adoptive mothers compared to biological mothers in relation to entitlement to maternity benefits, the Court found a violation of Article 14 in conjunction with Article 8, noting that the domestic authorities had failed to take into account the fact that the position of a biological mother at the time of birth corresponded to that of an adoptive mother immediately after adoption (§§ 46-47).

146. The Court has come to similar conclusions under Article 14 in conjunction with Article 8 in other cases involving related benefits, such as family welfare benefits or child benefits:

- *Fawsie v. Greece*, 2010, concerning the refusal to grant a large-family benefit on grounds of nationality (§§ 34-40; see also *Saidoun v. Greece*, 2010, §§ 36-42);
- *Dhahbi v. Italy*, 2014, concerning the refusal to grant a large-family benefit on grounds of nationality (§§ 51-54);
- *Okpisz v. Germany*, 2005, concerning the different treatment with regard to child benefits of aliens who were in possession of a stable residence permit and those who were not (§ 34; see also *Niedzwiecki v. Germany*, 2005, § 33);

147. Moreover, *Efe v. Austria*, 2013, concerned alleged discrimination in refusing to grant a family allowance and tax credits in respect of maintenance payments due to the residence abroad of the applicant's children. The Court held that by creating a claim for a family allowance as part of its social and benefits system, the State had voluntarily decided to provide for an additional right falling within the general scope of Article 1 of Protocol No. 1 (§ 47). The Court did not find that this amounted to discrimination, noting in particular that the family allowance was designed to cater for the needs of the resident population and aimed at sharing the burden between families within the population as an investment in future generations in the context of the "intergenerational contract" to which children living outside the country would not, as a rule, be able to contribute in the future (§§ 52-53; see also *Santos Hansen v. Denmark* (dec.), 2010, concerning the refusal to grant a special child subsidy for a child adopted abroad).

## C. Social security and employment benefits

148. The case of *Gaygusuz v. Austria*, 1996, concerned the refusal to grant emergency assistance to an unemployed man due to his nationality. The Court considered that the right to emergency assistance was a pecuniary right for the purposes of Article 1 of Protocol No. 1, holding the latter applicable to the case and finding a violation thereof in conjunction with Article 14, as the difference in treatment had not been based on any "objective and reasonable justification" (§§ 41 and 50; see also, *Willis v. the United Kingdom*, 2002, §§ 36 and 41-43, and *Runkee and White v. the United Kingdom*, 2007, § 45, both concerning the unavailability of widow's allowances to widowers).

149. In *Stec and Others v. the United Kingdom* [GC], 2006, concerning differences in the entitlement to social security benefits (industrial injuries) due to the different State pensionable age between men and women, the Court held that the State was reasonably and objectively justified in correcting the disadvantaged economic position of women at the time, until social and economic changes removed the need for such special treatment for women. Similarly, the decision to link eligibility to such benefits to the pension system was justified, given that the benefits in question were intended

to compensate for a reduced earning capacity during a person's working life. There had, therefore, not been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (§§ 54-66; in contrast, see *Luczak v. Poland*, 2007, §§ 49-60, concerning a refusal of affiliation to a farmers' social-security scheme on account of the applicant's nationality).

150. Moreover, in *Čakarević v. Croatia*, 2018, the Court examined a complaint concerning the retrospective repayment order of welfare unemployment benefits which had been mistakenly granted to the applicant. In finding that the applicant had a legitimate expectation under Article 1 of Protocol No. 1 to rely on those benefits as rightful entitlements, the Court noted, in particular, the nature of the benefit under consideration which was to provide support for basic subsistence needs, and the fact that, at the time of receipt of those benefits, the applicant could entertain a legitimate expectation that her presumed entitlement to those funds would not be capable of being called into question retrospectively (§§ 64-65). The Court came to the conclusion that the obligation to reimburse the amount of the unemployment benefits paid in error placed an excessive individual burden on the applicant, taking into account her overall financial and personal situation: it represented a significant amount of money for her given that she was deprived of her only source of income, the amount she had received had been consumed for satisfying her necessary basic living expenses, she had been suffering from a psychiatric condition and she had been incapable of working for a long period of time. Accordingly, the Court found a violation of Article 1 of Protocol No. 1 to the Convention (§§ 87-91; see also, to similar effect, *Romeva v. North Macedonia*, 2019, §§ 66-79).

151. The Court has also examined complaints related to social security benefits under Article 4 of the Convention. In *Schuitemaker v. the Netherlands* (dec.), 2010, the applicant, who was in receipt of unemployment benefits, complained that under new legislation she was obliged to take up "generally accepted" employment as a condition for continuing to receive her benefit payments. The Court found that, where a State has introduced a system of social security, it was fully entitled to lay down conditions of eligibility for such benefits. In particular, a condition to the effect that a person must make demonstrable efforts to obtain and take up generally accepted employment cannot be considered unreasonable. On the facts of the case, this was even more so as the legislation did not require recipients of benefits to seek and take up employment which was not generally socially accepted or in respect of which they had conscientious objections. The condition at issue could therefore not be equated with compelling a person to perform forced or compulsory labour within the meaning of Article 4 § 2 of the Convention.

## D. Pensions

152. The Court has considered a number of cases concerning the reduction, suspension or discontinuance of social-security pensions under Article 1 of Protocol 1. The Court has noted that social-security schemes are an expression of a society's commitment to the principle of social solidarity with its vulnerable members: pensions being in general disbursed in order to provide compensation for reduced earning capacity as a person gets older. However, when a person in receipt of an old-age pension continues or resumes work, his or her working life could not be considered over and earning capacity still exists (*Fábián v. Hungary* [GC], 2017, § 70).

153. In examining the proportionality of an interference, the Court has had particular regard to factors such as the extent of the loss of benefits, whether there was an element of choice, and the extent of the loss of means of subsistence (*Fábián v. Hungary* [GC], 2017, § 73):

- *Moskal v. Poland*, 2009, concerning the termination of the applicant's early retirement pension, which she had requested in order to take care of her child suffering from serious health conditions (§§ 67-76, violation of Article 1 of Protocol No. 1);
- *Apostolakis v. Greece*, 2009, concerning the total deprivation of a retirement pension as an automatic result of a criminal conviction (§§ 39-43, violation of Article 1 of Protocol No. 1;

see, in contrast, *Philippou v. Cyprus*, 2016, §§ 66-75, where the Court did not find a violation of Article 1 of Protocol No. 1);

- *Klein v. Austria*, 2011, concerning the complete deprivation of all entitlements to a retirement pension following a lawyer’s disqualification from practice, after having contributed to the pension scheme during his whole career both individually and collectively (§§ 52-58, violation of Article 1 of Protocol No. 1);
- *Valkov and Others v. Bulgaria*, 2011, concerning a cap imposed on the maximum amount of pension (§§ 94-101, no violation of Article 1 of Protocol No. 1);
- *Stefanetti and Others v. Italy*, 2014, concerning the loss of approximately two-thirds of an old-age pension as a result of lower contributions paid when working abroad (§§ 59-67, violation of Article 1 of Protocol No. 1<sup>25</sup>);
- *Fábián v. Hungary* [GC], 2017, concerning the suspension of a State pension for a pensioner employed in the civil service (§§ 69-85, no violation of Article 1 of Protocol No. 1);
- *Savickis and Others v. Latvia* [GC], 2022, concerning the exclusion of employment periods accrued in other former USSR states from a State pension calculation for permanently resident non-citizens, in contrast to Latvian citizens (§§ 215-221, no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1).

154. The Court has also attached particular importance to the principle of ‘good governance’, according to which public authorities must act with the utmost scrupulousness when dealing with matters of vital importance to individuals, such as welfare benefits and other property rights. While it has considered that public authorities should not be prevented from correcting their mistakes, being mindful of the importance of social justice, this cannot prevail in a situation where the individual concerned is required to bear an excessive burden as a result of a measure divesting him or her of a benefit (*Moskal v. Poland*, 2009, §§ 72-73).

155. Furthermore, with regard to complaints of alleged discrimination in a welfare or pensions system, the Court has stressed that it is the compatibility with Article 14 of the system that is relevant for it rather than the individual facts or circumstances of the particular applicants or of others who are or might be affected by the legislation (*Carson and Others v. the United Kingdom* [GC], 2010, § 62, with further references therein). The Court’s role is to determine the question of principle, namely whether the legislation as such unlawfully discriminates between persons who are in an analogous situation (*ibid.*).

156. In the case of *Carson and Others*, concerning the absence of index-linking to pensions of individuals resident in overseas countries, the Court found that the applicants were not in a relevantly similar position to residents of the United Kingdom. The Court considered, *inter alia*, that the pension system was primarily designed to serve the needs of resident pensioners and that no comparison could be drawn to pensioners resident elsewhere due to the range of economic and social variables which apply from country to country. In addition, it noted that as non-residents the applicants did not contribute to the respondent State’s economy: in particular, they paid no tax to offset the cost of any increase in the pension (§ 86; compare and contrast with *Pichkur v. Ukraine*, 2013, §§ 50-51, concerning the complete termination of a retirement pension due to residency abroad).

157. In *Andrle v. the Czech Republic*, 2011, the Court found that the lowering of the pensionable age for women who had raised children – which did not exist for men – was a measure taken to rectify the inequality in question and that the timing and the extent of the measures aimed at equalising the pensionable age had not been manifestly unreasonable. Consequently, there had not been a violation of Article 14 in conjunction with Article 1 of Protocol No. 1 (§§ 54-61).

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<sup>25</sup> In reaching its conclusion, the Court made reference to the minimum pension amount according to the European Committee of Social Rights (§§ 62-64).

158. Moreover, in *Stummer v. Austria* [GC], 2011, the Court examined a complaint of alleged discrimination in the refusal to take work performed in prison into account in the calculation of pension rights. In finding that working prisoners were in a relevantly similar position to ordinary employees, the Court noted that what was at issue was not the nature or aim of the work carried out but the need to provide for persons of old age and hence affiliation to the old-age pension system (§ 95). The Court found that the difference in treatment was proportionate, noting that the question of working prisoners' affiliation to the old-age pension system was closely linked to issues of penal and social policy, an area in which the State enjoys a wide margin of appreciation: the respondent State could not be reproached for having given priority to an insurance scheme, namely unemployment insurance, which it had considered to be the most relevant for the reintegration of prisoners upon their release, and not that of an old-age pension system. Accordingly, there had not been a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 (§§ 101-111).

159. With regard to survivors' pensions, in *Muñoz Díaz v. Spain*, 2009, the Court examined a complaint about the refusal to recognise the validity of a Roma marriage for the purposes of establishing an entitlement to a survivor's pension. It found that it had been disproportionate for the State to have, on the one hand, issued the applicant and her Roma family with a family record book, granted them large-family status, afforded health-care assistance to her and her six children and collected social-security contributions from her Roma husband for over nineteen years, thus recognising her status as spouse and, on the other, to have refused to recognise the effects of a Roma marriage when it came to the entitlement to a survivor's pension. The applicant's situation had revealed a disproportionate difference in treatment compared to similar situations where the persons concerned had believed in good faith that they were married even though the marriage was not legally valid. Consequently, the Court found a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 (§§ 62-71; see, in contrast, *Şerife Yiğit v. Turkey* [GC], 2010, §§ 83-88).

## V. Housing<sup>26</sup>

### Article 8 of the Convention - Right to respect private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

### Article 14 of the Convention – Prohibition of discrimination

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

### Article 1 of Protocol No. 1 – Right to property

1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

### Article 2 of Protocol No. 4 to the Convention – Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.”

## A. General Considerations

### 1. Scope

160. There is no right to be provided with housing under Article 8 of the Convention (*Chapman v. the United Kingdom* [GC], 2001, § 99; *Hudorovič and Others v. Slovenia*, 2020, § 114). The scope of any positive obligation to house the homeless must be limited (*O'Rourke v. UK* (dec.), 2001;

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<sup>26</sup> For a more comprehensive assessment, see section ‘Housing’ under chapter ‘Home’ of the *Case-Law Guide on Article 8 of the European Convention on Human Rights* and sub-section ‘Lease on property and housing rights’ under chapter ‘Concept of “possessions”’ and section ‘Tenancies and rent control’ under chapter ‘Specific issues’ of the *Case-Law Guide on Article 1 of Protocol No. 1 of the European Convention on Human Rights*.

*Hudorovič and Others v. Slovenia*, 2020, § 114). However, the Court has accepted that an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases (*Yordanova and Others*, 2012, § 130). Furthermore, as the Court has previously held with regard to other social benefits (see, for example, *Stec and Others v. the United Kingdom* (dec.) [GC], 2005, § 55), where a Contracting State decides to provide such benefits, it must do so in a way that is compliant with Article 14. The Court has found that legislation which impacts eligibility for assistance in finding accommodation for people threatened with homelessness affects their home and family life and therefore falls within the ambit of Article 8 (*Bah v. the United Kingdom*, 2011, § 40).

161. The protection provided under Article 8 of the Convention may also extend to occupants who are partners of persons with tenancy rights (*Prokopovich v. Russia*, 2004, § 37). In *Karner v. Austria*, 2003, the Court found a violation of Article 14 taken in conjunction with Article 8 where an occupant was prevented from succeeding to a tenancy after the death of his same-sex partner (§§ 41-43; see also *Kozak v. Poland*, 2010, § 99).

162. Moreover, Article 8 does not confer a right to live in a particular location (*Codona v. United Kingdom* (dec.), 2006; *Garib v. the Netherlands* [GC], 2017, § 141, but the freedom to choose one's residence is "at the heart of Article 2 § 1 of Protocol No. 4 (freedom of movement)").

163. Although the Convention does not protect access to safe drinking water as such, a persistent and long-standing lack of access to safe drinking water can have adverse consequences for health and human dignity, effectively eroding the core of private life and the enjoyment of a home, meaning that a State's positive obligations under Article 8 may be triggered. The existence of any positive obligation in this respect and its eventual content are to be determined by the specific circumstances of the persons affected, by the legal framework and by the economic and social situation of the State in question (*Hudorovič and Others v. Slovenia*, 2020, § 116). However, in *Hudorovič and Others*, concerning the allegedly insufficient measures adopted by the State authorities to ensure access to safe drinking water and sanitation for Roma communities residing in illegal settlements, the Court held that the State could not bear the entire burden of providing running water to the applicants' homes, in particular when, as in this case, there were no financial or other obstacles preventing the applicants from improving their living conditions. In these circumstances, noting that the authorities had provided the applicants with the opportunity to access drinking water and that the latter were in receipt of social benefits, the Court found that the respondent State had taken into account the applicants' vulnerable position and satisfied the requirements of Article 8 of the Convention (§§ 149-159).

164. Furthermore, the Court has found that, where, under the terms of a final and enforceable judgment, a person has been allocated housing which he or she has the right to possess and make use of and, subject to certain conditions, to purchase, he or she can be said to have a "possession" within the meaning of Article 1 of Protocol No. 1 (*Teteriny v. Russia*, 2005, §§ 48-50). However, in *Tchokontio Hapi v. France*, 2015, concerning the non-enforcement of a court order requiring the urgent rehousing of the applicant, the Court distinguished between a right and an option of a future purchase. Noting that, under the resulting social housing tenancy, the applicant had the right to make use of the flat and only an option to purchase it, the Court found that there was no legitimate expectation of acquiring property and that therefore her right to a social housing tenancy did not amount to a "possession" within the meaning of Article 1 of Protocol No. 1 (§§ 59-60). A similar, yet more general, distinction was made by the Court in cases against successor States involving specially protected tenancies after the disintegration of the former Yugoslavia (*Mago and Others v. Bosnia and Herzegovina*, 2012, § 78).



## 2. Margin of Appreciation

165. The Court will usually grant a wide margin of appreciation in spheres involving the application of social or economic policies, including as regards housing (*Connors v. the United Kingdom*, 2004, § 82; *Yordanova and Others v. Bulgaria*, 2012, § 118; *Hudorovič and Others v. Slovenia*, 2020, § 141). Because of their direct knowledge of their society and its needs, the national authorities are, in principle, better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature’s policy choice unless it is “manifestly without reasonable foundation” (*Stec and Others v. the United Kingdom* [GC], 2006, § 52; *Bah v. the United Kingdom*, 2011, § 37). This is particularly so in the context of the allocation of limited State resources (*Hudorovič and Others v. Slovenia*, 2020, § 141). The Court has also held that the margin of appreciation in housing matters is narrower when it comes to the rights guaranteed by Article 8 compared to those in Article 1 of Protocol No. 1 to the Convention, regard being had to the central importance of Article 8 of the Convention to the individual’s identity, self-determination, physical and moral integrity as well as to the maintenance of relationships with others and a settled and secure place in the community (*Andrey Medvedev v. Russia*, 2016, § 53; *Gladysheva v. Russia*, 2011, § 93).

166. The Court has found it legitimate for States to put in place criteria according to which a benefit such as social housing can be allocated, when there is insufficient supply available to satisfy demand, so long as such criteria are not arbitrary or discriminatory. States may be justified in distinguishing between different categories of immigrants and in limiting the access of certain categories to public services such as social housing (*Bah v. the United Kingdom*, 2011, § 49). *Bah* concerned the refusal to take a minor subject to immigration control into account when determining priority in entitlement to social housing. The Court did not find a violation of Article 14 in conjunction with Article 8, holding that the differential treatment to which the applicant was subjected was reasonably and objectively justified by the need to allocate, as fairly as possible, the scarce stock of social housing available in the United Kingdom and the legitimacy, in so allocating, of having regard to the immigration status of those in need of housing (§ 52; see also *L.F. v. the United Kingdom* (dec.), 2022, §§ 46-48, concerning the exclusion of non-members of the Orthodox Jewish Community from social housing owned by a charity catering for that community).

167. While the margin of appreciation is in principle wide, the Court has stressed that measures of economic and social policy must, nevertheless, be implemented in a manner that does not violate the prohibition of discrimination and complies with the requirement of proportionality. In the context of Article 14 in conjunction with Article 1 of Protocol No. 1, the Court has limited its acceptance to respect the legislature’s policy choice as not “manifestly without reasonable foundation” to circumstances where an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality. Outside that context, and where the alleged discrimination is on the basis of disability or gender, the State’s margin of appreciation is considerably reduced and “very weighty reasons” would be required to justify the difference of treatment at issue (*J.D. and A. v. the United Kingdom*, 2019, §§ 88-89, 97 and 104).

168. In addition, in its case-law the Court has stressed the necessity for States to take into account vulnerable and disadvantaged social groups, such as, for example, the Roma population, who may need assistance in order to be able to enjoy effectively the same rights as the majority population (*Hudorovič and Others v. Slovenia*, 2020, § 142). Such circumstances may give rise to a positive obligation under the Convention, by virtue of Article 8, to facilitate the Roma way of life (*Connors v. the United Kingdom*, 2004, §§ 84 and 94). This is particularly so if the extent of the intrusion into Article 8 rights is serious, such as measures leading to homelessness (*ibid.*, §§ 85-86). In addition, the Court has considered the applicants’ specificity as a social group and their needs as one of the relevant factors in the assessment of the proportionality that the national authorities are under a duty to undertake (*Yordanova and Others*, 2012, §§ 129 and 132-133; *Hudorovič and Others v. Slovenia*, §§ 142 and 147).

169. For a recapitulation of the relevant general principles concerning the State's margin of appreciation and the proportionality assessment in this area, see *Faulkner and McDonagh v. Ireland* (dec.), 2022, §§ 94-98.

## B. Eviction / Loss of home

170. In its case-law, the Court has generally considered it legitimate for the authorities to seek to regain possession of land or property from persons who did not have a right to occupy it (*Connors v. the United Kingdom*, 2004, § 69; *McCann v. the United Kingdom*, 2008, § 48; *Yordanova and Others v. Bulgaria*, 2012, § 111).

171. However, evictions must not only be prescribed by domestic law, they must be proportionate to the legitimate aim pursued, regard being had to the particular circumstances of the case (*Orlić v. Croatia*, 2011, § 64; *Andrey Medvedev v. Russia*, 2016, § 54). The existence of procedural safeguards for such measures is a crucial consideration in the Court's assessment of the proportionality of the interference (*Connors v. the United Kingdom*, 2004, §§ 83 and 92; *Faulkner and McDonagh v. Ireland* (dec.), 2022, §§ 101-102). In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and afforded due respect to the interests of the individual safeguarded by Article 8 of the Convention (*ibid.*; *Brežec v. Croatia*, 2013, §§ 48-50). In determining whether the required proportionality assessment was undertaken at domestic level, the Court may consider the overall fairness of the proceedings in their entirety (by analogy with Article 6) (*Faulkner and McDonagh v. Ireland* (dec.), 2022, § 103, where the court found that the disadvantage to the applicants due to the initial lack of legal representation was almost immediately overcome when they were granted legal aid some days later).

172. Moreover, the Court has established under Article 8 of the Convention that any person at risk of losing his home should, in principle, be able to have the proportionality of the measure determined by an independent tribunal, even if, under domestic law, the right to occupation has come to an end (*McCann v. the United Kingdom*, 2008, §§ 50 and 53). This principle has been developed in the context of State-owned or socially-owned accommodation (*F.J.M. v. the United Kingdom* (dec.), 2018, § 37, with further references therein). However, a distinction has been drawn between public authority landlords and private landlords, to the effect that the principle does not automatically apply in cases where possession is sought by a private individual or enterprise. On the contrary, in these cases the balance between the competing interests of the private parties involved (private sector landlord and residential occupier) may be considered to be struck by the legislation which has the purpose of protecting the Convention rights concerned (*ibid.*, §§ 41-46).

173. Where national authorities, in their decisions ordering and upholding the applicant's eviction, have not given any explanation or put forward any arguments demonstrating that the applicant's eviction was necessary, the Court may draw the inference that the State's legitimate interest in being able to control its property should come second to the applicant's right to respect for his home (*Bjedov v. Croatia*, 2012, §§ 70-71; *Yordanova and Others v. Bulgaria*, 2012, § 118). *Yordanova and Others* concerned the planned eviction of Roma from their long-established settlements without arrangements for alternative housing. The Court found that the eviction would constitute a violation of Article 8 of the Convention on the grounds that the national authorities had not taken into account the applicants' underprivileged status and had failed to provide reasons as to why the applicants' removal was necessary, in particular in the absence of alternative shelter which would render them homeless (§§ 122-134).

174. The Court has drawn an analogy of the Article 8 principles established in the above-mentioned cases concerning the eviction of tenants and occupiers from public housing or land with those concerning the loss of one's home, affirming its position that the assessment of the necessity of the interference in such cases involves not only issues of substance but also of procedure, namely whether the decision-making process afforded due respect to the interests protected under Article 8

(*Ivanova and Cherkezov v. Bulgaria*, 2016, §§ 52-53). In *Ivanova and Cherkezov*, concerning the order for demolition of the applicants' home for a breach of building regulations, the Court found that the intended demolition would constitute a violation of Article 8 due to the fact that the applicants did not have at their disposal a procedure enabling them to obtain a proper review of the proportionality of the measure. The domestic proceedings had only focused on the illegality of the building, not engaging with the personal circumstances of the applicants, such as the fact that this was their only home and the unavailability of alternative accommodation (§§ 56-62).

175. Cases involving evictions may also entail positive obligations for the respondent State. In *Pibernik v. Croatia*, 2004, a failure by the national authorities to enforce an eviction order from a flat, in favour of the owner, was deemed by the Court to amount to a failure by the State to comply with its obligations under Article 8 of the Convention (§§ 64 and 70; see also *Cvijetić v. Croatia*, 2004, §§ 51-53).

### C. Rent Control

176. The Court has recognised that areas such as housing, which modern societies consider a prime social need and which plays a central role in the welfare and economic policies of Contracting States, may often call for some form of regulation by the State. In that sphere, decisions as to whether, and if so when, it may be left fully to the play of free market forces or whether it should be subjected to State control, as well as the choice of measures for securing the housing needs of the community and of the timing for their implementation, necessarily involve the consideration of complex social, economic and political issues. Finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, the Court has on many occasions declared that it will respect the legislature's judgment as to what is in the "public" or "general" interest unless that judgment is manifestly without reasonable foundation (*Hutten-Czapska v. Poland* [GC], 2006, §§ 165-66).

177. In *Mellacher and Others v. Austria*, 1989, concerning landlords who challenged the introduction of a statutory reduction in rent under Article 1 of Protocol No. 1, the Court found that it was reasonable for the Austrian lawmaker to conclude that social justice required reducing the original rents and that the rent reductions flowing from the statute, although substantial, did not necessarily place a disproportionate burden on landlords (§§ 53-57).

178. Conversely, in *Hutten-Czapska v. Poland* [GC], 2006, where the Court was faced with a complaint by a landlord who was affected by a restrictive system of rent control introduced following the collapse of the communist regime in Poland, the Court found a violation of Article 1 of Protocol No. 1. The scheme, apart from setting the levels of rent chargeable, consisted of a combination of various restrictions on landlords' rights in respect of the free contractual will to enter into and negotiate a lease agreement with tenants, and the determination of conditions for the termination of leases. While the Court accepted the legitimate aim of the impugned rent-control scheme, which was to secure the social protection of tenants and ensure the gradual transition from State-controlled rent to a fully negotiated contractual rent, and acknowledged the exceptionally difficult and socially sensitive issues involved in reconciling the conflicting property rights of landlords and social rights of tenants, it found that the respondent State had failed to strike the requisite fair balance between the two by placing a disproportionate and excessive burden on the applicant in this case (§§ 178 and 223-225).

179. The Court has dealt with other similar issues concerning rent control in cases against member States after the fall of previous regimes, finding further violations of Article 1 of Protocol No. 1 (*Statileo v. Croatia*, 2014, §§ 140-145; *Bittó and Others v. Slovakia*, 2014, §§ 105-119). In *Kasmi v. Albania*, 2020, the applicant complained of his inability to recover possession of property recognised as belonging to his family following privatisation reforms after the fall of the communist rule in Albania, but which was occupied by tenants who, due to their vulnerable status as retirees

threatened with homelessness, enjoyed special protection. While the Court accepted the legitimate aim of the legislation, which was to provide housing to a vulnerable part of society at reasonably affordable prices, in a country where availability of dwellings could not meet the demand, it found a violation of Article 1 of Protocol No. 1, having regard to the tenancy agreements imposed by law, the lack of adequate mechanisms safeguarding the applicant's rights to terminate the tenancy, the low amount of rent fixed by law which did not allow for its indexation to inflation, and the long period of uncertainty in which the applicant found himself (§§ 76 and 79-85).

180. A similar conclusion was reached in the case of *Berger-Krall and Others v. Slovenia*, 2014, albeit from the perspective of the rights of tenants under Article 1 of Protocol No. 1, leading to a non-violation of the Convention. It concerned complaints by tenants who had been residing in socially-owned flats under "specially protected tenancy" agreements under the previous regime about an increase in rent and reduced security of tenure following the country's move to a market economy. Although the Court acknowledged a general degradation of the legal protection afforded to tenants as a result of the reforms, the Court noted that these were somehow unavoidable consequences of the legislature's choice of denationalisation and transition to a market economy, in which the State had to adequately balance the rights of owners and tenants. In addition, the Court considered that the applicants still benefited from special protection, notably because their contracts were for an indefinite duration and that the increase in rent was still lower than the free market rent and, in any case, not excessive in relation to their income. Accordingly, the Court found that the respondent State, in reconciling the conflicting interests at play, had ensured a distribution of the social and financial burden involved in the housing reform (§§ 205-212).

181. Moreover, in *Edwards v. Malta*, 2006, concerning the requisition of the applicant's tenement and adjoining field by the Government to provide housing for the homeless, the Court also found a violation of Article 1 of Protocol No. 1 on account of the constraints placed on the enjoyment of the applicant owner's rights. The Court accepted the legitimate aim pursued by the impugned requisition and rent control, which was to ensure the just distribution and use of housing resources, with a view to securing the social protection of tenants, preventing homelessness, as well as at protecting the dignity of poorly off tenants (§ 67). However, in assessing whether a fair balance between the general interest of the community and the applicant's right to the peaceful enjoyment of his possessions had been achieved, the Court noted that the owner had lost control of his property for almost 30 years, the rent he received in compensation was extremely low compared to the market rate and that he had no influence over the selection of the tenant or over any of the fundamental terms of the tenancy. Therefore, it found that a disproportionate and excessive burden has been placed on the owner, who had to bear most of the social and financial costs of providing housing for others (§§ 73-79).

182. In *Lindheim and Others v. Norway*, 2012, legislative amendments granted lessees of land, used for permanent or holiday homes, the right to extend their leases on the same terms as the previous lease for an unlimited period of time. The Court also found a violation of Article 1 of Protocol No. 1. It considered that the social policy considerations pursued by the legislation, namely to protect the interests of leaseholders lacking financial means, were legitimate as the lifting of rent controls in 2002 had substantially affected many unprepared tenants by drastically increasing their ground rent (§§ 97-100). However, the Court held that the legislative amendments placed a disproportionate burden on the applicants due to a number of factors including that the level of rent was strikingly low, extensions were of an indefinite duration and that the rent could only be increased in line with the consumer price index and not the value of the land, and only the lessee could terminate the lease agreement (§§ 126-136).

183. The purpose for which a property is used by lessees can also be an important factor in the Court's assessment of the proportionality of rent control measures. In *Bradshaw and Others v. Malta*, 2018, where the subject of the lease was a property used by a band club, the Court noted that the use being made of the premises was for social and cultural activities, thus of a commercial

nature, as opposed to, for example, social housing, which involved a less significant degree of public interest than in other cases and which did not justify such a substantial reduction of rent compared with the free market rental value (§§ 58 and 63-66).

#### D. Other measures of State control

184. In *Garib v. the Netherlands* [GC], 2017, the Court examined a complaint under Article 2 of Protocol No. 4 to the Convention against town planning laws which required persons wishing to live in certain city districts to either have already been residing locally for the preceding six years or have an income from work in order to obtain a housing permit in that area. The aim of the legislation was to stop the decline and stigmatisation of certain impoverished inner-city districts in Rotterdam by encouraging settlement by persons who were not dependent on social welfare. The Court noted that, given the social and economic context of the case, the legislature's margin of appreciation in principle extended both to its decision to intervene in the subject area and, once having intervened, to the detailed rules it laid down in order to achieve a balance between the competing public and private interests. More specifically, it reiterated that in an area as complex and difficult as that of the development of large cities, the State enjoyed a wide margin of appreciation in order to implement their town-planning policy (§§ 138-139).

185. In determining whether the interference with the applicant's rights, whose application for a housing permit was rejected due to her not meeting either requirement, was justified, the Court assessed the legislative framework and the applicant's individual circumstances. The Court found that there was no evidence that the authorities' policy choices at the material time were plainly wrong or produced disproportionate negative effects at the level of the individual affected. On the contrary, the evidence was that the socioeconomic composition of the relevant districts had begun to change - more new settlers had been in work than before (§§ 147-148). In addition, the Court accorded considerable importance to the inclusion of safeguards which indicated that adequate provision had been made for the rights and interests of persons such as the applicant: sufficient alternative housing had to be available locally for those who did not qualify for a permit; the designation of districts had to be reviewed every four years and the relevant Minister would report every five years to Parliament on the effectiveness of the legislation and its effects in practice; and an individual hardship clause was included. The availability of judicial review (at two levels of jurisdiction satisfying Article 6) provided additional protection. As a result, the Court found that the respondent State had not exceeded the margin of appreciation afforded to it (§§ 150-157).

186. Moreover, in balancing the applicant's interests against the public interest pursued by the legislation, the Court held that the applicant's personal situation, as a result of the refusal of her housing permit, was not particularly compelling. The Court noted, *inter alia*, that there was no suggestion that the applicant had suffered any hardship, she had refused to state why - personal preference apart - she wished to remain in the district, and it emerged that she had moved to Government-subsidised housing in a different municipality just before her six-year waiting period ended. As a result, the Court found that the consequences for the applicant of the refusal to her of a housing permit did not amount to such disproportionate hardship that her interest should outweigh the general interest served by the consistent application of the measure in issue (§§ 160-165). Were an unsupported personal preference to be accepted, the domestic authorities and the Court would be deprived of the possibility of weighing up the public and private interests involved and public decision-making would be overridden, in effect reducing the State's margin of appreciation to nought (§ 166).

#### E. Housing benefits

187. The Court's case-law on housing benefits is mainly to be found under Article 14 read in conjunction with Article 1 of Protocol No. 1 to the Convention. *Vrountou v. Cyprus*, 2015, concerned



the denial of a refugee card, the sole means of obtaining a housing benefit, on the basis that the applicant was the child of a displaced woman rather than a displaced man. The Court found that there was no objective and reasonable justification for the difference in treatment and therefore a violation of these provisions (§ 76). Among other factors, the Court considered that the housing benefit clearly fell within the ambit of Article 1 of Protocol No. 1 because, were it not for the need to have a refugee card, the applicant would have had a right, enforceable under domestic law, to receive housing assistance (§§ 64-66).

188. In *J.D. and A. v. the United Kingdom*, 2019, concerning the failure to make a distinction in favour of applicants in a vulnerable situation when reducing housing benefits, the Court examined complaints relating to the State's positive obligations under Article 14, namely the obligation to treat differently persons whose situations are significantly different. The two applicants, tenants of social housing, complained under Article 14 in conjunction with Article 1 of Protocol No. 1 that the reduction of their housing benefits to which they had previously been entitled, as a result of a change to the statutory scheme aimed at saving public funds, had put them in a more precarious position than others affected by the reduction because of their personal circumstances: the first applicant cared full-time for her disabled child and the second was housed under a 'sanctuary scheme' to protect those who had experienced and remained at risk of serious domestic violence.

189. Having established that the applicants, who were treated in the same way as other recipients of the housing benefit even though their circumstances were significantly different, were particularly prejudiced by the impugned measure, the Court considered whether such failure to treat differently was objectively and reasonably justified. In the circumstances of the case, where the alleged discrimination was on the basis of disability and gender, very weighty reasons would be required to justify the impugned measure in respect of the applicants (§§ 96-97).

190. As regards the first applicant, the Court found that while it would have been extremely disruptive and highly undesirable for her to move, she could move to smaller, appropriately adapted accommodation and a discretionary housing benefit was available to her. The Court was satisfied that these amounted to sufficiently weighty reasons for it to conclude that the means employed to implement the measure were proportional and the difference in treatment was justified (§§ 101-102). However, as regards the second applicant, the Court considered that since the aim of reducing the housing benefit (incentivising her to move to a smaller house) conflicted with the aim of the 'sanctuary scheme' (to enable her to remain in her home for her own safety), no weighty reasons had been given to justify the prioritisation of one legitimate aim over the other. Accordingly, the imposition of the statutory change on that small and easily identifiable group had not been justified and was discriminatory (§§ 103-105).



## VI. Specific vulnerable groups

### Article 3 of the Convention

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

### Article 8 of the Convention - Right to respect private and family life

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.  
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

### Article 14 of the Convention – Prohibition of discrimination

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

### Article 1 of Protocol No. 1 – Right to property

“1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.  
2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

### Article 2 of Protocol No. 1 – Right to education

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

### Article 4 of Protocol No. 4 – Prohibition of collective expulsion of aliens

“Collective expulsion of aliens is prohibited.”

191. This Chapter will consider the social dimension of the Court’s case-law relating to certain vulnerable groups such as migrants/asylum seekers, persons with disabilities and Roma people.

### A. Migrants/Asylum-seekers<sup>27</sup>

192. In its assessment of their Convention rights, the Court pays particular attention to the vulnerable status of migrants/asylum-seekers given their precarious situation and past experiences (*M.S.S. v. Belgium and Greece* [GC], 2011, §§ 232 and 251; *B.G. and Others v. France*, 2020, § 78). This is particularly so when children are involved, to which the Court has referred to as being in a situation of “extreme vulnerability”, whether accompanied or unaccompanied, that takes

<sup>27</sup> See also, *Case-Law Guide on Immigration of the European Convention on Human Rights*.

precedence over considerations relating to his or her status as an irregular migrant (*N.T.P. and Others v. France*, 2018, § 44; *Khan v. France*, 2019, §§ 73-74 and §§ 92-93; *B.G. and Others v. France*, 2020, § 79).

193. The Court has reiterated that Article 3 does not oblige States to provide everyone within their jurisdiction with a home nor to give migrants financial assistance to enable them to maintain a certain standard of living, but the responsibility of the State may be engaged under Article 3 where an applicant, in circumstances wholly dependent on State support, finds himself/herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity (*M.S.S. v. Belgium and Greece* [GC], 2011, §§ 249 and 253; *Tarakhel v. Switzerland* [GC], 2014, §§ 95 and 98). In *M.S.S. v. Belgium and Greece* [GC], 2011, the Court examined under Article 3 complaints of an asylum-seeker who was living on the streets for several months in a state of extreme poverty without any means of subsistence (unable to cater for most basic needs such as food and hygiene) and under the constant fear of being attacked and robbed. The Court found a violation of Article 3 on account of the failure by the respondent State to have due regard to the applicant's vulnerability as an asylum-seeker and their inaction in the particularly serious situation in which he had found himself for months. It considered that the applicant had been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation had aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. His living conditions, combined with the prolonged uncertainty in which he had remained and the total lack of any prospects of his situation improving, had attained the level of severity required to fall within the scope of Article 3 of the Convention (§§ 263-264).

194. A similar conclusion was reached by the Court in *N.H. and Others v. France*, 2020, concerning asylum seekers who, due to administrative delays preventing them from receiving the support provided for by law pending their asylum application, were forced to live rough in the street for several months, without access to sanitary facilities, having no means of subsistence and constantly in fear of being attacked or robbed. The Court found that the authorities had failed to fulfil their duties towards the applicants under domestic law and had not provided an appropriate response upon being alerted of the applicants' precarious situation. Accordingly, the applicants had been victims of degrading treatment, with the authorities showing disrespect for their dignity, that had exceeded the threshold of severity for the purposes of Article 3 of the Convention (§§ 165-186). On the other hand, the Court held that the Article 3 threshold was not reached in respect of one applicant who had also lived in a tent for months but who had received documents certifying his asylum-seeker status and financial assistance within a comparatively shorter period of time (§ 187).

195. Furthermore, in *Tarakhel v. Switzerland* [GC], 2014, concerning the proposed removal to Italy of an Afghan couple of asylum-seekers and their six minor children, the Court held that an expulsion would constitute a violation of Article 3 in the absence of guarantees obtained by the respondent State that the applicants would be taken charge of in facilities and conditions (adequate accommodation, food, health care, etc.) adapted to the age of the children and that the family would be kept together upon arrival in the receiving State (§§ 120-122).

196. The Court has come to similar conclusions in other cases involving children:

- *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 2006, concerning the detention of an unaccompanied five year old in a centre designed for adults and incapable of meeting a child's needs, followed by her deportation without the requisite measures and precautions for her situation (§§ 50-59 and 66-71);
- *Muskhadzhiyeva and Others v. Belgium*, 2010, concerning the detention of four minor asylum-seekers, respectively aged seven months, three and a half years, five and seven years at the material time, accompanied by their parents, in a facility ill-equipped to receive children which had resulted in deterioration of their psychological health in particular (§§ 59-63);

- *Popov v. France*, 2012, concerning the detention of minor children, pending expulsion, accompanied by their parents, for fifteen days, in an adult environment with a strong police presence, with no activities to keep them occupied, combined with their parents’ distress, which was clearly ill-suited to their age (§§ 91-103);
- *A.B. and Others v. France*, 2016, concerning the detention of a four-year-old, albeit accompanied with his parents, for eighteen days in a detention facility in which, *inter alia*, he was exposed to particularly high levels of noise and mixed with armed police officers in uniform during transfers to various judicial and administrative hearings which he was obliged to attend as he could not be left alone (§§ 112-115);
- *Khan v. France*, 2019, concerning the precarious living conditions of an unaccompanied foreign minor in a shantytown, an environment manifestly unsuitable for children, for several months and the failure by the authorities to execute a judicial placement order for the applicant, who was in a vulnerable position, to be provided with care and protection (§§ 81-95);
- *Moustahi v. France*, 2020, concerning the interception at sea and subsequent detention of unaccompanied minors though they being arbitrarily associated with an unrelated adult and deportation without precautions to a third State (§§ 58-70).

197. In *Moustahi v. France*, 2020, the Court also found violations of Articles 5 and 4 of Protocol No. 4 to the Convention with regard to the detention and expulsion of the unaccompanied minors. It underlined the considerable vulnerability of the children due to their age (five and three years old) and the fact that they had been left to cope on their own, separated from any member of their family or any designated adult to look after them (§§ 91-94; §§ 103-104; and §§ 133-137). In addition, the Court found a violation of Article 8 in relation to the authorities’ refusal to allow the father to reunite or meet with his children who were placed in detention, on account of the illegality of the children’s detention and, importantly, the failure to ensure respect for the children’s’ best interests by arbitrarily associating them with an unrelated adult (§§ 113-115; see also *Popov v. France*, 2012, §§ 140-148, on “child’s best interests” under Article 8 in the context of the detention of migrant children).

198. In other cases, however, the Court has concluded to a finding of non-violation of Article 3:

- *N.T.P. and Others v. France*, 2018, where the applicants (a mother and her three young children) had been provided with night-time accommodation in a privately run shelter funded by the authorities and had been given food and medical care and the children had been in school (§§ 45-49);
- *B.G. and Others v. France*, 2020, where the applicants (families with minor children) had temporarily stayed in a tented camp set up in a car park, with the authorities having taken measures to improve their material living conditions, in particular by ensuring medical care and schooling for the children, and their subsequent placement in a flat (§§ 87-89).

## B. Persons with disabilities<sup>28</sup>

199. The Court has dealt with cases concerning rights of persons with disabilities under various Articles of the Convention. The Court has identified persons with disabilities as belonging to a particularly vulnerable group, noting that they have historically been subject to discrimination and prejudice that has resulted in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs. Therefore,

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<sup>28</sup> See also, sub-section ‘Health and disability’ under chapter ‘Discrimination by ground’ of the *Case-Law Guide on Article 14 of the European Convention on Human Rights* and sub-section ‘Disability issues’ under chapter ‘Private life’ of the *Case-Law Guide on Article 8 of the European Convention on Human Rights*.

the Court has stressed the need to prevent discrimination against people with disabilities and foster their full participation and integration in society, underlining that the State’s margin of appreciation is substantially narrower in this context and that it must have very weighty reasons for restricting fundamental rights of such people (*Glor v. Switzerland*, 2009, § 84; *Guberina v. Croatia*, 2016, § 73).

### 1. Access to specific areas, buildings and services

200. The Court has held that Article 8 cannot be taken to be generally applicable each time there is a disruption in the everyday life of a person alleging lack of access to a public establishment: it applies only in exceptional cases where such a lack of access to public buildings and buildings open to the public affects his/her life in such a way as to interfere with the right to personal development and the right to establish and develop relationships with other human beings and the outside world. In such circumstances, the State might have a positive obligation to ensure access to the buildings in question (*Zehnalova and Zehnal v. the Czech Republic* (dec.), 2002; *Farcaș v. Romania* (dec.), 2010, § 68; *Arnar Helgi Lárusson v. Iceland*, 2022, §§ 44-46).

201. In the case of access to a private beach by a person with disabilities, the Court held that the right asserted concerned interpersonal relations of such broad and indeterminate scope that there could be no conceivable direct link between the measures the State was being urged to take in order to make good the omissions of the private bathing establishments and the applicant’s private life. Accordingly Article 8 was not applicable (*Botta v. Italy*, 1998, § 35).

202. Furthermore, in cases concerning restricted access to certain buildings and services of persons with disabilities, the Court has found Article 8 not to be applicable and rejected the complaint as incompatible *ratione materiae*. In *Zehnalova and Zehnal v. the Czech Republic* (dec.), 2002, concerning access to public buildings and other buildings open to the public, the Court considered that there had been no special link between the lack of access to the buildings in question and the particular needs of the applicant’s private life. It expressed doubts, in view of the large number of buildings complained of, as to the applicant’s needs to use them on a daily basis and whether there was a direct and immediate link between the measures the State was being urged to take and the applicants’ private life. Accordingly, the Court held that Article 8 was not applicable.

203. Relying on similar grounds the Court held Article 8 not to be applicable in *Farcaș v. Romania* (dec.), 2010, a case concerning the applicant’s complaint about the alleged failure of the authorities to take positive measures to facilitate access to certain public buildings and public transport. In addition, the Court noted that the national authorities had not remained inactive and that the situation in the town where the applicant was living had gradually improved, with the adoption of legislation that encouraged the integration of disabled people in social, economic and cultural life, and imposed obligations on the various players in public life to facilitate the access of these people to the various buildings intended for the public and their integration into society (§§ 68-71).

204. In *Glaisen v. Switzerland* (dec.), 2019, the Court examined a complaint about the lack of access to a private cinema by a paraplegic person wishing to see a film that was not being shown in cinemas with disabled access. While noting the applicant’s social and family situation and acknowledging the importance of going to the cinema as not being merely confined to seeing a film, but also involving exchanges with other people, the Court nonetheless considered that Article 8 could not be construed as conferring a right of access to a particular cinema to watch a specific film. In particular, the Court noted that there was general access to other cinemas in the vicinity which were adapted to the applicant’s needs (§§ 48-49). Therefore, the refusal to allow the applicant to enter a cinema to see a specific film did not affect his life in such a way as to interfere with his right to personal development or to establish and develop relationships with other human beings and the outside world (§ 50).

205. However, the Court distinguished the above-noted cases from that of the applicant in *Arnar Helgi Lárússon v. Iceland*, 2022, a case concerning an applicant wheelchair user who unsuccessfully took proceedings to improve the accessibility of two public buildings (arts and cultural centres) in his town. The Court found that the lack of wheelchair access fell within the ambit of “private life” guaranteed by Article 8. The Court considered that the applicant had clearly identified two particular buildings which were publicly owned and/or operated and which had appeared to play an important role in the local life of his municipality, the lack of access to which had hindered him from attending a substantial part of the cultural activities, social events and parties offered by his community. Underlining European and international standards to the effect that people with disabilities should be enabled to fully integrate into society and have equal opportunities for participation in the life of the community, the Court found that the impugned situation was liable to affect the applicant’s rights to personal development and to establish and develop relationships with the outside world, thereby falling within the “ambit” of Article 8 (§§ 44-46). On the merits, the Court did not find a violation of the Convention notably in that the national authorities had already made considerable efforts to improve accessibility of public buildings in the municipality, prioritising educational and sports facilities, which the Court did not consider arbitrary nor unreasonable (§§ 63-65).

206. In other instances, the Court has considered the applicability of Article 8 to certain complaints without, however, taking a final position on the matter. *Mótka v. Poland* (dec.), 2006, concerned the lack of assistance to a handicapped person to enter a polling station to cast his vote. While finding it unnecessary to determine the applicability of the Article as the application was inadmissible on other grounds, the Court did not rule out the possibility of a sufficient link to Article 8, having regard to the fact that the applicant’s involvement in the life of his local community and the exercise of his civic duties was affected, thereby touching upon the possibility for the applicant to develop social relations with others and for his own personal development.<sup>29</sup> Similarly, in *Farcaş v. Romania* (dec.), 2010, the applicant complained about the alleged impossibility for him to challenge the decisions rendered by his employer and various administrative authorities because of the architectural obstacles which did not allow him access to the buildings of the competent authorities and courts and the Court indicated that it did not exclude the possibility of Article 8 being applicable, taking into account the consequences of the contested decisions on the applicant’s daily life (§§ 62-63). In *Bayrakci v. Turkey*, 2013, concerning the absence in the workplace of toilet facilities adapted to the applicant’s disabilities, the Court asserted that it had no doubts that the absence of toilet facilities could have real and serious consequences on the applicant’s daily life. In addition, it considered that it could not be excluded that the lack of toilet facilities adapted to the applicant’s needs, who wished to lead a normal active life, may have aroused in him feelings of humiliation and distress capable of affecting his personal autonomy, and therefore the quality of his private life. Accordingly, the Court did not exclude that there existed a direct and immediate link between the measures requested by the applicant and his private life, and therefore concluded that Article 8 could apply in the circumstances of the case (§§ 26-27).

207. Moreover, the Court also considered the applicant’s complaints, in *Farcaş v. Romania* (dec.), 2010, (see the preceding paragraph) about his alleged inability to access a court building and public services, under Articles 6 § 1 (right of access to a court) and 34 (right of individual petition) of the Convention. The Court found that Article 6 § 1 was applicable given that the applicant’s complaint about the impossibility to bring legal proceedings due to his disability had direct implications for his civil rights and obligations within the meaning of Article 6 § 1 (§§ 47-48). It also considered that Article 34 could come into play if it transpired that the applicant had not been able to exhaust

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<sup>29</sup> Under “Relevant domestic and international law”, the Court referred to various texts adopted by the Council of Europe which stress the importance of full participation of people with disabilities in society, in particular in political and public life, such as Recommendation No. R (92) 6 and Recommendation No. Rec(2006)5 of the Committee of Ministers, Recommendation 1185 (1992) of the Parliamentary Assembly and Article 15 of the European Social Charter (revised).



domestic remedies, consult a lawyer to prepare his defence before the domestic courts or communicate freely with the Court. In this connection, positive measures could be expected from the State under Article 34 (§ 49). On the facts of the case, however, the Court concluded that the applicant's right of access to a court and right of individual petition had not been hindered by such insurmountable obstacles as to prevent the applicant from bringing proceedings or from lodging an application or communicating with the Court, noting in particular the availability of the postal service or an intermediary for such purposes (§§ 50-54).

## 2. Disability benefits / Tax relief

208. The Court has been mindful of the special characteristics of disability benefits and the circumstances of the persons concerned, particularly when such benefits constitute their only source of income or a significant part thereof (*Bélané Nagy v. Hungary* [GC], 2016, § 123; *Kjartan Ásmundsson v. Iceland*, 2004, § 44).

209. In *Bélané Nagy v. Hungary* [GC], 2016, the Court examined the discontinuation of the applicant's disability benefits due to the introduction by law of new eligibility criteria. While accepting that the interference had been in accordance with the law and in pursuit of a legitimate purpose (protecting public funds), the Court found that there was no reasonable relationship of proportionality between the aim pursued and the means applied as the applicant had been subjected thereby to a complete deprivation of any entitlements. In particular, the Court underlined the fact that the applicant did not have any other significant income on which to subsist and that she evidently had difficulties in pursuing gainful employment and belonged to the vulnerable group of disabled persons. Accordingly, the Court found a violation of Article 1 of Protocol No. 1 (§§ 123-126).

210. Similarly, in *Kjartan Ásmundsson v. Iceland*, 2004, concerning the complete discontinuation of a disability benefit following legislative amendments, the Court noted that such a total deprivation of the benefit affected the applicant in a particularly harsh manner as he had been receiving it on a regular basis for twenty years and it constituted no less than one-third of his gross monthly income (§ 44). In addition, the Court observed that the legitimate concern to resolve the Pension Fund's financial difficulties seemed hard to reconcile with the fact that the vast majority of the 689 disability pensioners had continued to receive disability benefits at the same level as before the adoption of the new rules, while 54 persons, among which the applicant, had to bear the most drastic measure of all, namely the total loss of their pension entitlements. As such, the applicant, as an individual, was made to bear an excessive and disproportionate burden, in breach of Article 1 of Protocol No. 1 (§§ 43-45).

211. Moreover, in *Mocie v. France*, 2003, the Court examined a complaint on account of the unreasonable length of proceedings following a request for an increase in the applicant's military invalidity pension. The Court found a violation of Article 6 § 1 of the Convention, noting, in particular, that the invalidity pension had made up the bulk of the applicant's income and that the proceedings, which had, in substance, been aimed at boosting the applicant's pension in view of his deteriorating health, had therefore been of particular importance to him, calling for particular diligence on the part of the authorities (§ 22).

212. The Court has examined other complaints concerning disability benefits under the prohibition of discrimination of Article 14 of the Convention:

- *Koua Poirrez v. France*, 2003, concerning the refusal to grant a disability benefit to a physically disabled foreigner on account of his nationality (§§ 47-50; violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1);
- *Di Trizio v. Switzerland*, 2016, concerning the refusal of a disability allowance to the applicant arising out of the method of calculation of invalidity benefits due to her choice to



work part-time after giving birth (§§ 88-104; violation of Article 14 taken in conjunction with Article 8);

- *Belli and Arquier-Martinez v. Switzerland*, 2018, concerning the discontinuation of non-contributory disability benefits owing to the residence abroad of the applicants; the first applicant, who had been deaf since birth, with difficulties speaking her mother tongue and no capacity of discernment on account of a severe disability which had required comprehensive therapeutic provision throughout her life, and her mother, the second applicant, who provided the requisite care and who was also her guardian (§§ 95-113; no violation of Article 14 taken in conjunction with Article 8);
- *Popović and Others v. Serbia*, 2020, concerning the alleged discriminatory treatment of civilian beneficiaries of disability benefits, who were in receipt of a lower amount of the same benefit than those classified as military beneficiaries, despite having exactly the same paraplegic disability (§§ 74-80; no violation Article 14 read in conjunction with Article 1 of Protocol No. 1).

213. In the context of tax relief due to a disability, in *Glor v. Switzerland*, 2009, the Court examined a complaint regarding the obligation to pay a military-service exemption tax by a person who was declared unfit for military service due to diabetes, as the competent tax authorities considered his disability a minor one. As to the applicability of Article 8, it considered that a tax collected by the State which has its origin in unfitness to serve in the army for health reasons – that is, a factor outside the person’s control – clearly fell within the scope of that Article. Next, in finding that the domestic authorities had failed to strike a fair balance between the protection of the interests of the community and respect for the Convention rights and freedoms of the applicant, the Court noted in particular the applicant’s willingness to do military service, the amount payable, which was not a negligible sum in light of the applicant’s modest income, and the lack of alternatives to the tax, such as the provision of special services in the military that required less physical effort for people in a situation comparable to that of the applicant. It therefore found a violation of Article 14 of the Convention taken in conjunction with Article 8 (§§ 90-98; see also *Ryser v. Switzerland*, 2021, § 28 and §§ 55-63).

214. Moreover, in *Guberina v. Croatia*, 2016, concerning the eligibility for tax relief for the purchase of a suitably adapted property, the Court took into account the housing/accessibility needs of the applicant’s disabled child when considering the differential treatment of the applicant, under Article 14 in conjunction with Article 1 of Protocol No. 1 to the Convention. The Court noted the applicant’s family situation, which had significantly changed with the birth of his son who suffered from multiple disabilities, and in particular the housing conditions in which they had lived - a flat in a residential building with no lift. It found that this situation had severely impaired the child’s mobility and consequently threatened his personal development and ability to reach his maximum potential, making it extremely difficult for him to participate fully in the community and the educational, cultural and social activities available for children (§§ 80-82). Subsequently, in coming to the conclusion that there was no objective and reasonable justification for the difference in treatment, the Court stressed that the competent domestic authorities gave no consideration to principles related to the specific circumstances of the case, such as reasonable accommodation, accessibility and non-discrimination against persons with disabilities with regard to their full and equal participation in all aspects of social life<sup>30</sup> (§§ 92-93).

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<sup>30</sup> The Court relied on the principles set out in the provisions of the UN Convention on the Rights of Persons with Disabilities (CRPD), and in the practice of the Committee on the Rights of Persons with Disabilities and the Committee on Economic, Social and Cultural Rights (§§ 34-37).

### 3. Education<sup>31</sup>

215. The Court has noted the importance of the fundamental principles of universality and non-discrimination in the exercise of the right to education. Inclusive education has been regarded as the most appropriate means of guaranteeing such fundamental principles, as it is geared to promoting equal opportunities for all, including persons with disabilities. Inclusive education indubitably forms part of the States' international responsibility (*Enver Şahin v. Turkey*, 2018, § 55; *G.L. v. Italy*, 2020, § 53).

216. The protection of persons with disabilities includes an obligation for States to ensure "reasonable accommodation" to allow persons with disabilities the opportunity to fully realise their rights, and a failure to do so amounts to discrimination (*Çam v. Turkey*, 2016, §§ 65-67; *Enver Şahin v. Turkey*, 2018, § 60; *G.L. v. Italy*, 2020, § 62).<sup>32</sup> In the educational sphere, the Court has considered that "reasonable accommodation" may take a variety of forms, whether physical or non-physical, educational or organisational, in terms of the architectural accessibility of school buildings, teacher training, curricular adaptation or appropriate facilities: such definition, however, being in principle placed on the national authorities, and not the Court (*Çam v. Turkey*, 2016, § 66; *Enver Şahin v. Turkey*, 2018, § 61; *G.L. v. Italy*, 2020, § 63). Nevertheless, the Court has underlined that national authorities must be particularly attentive to the impact that their choices have on highly vulnerable groups, such as autistic children (*Sanlısoy v. Turkey* (dec.), 2016, § 61).

217. In *Çam v. Turkey*, 2016, the Court examined the refusal to enrol the applicant, who was blind, as a student at the Turkish Music Academy due to the lack of appropriate infrastructure. The Court noted that the relevant domestic authorities had at no stage attempted to identify the applicant's needs or to explain how her blindness could have impeded her access to a musical education, nor considered physical adaptations in order to meet any special educational needs arising from the applicant's blindness. As a result, the Court considered that the applicant was denied, without any objective and reasonable justification, an opportunity to study in the Music Academy, solely on account of her visual disability, finding a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1 (§§ 68-69).

218. Furthermore, in *Enver Şahin v. Turkey*, 2018, the Court examined the rejection of a disabled student's request for the university to carry out necessary alterations and work to make the teaching premises accessible. The Court found that the national educational authorities, in only offering human assistance as an alternative due to the lack of funding available, had failed to conduct an individual assessment of the disabled student's needs and had not given consideration to its potential effects on his security, dignity and autonomy. Relying on the notion of personal autonomy under Article 8, which the Court considered akin to Article 2 of Protocol No. 1, it found that the proposed measure of assistance could not have been deemed reasonable under Article 8 because it disregarded the applicant's need to live as independently and autonomously as possible (§§ 62-65). The subsequent judicial response had also failed to identify the applicant's real needs and the ways and means of meeting them without imposing a disproportionate or undue burden on the authorities (§§ 66-67). Accordingly, the Court concluded that the national authorities had not reacted with the requisite diligence to ensure that the applicant could continue to exercise his right to education on an equal footing with other students and, consequently, to strike a fair balance between the competing interests at stake, in breach of Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1 (§ 68).

219. The Court came to a similar conclusion in *G.L. v. Italy*, 2020, §§ 70-72, concerning a child suffering from non-verbal autism who was not able to receive, due to a lack of financial resources,

<sup>31</sup> See sub-section 'Persons with disabilities' under chapter 'Right to education' of the *Case-Law Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights*.

<sup>32</sup> The Court referred to the need to interpret Article 14 in the light of the requirements set out in the CRPD.

the specialised assistance to which she was entitled under the relevant legislation, which prevented her from continuing to attend primary school in conditions equivalent to those enjoyed by non-disabled pupils. The Court noted, in particular, that the national authorities had never considered the possibility that the lack of resources could be compensated for, not by a change in reasonable accommodation to ensure equal opportunities for children with disabilities, but by a reduction in the overall provision of education when distributed equally between non-disabled and disabled pupils. It considered, in this regard, that any budgetary restrictions had to have an equivalent impact on the provision of education for disabled and non-disabled pupils alike. The applicant should have benefited from specialised assistance aimed at promoting her autonomy and personal communication and improving her learning, social life and school integration, in order to avoid the risk of marginalisation (§§ 68-69)<sup>33</sup>. Moreover, the Court considered that the discrimination sustained by the applicant had been all the more serious as it had taken place in the context of primary school, which formed the foundation of child education and social integration, giving children their first experience of living together in a community (§ 71).

### C. Roma people

220. As evidenced in the cases concerning evictions (see Chapter on ‘Housing’ above), the Court has stressed the need for States to take into account the vulnerable and disadvantaged status of the Roma as regards the protection of their rights, which in certain circumstances may also give rise to a positive obligation under the Convention. The Court has considered such a requirement for special protection to also extend to the sphere of education, reiterating that as a result of their history the Roma are a specific type of disadvantaged and vulnerable minority (*D.H. and Others v. the Czech Republic* [GC], 2007, § 182; *Oršuš and Others v. Croatia* [GC], 2010, § 147). In taking steps to achieve the social and educational integration of the Roma, States must ensure that these are attended by safeguards that would ensure sufficient regard to their special needs as members of a disadvantaged group (*D.H. and Others v. the Czech Republic* [GC], 2007, §§ 205-207; *Oršuš and Others v. Croatia* [GC], 2010, §§ 180-182).

221. The Court has found violations of Article 14 read in conjunction with Article 2 of Protocol No. 1 in a number of cases concerning the right to education of Roma pupils. These cases concerned the disproportionate number of Roma children placed in special schools for children with mental disabilities (*D.H. and Others v. the Czech Republic* [GC], 2007; *Horváth and Kiss v. Hungary*, 2013), in Roma-only classes (*Oršuš and Others v. Croatia* [GC], 2010), or in Roma-only schools (*Lavida and Others v. Greece*, 2013), as well as their inability to access school before being assigned to special classrooms in an annex to the main primary school buildings (*Sampanis and Others v. Greece*, 2008). In all of these cases the Court found that the differential treatment to which Roma pupils had been subject, albeit unintentional, had constituted a form of indirect discrimination.

222. The Court has taken into account the special needs of the Roma also in other areas. For instance, in *Muñoz Díaz v. Spain*, 2009, concerning the refusal to recognise the validity of a Roma marriage for purposes of establishing an entitlement to a survivor’s pension, the Court stressed that the vulnerable position of Roma means that some special consideration should be given to their needs and to their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases (§ 61).

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<sup>33</sup> In support of its conclusions, the Court referred to Article 15 of the European Social Charter (revised), according to which States should “promote the full social integration and participation in the life of the community [of disabled persons] in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility” and Article 24 of the CRPD.

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The case-law cited in this Guide refers to judgments or decisions delivered by the Court and to decisions or reports of the European Commission of Human Rights (“the Commission”).

Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation “(dec.)” indicates that the citation is of a decision of the Court and “[GC]” that the case was heard by the Grand Chamber.

Chamber judgments that are not final within the meaning of Article 44 of the Convention are marked with an asterisk in the list below. Article 44 § 2 of the Convention provides: “The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43”. In cases where a request for referral is accepted by the Grand Chamber panel, the Chamber judgment does not become final and thus has no legal effect; it is the subsequent Grand Chamber judgment that becomes final.

The hyperlinks to the cases cited in the electronic version of the Guide are directed to the HUDOC database (<http://hudoc.echr.coe.int>) which provides access to the case-law of the Court (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), and of the Commission (decisions and reports) and to the resolutions of the Committee of Ministers.

The Court delivers its judgments and decisions in English and/or French, its two official languages. HUDOC also contains translations of many important cases into more than thirty non-official languages, and links to around one hundred online case-law collections produced by third parties. All the language versions available for cited cases are accessible via the ‘Language versions’ tab in the HUDOC database, a tab which can be found after you click on the case hyperlink.

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