



PIL (2019) Case Law
Appendix I Revised

CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS RELATED TO PUBLIC INTERNATIONAL LAW

**prepared by the
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This document contains press releases and legal summaries of relevant cases of the European Court of Human Rights related to public international law.

The full texts of the Court's judgments are accessible on its website (<http://www.hudoc.echr.coe.int>).

**CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS RELATED TO PUBLIC
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33. ECtHR, *Dadayan v. Armenia* No. 14078/12, Chamber judgment of 6 September 2018 (Article 6-1, Right to a fair trial – Violation; Article 6-3(d), Right to obtain attendance and examination of witnesses – Violation). The applicant, an Armenian national, was prosecuted and convicted in Armenia for the smuggling of enriched uranium on the basis of two other accused smugglers’ witness statements, prosecuted and convicted in Georgia, and whom the Armenian trial court never heard in person due to the Georgian authorities’ refusal to authorise their transfer to Armenia. The applicant successfully claimed his right to a fair trial.93

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- 37. ECtHR, *Assem Hassan Ali v. Denmark*, No. 25593/14, Chamber judgment of 23 October 2018 (Article 8, Right to respect for private and family life – No violation).** The applicant, a Jordanian national, contested a deportation order issued following serious crimes he had committed in Denmark, invoking Article 8 of the *European Convention on Human Rights* and citing his links to his wife and child remaining in Denmark. His claim was unsuccessful as the Court recognised that the domestic courts had carefully balanced the competing interests and had explicitly taken into account the criteria set out in the Court’s case law regarding Article 8.103
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- 39. ECtHR, *Arrozpide Sarasola and Other v. Spain*, No. 65101/16, Chamber judgment of 23 October 2018 (Article 5-1, Right to liberty and security – No violation; Article 6, Right of access to a court – Violation; Article 7, No punishment without law – No violation).** The case concerned the calculation of the maximum length of prison terms to be served in Spain by members of the terrorist organisation ETA and the question of whether time already served in France should be taken into account.107
- 40. ECtHR, *Khanh v. Cyprus*, No. 43639/12, Chamber judgment of 4 December 2018 (Article 3, Prohibition of torture and of inhuman or degrading treatment – Violation).** The applicant, a Vietnamese national, successfully argued that her conditions of detention at the Limassol police station violated Article 3 of the *European Convention on Human Rights*. The Court considered that the conditions of the applicant's detention subjected her to hardship beyond the unavoidable level of suffering inherent in detention.111

1. **ECtHR, *X v. Sweden*, No. 36417/16, Chamber judgment of 9 January 2018 (Article 3, Prohibition of torture and of inhuman or degrading treatment - Violation).** The applicant, a Moroccan national living in Sweden, successfully claimed that he would face torture if Sweden deported him to Morocco.
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ECHR 003 (2018)
09.01.2018

Press release issued by the Registrar

The applicant is a Moroccan national who currently lives in Sweden. He has been granted anonymity by the Court. The case concerned his complaint that he would face torture in Morocco if Sweden deported him. The Court had indicated to Sweden under Rule 39 of the Rules of Court in September 2016 that the deportation order should not be carried out until further notice.

The applicant was granted a Swedish residence permit in 2005. In March 2016 the Swedish Security Service applied to the Migration Agency for an order to expel him, saying that he was a national security threat. He applied for asylum and international protection during the Migration Agency's examination of the case, arguing that as the Security Service had labelled him as a terrorist he would risk torture and at least 10 years' prison if deported to Morocco. Although he had never been suspected of any crime in his native country, the Swedish authorities would inform their Moroccan counterparts of the reason for his arrest and expulsion, which could lead to him being ill-treated and held in arbitrary detention as a terrorism suspect.

The Migration Agency granted the Security Service's request and rejected the applicant's asylum application. It did not agree with his arguments that he faced a risk of ill-treatment if he was deported and shared the Security Service's assessment about him. In June 2016 the Migration Court of Appeal agreed with the Migration Agency's assessment and it was then upheld by the Government in September of the same year. The Government also agreed with the Security Service's assessment of the applicant and found that it was reasonable to fear that he might commit or participate in a terrorist offence.

The Government stayed enforcement of the expulsion order on 22 September 2016 after the Court's indication.

Relying on Article 3 (prohibition of torture and of inhuman or degrading treatment), the applicant complained that if Sweden deported him to Morocco he would be considered as a security threat and subjected to ill-treatment.

Violation of Article 3 – in the event of Mr X's deportation to Morocco

Interim measure (Rule 39 of the Rules of Court) -not to expel Mr X- still in force until judgment becomes final or until further order.

Just satisfaction: EUR 3,300 (costs and expenses)

2. ECtHR, *Milić and Others v. Croatia*, No. 38766/15, Chamber judgment of 25 January 2018 (Article 2, Right to life - No violation). The applicants, the members of a Croatian family, unsuccessfully complained that the national authorities had not carried out a proper investigation into the death of their relative who was killed in August 1995 during a Croatian army operation to retake the Krajina area.
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ECHR 028 (2018)
25.01.2018

Press release issued by the Registrar

The applicants are a Croatian family, Milica Milić, Vera Šumaković, Nada Jurašin and Zoran Milić. They live in Concord, the United States of America (Milica Milić), Dobrinči, Serbia (Nada Jurašin and Zoran Milić), and Belgrade (Vera Šumaković).

The case concerned their complaint that the Croatian authorities had not carried out a proper investigation into the death of their relative, P.M., born in 1942, respectively the first applicant's husband and the other applicants' father.

P.M. was killed in August 1995 during a Croatian army operation to retake the Krajina area. The applicants allege that he was killed outside his own house and was unarmed while the Government states that he was armed and was killed in an exchange of fire. An investigation into his death was begun in September 2005 and was ultimately closed in 2015 with no charges being brought. A claim for damages by the family was also unsuccessful.

The applicants relied in particular on Article 2 (right to life) in their complaint.

No violation of Article 2

3. ECtHR, *J.R. and Others v. Greece*, No. 22696/16, Chamber judgment of 25 January 2018 (Article 3, Prohibition of inhuman or degrading treatment - No violation; Article 5-1, Right to liberty and security - No violation; Article 5-2, Right to be informed promptly of the reasons for arrest - Violation; Article 34, Right of individual application - No violation). The applicants, three Afghan nationals, complained about the conditions in which they were held in the Vial reception centre, on the Greek island of Chios and about the circumstances of their detention.

ECHR 029 (2018)

25.01.2018

Press release issued by the Registrar

In today's **Chamber** judgment in the case of *J.R. and Others v. Greece* (application no. 22696/16) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights,

a violation of Article 5 § 2 (right to be informed promptly of the reasons for arrest);

no violation of Article 3 (prohibition of inhuman or degrading treatment); and

no violation of Article 34 (right of individual application).

The case concerned the conditions in which three Afghan nationals were held in the Vial reception centre, on the Greek island of Chios, and the circumstances of their detention.

The Court found in particular that the applicants had been deprived of their liberty for their first month in the centre, until 21 April 2016 when it became a semi-open centre. The Court was nevertheless of the view that the one-month period of detention, whose aim had been to guarantee the possibility of removing the applicants under the EU-Turkey Declaration, was not arbitrary and could not be regarded as "unlawful" within the meaning of Article 5 § 1 (f).

However, the applicants had not been appropriately informed about the reasons for their arrest or the remedies available in order to challenge that detention.

As to the conditions of detention in the centre, the Court noted the emergency situation facing the Greek authorities after significant numbers of migrants had arrived and the ensuing material difficulties. It observed that several NGOs had visited the centre and had partly confirmed the applicants' allegations, but found that the conditions were not severe enough for their detention to be characterised as inhuman or degrading treatment had not been reached.

Principal facts

The applicants, Mr J.R., Ms N.R. and Mr A.R., are Afghan nationals who were born in 1990, 1994 and 1989. The first two are brother and sister, while Mr A.R. is the boyfriend of Ms N.R.

On 21 March 2016 the three applicants, together with the two children of Ms N.R., aged 4 and 7, arrived on the island of Chios, where they were arrested and placed in the VIAL centre (migrant reception, identification and registration centre in a disused factory, known by its acronym VIAL). They remained in the centre until September 2016 (J.R.) and November 2016 (N.R. and A.R.). In the meantime they applied for asylum.

Between 21 March and late April 2016, after the entry into force of the EU-Turkey Declaration (an agreement concerning the return of irregular migrants from Greece to Turkey), the centre had to cope with

large numbers of new arrivals, bringing the total number of occupants to over 2,000 – more than double its capacity. The overcrowding entailed poor living conditions, according to the applicants and partly confirmed by reports of visits by various organisations including Human Rights Watch, the European Committee for the Prevention of Torture (CPT) and the Hellenic Council for Refugees: there was insufficient food, a lack of hygiene, the water supply was often cut off, and medical care and legal assistance were scarce.

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security), the applicants complained about the conditions and length of their detention in the centre, which they regarded as arbitrary. They also complained that they had not received any information about the reasons for their detention, neither in their mother tongue nor in any other language, in breach of Article 5 § 2 (right to be informed promptly of the charge). They argued that the conditions of their detention in the “Vial” centre also breached Article 3 (prohibition of inhuman or degrading treatment). Lastly, J.R. relied on Article 34 (right of individual application), alleging that the fact of being summoned and questioned by the police in October 2016 concerning his application to the Court constituted an attempt to intimidate him and dissuade him from pursuing his case.

The application was lodged with the European Court of Human Rights on 19 April 2016.

Written comments were received from the Office of the UN High Commissioner for Refugees and the UN High Commissioner for Human Rights, after they had been granted leave by the President to intervene as third parties.

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

Kristina **Pardalos** (San Marino), *President*,
 Linos-Alexandre **Sicilianos** (Greece),
 Aleš **Pejchal** (the Czech Republic),
 Ksenija **Turković** (Croatia),
 Armen **Harutyunyan** (Armenia),
 Pauliine **Koskelo** (Finland),
 Tim **Eicke** (the United Kingdom),

and also Abel **Campos**, *Section Registrar*.

Decision of the Court

Article 5 § 1 (right to liberty and security)

The Court noted that on 21 April 2016 the “Vial” Centre had been converted into a semi-open centre and that the applicants could therefore go out during the day. It concluded that the applicants’ detention in the centre between 21 March and 21 April amounted to deprivation of liberty, whereas after that date they were subject only to a restriction of movement.

The Court considered that the situation in question fell within the scope of Article 5 § 1 (f) of the Convention. The applicants had been detained with a view to their deportation, the aim being to prevent them from remaining in Greece unlawfully and to identify and register them as part of the implementation of the “EU-Turkey Declaration”. It noted that the applicants’ deprivation of liberty was based on section 76 of Law no. 3386/2005 and was intended first of all to guarantee the possibility of their removal. It observed that a detention period of one month should not be considered excessive for the purposes of the necessary administrative formalities. Lastly, it noted that the applicants had been released one month and ten days after expressing their wish to apply for asylum.

The Court therefore found that the applicants’ detention had not been arbitrary and that it could not be regarded as “unlawful” within the meaning of Article 5 § 1 (f). There had not, therefore, been a violation of this provision.

Article 5 § 2 (right to be informed promptly of the charge)

The Court found it likely that, while the applicants could have been aware that they had entered Greece unlawfully, they might not have known that their situation was covered by the “EU-Turkey Declaration”, signed the day before their arrest. It noted that, even if they had received an information leaflet, as the Government had stated, its content was not such as to provide them with sufficient details about the reasons for their arrest or the remedies available to them.

The Court thus found that there had been a violation of Article 5 § 2 of the Convention.

Article 3 (prohibition of torture and inhuman or degrading treatment)

The Court noted that the facts in question occurred at the time of an exceptional and sharp increase in migratory flows in Greece, which had created organisational, logistical and structural difficulties. It reiterated that, in view of the absolute nature of Article 3, the factors associated with an increasing influx of migrants could not absolve States of their obligations to ensure that all persons deprived of their liberty were held in conditions compatible with respect for human dignity. It observed that several NGOs had visited the centre and confirmed some of the applicants’ allegations concerning its general condition.

The Court found that the CPT had not been particularly critical of the conditions prevailing in the centre, particularly as regards the aspects that could have concerned the applicants’ situation. Its criticisms had focused mainly on medical care, the lack of adequate information and legal assistance and the poor quality of drinking water and food. It was apparent from the file that those problems were not such as to affect the applicants excessively in terms of Article 3 of the Convention. The Court also noted that the applicants’ detention had been short, namely thirty days. It therefore considered that the threshold of severity required for their detention to be characterised as inhuman or degrading treatment had not been reached. There had not, therefore, been a violation of Article 3.

Article 34 (right of individual application)

The Court reiterated that it was in principle not appropriate for the authorities of a respondent State to enter into direct contact with an applicant in connection with his or her case before the Court, although not all enquiries by authorities about a pending application could be regarded as a measure of intimidation. The summons and questioning to which J.R. was subjected concerned the gathering, for the preparation of the Government’s observations to the Court, of information on the applicants’ residence after leaving the centre and on their representation. In the Court’s view, there was nothing to suggest that the aim of the interview had been to persuade the applicants to withdraw or amend their application or to hinder them in the effective exercise of their right of individual application, nor was there any indication that it had had such an effect.

The Court found that the respondent State had not failed to fulfil its obligations under Article 34.

Just satisfaction (Article 41)

The Court held that Greece was to pay the applicants EUR 620 each in respect of non-pecuniary damage, and awarded EUR 1,000 to the applicants jointly in respect of costs and expenses.

4. ECtHR, *M.A. v. France*, No. 9373/15, Chamber judgment of 1 February 2018 (Article 3, Prohibition of torture and inhuman or degrading treatment - Violation; Article 34, Right of individual application - Violation). The applicant, an Algerian national convicted in France for involvement in a terrorist organisation, successfully claimed that his expulsion to Algeria had exposed him to a real and serious risk of inhuman or degrading treatment, since his conviction for terrorist offences had been known to the Algerian authorities. He successfully further claimed that the way in which the French authorities prepared his expulsion violated his right of individual application. In its judgment the Court relied, amongst others, on the reports of the *United Nations Committee against Torture* and of several NGOs, describing the alarming situation in Algeria.

ECHR 044 (2018)
01.02.2018

Press release issued by the Registrar

In today's **Chamber** judgment in the case of **M.A. v. France** (application no. 9373/15) the European Court of Human Rights held, by a majority, that there had been:

a violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the European Convention on Human Rights, and

a violation of Article 34 (right of individual application).

The case concerned the expulsion to Algeria of an Algerian national convicted in France of involvement in a terrorist organisation.

The Court found, in particular, that the expulsion of the applicant, whose conviction for terrorist offences had been known to the Algerian authorities, had exposed him to a real and serious risk of treatment contrary to Article 3. That risk was described in detail in the reports of the UN Committee against Torture and of several NGOs, describing the alarming situation in Algeria.

The Court observed that the French authorities had prepared the applicant's expulsion to Algeria in such a way that it had taken place only seven hours after the applicant had been informed of it. In so doing they had deliberately created a situation whereby the applicant would have great difficulty in submitting a request for an interim measure to the Court, and had lowered the level of protection under Article 3 of the Convention.

The Court reaffirmed that it was acutely aware of the extent of the danger posed to the community by terrorism and that it was legitimate for Contracting States to take a very firm stand against those who contributed to terrorist acts.

Principal facts

The applicant is an Algerian national who was born in 1976 and is currently in Algeria.

Having been involved in Islamist movements in Algeria, the applicant left his country of origin in 1999 and travelled to Spain and then France. In 2006 he was sentenced to seven years' imprisonment and was made the subject of a permanent exclusion order from French territory for involvement in a conspiracy to prepare acts of terrorism.

In 2010 the French authorities attempted to enforce the permanent exclusion order. On 19 April 2010 the applicant lodged a request with the Court for an interim measure under Rule 39 of the Rules of Court. On 26 April the Court indicated to the Government that they should not deport the applicant to Algeria for the duration of the proceedings. The applicant was released and made the subject of a compulsory residence order. By a decision of 1 July 2014 (application no. 21580/10) the Court declared his application inadmissible for non-exhaustion of domestic remedies, and the interim measure was lifted.

In December 2014 the applicant lodged an asylum application, which was rejected by the French Office for the Protection of Refugees and Stateless Persons (OFPRA) on 17 February 2015. He was informed of the OFPRA decision on 20 February while he was attending a police station in the framework of the obligations relating to his compulsory residence order. The authorities enforced the removal order and the applicant was immediately taken to Roissy airport in Paris.

The applicant's lawyer, having been informed that he was being expelled, submitted a fresh request for interim measures to the Court. The Court acted on the request the same day, indicating to the Government not to remove the applicant before 25 February. However, by the time the police received the necessary instructions, the doors of the aircraft had already closed with the applicant on board. The aircraft took off for Algeria at 4.15 p.m.

On his arrival in Algeria the applicant was taken into police custody and was then charged and placed in pre-trial detention. According to the information communicated by the parties to the Court, he is still being detained at Chlef Prison.

Complaints, procedure and composition of the Court

The applicant submitted that his removal to Algeria would expose him to a serious risk of treatment contrary to Article 3 (prohibition of torture and inhuman and degrading treatment), the Algerian Government having been informed of his conviction in France for terrorist offences. He stated that he had already been the victim of such treatment since arriving in Algeria and faced further similar risks. He alleged that by handing him over to the Algerian authorities, in breach of the interim measure indicated by the Court, the French Government had failed in its obligations under Article 34 (right of individual application). Finally, the applicant also relied on Article 8 (right to respect for private and family life), as well as Article 3 in respect of his wife and children.

The application was lodged with the European Court of Human Rights on 20 February 2015.

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

Angelika **Nußberger** (Germany), *President*,
Erik **Møse** (Norway),
André **Potocki** (France),
Yonko **Grozev** (Bulgaria),
Síofra **O'Leary** (Ireland),
Gabriele **Kucsko-Stadlmayer** (Austria),
Lətif **Hüseynov** (Azerbaijan),

and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Article 3

The Court reaffirmed that it was legitimate for Contracting States to take a very firm stand against those who contributed to terrorist acts. It observed, in relation to the instant case, that reports drawn up by the UN Committee against Torture and several NGOs described the worrying situation in Algeria. Those reports, dating from the year of the applicant's expulsion to Algeria, mentioned many cases of arrests by the Information and Security Department (DRS), particularly arrests of persons suspected of involvement in international terrorism. Such persons had then been held in detention without court supervision or the possibility of communicating with the outside world, and had often been ill-treated, or indeed tortured.

The Court noted that in France the applicant had been convicted under a detailed and reasoned judgment, which had been made public. On his arrival in Algeria he had, as he had feared, been arrested by the DRS and imprisoned. Given the applicant's profile and the fact that the Algerian authorities had been aware of his

conviction for serious acts of terrorism, the Court considered that at the time of his removal to Algeria there had been a real and serious risk that he would face treatment contrary to Article 3 of the Convention.

The French authorities had therefore violated Article 3 of the Convention.

Article 34

The Court noted that the interim measure had not been observed, as in fact acknowledged by the Government. Being fully aware that the authorities might be required to implement an expulsion order rapidly and effectively, it reiterated that the conditions for the execution of such a measure should not be geared to depriving the expellee of the right to request the Court to indicate an interim measure. The Court observed that the applicant had not been notified of the decision to reject his asylum application of 17 February until 20 February, when his transport had already been organised and the Algerian authorities had already issued a laissez-passer, without his knowledge. The Court concluded that the French authorities had created conditions whereby the applicant would have found it very difficult to apply to the Court for a second interim measure. They had deliberately and irreversibly lowered the level of protection of the rights set forth in the Convention. The expulsion had deprived any possible finding of a violation of its efficacy.

The Court concluded that the French authorities had failed in their obligations under Article 34.

Other articles

The Court rejected the complaint concerning an alleged violation of Article 8 on the grounds that the applicant had not exhausted the available domestic remedies. As regards the applicant's allegation that his wife and children had been the victims of a violation of Article 3, the Court noted that the latter were not applicants in the case. That complaint was therefore rejected.

Just satisfaction (Article 41)

The Court considered that the non-pecuniary damage had been sufficiently compensated by the findings of violations. It held that France was to pay the applicant EUR 4,000 in respect of costs and expenses.

Article 46

Given the applicant's extremely vulnerable situation after his transfer to Algeria, the Court stated that it was incumbent on the French Government to do their utmost to obtain from the Algerian authorities a concrete and precise assurance that the applicant had not been, and would not be, subjected to treatment contrary to Article 3 of the Convention.

Separate opinion

Judge O'Leary expressed a separate opinion, which is annexed to the judgment.

5. ECtHR, *Tsezar and Others v. Ukraine*, Nos. 73590/14, 73593/14, 73820/14, 4635/15, 5200/15, 5206/15, and 7289/15, Chamber judgment of 13 February 2018 (Article 6-1, Right of access to court - No violation; Article 1 of Protocol No. 1, Protection of property - Inadmissible). The applicants, seven residents of Donetsk, complained that they had not been able to bring cases before a court in the city where they lived. The Court noted that because of the conflict in eastern Ukraine the authorities had moved the Donetsk courts to neighbouring regions which were under Government control but there was no evidence that the applicants' personal circumstances had prevented them from travelling to the area where the courts were relocated to file claims. Therefore, the Government's actions had not impaired the very essence of their right of access to a court.

ECHR 061 (2018)
13.02.2018

Press release issued by the Registrar

In today's **Chamber** judgment in the case of *Tsezar and Others v. Ukraine* (applications nos. 73590/14, 73593/14, 73820/14, 4635/15, 5200/15, 5206/15, and 7289/15) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 6 § 1 (right of access to court) of the European Convention on Human Rights.

The case concerned a complaint by seven residents of Donetsk that they had not been able to bring cases challenging a suspension of pension payments and other social benefits ("social benefits") before a court in the city where they lived.

The Court noted that because of the conflict in eastern Ukraine the authorities had moved the Donetsk courts to neighbouring regions which were under Government control. There was no evidence that the applicants' personal circumstances had prevented them from travelling to the area where the courts were now located to file claims and the Government's actions had not impaired the very essence of their right of access to a court.

The Court declared a complaint by the applicants under **Article 1 of Protocol No. 1 (protection of property)** to the Convention about the suspension of the social benefits inadmissible for failure to use available legal remedies as they had not gone to court in the neighbouring regions, even though that option had been available to them.

Principal facts

The applicants, Lyubov Tsezar, Nikolay Tsezar, Svetlana Karlyuk, Kateryna Vanina, Tetyana Chernovol, Tetyana Vysla and Anatoliy Vyslyy, are Ukrainian nationals who were born in 1954, 1952, 1964, 1926, 1952, 1960, and 1956 respectively and live in Donetsk (Ukraine).

After the outbreak of the conflict in eastern Ukraine in April 2014, payments of social benefits to people living in areas which were outside Government control were suspended. The areas included settlements of the Donetsk and Luhansk regions. In September 2014 the jurisdiction of the Donetsk courts was relocated to neighbouring Government-controlled territory.

Some of the applicants continued to receive their social benefits until June 2014 and some to August of that year. In June 2015, the Tsezars registered with the Labour and Social Security Department of a neighbouring Government-controlled area. They had their social benefits reinstated and backdated. Ms Vysla registered with a social security office in Kyiv in September 2015 but did not apply for reinstatement of her social benefits. None of the other applicants applied for the reinstatement of social benefits in Government-controlled areas. The Government stated that Ms Vysla and Mr Vyslyy had travelled to such an area in October 2015.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 and/or Article 13 (right to an effective remedy) of the Convention, the applicants complained of not being able to challenge the suspension of their social benefits in court as the courts had been removed from the area of hostilities. They also complained about the suspension itself under Article 1 of Protocol No. 1 (protection of property) to the Convention.

Several applicants raised an issue under Article 14 (prohibition of discrimination) in conjunction with Article 6 and Article 1 of Protocol No. 1 about discrimination based on their place of residence.

The first three applications were lodged with the European Court of Human Rights on 10 November 2014 and the other applications were lodged on 14 January 2015.

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

Vincent A. **De Gaetano** (Malta), *President*,
 Ganna **Yudkivska** (Ukraine),
 Faris **Vehabović** (Bosnia and Herzegovina),
 Iulia **Motoc** (Romania),
 Carlo **Ranzoni** (Liechtenstein),
 Georges **Ravarani** (Luxembourg),
 Marko **Bošnjak** (Slovenia),

and also Marialena **Tsirli**, *Section Registrar*.

Decision of the Court

Article 6 § 1

The Court decided to treat the complaints under Article 6 and Article 13 in conjunction with Article 1 of Protocol No. 1 under the heading of Article 6 § 1 alone.

It noted that the domestic courts in the city of Donetsk had been moved to areas under Government control after the outbreak of the conflict in eastern Ukraine. It had therefore to examine whether the authorities had taken all the measures available to them to organise its judicial system in a way that would ensure that the rights protected by Article 6 were effective in practice.

In *Khlebik v. Ukraine* it had found that the Government had done all it could to organise its judicial system in a way that was in compliance with Article 6 in the situation of an ongoing conflict. In this case too it decided that the domestic authorities had taken all the steps that could reasonably have been expected of them to ensure access to the judicial system for residents of territories outside Government control.

Given that there was no evidence that the applicants' personal situations prevented them travelling to the neighbouring regions, the Court concluded that the very essence of their right of access to a court had not been impaired. The limitation of that right had been due to the objective situation of the hostilities in the areas the Government do not control and had not been disproportionate. There had therefore been no violation of the provision in question.

Article 1 of Protocol No. 1

The Court decided that the applicants' complaint that the suspension of their social benefits had breached their property rights was inadmissible for failure to use all the legal remedies available to them as they had not challenged that decision before the domestic courts, even though they had been able to travel to the neighbouring Government-controlled regions.

Other Articles

The Court rejected the applicants' complaints under Article 14 in conjunction with Article 6 and Article 1 of Protocol No. 1 as manifestly ill-founded. It found that the applicants, who had complained of discrimination based on their place of residence, were not in the same situation as other residents of Ukraine. The Government did not exercise effective control of their city and had had to take special measures which were not needed in other parts of the country. It also dismissed a complaint by the first three applicants under Article 2 (right to life), related to their low standard of living, as inadmissible for failure to exhaust domestic legal remedies.

6. ECtHR, *Stern Taulats and Roura Capellera v. Spain*, No. 51168/15, Chamber judgment of 13 March 2018 (Article 10, Freedom of expression - Violation). The applicants, two Spanish nationals, successfully claimed that their conviction for setting fire to a photograph of the royal couple at a public demonstration held during the Spanish King's official visit to Girona in September 2007 violated their freedom of expression. In its judgment the Court relied, among others, on *Recommendation No. R (97) 20 of the Committee of Ministers to Member States on Hate Speech* and decided that the prison sentence served on the applicants had been neither proportionate to the legitimate aim pursued nor necessary in a democratic society.

ECHR 097 (2018)
13.03.2018

Press release issued by the Registrar

In today's **Chamber** judgment in the case of *Stern Taulats and Roura Capellera v. Spain* (application no. 51168/15) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The case concerned the conviction of two Spanish nationals for setting fire to a photograph of the royal couple at a public demonstration held during the King's official visit to Girona in September 2007.

The Court found in particular that the act allegedly committed by the applicants had been part of a political, rather than personal, critique of the institution of monarchy in general, and in particular of the Kingdom of Spain as a nation. It also noted that it was one of those provocative "events" which were increasingly being "staged" to attract media attention and which went no further than the use of a certain permissible degree of provocation in order to transmit a critical message in the framework of freedom of expression. Moreover, the Court observed that the act in question had not constituted incitement to hatred or violence. Lastly, it held that the prison sentence served on the applicants had been neither proportionate to the legitimate aim pursued (protection of the reputation or rights of others) nor necessary in a democratic society.

Principal facts

The applicants, Enric Stern Taulats and Jaume Roura Capellera, are two Spanish nationals who were born in 1988 and 1977 respectively. They live in Girona and Banyoles (Spain) respectively.

In September 2007, while the King was on an official visit to Girona, the applicants set fire, during a public demonstration, to a large photograph of the royal couple which they had placed upside-down. As a result, they were sentenced to 15 months' imprisonment for insult to the Crown. The judge subsequently replaced that penalty with a fine of 2,700 euros each but ruled that, in the event of failure to pay the fine in whole or in part, the applicants would have to serve the prison term. That judgment was upheld by the *Audiencia Nacional* on 5 December 2008. When the judgment became final the applicants paid the fine. However, they lodged an *amparo* appeal with the Constitutional Court, which concluded that the act with which they had been charged fell outside the scope of freedom of expression and freedom of opinion, given that the applicants had been guilty of incitement to hatred and violence against the King and the monarchy.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression), the applicants complained that the judgment finding them guilty of insult to the Crown amounted to unjustified interference with their right to freedom of expression. On the same grounds the applicants also complained of a violation of Article 9 (freedom of thought, conscience and religion) read in conjunction with the aforementioned Article 10.

The application was lodged with the European Court of Human Rights on 2 October 2015.

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

Helena **Jäderblom** (Sweden), *President*,
Branko **Lubarda** (Serbia),
Luis **López Guerra** (Spain),
Helen **Keller** (Switzerland),
Pere **Pastor Vilanova** (Andorra),
Alena **Poláčková** (Slovakia),
Georgios A. **Serghides** (Cyprus),

and also Fatoş **Aracı**, *Deputy Section Registrar*.

Decision of the Court

Article 10

The Court noted that the applicants' conviction amounted to an interference with their right to freedom of expression, that the interference was prescribed by law and that it pursued a legitimate aim, namely the protection of the reputation or rights of others. As regards its necessity in a democratic society, the Court noted the following:

First of all, the applicants' act had been part of a political, rather than personal, critique of the institution of monarchy in general, and in particular of the Kingdom of Spain as a nation. The impugned "staged event" had been part of a debate on issues of general interest, that is to say the independence of Catalonia, the monarchic structure of the State and a critique of the King as a symbol of the Spanish nation. It had not been a personal attack on the King of Spain geared to insulting and vilifying his person, but a denunciation of what the King represented as the Head and the symbol of the State apparatus and the forces which, according to the applicants, had occupied Catalonia – which fell within the sphere of political criticism or dissidence and corresponded to the expression of rejection of the monarchy as an institution.

Secondly, the Constitutional Court had questioned the way in which the applicants had expressed their political criticism (use of fire and of a large upside-down photograph), considering that their mode of expression had spilled over from the sphere of freedom of expression into that of hate speech and incitement to violence.

The Court took the view that the applicants had used symbolical elements clearly and manifestly linked to their practical political criticism of the Spanish State and its monarchical form: the effigy of the King of Spain was the symbol of the King as the Head of the State apparatus; using fire and turning the photograph upside-down expressed a radical rejection or refusal, and those two elements were used as the manifestation of criticism of a political or other nature; the size of the photograph appeared to have been intended to ensure the visibility of the act in question, which had taken place in a public square. The applicants' act had therefore been one of the provocative "events" which were increasingly being staged to attract media attention and which merely used a certain permissible degree of provocation to transmit a critical message in the context of freedom of expression.

Thirdly, the applicants' intention had not been to incite anyone to commit acts of violence against the King, even though the "performance" had entailed burning an image of the figurehead of the State. Indeed, an act of this type should be interpreted as the symbolic expression of dissatisfaction and protest. Even though the "staged event" had involved burning an image, it was a means of expressing an opinion in a debate on a public-interest issue, namely the monarchy institution. The Court reiterated in that context that freedom of expression extended to "information" and "ideas" that offended, shocked or disturbed: such were the demands of pluralism, tolerance and broad-mindedness, without which there was no "democratic society".

Fourthly, the Court was not convinced that the impugned act could reasonably be construed as incitement to hatred or violence. In the present case, incitement to violence could not be deduced from the joint examination of the "props" used for staging the event or from the context in which it had taken place; nor could it be established on the basis of the consequences of the act, which had not led to violent behaviour or

disorder. Furthermore, the facts could not be considered as constituting hate speech, given the irrelevance of Article 17 of the Convention (prohibition of abuse of rights) to the present case.

Fifthly, the criminal penalty imposed on the applicants – a prison sentence, to be executed in the event of failure to pay the fine – amounted to an interference with freedom of expression which had been neither proportionate to the legitimate aim pursued nor necessary in a democratic society.

The Court therefore found a violation of Article 10 of the Convention. It also deemed unnecessary any separate consideration of the complaint under Article 9 concerning the same facts.

Just satisfaction (Article 41)

The Court held that the finding of a violation was sufficient just satisfaction for the non-pecuniary damage sustained by the applicants. It also held that Spain was to pay each of the applicants EUR 2,700 in respect of pecuniary damage and EUR 9,000, to the applicants jointly, in respect of costs and expenses.

7. ECtHR, *A.E.A. v. Greece*, No. 39034/12, Chamber judgment of 15 March 2018 (Article 3, Prohibition of inhuman or degrading treatment, in conjunction with Article 13, Right to an effective remedy - Violation). The applicant, a Sudanese national who was born in the Darfur region and belongs to a non-Arab tribe, successfully alleged deficiencies in the system operated by the Greek authorities for examining asylum applications, complaining *inter alia* that his asylum application had not been registered for three years.
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ECHR 104 (2018)
15.03.2018

Press release issued by the Registrar

The applicant, A.E.A., is a Sudanese national who was born in the Darfur region. He belongs to a non-Arab tribe.

The case concerned Greece's asylum procedure, which the applicant alleged had been deficient at the time, and his living conditions in Greece.

A.E.A. stated that he left Sudan in 2003 after being tortured on account of his political views. He arrived in Greece in April 2009. According to his account, he was issued with an automatic expulsion order on his arrival. He was then allegedly prevented from having access to the asylum procedure, between April 2009 and July 2012. As a result, he lived like a homeless person in derelict buildings or with compatriots. In July 2012 the Greek authorities registered his asylum application, which was rejected in July 2013.

On an unspecified date A.E.A. left Greece and moved to France, where he applied for international protection.

Relying in particular on Articles 3 (prohibition of inhuman or degrading treatment) and 13 (right to an effective remedy) of the European Convention, A.E.A. alleged deficiencies in the system operated by the Greek authorities for examining asylum applications, complaining *inter alia* that his asylum application had not been registered for three years (from April 2009 to July 2012).

Violation of Article 13 in conjunction with Article 3

Just satisfaction: EUR 2,000 (non-pecuniary damage)

8. ECtHR, *Nait-Liman v. Switzerland*, No. 51357/07, **Grand Chamber judgement of 15 March 2018 (Article 6-1, Right of access to a court - No violation)**. The applicant, a Swiss national of Tunisian origin, unsuccessfully complained that the refusal by the Swiss courts to examine his civil claim for compensation for the non-pecuniary damage arising from acts of torture allegedly inflicted on him in the premises of the Ministry of the Interior of Tunisia violated his right of access to court. The Court considered that international law had not imposed an obligation on the Swiss authorities to open their courts with a view of ruling on the merits of the applicant's compensation claim, on the basis of either universal civil jurisdiction in respect of acts of torture or a forum of necessity.

ECHR 103 (2018)
15.03.2018

Press release issued by the Registrar

In today's **Grand Chamber** judgment in the case of *Nait-Liman v. Switzerland* (application no. 51357/07) the European Court of Human Rights held, by a majority (fifteen votes to two), that there had been:

no violation of Article 6 § 1 (right of access to a court) of the European Convention on Human Rights.

The case concerned the refusal by the Swiss courts to examine Mr Naït-Liman's civil claim for compensation for the non-pecuniary damage arising from acts of torture allegedly inflicted on him in Tunisia.

The Court considered, on the basis of a comparative legal study, that international law had not imposed an obligation on the Swiss authorities to open their courts with a view to ruling on the merits of Mr Naït-Liman's compensation claim, on the basis of either universal civil jurisdiction in respect of acts of torture or a forum of necessity. It followed that the Swiss authorities had enjoyed a wide margin of appreciation in this area.

With regard to the criteria laid down by the legislature, the Court concluded that by introducing a forum of necessity with the criteria laid down in section 3 of the Federal Law on Private International Law, the Swiss legislature had not exceeded its margin of appreciation. As to the margin of appreciation of the domestic courts, the Court could perceive no arbitrary or manifestly unreasonable elements in the Federal Supreme Court's interpretation in its judgment of 22 May 2007, by which the Federal Supreme Court dismissed Mr Naït-Liman's appeal, holding that the Swiss courts did not have territorial jurisdiction.

The Court reiterated, however, that this conclusion did not call into question the broad consensus within the international community on the existence of a right for victims of acts of torture to obtain appropriate and effective redress, nor the fact that the States were encouraged to give effect to this right.

Principal facts

The applicant, Abdennacer Naït-Liman, is a Tunisian national who has acquired Swiss nationality. He was born in 1962 and lives in Versoix in the Canton of Geneva.

According to the applicant, he was arrested in April 1992 by the police in Italy and taken to the Tunisian consulate in Genoa, where he was presented with a bill of indictment according to which he represented a threat to Italian State security. He was then taken to Tunis by Tunisian agents. Mr Naït-Liman alleges that, from 24 April to 1 June 1992, he was detained and tortured in Tunis in the premises of the Ministry of the Interior on the orders of A.K., the then Minister of the Interior. Following the alleged torture, Mr Naït-Liman fled Tunisia in 1993 for Switzerland, where he applied for political asylum; this was granted in 1995.

On 14 February 2001, having learnt that A.K. was being treated in a Swiss hospital, the applicant lodged a criminal complaint against him with the Principal Public Prosecutor for the Republic and the Canton of Geneva. He applied to join these proceedings as a civil party. On the same date the principal public

prosecutor transmitted to the head of the security police a request to attempt to locate the accused individual and, if possible, to arrest him and bring him before an investigating judge. The police contacted the hospital, which informed them that A.K. had indeed been a patient there, but that he had already left the hospital on 11 February 2001. On 19 February 2001 the principal public prosecutor discontinued the proceedings on the grounds that A.K. had left Switzerland and that the police had been unable to arrest him.

On 8 July 2004 the applicant lodged a claim for damages with the Court of First Instance of the Republic and the Canton of Geneva against Tunisia and against A.K. On 15 September 2005 the Court of First Instance declared the claim inadmissible on the ground that it lacked territorial jurisdiction and that the Swiss courts did not have jurisdiction under the forum of necessity in the case at hand, owing to the lack of a sufficient link between, on the one hand, the case and the facts, and, on the other, Switzerland.

Mr Naït-Liman lodged an appeal with the Court of Justice of the Republic and the Canton of Geneva. His appeal was rejected in a judgment of 15 September 2006. The Court of Justice held that the respondents enjoyed immunity from jurisdiction, and considered that there had been no violation of Mr Naït-Liman's right of access to a court. Mr Naït-Liman lodged an appeal with the Federal Supreme Court, which dismissed it in a judgment of 22 May 2007, considering that the Swiss courts in any event lacked territorial jurisdiction.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right of access to a court), the applicant complained that the Swiss courts had declined jurisdiction to examine the merits of his action for damages, lodged against Tunisia and against A.K., who were, he alleged, responsible for the acts of torture that had been inflicted on him on the territory of Tunisia.

The application was lodged with the European Court of Human Rights on 20 November 2007.

The Redress Trust and the World Organisation against Torture (OMCT) were given leave to intervene in the written procedure.

The Court delivered a Chamber judgment on 21 June 2016, holding, by four votes to three, that there had been no violation of Article 6 § 1 of the Convention.

On 19 September 2016 the applicant requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 28 November 2016 the panel of the Grand Chamber accepted that request.

The Government of the United Kingdom, which had been granted leave to intervene in the written procedure, submitted observations. The Redress Trust jointly with the OMCT, Amnesty International jointly with the International Commission of Jurists, and Citizen's Watch also submitted observations.

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

Guido **Raimondi** (Italy), *President*,
Angelika **Nußberger** (Germany),
Linos-Alexandre **Sicilianos** (Greece),
Ganna **Yudkivska** (Ukraine),
Helena **Jäderblom** (Sweden),
Ledi **Bianku** (Albania),
Kristina **Pardalos** (San Marino),
Helen **Keller** (Switzerland),
André **Potocki** (France),
Aleš **Pejchal** (the Czech Republic),
Krzysztof **Wojtyczek** (Poland),
Dmitry **Dedov** (Russia),
Yonko **Grozev** (Bulgaria),
Pere **Pastor Vilanova** (Andorra),

Pauliine **Koskelo** (Finland),
 Georgios A. **Serghides** (Cyprus),
 Tim **Eicke** (the United Kingdom),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar*.

Decision of the Court

Article 6 § 1 (right of access to a court)

1. Applicability of Article 6 of the Convention

The Court held (by sixteen votes to one) that Article 6 of the Convention was applicable in this case since, on the one hand, it concerned a “genuine and serious” dispute, and, on the other, the applicant could lay claim to a right which was, at least on arguable grounds, recognised under Swiss law: the right of victims of acts of torture to obtain redress was recognised under Swiss law, in particular by Article 41 of the Swiss Code of Obligations, and by various elements of international law, especially Article 14 of the 1984 United Nations Convention against Torture (in force in Switzerland since 26 June 1987).

2. Merits

The Court identified several legitimate aims pursued by the restriction on the right of access to a court, which were all related to the proper administration of justice, particularly in terms of the problems in gathering and assessing the evidence, the difficulties linked to execution of a judgment, the State’s wish to discourage forum-shopping, and the risk of attracting similar complaints, which could create an excessive workload for the domestic courts.

With regard to the proportionality of the restriction on the applicant’s right of access to a court, the Court reiterated that the State enjoyed a certain margin of appreciation in regulating this right; the scope of this margin depended, *inter alia*, on the relevant international law in this area.

The Court identified two concepts of international law that were relevant for the present case: universal jurisdiction and the forum of necessity. The Court had first to examine whether Switzerland was bound to recognise universal civil jurisdiction for acts of torture by virtue of an international custom, or of treaty law.

With regard to a possible international custom, it transpired from the comparative legal study conducted by the Court that, of the 39 European States examined, only the Netherlands recognized universal civil jurisdiction in respect of acts of torture. Outside Europe, universal civil jurisdiction was recognised only in the United States and Canada, provided in the latter case that the claimant could demonstrate that the torture had taken place in the context of a terrorist act. Moreover, several member States of the Council of Europe provided for the universal jurisdiction of their courts in criminal matters, and allowed a claimant in such cases to apply, as a civil party, to join the proceedings brought before a criminal court.

The Court concluded that those States which recognised universal civil jurisdiction – operating autonomously in respect of acts of torture – were currently the exception. Although the States’ practice was evolving, the prevalence of universal civil jurisdiction was not yet sufficient to indicate the emergence, far less the consolidation, of an international custom which would have obliged the Swiss courts to find that they had jurisdiction to examine Mr Naït-Liman’s action. As it currently stood, international treaty law also failed to recognise universal civil jurisdiction for acts of torture, obliging the States to make available civil remedies in respect of acts of torture perpetrated outside the State territory by the officials of a foreign State.

The Court concluded that international law had not obliged the Swiss authorities to open their courts to Mr Naït-Liman on the basis of universal civil jurisdiction for acts of torture.

The Court had then to determine whether international law had imposed an obligation on the Swiss authorities to make a forum of necessity available to Mr Naït-Liman so that the compensation claim in respect of the alleged damage sustained as a result of human-rights violations could be examined.

Firstly, it transpired from the study conducted by the Grand Chamber that, of the 40 States examined, 28 European States did not recognise the forum of necessity. As the forum of necessity was not generally accepted by the States, it could not be concluded that there existed an international custom rule enshrining the concept of forum of necessity. The Court further noted that there was also no international treaty obligation on the States to provide for a forum of necessity.

It had therefore to be concluded that international law had not imposed an obligation on the Swiss authorities to open their courts with a view to ruling on the merits of Mr Naït-Liman's compensation claim, on the basis of either universal civil jurisdiction in respect of acts of torture or a forum of necessity. It followed that the Swiss authorities had enjoyed a wide margin of appreciation in this area.

In order to determine whether the Swiss authorities had exceeded their margin of appreciation in the present case, the Court was required to examine, in turn, section 3 of the Federal Law on Private International Law and the decisions issued by the Swiss courts.

With regard to the criteria laid down by the Swiss legislature for the implementation of section 3 of the Federal Law on Private International Law, the comparative law study carried out by the Court indicated that in all the States which did recognise the forum of necessity, it was applied only exceptionally and subject to two cumulative conditions, namely the absence of another forum with jurisdiction, and the existence of a sufficient connection between the case and the State which assumed jurisdiction. The Court concluded that by introducing a forum of necessity with the criteria laid down in section 3 of the Federal Law on Private International Law, the Swiss legislature had not exceeded its margin of appreciation.

With regard to the margin of appreciation of the domestic courts, the Court reiterated that in those States which recognised the forum of necessity, the courts enjoyed considerable discretion in defining the connecting links and applying them on a case-by-case basis. In the present case, the Court perceived no arbitrary or manifestly unreasonable elements in the Federal Supreme Court's interpretation of section 3 of the Federal Law on Private International Law in its judgment of 22 May 2007. Moreover, it discerned no elements indicating that the Federal Supreme Court had exceeded its margin of appreciation in another manner.

In conclusion, the Court considered that the Swiss courts' refusal to accept jurisdiction to examine Mr Naït-Liman's action seeking redress for the acts of torture to which he was allegedly subjected had pursued legitimate aims and had not been disproportionate to them. It followed that there had been no violation of the right of access to a court within the meaning of Article 6 of the Convention. Nonetheless, the Court reiterated that this conclusion did not call into question the broad consensus within the international community on the existence of a right for victims of acts of torture to obtain appropriate and effective redress, nor the fact that the States were encouraged to give effect to this right. However, it did not seem unreasonable for a State which established a forum of necessity to make its exercise conditional on the existence of certain connecting factors with that State, to be determined by it in compliance with international law. Given the dynamic nature of this area, the Court did not rule out the possibility of developments in the future.

The Court invited the States Parties to the Convention to take account in their legal orders of any developments facilitating effective implementation of the right to compensation for acts of torture.

Separate opinions

Judge Wojtyczek expressed a partly dissenting opinion. Judge Dedov and Judge Serghides each expressed a dissenting opinion. These opinions are annexed to the judgment.

9. ECtHR, *Mehmet Hasan Altan v. Turkey*, No. 13237/17, Chamber judgment of 20 March 2018 (Article 5-1, Right to liberty and security - Violation; Article 5-4, Right to a speedy review of the lawfulness of detention - No violation; Article 10, Freedom of expression - Violation). The applicant, a Turkish national, an economics professor and a journalist, was arrested on suspicion of having links to the media wing of FETÖ/PDY (“Gülenist Terror Organisation/Parallel State Structure”) and placed in pre-trial detention on the grounds that articles drafted by him had promoted FETÖ/PDY. The Court found that there had been a violation of the applicant’s right to liberty and security as well as his right to freedom of expression but not a violation of his right to a speedy review of the lawfulness of detention.

ECHR 107 (2018)
20.03.2018

Press release issued by the Registrar

Following deliberations held on 20 February 2018 on the admissibility and merits of the case of *Mehmet Hasan Altan v. Turkey* (application no. 13237/17), the European Court of Human Rights held in today’s **Chamber** judgment:

- by a majority (six votes to one), that there had been **a violation of Article 5 § 1 (right to liberty and security)** of the European Convention on Human Rights;
- by a majority (six votes to one), that there had been **a violation of Article 10 (freedom of expression)**; and
- unanimously, that there had been **no violation of Article 5 § 4 (right to a speedy review of the lawfulness of detention)** on account of the alleged lack of a speedy judicial review by the Constitutional Court.

Under Article 5 § 1, the Court found in particular that Mr Altan’s continued pre-trial detention, after the Constitutional Court’s clear and unambiguous judgment of 11 January 2018 finding a violation of Article 19 § 3 of the Constitution, could not be regarded as “lawful” and “in accordance with a procedure prescribed by law” as required by the right to liberty and security. In that connection the Court observed, in particular, that the reasons given by the Istanbul 26th Assize Court in rejecting the application for Mr Altan’s release, following a “final” and “binding” judgment delivered by the supreme constitutional judicial authority, could not be regarded as satisfying the requirements of Article 5 § 1 of the Convention. The Court held that for another court to call into question the powers conferred on a constitutional court to give final and binding judgments on individual applications ran counter to the fundamental principles of the rule of law and legal certainty, which were inherent in the protection afforded by Article 5 of the Convention and were the cornerstones of the guarantees against arbitrariness.

The Court emphasised that Mr Altan’s continued pre-trial detention, after the Constitutional Court’s judgment, raised serious doubts as to the effectiveness of the remedy of an individual application to the Constitutional Court in cases concerning pre-trial detention. However, as matters stood, the Court did not intend to depart from its previous finding (*Koçintar*, § 442) that the right to lodge an individual application with the Constitutional Court constituted an effective remedy in respect of complaints by persons deprived of their liberty. Nevertheless, it reserved the right to examine the effectiveness of the system of individual applications to the Constitutional Court in cases brought under Article 5 of the Convention, especially in view of any subsequent developments in the case law of the first-instance courts, in particular the assize courts, regarding the authority of the Constitutional Court’s judgments.

Under Article 10, the Court held in particular that there was no reason to reach a different conclusion from that of the Constitutional Court, which had found that Mr Altan’s initial and continued pre-trial detention, following his expression of his opinions, constituted a severe measure that could not be regarded as a necessary and proportionate interference in a democratic society. In that regard, the Court pointed out in particular that criticism of governments and publication of information regarded by a country’s leaders as endangering national interests should not attract criminal charges for particularly serious offences such as

belonging to or assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda.

Regarding the complaint under Article 5 § 4 concerning the length of proceedings in the Constitutional Court (14 months and three days), the Court found that the situation in the present case was exceptional, especially on account of the complexity of the case and the Constitutional Court's current caseload.

Lastly, the Court unanimously rejected the complaint concerning the lawfulness of the applicant's detention in police custody (Article 5 § 3) for failure to exhaust domestic remedies, and also the complaints concerning his lack of access to the investigation file (Article 5 § 4) and the right to compensation for unlawful detention (Article 5 § 5) as being manifestly ill-founded.

Principal facts

The applicant, Mehmet Hasan Altan, is a Turkish national who was born in 1953. He is currently in detention in Istanbul (Turkey).

Mr Altan is an economics professor and a journalist. Prior to the attempted military coup of 15 July 2016, he presented a political discussion programme on Can Erzinçan TV, a television channel that was closed down following the adoption of Legislative Decree no. 668, issued on 27 July 2016.

In the course of a criminal investigation relating to suspected members of FETÖ/PDY ("Gülenist Terror Organisation/Parallel State Structure"), Mr Altan was arrested on 10 September 2016 and taken into police custody on suspicion of having links to the organisation's media wing. On 22 September 2016 he appeared before the Istanbul 10th Magistrate's Court and was placed in pre-trial detention. On various dates Mr Altan applied without success to be released pending trial. On 8 November 2016 Mr Altan lodged an individual application with the Constitutional Court.

On 14 April 2017 the Istanbul public prosecutor filed an indictment with the Istanbul Assize Court in respect of several individuals including Mr Altan, in particular accusing them, under Articles 309, 311 and 312 in conjunction with Article 220 § 6 of the Criminal Code, of attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the government by force and violence, and of committing offences on behalf of a terrorist organisation without being members of it.

On 11 January 2018 the Constitutional Court gave judgment, holding that there had been a violation of the right to liberty and security and the right to freedom of expression and of the press. Despite the Constitutional Court's judgment, the Istanbul Assize Court rejected Mr Altan's subsequent application for release.

On 16 February 2018 the Istanbul 26th Assize Court sentenced Mr Altan to aggravated life imprisonment for attempting to overthrow the constitutional order.

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security), Mr Altan complained that his initial pre-trial detention and its continuation were arbitrary and that there was no evidence grounding a suspicion that he had committed a criminal offence. He also complained that insufficient reasons had been given for the judicial decisions ordering and extending his detention.

Relying on Article 5 § 4 (right to a speedy review of the lawfulness of detention), Mr Altan submitted that the proceedings in the Constitutional Court had failed to observe the requirement of "speediness".

Under Articles 10 (freedom of expression) and 17 (prohibition of abuse of rights), Mr Altan complained of a breach of his right to freedom of expression on account of his initial and continued pre-trial detention. The Court decided to examine this part of the application under Article 10 alone.

Mr Altan also relied on Article 5 §§ 3 (lawfulness of detention in police custody), 4 (lack of access to the investigation file) and 5 (right to compensation for unlawful detention), and Article 18 (limitation on use of restriction of rights) in conjunction with Articles 5 and 10 of the Convention.

The application was lodged with the European Court of Human Rights on 12 January 2017.

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

Robert **Spano** (Iceland), *President*,
 Paul **Lemmens** (Belgium),
 Ledi **Bianku** (Albania),
 Nebojša **Vučinić** (Montenegro),
 Valeriu **Grițco** (the Republic of Moldova),
 Jon Fridrik **Kjølbro** (Denmark), and
 Ergin **Ergül** (Turkey), *ad hoc judge*,

and also Stanley **Naismith**, *Section Registrar*.

Decision of the Court

Article 5 § 1 (right to liberty and security)

The Court found that there had been a **violation of Article 5 § 1** for the following reasons.

1. The Constitutional Court's judgment

Mr Altan had lodged an individual application with the Constitutional Court, which had held that the investigating authorities had been unable to demonstrate any factual basis that might indicate that he had been acting in accordance with the aims of FETÖ/PDY or with the purpose of preparing the ground for a possible military coup. On the basis of the evidence presented by the prosecution, the Constitutional Court had held that there were no strong indications that Mr Altan had committed the offences with which he was charged. With regard to the application of Article 15 of the Constitution (providing for the suspension of the exercise of fundamental rights and freedoms in the event of war, general mobilisation, a state of siege or a state of emergency), the Constitutional Court had concluded that the right to liberty and security would be meaningless if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed a criminal offence. In the Constitutional Court's view, Mr Altan's deprivation of liberty was therefore disproportionate to the strict exigencies of the situation.

Accordingly, the Court observed that it had been established by the Constitutional Court that Mr Altan had been placed and kept in pre-trial detention in breach of Article 19 § 3 of the Constitution. In the Court's view, that conclusion amounted in substance to an acknowledgment that Mr Altan's deprivation of liberty had contravened Article 5 § 1 of the Convention, and the Court endorsed the Constitutional Court's findings.

2. Applications for release following the Constitutional Court's judgment

Following the Constitutional Court's judgment, the Istanbul 26th and 27th Assize Courts had refused to release Mr Altan, holding that the Constitutional Court had not had jurisdiction to assess the evidence in the case file and that its judgment had therefore not been in compliance with the law, and also that ordering Mr Altan's immediate release on the basis of that judgment would run counter to the general principles of law, the independence of the judiciary, the principle that no authority could give instructions to the courts, and the right to a court.

The Court could not accept the 26th Assize Court's argument that the Constitutional Court should not have assessed the evidence in the case file. To hold otherwise would amount to maintaining that the Constitutional Court could have examined Mr Altan's complaint concerning the lawfulness of his initial and continued pre-trial detention without considering the substance of the evidence produced against him. The Court also pointed out that prior to the Constitutional Court's judgment, the Government had explicitly urged the Court

to reject Mr Altan's application for failure to exhaust domestic remedies, on the grounds that his individual application to the Constitutional Court was still pending. That argument had backed up the Government's view that an individual application to the Constitutional Court was an effective remedy for the purposes of Article 5 of the Convention. Such a position was, moreover, consistent with the Court's findings in the case of *Koçintar v. Turkey*. To put it briefly, the Court found that this argument by the Government could only be interpreted as meaning that under Turkish law, if the Constitutional Court had ruled that an applicant's pre-trial detention was in breach of the Constitution, the response by the courts with jurisdiction to rule on the issue of pre-trial detention must necessarily entail releasing him, unless new grounds and evidence justifying his continued detention were put forward. However, in the event, the 26th Assize Court had rejected the application for Mr Altan's release following the Constitutional Court's judgment of 11 January 2018 by interpreting and applying domestic law in a manner departing from the approach indicated by the Government before the Court. The Court moreover observed that the reasons given by the Istanbul 26th Assize Court in rejecting the application for the applicant's release, following a "final" and "binding" judgment delivered by the supreme constitutional judicial authority, could not be regarded as satisfying the requirements of Article 5 § 1 of the Convention. For another court to call into question the powers conferred on a constitutional court to give final and binding judgments on individual applications ran counter to the fundamental principles of the rule of law and legal certainty, which were inherent in the protection afforded by Article 5 of the Convention and were the cornerstones of the guarantees against arbitrariness. Thus, although the Constitutional Court had transmitted its judgment to the Assize Court so that it could take the necessary action, the Assize Court had resisted the Constitutional Court by refusing to release Mr Altan, with the result that the violation found by the Constitutional Court had not been redressed. The Court also observed that the case file disclosed no new grounds or evidence showing that the basis for the detention had changed following the Constitutional Court's judgment. It noted in particular that the Government had not demonstrated that the evidence purportedly available to the 26th Istanbul Assize Court justifying the strong suspicion against the applicant had in fact been any different from the evidence examined by the Constitutional Court.

Accordingly, the Court found that Mr Altan's continued pre-trial detention, after the Constitutional Court had given its clear and unambiguous judgment finding a violation of Article 19 § 3 of the Constitution, could not be regarded as "lawful" and "in accordance with a procedure prescribed by law" as required by the right to liberty and security.

3. *The derogation by Turkey*

The Court accepted that the notice of derogation by Turkey satisfied the formal requirement laid down in Article 15 § 3 of the Convention, namely to keep the Secretary General of the Council of Europe fully informed of the measures taken by way of derogation from the Convention and the reasons for them. It reiterated that under Article 15 of the Convention, any High Contracting Party had the right, in time of war or public emergency threatening the life of the nation, to take measures derogating from its obligations under the Convention, other than those listed in paragraph 2 of that Article, provided that such measures were strictly proportionate to the exigencies of the situation and that they did not conflict with other obligations under international law. It observed that the Constitutional Court, having examined from a constitutional perspective the facts leading to the declaration of a state of emergency, had concluded that the attempted military coup had posed a severe threat to the life and existence of the nation. In the light of the Constitutional Court's findings and all the other material available to it, the Court likewise considered that the attempted military coup had disclosed the existence of a "public emergency threatening the life of the nation" within the meaning of the Convention.

As to whether the measures taken in the present case had been strictly required by the exigencies of the situation, the Court considered, having regard to Article 15 of the Convention and the derogation by Turkey, that, as the Constitutional Court had found, a measure entailing pre-trial detention that was not "lawful" and had not been effected "in accordance with a procedure prescribed by law" on account of the lack of reasonable suspicion could not be said to have been strictly required by the situation.

4. *Effectiveness of the remedy of an individual application*

The Court emphasised that Mr Altan's continued pre-trial detention, even after the Constitutional Court's judgment, as a result of the decisions delivered by the Istanbul 26th Assize Court, raised serious doubts as to the effectiveness of the remedy of an individual application to the Constitutional Court in cases concerning pre-trial detention. However, as matters stood, the Court did not intend to depart from its previous finding that the right to lodge an individual application with the Constitutional Court constituted an effective remedy in respect of complaints by persons deprived of their liberty under Article 19 of the Constitution (*Koçintar*, § 44). Nevertheless, it reserved the right to examine the effectiveness of the system of individual applications to the Constitutional Court in relation to applications under Article 5 of the Convention, especially in view of any subsequent developments in the case-law of the first-instance courts, in particular the assize courts, regarding the authority of the Constitutional Court's judgments. In that regard, it would be for the Government to prove that that remedy was effective, both in theory and in practice.

5. Mr Altan's complaint that insufficient reasons were given for the judicial decisions ordering and extending his pre-trial detention

The Court held unanimously that there was no need for a separate examination of this complaint, in view of its finding under Article 5 § 1 of the Convention.

Article 5 § 4 (lack of a speedy judicial review by the Constitutional Court)

The proceedings concerning Mr Altan's individual application to the Constitutional Court had lasted 14 months and three days. The Court considered that in normal circumstances, such a period could not be regarded as "speedy". However, it observed that Mr Altan's application to the Constitutional Court had been a complex one, being one of the first of a series of cases raising new and complicated issues concerning the right to liberty and security and freedom of expression under the state of emergency following the attempted military coup. Moreover, bearing in mind the Constitutional Court's caseload following the declaration of a state of emergency, the Court noted that this was an exceptional situation. Accordingly, although the duration of 14 months and three days before the Constitutional Court could not be described as "speedy" in an ordinary context, in the specific circumstances of the case **the Court found that there had been no violation of Article 5 § 4 of the Convention.**

The Court pointed out, however, that that conclusion did not mean that the Constitutional Court had *carte blanche* when dealing with any similar complaints raised under Article 5 § 4 of the Convention. In accordance with Article 19 of the Convention, the Court retained its ultimate supervisory jurisdiction for complaints submitted by other applicants alleging that, after lodging an individual application with the Constitutional Court, they had not had a speedy judicial decision concerning the lawfulness of their detention.

Article 10 (freedom of expression)

The Court found, in the light of the Constitutional Court's judgment of 11 January 2018, that Mr Altan's pre-trial detention had constituted an "interference" with his right to freedom of expression; that it had been prescribed by the relevant provisions of the Criminal Code and the Code of Criminal Procedure ("the CCP"); and that it had pursued the legitimate aims of preventing disorder and crime.

The Court could see no reason to reach a different conclusion from the Constitutional Court, which had found that Mr Altan's initial and continued pre-trial detention, following his expression of his opinions, had constituted a severe measure that could not be regarded as a necessary and proportionate interference in a democratic society for the purposes of Articles 26 and 28 of the Constitution. Finding that the judges concerned had not shown that depriving Mr Altan of his liberty had met a pressing social need, the Constitutional Court had held that in so far as his detention had not been based on any concrete evidence other than his articles and comments, it could have had a chilling effect on freedom of expression and of the press. The Court also referred to its own conclusions under Article 5 § 1 of the Convention.

While taking into account the circumstances surrounding the cases brought before it, in particular the difficulties facing Turkey in the aftermath of the attempted military coup, the Court observed that one of the principal characteristics of democracy was the possibility it offered of resolving problems through public

debate. It had emphasised on many occasions that democracy thrived on freedom of expression. In that context, the existence of a “public emergency threatening the life of the nation” must not serve as a pretext for limiting freedom of political debate, which was at the very core of the concept of a democratic society. In the Court’s view, even in a state of emergency – which, as the Constitutional Court had noted, was a legal regime whose aim was to restore the normal regime by guaranteeing fundamental rights – the Contracting States should bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort should be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness. Moreover, criticism of governments and publication of information regarded by a country’s leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda. Even where such serious charges had been brought, pre-trial detention should only be used as an exceptional measure of last resort when all other measures had proved incapable of fully guaranteeing the proper conduct of proceedings. Should that not be the case, the national courts’ interpretation could not be regarded as acceptable. Lastly, the pre-trial detention of anyone expressing critical views produced a range of adverse effects, both for the detainees themselves and for society as a whole, since the imposition of a measure entailing deprivation of liberty, as in the present case, would inevitably have a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices, and a chilling effect of that kind could be produced even when the detainee was subsequently acquitted.

With regard to the derogation by Turkey, in the absence of any strong reasons to depart from its assessment concerning the application of Article 15 in relation to Article 5 § 1 of the Convention, the Court found that its conclusions were also valid in the context of its examination under Article 10.

The Court therefore held that there had been a violation of Article 10 of the Convention.

Article 18 (limitation on use of restriction of rights)

The Court held unanimously that there was no need for a separate examination of the complaint under Article 18 of the Convention (limitation on use of restriction of rights).

Complaints declared inadmissible

Article 5 § 3 (lawfulness of detention in police custody)

Regarding complaints about the lawfulness and duration of detention in police custody, the Turkish legal system provided two remedies: an objection with a view to securing release from custody (Article 91 § 5 of the CCP) and a compensation claim against the State (Article 141 § 1 (a) of the CCP). Mr Altan had lodged an objection seeking his release from police custody and had therefore availed himself of the remedy provided for in Article 91 § 5 of the CCP. However, he had not brought a compensation claim under Article 141 § 1 (a) of the CCP. In that connection the Court noted that where there were doubts as to a domestic remedy’s effectiveness and prospects of success – as Mr Altan had maintained – the remedy in question had to be attempted. The Court therefore rejected the complaint concerning his detention in police custody for failure to exhaust domestic remedies (Article 35 §§ 1 and 4 of the Convention). It pointed out, however, that that conclusion in no way prejudiced any subsequent review of the question of the effectiveness of the remedy concerned, and in particular of the domestic courts’ ability to develop a uniform, Convention-compliant approach to the application of Article 141 § 1 (a) of the CCP.

Article 5 § 4 (lack of access to the investigation file)

On an unspecified date, the Istanbul public prosecutor had decided, on the basis of Article 3 § 1 (l) of Legislative Decree no. 668, to restrict the suspects’ and their lawyers’ access to the investigation file. However, first the police, then the public prosecutor and finally the magistrate had put detailed questions about the evidence to Mr Altan, who had been assisted by counsel, and the contents of the questions had been reproduced in the records of the questioning. Although he had not had an unlimited right of access to the evidence, Mr Altan had had sufficient knowledge of the substance of the evidence forming the basis for

his pre-trial detention and had thus had the opportunity to properly contest the reasons given to justify the detention. This complaint was therefore manifestly ill-founded (Article 35 §§ 3 (a) and 4 of the Convention).

Article 5 § 5 (right to compensation for unlawful detention)

Mr Altan had been awarded compensation (amounting to approximately EUR 4,500 by the Constitutional Court for the violations it had found. The Court held that although this amount was lower than what it would itself have awarded, it could not be regarded as wholly disproportionate either. This complaint was therefore manifestly ill-founded (Article 35 §§ 3 (a) and 4 of the Convention).

Just satisfaction (Article 41)

The Court held that Turkey was to pay Mr Altan EUR 21,500 in respect of non-pecuniary damage.

Separate opinion

Judge Spano, joined by Judges Bianku, Vučinić, Lemmens and Gričco, expressed a concurring opinion. Judge Ergül expressed a partly dissenting opinion. These opinions are annexed to the judgment.

10. ECtHR, *Sahin Alpay v. Turkey*, No. 16538/17, Chamber judgment of 20 March 2018 (Article 5-1, Right to liberty and security - Violation; Article 5-4, Right to a speedy review of the lawfulness of detention - No violation; Article 10, Freedom of expression - Violation). The applicant, a Turkish journalist, suspected of belonging to FETÖ/PDY (“Gülenist Terror Organisation/Parallel State Structure”), was arrested and placed in pre-trial detention on the grounds that articles drafted by him had promoted FETÖ/PDY. The Court found that there had been a violation of the applicant’s right to liberty and security as well as his right to freedom of expression but no violation of his right to a speedy review of the lawfulness of detention.

ECHR 108 (2018)
20.03.2018

Press release issued by the Registrar

Following deliberations held on 20 February 2018 on the admissibility and merits of the case of *Şahin Alpay v. Turkey* (application no. 16538/17), the European Court of Human Rights held in today’s Chamber judgment:

- by a majority (six votes to one), that there had been **a violation of Article 5 § 1 (right to liberty and security)** of the European Convention on Human Rights;
- by a majority (six votes to one), that there had been **a violation of Article 10 (freedom of expression)**; and
- unanimously, that there had been **no violation of Article 5 § 4 (right to a speedy review of the lawfulness of detention)**.

Under Article 5 § 1, the Court found in particular that Mr Alpay’s continued pre-trial detention, after the Constitutional Court’s clear and unambiguous judgment of 11 January 2018 finding a violation of Article 19 § 3 of the Constitution, could not be regarded as “lawful” and “in accordance with a procedure prescribed by law” as required by the right to liberty and security. In that connection the Court observed, in particular, that the reasons given by the Istanbul 13th Assize Court in rejecting the application for Mr Alpay’s release, following a “final” and “binding” judgment delivered by the supreme constitutional judicial authority, could not be regarded as satisfying the requirements of Article 5 § 1 of the Convention. The Court held that for another court to call into question the powers conferred on a constitutional court to give final and binding judgments on individual applications ran counter to the fundamental principles of the rule of law and legal certainty, which were inherent in the protection afforded by Article 5 of the Convention and were the cornerstones of the guarantees against arbitrariness.

The Court emphasised that the fact that Mr Alpay had been kept in pre-trial detention, even after the Constitutional Court’s judgment, raised serious doubts as to the effectiveness of the remedy of an individual application to the Constitutional Court in cases concerning pre-trial detention.

However, as matters stood, the Court did not intend to depart from its previous finding (*Koçintar*, § 44) that the right to lodge an individual application with the Constitutional Court constituted an effective remedy in respect of complaints by persons deprived of their liberty. Nevertheless, it reserved the right to examine the effectiveness of the system of individual applications to the Constitutional Court in cases brought under Article 5 of the Convention, especially in view of any subsequent developments in the case-law of the first-instance courts, in particular the assize courts, regarding the authority of the Constitutional Court’s judgments.

Under Article 46 (binding force and execution of judgments) of the Convention, the Court held that it was incumbent on the respondent State to ensure the termination of Mr Alpay’s pre-trial detention at the earliest possible date.

Under Article 10, the Court held that there was no reason to reach a different conclusion from that of the Constitutional Court, which had found that Mr Alpay's initial and continued pre-trial detention, following his expression of his opinions, constituted a severe measure that could not be regarded as a necessary and proportionate interference in a democratic society. In that regard, the Court pointed out that criticism of governments and publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda.

Regarding the complaint under Article 5 § 4 concerning the length of proceedings in the Constitutional Court (16 months and three days), the Court found that the situation in the present case was exceptional, especially on account of the complexity of the case and the Constitutional Court's current caseload.

Lastly, the Court unanimously rejected the complaint under Article 5 § 5 (right to compensation for unlawful detention), finding that Mr Alpay had had a remedy by which he could have obtained compensation in respect of his complaint under Article 5 § 1 of the Convention, since the Constitutional Court had jurisdiction to order redress in the form of an award of compensation.

Principal facts

The applicant, Şahin Alpay, is a Turkish national who was born in 1944. He is currently in detention in Istanbul (Turkey).

Mr Alpay is a journalist who had been working since 2002 for the daily newspaper *Zaman*, which was viewed as the principal publication medium of the "Gülenist" network and was closed down following the adoption of Legislative Decree no. 668, issued on 27 July 2016. He also lectured on comparative politics and Turkish political history at a private university in Istanbul.

On 27 July 2016 Mr Alpay was arrested at his home and taken into police custody on suspicion of being a member of the terrorist organisation FETÖ/PDY ("Gülenist Terror Organisation/Parallel State Structure"). On 30 July 2016 he was brought before the Istanbul 4th Magistrate's Court and placed in pre-trial detention on the grounds that articles by him had promoted the terrorist organisation in question. Applications for Mr Alpay's release were rejected. On 8 September 2016 Mr Alpay lodged an individual application with the Constitutional Court.

On 10 April 2017 the Istanbul public prosecutor filed an indictment with the Istanbul Assize Court in respect of several individuals suspected of being part of the FETÖ/PDY media wing, including Mr Alpay, in particular accusing them, under Articles 309, 311 and 312 in conjunction with Article 220 § 6 of the Criminal Code, of attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the government by force and violence, and of committing offences on behalf of a terrorist organisation without being members of it.

On 11 January 2018 the Constitutional Court gave judgment, holding that there had been a violation of the right to liberty and security and the right to freedom of expression and of the press. Despite the Constitutional Court's judgment, the Istanbul Assize Court rejected Mr Alpay's subsequent application for release.

Criminal proceedings against Mr Alpay are currently pending before the Istanbul 13th Assize Court.

Complaints, procedure and composition of the Court

Relying on Article 5 §§ 1 and 3 (right to liberty and security), Mr Alpay complained that his initial pre-trial detention and its continuation were arbitrary and that there had been no evidence grounding a suspicion that he had committed a criminal offence. He also objected that he had been kept in pre-trial detention despite the Constitutional Court's finding of a violation (in its judgment of 11 January 2018). In addition, he complained about the length of his pre-trial detention and contended that insufficient reasons had been given for the judicial decisions ordering and extending it.

Relying on Article 5 § 4 (right to a speedy review of the lawfulness of detention), Mr Alpay submitted that the proceedings in the Constitutional Court had failed to observe the requirement of “speediness”.

Under Article 5 § 5 (right to compensation for unlawful detention), Mr Alpay complained that he had not had access to an effective remedy by which he could have obtained compensation for the damage sustained on account of his pre-trial detention.

Relying on Article 10 (freedom of expression), Mr Alpay complained of a breach of his right to freedom of expression.

Under Article 18 (limitation on use of restriction of rights), Mr Alpay alleged that he had been detained for expressing critical opinions about the government authorities.

The application was lodged with the European Court of Human Rights on 28 February 2017.

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

Robert **Spano** (Iceland), *President*,
Paul **Lemmens** (Belgium),
Ledi **Bianku** (Albania),
Nebojša **Vučinić** (Montenegro),
Valeriu **Grițco** (the Republic of Moldova),
Jon Fridrik **Kjølbro** (Denmark) and,
Ergin **Ergül** (Turkey), *ad hoc judge*,

and also Stanley **Naismith**, *Section Registrar*.

Decision of the Court

Article 5 § 1 (right to liberty and security)

The Court found that there had been a **violation of Article 5 § 1** for the following reasons.

1. The Constitutional Court’s judgment

In its judgment of 11 January 2018 the Constitutional Court had established that Mr Alpay had been placed and kept in pre-trial detention in breach of Article 19 § 3 of the Constitution, holding that the investigating authorities had been unable to demonstrate any factual basis that might indicate that he had been acting in accordance with the aims of FETÖ/PDY. On the basis of the evidence presented by the prosecution, the Constitutional Court had held that there were no strong indications that Mr Alpay had committed the offences with which he was charged. In the Constitutional Court’s view, Mr Alpay’s deprivation of liberty was therefore disproportionate to the strict exigencies of the situation.

Finding that the Constitutional Court’s conclusion amounted in substance to an acknowledgment that Mr Alpay’s deprivation of liberty had contravened Article 5 § 1 of the Convention, the Court endorsed the Constitutional Court’s findings.

2. Applications for release following the Constitutional Court’s judgment

Although the Constitutional Court had found a violation of Article 19 § 3 of the Constitution, the Istanbul 13th and 14th Assize Courts had refused to release Mr Alpay. In particular, the 13th Assize Court had held that the Constitutional Court had not had jurisdiction to assess the evidence in the case file, and that its judgment had not been in compliance with the law and had amounted to usurpation of power.

The Court could not accept the 13th Assize Court’s argument that the Constitutional Court should not have assessed the evidence in the case file. To hold otherwise would amount to maintaining that the Constitutional

Court could have examined Mr Alpay's complaint concerning the lawfulness of his initial and continued pre-trial detention without considering the substance of the evidence produced against him.

Furthermore, prior to the Constitutional Court's judgment, the Government had explicitly urged the Court to reject Mr Alpay's application for failure to exhaust domestic remedies, on the grounds that his individual application to the Constitutional Court was still pending. That argument had backed up the Government's view that an individual application to the Constitutional Court was an effective remedy for the purposes of Article 5 of the Convention. Such a position was, moreover, consistent with the Court's findings in the case of *Koçintar v. Turkey*.⁵ The Court accordingly found that this argument by the Government could only be interpreted as meaning that under Turkish law, if the Constitutional Court ruled that an applicant's pre-trial detention was in breach of the Constitution, the response by the courts with jurisdiction to rule on the issue of pre-trial detention must necessarily entail releasing him, unless new grounds and evidence justifying his continued detention were put forward. However, in the event, the 13th Assize Court had rejected the application for Mr Alpay's release following the Constitutional Court's judgment of 11 January 2018 by interpreting and applying domestic law in a manner departing from the approach indicated by the Government before the Court.

The Court observed, moreover, that the reasons given by the Istanbul 13th Assize Court in rejecting the application for Mr Alpay's release, following a "final" and "binding" judgment delivered by the supreme constitutional judicial authority, could not be regarded as satisfying the requirements of Article 5 § 1 of the Convention. For another court to call into question the powers conferred on a constitutional court to give final and binding judgments on individual applications ran counter to the fundamental principles of the rule of law and legal certainty, which were inherent in the protection afforded by Article 5 of the Convention and were the cornerstones of the guarantees against arbitrariness.

Thus, although the Constitutional Court had transmitted its judgment to the Assize Court so that it could take "the necessary action", the Assize Court had resisted the Constitutional Court by refusing to release Mr Alpay, with the result that the violation found by the Constitutional Court had not been redressed. The Court observed, moreover, that the case file disclosed no new grounds or evidence showing that the basis for the detention had changed following the Constitutional Court's judgment. In that connection it noted in particular that the Government had not demonstrated that the evidence purportedly available to the 13th Istanbul Assize Court justifying the strong suspicion against Mr Alpay had in fact been any different from the evidence examined by the Constitutional Court.

Accordingly, the Court found that Mr Alpay's continued pre-trial detention, after the Constitutional Court had given its clear and unambiguous judgment finding a violation of Article 19 § 3 of the Constitution, could not be regarded as "lawful" and "in accordance with a procedure prescribed by law" as required by the right to liberty and security.

3. *The derogation by Turkey*

The Court accepted that the notice of derogation by Turkey satisfied the formal requirement laid down in Article 15 § 3 of the Convention, namely to keep the Secretary General of the Council of Europe fully informed of the measures taken by way of derogation from the Convention and the reasons for them. It reiterated that under Article 15 of the Convention, any High Contracting Party had the right, in time of war or public emergency threatening the life of the nation, to take measures derogating from its obligations under the Convention, other than those listed in paragraph 2 of that Article, provided that such measures were strictly proportionate to the exigencies of the situation and that they did not conflict with other obligations under international law. It observed that the Constitutional Court, having examined from a constitutional perspective the facts leading to the declaration of a state of emergency, had concluded that the attempted military coup had posed a severe threat to the life and existence of the nation. In the light of the Constitutional Court's findings and all the other material available to it, the Court likewise considered that the attempted military coup had disclosed the existence of a "public emergency threatening the life of the nation" within the meaning of the Convention.

As to whether the measures taken in the present case had been strictly required by the exigencies of the situation, the Court considered, having regard to Article 15 of the Convention and the derogation by Turkey,

that, as the Constitutional Court had found, a measure entailing pre-trial detention that was not “lawful” and had not been effected “in accordance with a procedure prescribed by law” on account of the lack of reasonable suspicion could not be said to have been strictly required by the situation.

4. Effectiveness of the remedy of an individual application

The Court emphasised that Mr Alpay’s continued pre-trial detention, even after the Constitutional Court’s judgment, as a result of the decisions delivered by the Istanbul 13th Assize Court, raised serious doubts as to the effectiveness of the remedy of an individual application to the Constitutional Court in cases concerning pre-trial detention. However, as matters stood, the Court did not intend to depart from its previous finding that the right to lodge an individual application with the Constitutional Court constituted an effective remedy in respect of complaints by persons deprived of their liberty under Article 19 of the Constitution (*Koçintar*, § 44). Nevertheless, it reserved the right to examine the effectiveness of the system of individual applications to the Constitutional Court in relation to cases brought under Article 5 of the Convention, especially in view of any subsequent developments in the case-law of the first-instance courts, in particular the assize courts, regarding the authority of the Constitutional Court’s judgments. In that regard, it would be for the Government to prove that this remedy was effective, both in theory and in practice.

Article 5 § 3 (Mr Alpay’s complaint that insufficient reasons were given for the judicial decisions ordering and extending his pre-trial detention)

In view of its finding under Article 5 § 1 of the Convention, the Court held that it was unnecessary to examine this complaint.

Article 5 § 4 (complaint concerning the lack of a speedy judicial review by the Constitutional Court)

The Court considered that although the duration of 16 months and three days before the Constitutional Court could not be described as “speedy” in an ordinary context, in the specific circumstances of the case **there had been no violation of Article 5 § 4 of the Convention**. Firstly, the Court observed that the case had been a complex one, being one of the first to raise new and complicated issues concerning the right to liberty and security and freedom of expression under the state of emergency following the attempted military coup. Secondly, bearing in mind the Constitutional Court’s caseload following the declaration of a state of emergency, the Court found that this was an exceptional situation. It pointed out, however, that that conclusion did not mean that the Constitutional Court had *carte blanche* when dealing with similar complaints. In accordance with Article 19 of the Convention, the Court retained its ultimate supervisory jurisdiction for complaints submitted by other applicants alleging that, after lodging an individual application with the Constitutional Court, they had not had a speedy judicial decision concerning the lawfulness of their detention.

Article 5 § 5 (right to compensation for unlawful detention)

Mr Alpay complained that he had not had an effective remedy by which he could have obtained compensation for the damage sustained on account of his pre-trial detention.

The Court unanimously declared this complaint inadmissible, finding that it was manifestly ill founded in so far as it concerned Article 5 § 1 of the Convention, and incompatible *ratione materiae* with the provisions of the Convention in so far as it concerned Article 5 § 4.

The Court considered that Mr Alpay had had a remedy by which he could have obtained compensation in respect of his complaint under Article 5 § 1 of the Convention, since the Constitutional Court had jurisdiction to order redress in the form of an award of compensation. Indeed, the Constitutional Court had given a judgment on the same day as the one in Mr Alpay’s case, in which it had awarded compensation for the violation it had found in respect of another journalist held in pre-trial detention (application no. 2016/23672).

Article 10 (freedom of expression)

The Court found firstly, in the light of the Constitutional Court's judgment of 11 January 2018, that Mr Alpay's pre-trial detention had constituted an "interference" with his right to freedom of expression; that the interference had been prescribed by the relevant provisions of the Criminal Code and the Code of Criminal Procedure; and that it had pursued the legitimate aims of preventing disorder and crime.

Next, the Court could see no reason to reach a different conclusion from the Constitutional Court, which had found that Mr Alpay's initial and continued pre-trial detention, following his expression of his opinions, had constituted a severe measure that could not be regarded as a necessary and proportionate interference in a democratic society for the purposes of Articles 26 and 28 of the Constitution. Finding that the judges concerned had not shown that depriving Mr Alpay of his liberty had met a pressing social need, the Constitutional Court had held that in so far as his detention had not been based on any concrete evidence other than his articles, it could have had a chilling effect on freedom of expression and of the press. The Court also referred to its own conclusions under Article 5 § 1 of the Convention.

While taking into account the circumstances surrounding the cases brought before it, in particular the difficulties facing Turkey in the aftermath of the attempted military coup, the Court observed that one of the principal characteristics of democracy was the possibility it offered of resolving problems through public debate. It had emphasised on many occasions that democracy thrived on freedom of expression. In that context, the existence of a "public emergency threatening the life of the nation" must not serve as a pretext for limiting freedom of political debate, which was at the very core of the concept of a democratic society. In the Court's view, even in a state of emergency – which, as the Constitutional Court had noted, was a legal regime whose aim was to restore the normal regime by guaranteeing fundamental rights – the Contracting States should bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort should be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness. Moreover, criticism of governments and publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda. Even where such serious charges had been brought, pre-trial detention should only be used as an exceptional measure of last resort when all other measures had proved incapable of fully guaranteeing the proper conduct of proceedings. Should that not be the case, the national courts' interpretation could not be regarded as acceptable. Lastly, the pre-trial detention of anyone expressing critical views produced a range of adverse effects, both for the detainees themselves and for society as a whole, since the imposition of a measure entailing deprivation of liberty, as in the present case, would inevitably have a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices, and a chilling effect of that kind could be produced even when the detainee was subsequently acquitted.

With regard to the derogation by Turkey, in the absence of any strong reasons to depart from its assessment concerning the application of Article 15 in relation to Article 5 § 1 of the Convention, the Court found that its conclusions were also valid in the context of its examination under Article 10.

The Court therefore held that there had been a violation of Article 10 of the Convention.

Article 18 (limitation on use of restriction of rights)

Having regard to all the conclusions it had reached under Article 5 § 1 and Article 10 of the Convention, the Court did not consider it necessary to examine this complaint separately.

Article 46 (binding force and execution of judgments)

The Court found that any continuation of Mr Alpay's pre-trial detention would entail a prolongation of the violation of Article 5 § 1 and a breach of the obligations on respondent States to abide by the Court's judgment in accordance with Article 46 § 1 of the Convention. Accordingly, having regard to the particular circumstances of the case, the reasons for its finding of a violation and the urgent need to put an end to the

violation of Article 5 § 1 of the Convention, the Court held that it was incumbent on the respondent State to ensure the termination of Mr Alpay's pre-trial detention at the earliest possible date.

Just satisfaction (Article 41)

The Court held that Turkey was to pay Mr Alpay EUR 21,500 in respect of non-pecuniary damage.

Separate opinions

Judge Spano, joined by Judges Bianku, Vučinić, Lemmens and Gričco, expressed a concurring opinion.

Judge Ergül expressed a partly dissenting opinion. These opinions are annexed to the judgment.

11. ECtHR, *Ireland v. The United Kingdom*, No. 5310/71, Chamber judgment of 20 March 2018 (Article 3, Prohibition of torture and of inhuman or degrading treatment - Revision request - Dismissed). Ireland made a revision request regarding a 1978 judgment asking the Court to find that men detained by the United Kingdom during Northern Ireland's civil strife suffered torture and not just inhuman and degrading treatment. This request was based on the grounds that new evidence had emerged. The Court found that Ireland had not demonstrated the existence of facts that were unknown to the Court at the time or which would have had a decisive influence on the original judgment. Therefore, there was no justification to revise the judgment.

ECHR 110 (2018)

20.03.2018

Press release issued by the Registrar

- The European Court of Human Rights has rejected a request by Ireland to revise a 1978 judgment and find that men detained by the United Kingdom during Northern Ireland's civil strife suffered torture, not just inhuman and degrading treatment.
- Ireland made the revision request in the case (application no. 5310/71) on the grounds that new evidence had emerged, which showed, in particular, that the effects of the ill-treatment had been long-term and severe.
- The Court found that the Government of Ireland had not demonstrated the existence of facts that were unknown to the Court at the time or which would have had a decisive influence on the original judgment. There was therefore no justification to revise the judgment.
- The revision request was dismissed by six votes to one by a Chamber. The judge elected in respect of Ireland issued a dissenting opinion.
- The men involved in the case were detained in 1971. They had had to spread-eagle themselves against the wall in a strained position, were hooded, deprived of food and sleep and subjected to a continuous, loud hissing noise. The methods were known as the “five techniques” in the original judgment.

Principal facts

The 1978 judgment found that the British authorities' use of the five techniques on the men, who had been detained under emergency powers, had amounted to inhuman and degrading treatment, but not torture. In contrast, the European Commission of Human Rights, a body which used to exist to take evidence, issue reports and decide whether cases could go to the Court, had classified the treatment as torture as well.

In December 2014 Ireland requested a revision of the Court's original judgment under Rule 80 of the ECHR's Rules of Court. The rule states that a revision can be made if facts emerge which might have had a decisive influence on an earlier decision but were not known at the time.

The Irish Government stated that such new facts had emerged in a June 2014 Irish television documentary. The Government had subsequently obtained archive documents and submitted that a psychiatrist, Dr L., who had been heard as an expert for the United Kingdom Government in the original proceedings, had misled the Commission by saying that the effects of the ill-treatment were short-lived. In fact, he had known that the use of the five techniques had long-lasting and severe effects. The Irish Government also referred to other documents released from archives which showed that the British Government had tried to prevent the Court from accessing the full truth about the five techniques.

If the Court had been aware of such information it would have made a finding of torture as well, the Irish Government stated. The United Kingdom Government objected to the revision request. There was nothing in the material to show that Dr L.'s evidence had been misleading while knowledge of the archive documents would not have changed the judgment. Revising the judgment would also serve no useful purpose as the Court's case-law on torture had in any event evolved since 1978.

Complaints, procedure and composition of the Court

The revision request was lodged with the European Court of Human Rights on 4 December 2014.

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

Helena **Jäderblom** (Sweden), *President*,
Branko **Lubarda** (Serbia),
Luis **López Guerra** (Spain),
Helen **Keller** (Switzerland),
Dmitry **Dedov** (Russia),
Síofra **O’Leary** (Ireland) and,
Lord **Reed** (United Kingdom), *ad hoc Judge*,

and also Stephen **Phillips**, *Section Registrar*.

Decision of the Court

The Court noted that the possibility to revise judgments under Rule 80 was an exceptional procedure which was based on the emergence of significant new facts which were not known at the time.

Ireland had argued two grounds for revision and supplied documents in support. It first referred to evidence that Dr L. had expressed opinions in civil compensation proceedings brought by some of the men in Northern Ireland that the interrogation methods had long-term psychiatric effects, whereas in the Strasbourg proceedings he had only referred to short-term and minor effects.

Secondly, it had submitted documents which allegedly showed the extent to which the United Kingdom had aimed at withholding information from the Court about key facts concerning the interrogation methods, including the fact that their use had been authorised at ministerial level.

However, the Court doubted whether the documents about Dr L. provided sufficient *prima facie* evidence of his providing misleading evidence. In particular, his findings about the long-term effects of the interrogation methods had been related to a man who had not been one of the two cases chosen from a larger group to illustrate the effects of the ill-treatment to the Commission. Other documents submitted by Ireland did not refer to Dr L.’s opinion specifically but to general medical opinion about such long-term health issues. The latter showed that at the time there was no consolidated scientific knowledge on this question.

The Court noted that the other archive documents were all internal British Government papers. Some demonstrated that the use of the interrogation methods had been authorised at ministerial level and some showed that the Government had been anxious to conclude domestic compensation settlements in order to avoid embarrassment and reputational damage. Overall, the Court found that the documents did not demonstrate facts which were unknown at the time. The Court and the Commission had both highlighted a lack of assistance from the United Kingdom, which had also conceded that authorisation for the techniques had been given “at high level”.

Finally, the Court held that even if it could be shown that Dr L. had provided misleading evidence about long-term psychiatric effects on the men, it could not be said that such knowledge might have had a decisive influence leading to a finding of torture.

The original judgment had made no reference to the issue of such long-term effects and it was difficult to argue that the Court had attached particular significance to that aspect of the case. The original judgment had stated that the difference between “torture” and “inhuman and degrading” treatment depended on the intensity of suffering, which in turn depended on a number of elements. It was not clear that the one element of long-term psychiatric suffering would have swayed the Court into a finding of torture.

Separate opinion

Judge O'Leary issued a dissenting opinion. The opinion is annexed to the judgment.

12. ECtHR, *Berkovich and Others v. Russia*, Nos. 5871/07, 61948/08, 25025/10, 19971/12, 46965/12, 75561/12, 73574/13, 504/14, 31941/14, and 45416/14, Chamber judgment of 27 March 2018 (Article 2 of Protocol No. 4, Freedom of movement - Violation). The applicants, Russian nationals who had been prevented from going abroad on the grounds that they had previously had access to State secrets during their employment, successfully claimed that their right to free movement had been violated. In its judgment the Court relied, amongst others, on relevant Council of Europe documents concerning the membership of the Russian Federation in the Organisation.

**ECHR 115 (2018)
27.03.2018**

Press release issued by the Registrar

The case concerned Russian nationals who had been prevented from going abroad on the grounds that they had previously had access to State secrets during their employment.

The applicants were born between 1950 and 1987 and live in Russia.

Following the termination of their employment, the authorities refused to issue them with or return their travel passports. They were told that their right to leave Russia would be restricted for the following five years. They all challenged these refusals in court, without success.

Relying on Article 2 of Protocol No. 4 (freedom of movement) to the European Convention, the applicants complained about the Russian authorities' refusal to issue them with a passport allowing them to leave Russia. They alleged that the restriction on their right to travel abroad had been unnecessary and disproportionate, especially in view of the fact that they had been allowed to travel during their employment, some on official business, others on holiday, and another to visit his parents.

Violation of Article 2 of Protocol No. 4

Just satisfaction: EUR 5,000 each to Mr Berkovich, Mr Ilchenko, Mr Litavrin, Mr Lytin, Mr Yenin, and Mr Garkusha, EUR 3,538 to Mr Burnayev, and EUR 4,000 to Mr Samasadkin in respect of non-pecuniary damage; EUR 5,000 to Mr Ilchenko, EUR 106 to Mr Lytin, EUR 850 to Mr Litavrin, EUR 137 to Mr Yenin, EUR 2,500 to Mr Garkusha, EUR 64 to Mr Burnayev, and EUR 42 to Mr Samasadkin in respect of costs and expenses.

13. ECtHR, *Guliyev and Sheina v. Russia*, No. 29790/14, Chamber judgment of 17 April 2018 (Article 8, Right to respect of private and family life - Violation). The applicants, a married couple of an Azerbaijani national and a Russian national, successfully argued that the Azerbaijani applicant's expulsion from the Russian Federation and the five-year re-entry ban that had been imposed on him violated their right to respect for private and family life.

**ECHR 145 (2018)
17.04.2018**

Press release issued by the Registrar

The applicants, Natig Yakhya-Ogly Guliyev, an Azerbaijani national, and Yulia Sheina, a Russian national, were born in 1975 and 1988 respectively. They are a married couple. Ms Sheina lives in Perm (Russia), which is where Mr Guliyev also lived prior to his expulsion in March 2014.

The case concerned Mr Guliyev's removal from Russia despite his argument that he had a family life there.

Mr Guliyev and Ms Sheina began living together in 2004 and later had two children. They concluded a marriage in a mosque in August 2012 after Mr Guliyev had arrived back in Russia under a visa-free agreement. He had permission to stay until early November 2012 and was arrested in December 2013 for failure to renew the permission. He pointed out that he had been injured in a shooting and had not been able to carry out that procedure, but the courts subsequently ordered his expulsion, which was taken place in March 2014. A third child was born in July 2014 with a heart condition. The European Court of Human Rights refused in August 2014 to grant the applicants' request for an interim measure to allow Mr Guliyev to return to Russia to visit the child.

Relying on Article 8 (right to respect for private and family life) of the European Convention on Human Rights, the applicants complained about Mr Guliyev's expulsion and the five-year re-entry ban that had been imposed on him.

Violation of Article 8

Just satisfaction: EUR 7,500 jointly to Mr Guliyev and Ms Sheina in respect of non-pecuniary damage.

- 14. ECtHR, *Paci v. Belgium*, No. 45597/09, Chamber judgment of 17 April 2018 (Article 5-1, Right to liberty and security - No violation; Article 6-1, Right to a fair hearing - No violation).** The applicant, an Italian national convicted in Belgium for international arms trafficking, unsuccessfully argued that his detention in Belgium had been unlawful and that he should have been surrendered to the Italian authorities at the close of the investigation. In its judgment the Court relied, among others, on the *EU Council Framework Decision on the European arrest warrant and the surrender procedures between Member States* (2002/584/JHA) of 13 June 2002.
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ECHR 147 (2018)
17.04.2018

Press release issued by the Registrar

In today's **Chamber** judgment in the case of *Paci v. Belgium* (application no. 45597/09) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 5 § 1 (right to liberty and security) and Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights.

The case concerned criminal proceedings conducted in Belgium which had led to the conviction of an Italian national (Mr Paci) for international arms trafficking. Mr Paci argued that his detention in Belgium had been unlawful and that he should have been surrendered to the Italian authorities at the close of the investigation. Furthermore, he complained about the use in the proceedings concerning the arms trafficking of evidence from telephone tapping which had been ordered in another criminal case, and about the fact that he had not had access to a full copy of the file in the latter case.

The Court ruled that the detention orders had been valid throughout the criminal proceedings and that Mr Paci's detention had been justified and had displayed no arbitrariness. It also found that Mr Paci's conviction had not been based on evidence with regard to which he had been unable, or insufficiently able, to exercise his defence rights, and that the proceedings as a whole had not been unfair.

Principal facts

The applicant, Eddy Paci, is an Italian national who was born in 1963 and lives in La Louvière (Belgium).

In 2007 Mr Paci was arrested by the Italian authorities under a European arrest warrant issued by a Belgian investigating judge. He was subsequently surrendered to the Belgian authorities on the condition that he was to be returned to Italy after his hearing by the Belgian authorities (a condition laid down in Italian law in favour of Italian nationals), to serve any sentence imposed on him by the Belgian courts. In 2008, the Mons Court of Appeal (Belgium) sentenced him to eight years' imprisonment and to the confiscation of various items of property. In 2009 the Belgian Court of Cassation dismissed his appeal on points of law. In 2010 Mr Paci was surrendered to the Italian authorities in order to serve the remainder of his sentence.

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 of the European Convention on Human Rights (right to liberty and security), the applicant complained about his detention in Belgium, alleging that the Belgian authorities should have surrendered him to the Italian authorities after his questioning by the Belgian police, as demanded by the Italian Supreme Court of Cassation on his surrender to the Belgian authorities in July 2007 and in accordance with Italian law.

Relying on Article 6 § 1 of the Convention (right to a fair trial), Mr Paci complained of the use, in the criminal proceedings concerning arms trafficking, of telephone tapping ordered in another criminal case relating to trade in stolen cars, in which Mr Paci had been involved with others. Mr Paci submitted that he

had been unable to verify the facts or to contest the evidence on which the telephone-tapping decision had been taken, since he had had no access to a full copy of the case concerning trade in stolen cars.

The application was lodged with the European Court of Human Rights on 17 August 2009.

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

Robert **Spano** (Iceland), *President*,
 Paul **Lemmens** (Belgium),
 Ledi **Bianku** (Albania),
 Nebojša **Vučinić** (Montenegro),
 Valeriu **Grițco** (Republic of Moldova),
 Jon Fridrik **Kjølbro** (Denmark),
 Stéphanie **Mourou-Vikström** (Monaco),

and also Stanley **Naismith**, *Section Registrar*.

Decision of the Court

Article 5 § 1 (right to liberty and security)

As regards the fact that Mr Paci had not been surrendered to the Italian authorities after the close of the investigation in Belgium: the Court noted that the Belgian courts had held that under Article 5 § 3 of the Council framework decision of 13 June 2002 on the EAW3, the applicant should not be surrendered to the executing State (Italy) until the proceedings in the issuing State (Belgium) had been completed. The Court reiterated that it was for the national authorities, and in particular the courts, to interpret and apply domestic law, and that it was not its task to assess whether the Belgian courts had properly interpreted the framework decision and Italian law, unless their interpretation appeared to be arbitrary or manifestly unreasonable. In the present case the Court had not noted any arbitrariness or manifest unreasonableness, and concluded that the detention orders had been valid throughout the criminal proceedings.

As regards Mr Paci's detention in a Belgian prison for almost two years after the conviction judgment delivered by the Mons Court of Appeal in 2008: the Court noted that the proceedings had ended with the judgment delivered by the Court of Cassation on 25 February 2009 dismissing Mr Paci's appeal. It noted that neither Mr Paci nor the Italian authorities had made any representations with regard to his surrender. For their part, the Belgian authorities had initiated the surrender procedure in the months following the judgment of the Court of Cassation. They had sent their Italian counterparts several reminders. Since the outcome of the surrender procedure had not depended solely on the Belgian authorities, as things stood no violation could be found on the basis of the period of time which had elapsed after the Court of Cassation had delivered its judgment. Therefore, Mr Paci's continued detention after the end of the proceedings against him had not been arbitrary.

Consequently, **Mr Paci's detention had been justified and there had been no violation of Article 5 § 1 of the Convention.**

Article 6 § 1 (right to a fair trial)

The Court noted that although Mr Paci had indeed been a suspect in the "stolen cars" case, he had not yet been charged, which had precluded granting him access to the corresponding case file. The confidentiality of judicial investigations had prevented the prosecution from revealing evidence which had to remain confidential for the purposes of the investigation in the "stolen cars" case. Moreover, Mr Paci had had access to the whole file in the "arms trafficking" case, including full copies of the reasoned orders and the documents relating to the execution of the telephone tapping, and he had been at liberty to contest the documentary evidence from the "stolen cars" case which were also in the "arms trafficking" file, including information on the proper reasoning of the orders.

The Court also noted that the telephone tapping had been authorised by the investigating judge

responsible for the “stolen cars” case, in the form of reasoned orders satisfying all the formal and substantive criteria which had to be complied with if the orders were to be valid. Furthermore, the trial courts had assessed all Mr Paci’s pleas in detail, including his complaints concerning the rights of the defence. Finally, Mr Paci had not been convicted solely on the basis of the telephone-tapping evidence, and there had been other factual evidence against him. Consequently, Mr Paci’s conviction was not based on evidence in respect of which he had been unable, or insufficiently able, to exercise his defence rights.

The proceedings as a whole had therefore not been unfair and there had been no violation of Article 6 § 1 of the Convention.

15. ECtHR, *Pirozzi v. Belgium*, No. 21055/11, Chamber judgment of 17 April 2018 (Article 5-1, Right to liberty and security - No violation; Article 6-1, Right to a fair trial - No violation). The applicant, an Italian national, convicted for drug trafficking in Italy but arrested in Belgium unsuccessfully complained that his surrender to the Italian authorities under a European arrest warrant without reviewing its lawfulness and propriety violated his right to a fair trial and to liberty and security. In its judgment the Court relied, amongst others, on the *EU Council Framework Decision on the European arrest warrant and the surrender procedures between Member States* (2002/584/JHA) of 13 June 2002.

ECHR 146 (2018)

17.04.2018

Press release issued by the Registrar

In today's **Chamber** judgment in the case of *Pirozzi v. Belgium* (application no. 21055/11) the European Court of Human Rights held, unanimously, that there had been:

no violation of Articles 5 § 1 (right to liberty and security) and 6 § 1 (right to a fair trial) of the European Convention on Human Rights.

The case concerned Mr Pirozzi's detention by the Belgian authorities and his surrender to the Italian authorities under a European arrest warrant (EAW) with a view to enforcing a criminal conviction imposing 14 years' imprisonment for drug trafficking.

The Court found, in particular, that Mr Pirozzi's arrest by the Belgian authorities with a view to placing him in detention and surrendering him to the Italian authorities had been carried out in accordance with lawful procedures.

The Court also held that the Belgian courts' implementation of the EAW had not been manifestly deficient such that the presumption of equivalent protection was rebutted, and that Mr Pirozzi's surrender to the Italian authorities could not be considered to have resulted from a trial amounting to a flagrant denial of justice.

Principal facts

The applicant, Vittorio Pirozzi, is an Italian national who was born in 1952. He is currently detained in Spoleto Prison (Italy).

In 2002 the Brescia Court of Appeal sentenced Mr Pirozzi to 15 years' imprisonment and ordered him to pay a fine of EUR 80,000 for drug trafficking. The judgment was issued in his absence, as Mr Pirozzi had been unable to appear for medical reasons. However, he was represented by his lawyer. The Brescia court, in response to an appeal, subsequently reduced the sentence by one year.

In 2010 the Naples Public Prosecutor's Office issued an EAW with a view to enforcing the sentence still to be served. Mr Pirozzi, who was tracked down in Brussels, was arrested by the Belgian police in August 2010. The day after his arrest he was presented to an investigating judge, who ordered that he be placed in detention. A few days later the Belgian courts held that the EAW was enforceable and he was handed over to the Italian authorities in September 2010.

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security), Mr Pirozzi alleged that his arrest by the Belgian authorities had been unlawful. In particular, he considered that the evidence concerning the measures taken to find and arrest him had not been included in the public prosecutor's office case file and that this had made it impossible to review the lawfulness and propriety of the operations preceding his arrest.

Relying on Article 6 § 1 (right to a fair trial), the applicant complained about his surrender to the Italian authorities under an EAW. In particular, he considered that the Belgian authorities had surrendered him to the Italian authorities without reviewing the lawfulness and propriety of the EAW, although it had been based on a conviction resulting from a trial *in absentia*.

The application was lodged with the European Court of Human Rights on 22 March 2011.

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

Robert **Spano** (Iceland), *President*,
 Paul **Lemmens** (Belgium),
 Ledi **Bianku** (Albania),
 Nebojša **Vučinić** (Montenegro),
 Valeriu **Grițco** (the Republic of Moldova),
 Jon Fridrik **Kjølbro** (Denmark),
 Stéphanie **Mourou-Vikström** (Monaco),

and also Stanley **Naismith**, *Section Registrar*.

Decision of the Court

Article 5 § 1 (right to liberty and security)

The court noted that Mr Pirozzi's arrest with a view to his placement in detention and his surrender to the Italian authorities had been conducted in accordance with a procedure prescribed by law within the meaning of Article 5 § 1 of the Convention. The EAW issued by the Italian judicial authorities had amounted to an arrest warrant, and Belgian law conferred on the police the task of searching for persons whose arrest was prescribed by law, taking them into custody and arresting them, and handing them over to the relevant authorities. Furthermore, in accordance with the law on detention on remand, the Crown Prosecutor had mandated the police to arrest Mr Pirozzi and to take him into custody by entering his place of residence. In addition, in the absence of any sign of arbitrariness in Mr Pirozzi's deprivation of liberty, its lawfulness did not depend on the lawfulness of the preceding operations to track him down and arrest him. **It followed that there had been no violation of Article 5 § 1 of the Convention.**

Article 6 § 1 (right to a fair hearing)

With regard to the lawfulness and propriety of the EAW: in line with the system established by the framework decision on the EAW, it was for the judicial authority which had issued the warrant and to which Mr Pirozzi ought to be handed over, namely the Italian judicial authorities, to assess the lawfulness and validity of the EAW. The Belgian public prosecutor's office did not therefore have discretion to assess the appropriateness of the arrest, and the Belgian courts could have refused to execute it only on the grounds set out in the Belgian legislation. In this connection, the Court considered that the review carried out by the Belgian authorities, thus limited, did not in itself give rise to any problem in relation to the Convention, provided that the Belgian courts examined the merits of the complaints raised under the Convention. In the present case, they had verified that the enforcement of the EAW in Mr Pirozzi's case did not give rise to manifestly deficient protection of the rights guaranteed by the Convention.

With regard to Mr Pirozzi's conviction *in absentia*: the Court noted that the Belgian legislation provided for the possibility that the Belgian court could have refused to execute the EAW if the applicant had been in the same situation as that described in the Court's case-law in the *Sejdovic v. Italy* case judgment. However, this had not been the case here. Mr Pirozzi had been officially informed of the date and place of the hearing before the Brescia Court of Appeal and he had been assisted and defended by a lawyer whom he had himself appointed; moreover, that defence had been effective, in that it had obtained a reduction in his sentence.

The Court therefore noted that the implementation of the EAW by the Belgian courts had not been manifestly deficient such that it rebutted the presumption of equivalent protection afforded both by the EAW system – as defined by the framework decision and clarified by the case-law of the Court of Justice of the

European Union – and by its application in Belgian law. The Court also concluded that Mr Pirozzi's surrender to the Italian authorities could not be considered as having been based on a trial amounting to a flagrant denial of justice. In consequence, it considered that **Mr Pirozzi's surrender to the Italian authorities had not been in breach of Article 6 § 1 of the Convention.**

16. ECtHR, *A.S. v. France*, No. 46240/15, Chamber judgment of 17 April 2018 (Article 3, Prohibition of inhuman and degrading treatment - No violation; Article 34, Right of individual application - Violation). The applicant, a Moroccan national who had been convicted in France of conspiracy to carry out terrorist acts, and who had previously been deprived of his French nationality for the same reason, unsuccessfully complained that he had been expelled to Morocco despite the fact that in that country he had risked being subjected to ill-treatment and of his conditions of detention there. However, the Court found that his expulsion to Morocco had been in breach of the interim measure indicated by the Court and therefore France had failed in its obligations under the right of individual application.

**ECHR 153 (2018)
19.04.2018**

Press release issued by the Registrar

In today's **Chamber** judgment in the case of *A.S. v. France* (application no. 46240/15) the European Court of Human Rights held that there had been:

unanimously, no violation of Article 3 (prohibition of inhuman or degrading treatment), and

by a majority, a violation of Article 34 (right of individual application) of the European Convention on Human Rights.

The case concerned the expulsion to Morocco of a Moroccan national who had been convicted in France of conspiracy to carry out terrorist acts, and who had previously been deprived of his French nationality for the same reason.

The Court noted in particular that Morocco had adopted general measures to prevent risks of treatment contrary to Article 3. The present application was therefore different from the case of *M. A. v. France*. Furthermore, despite his release, the applicant had failed to provide any evidence that his conditions of detention had exceeded the requisite severity threshold for a violation of Article 3.

As regards Article 34, the Court found that the expulsion order had not been served on the applicant until 22 September 2015, the day of his release, more than one month after the decision had been taken, and that he had been immediately taken to the airport for expulsion to Morocco. The applicant had therefore not had sufficient time to request that the Court suspend the decision, even though the French authorities had taken it a long time previously.

Principal facts

The applicant, A.S., is a Moroccan national who was born in 1970.

Mr A.S. arrived in France in 1991 and acquired French nationality in 2002. In 2013 he was sentenced to seven years' imprisonment for involvement, in 2007, 2008, 2009 and up to 30 April 2010, in a conspiracy to carry out terrorist acts in Paris, elsewhere in France, in Morocco, in Iran and in Afghanistan. In May 2014 he was deprived of his nationality. During his prison term Mr A.S. submitted an asylum application on the grounds that he feared ill-treatment if he returned to Morocco. His application was rejected on 25 August 2015. The Minister of the Interior issued an expulsion order against him on 14 August 2015, without informing him. On 21 September Morocco was established as the country of destination of the expulsion. The next day, on the date of his release, the applicant was served with the expulsion order. His lawyer lodged a request for an interim measure with the Court. At 12.05 p.m. on 22 September the Court indicated to the French Government that it should refrain from expelling the applicant until 25 September, but Mr A.S. was expelled to Casablanca at 12.35 p.m. on 22 September.

On arrival in Casablanca Mr A.S. was arrested and remanded in custody, and then placed in preventive detention on 2 October 2015. On 10 March 2016 he was sentenced by a Moroccan court to five years' immediate imprisonment, but was released on 21 December 2016 by the Court of Appeal, on the grounds that he had already served his whole sentence in France for the same acts in respect of which he had been tried in Morocco. On 21 December 2016 the National Court on the Right of Asylum dismissed his appeal against the decision of the French Office for the Protection of Refugees and Stateless Persons (OFPRA).

Complaints, procedure and composition of the Court

The applicant had alleged that he had been expelled to Morocco despite the fact that in that country he had risked being subjected to ill-treatment prohibited by Article 3 (prohibition of torture and inhuman and degrading treatment). He had also complained of his conditions of detention in the Tiflet and Salé Prisons in Morocco. The applicant submitted that by expelling him to Morocco in breach of the interim measure indicated by the Court, France had failed in its obligations under Article 34 (right of individual application). The applicant also relied on Articles 8 (right to respect for private and family life), Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens) and Article 14 (prohibition of discrimination).

The application was lodged with the European Court of Human Rights on 21 September 2015.

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

Angelika **Nußberger** (Germany), *President*,
 Erik **Møse** (Norway),
 André **Potocki** (France),
 Síofra **O'Leary** (Ireland),
 Mārtiņš **Mits** (Latvia),
 Gabriele **Kucsko-Stadlmayer** (Austria),
 Lado **Chanturia** (Georgia),

and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Article 3 (prohibition of torture and inhuman and degrading treatment)

The Court pointed out that the date of the applicant's expulsion to Morocco, that is to say 22 September 2015, should be taken into account in assessing whether there had been any real risk of his being subjected to treatment contrary to Article 3 in that country. The Court was also prepared to consider any subsequent information it might receive.

The Court observed that according to the Amnesty International report, Morocco had taken action to prevent risks of torture and inhuman and degrading treatment. It agreed with OFPRA's finding that the nature of the applicant's conviction and the national and international context of combating terrorism explained why A.S. might be subjected to control and supervisory measures on his return to Morocco, without such measures amounting *ipso facto* to treatment contrary to Article 3. The Court also noted that the applicant had not presented any evidence to prove that the persons presented as his accomplices who had been prosecuted in Morocco had sustained inhuman or degrading treatment.

The Court drew a distinction between the present application and the cases of *M.A. v. France* and *X. v. Switzerland*. M.A. had been expelled to a country which, unlike Morocco, had failed to take any practical action to prevent the risk of torture in detention. In *X. v. Switzerland*, the applicant had been able to prove that the third person who he submitted had been in a comparable position had actually suffered treatment prohibited under Article 3. The Court noted that despite his release and his contacts with a lawyer, the applicant had failed to present any evidence, such as medical certificates, to show that his conditions of detention had exceeded the requisite severity threshold for a violation of Article 3.

The Court concluded that there could be no finding of a violation of Article 3.

Article 34 (right of individual application)

The Court noted, and the Government had in fact acknowledged, that the interim measure which it had indicated had not been complied with. It was fully aware that it was sometimes necessary to execute an expulsion order efficiently and expeditiously, but pointed out that the conditions for such execution should not be geared to depriving the person subject to expulsion of the right to request an interim measure from the Court. In the instant case the order had been served on the applicant on 22 September 2015, the day on which he was released, more than one month after the decision to expel him. A.S. had been immediately taken to the airport to be flown to Morocco. Consequently, A.S. had had insufficient time effectively to request that the Court suspend the decision, even though France had taken it a long time previously.

Moreover, the expulsion had rendered nugatory any finding of a violation of the Convention because the applicant had been expelled to a country which was not bound by the latter and in which he claimed that he was liable to be subjected to treatment which it prohibited.

The Court concluded that the French authorities had failed in their obligations under Article 34.

Other articles

As regards the applicant's complaints under Article 8, Article 1 of Protocol No. 7 and Article 14, the Court observed that the applicant had complained of a violation of Article 8 before the Paris Administrative Court when contesting the expulsion order of 14 August 2015. That appeal was still pending before the Administrative Court of Appeal.

Consequently, those complaints had to be rejected as premature.

Just satisfaction (Article 41)

The Court considered that the finding of non-compliance with Article 34 was in itself sufficient just satisfaction for the damage sustained by the applicant.

Separate opinion

Judge O'Leary expressed a separate opinion, the text of which is annexed to the judgment.

17. ECtHR, *Dimitras v. Greece*, No. 11946/11, Chamber judgment of 19 April 2018 (Article 6-1, Access to court - No violation; Article 6-1, Length of the proceedings - Violation; Article 13, Right to an effective remedy - Violation). The applicant, a Greek national, complained that his criminal action for slander against a Government official had never been heard as the official had received immunity after being elected to Parliament, there had been delays caused by the domestic authorities and the offence eventually had become time-barred. In its judgment the Court relied, among others, on the Greek Constitution and concluded that the national courts' decision to dismiss the request for lifting the immunity of the Government official violated the applicant's right to an effective remedy.

**ECHR 152 (2018)
19.04.2018**

Press release issued by the Registrar

The applicant, Panayotis Dimitras, is a Greek national who was born in 1953 and lives in Glyka Nera (Greece).

The case concerned his complaint that his criminal action for slander against a Government official had never been heard as the official had received immunity after being elected to Parliament, there had been delays caused by the domestic authorities and the offence eventually had become time-barred.

On 1 June 2007 Mr Dimitras lodged a criminal complaint for slander against E.T., the General Secretary of a Government Ministry. He accused E.T. of making false statements to the press about the Greek Helsinki Monitor, a non-governmental organisation of which he is the executive director. However, while the case was still pending, E.T. was elected a Member of Parliament and the court suspended the proceedings until Parliament granted leave to continue the prosecution. In October 2010, about one month after the offence had become time-barred (on 4 September 2010), Parliament ruled that E.T.'s immunity should not be lifted and dismissed the request for leave to continue the criminal proceedings. When E.T.'s parliamentary term came to an end, the case was nonetheless considered by the domestic court, which held on 26 October 2012 that the offence had become time-barred, and ended the criminal prosecution.

Relying in particular on Article 6 § 1 (access to court), Mr Dimitras argued that the authorities had knowingly let the statute of limitations expire, resulting in the offence becoming time-barred and a breach of his right of access to court. Further relying on Article 6 § 1 (right to a fair hearing within a reasonable time) and Article 13 (right to an effective remedy), he also complained that the length of the proceedings – more than five years – had been excessive and that there had been no effective remedy in Greece for him to bring a complaint about that.

**No violation of Article 6 § 1 (access to court)
Violation of Article 6 § 1 (length of proceedings)
Violation of Article 13**

Just satisfaction: EUR 3,000 (non-pecuniary damage) and EUR 600 (costs and expenses).

- 18. ECtHR, *Benedik v. Slovenia*, No. 62357/14, Chamber judgment of 24 April 2018 (Article 8, Right to respect for private and family life - Violation).** The applicant successfully claimed that the failure of the Slovenian police to obtain a court order to access subscriber information associated with a dynamic IP address recorded by the Swiss law-enforcement authorities during their monitoring of users of a certain file-sharing network was in breach of his right to respect for private and family life. In its judgment, the Court referred, among others, to the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ETS No. 108) of 28 January 1981 and to the *Convention on Cybercrime* (ETS No. 185) of 1 July 2004.
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ECHR 160 (2018)

24.04.2018

Press release issued by the Registrar

In today's **Chamber** judgment in the case of *Benedik v. Slovenia* (application no. 62357/14) the European Court of Human Rights held, by six votes to one, that there had been:

a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The case concerned the Slovenian police's failure to obtain a court order to access subscriber information associated with a dynamic IP address recorded by the Swiss law-enforcement authorities during their monitoring of users of a certain file-sharing network. This led to the applicant being identified after he had shared files over the network, including child pornography. The Court found in particular that the legal provision used by the police to obtain the subscriber information associated with the dynamic IP address had not met the Convention standard of being "in accordance with the law". The provision had lacked clarity, offered virtually no protection from arbitrary interference, had no safeguards against abuse and no independent supervision of the police powers involved.

It stated that a finding of a violation of Mr Benedik's rights under the Convention was sufficient just satisfaction for any non-pecuniary damage.

Principal facts

The applicant, Igor Benedik, is a Slovenian national who was born in 1977 and lives in Kranj (Slovenia).

In 2006 police in Switzerland informed their counterparts in Slovenia about a dynamic IP address that was being used in a peer-to-peer file-sharing network, which included the sharing of child pornography pictures or videos. In August 2006 the Slovenian police asked the local Internet service provider for information about the user who had been assigned that IP address, which the company handed over. The police used a provision of the Criminal Procedure Act which allowed them to request information from an electronic communication provider about the user of a certain means of electronic communication whose details were not available in the relevant directory. The police did not obtain a court order. In December of the same year the police got a court order to obtain information about that user's traffic data. Although the IP address at first identified Mr Benedik's father as the subscriber to the Internet service in question, it transpired that it was Mr Bendik who used the service himself and had downloaded files with child pornography. He was formally placed under investigation in November 2007. He denied committing any offence and told investigators that he did not know what was on the files. He was convicted in December 2008 of the offence of the display, manufacture, possession or distribution of child pornography.

He made unsuccessful appeals to the Ljubljana Higher Court, the Supreme Court and the Constitutional Court. He alleged throughout the domestic proceedings that the evidence about his identity had been obtained unlawfully because the authorities had not had a court order to obtain subscriber information associated with the dynamic IP address in question.

In particular, the Constitutional Court found that such information was in principle protected by constitutional data privacy safeguards but that Mr Benedik had waived his right to protection by revealing his IP address and the content of his communications on the file-sharing network.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), the applicant complained that the police had obtained information about him by accessing data linked to his dynamic IP address in an arbitrary way, without obtaining a court order.

The application was lodged with the European Court of Human Rights on 10 September 2014.

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

Ganna **Yudkivska** (Ukraine), *President*,
 Vincent A. **De Gaetano** (Malta),
 Faris **Vehabović** (Bosnia and Herzegovina),
 Carlo **Ranzoni** (Liechtenstein),
 Georges **Ravarani** (Luxembourg),
 Marko **Bošnjak** (Slovenia),
 Péter **Paczolay** (Hungary),

and also Andrea **Tamietti**, *Deputy Section Registrar*.

Decision of the Court

Article 8

The Court first held that Mr Benedik's interest in having his identity with respect to his online activity protected fell within the scope of the notion of "private life" under the Convention.

It went on to assess in particular whether the police's interference with his rights had been "in accordance with the law". That meant that the measure had to have some basis in domestic law; the law had to be accessible; the person affected had to be able to foresee the consequences of his or her actions; and the provision had to be compatible with the rule of law.

The Court found that the provision of the Criminal Procedure Act used by the police to access subscriber information raised no questions as to its accessibility, but it also had to be satisfied that there were sufficient guarantees against abuse.

The provision concerned a request for information on the owner or user of a means of electronic communication, however, it had no rules covering the link between a dynamic IP address and subscriber information. In contrast, other legislation laid down rules on the secrecy and confidentiality of electronic communication. For example, Article 37 of the Constitution required a court order for any interference with the privacy of communication.

It was not the Court's task to say which piece of legislation should have prevailed, but in examining the domestic judgments it highlighted the constitutional finding on Mr Benedik: access to subscriber information based on his IP address had in principle required a court order, but the Constitutional Court had ultimately found that it had not been necessary to get such an order in Mr Benedik's case as he had effectively waived his right to privacy by revealing his IP address and the contents of his communication on the file-sharing network. However, the Court did not find that decision to be reconcilable with the scope of the right to privacy under the Convention.

In the Court's view, the police should have got a court order and nothing in the law had prevented them from seeking one. In fact, they had obtained a court order subsequently to obtain similar information. In addition, there were at the time no regulations on retaining the relevant data and no safeguards against abuse by State officials in the procedure for accessing and transferring them. No independent supervision of the use of the

police's powers in relation to obtaining information from ISPs had existed at the time, although the Court noted that Slovenia had subsequently passed legislation to regulate such matters.

Overall, the Court found that the law used by the police to obtain subscriber information relating to the dynamic IP address had lacked clarity and had not offered sufficient safeguards against arbitrary interference with his Article 8 rights. The interference with Mr Benedik's rights had therefore not been "in accordance with the law" and had led to a violation of the Convention.

Just satisfaction (Article 41)

The Court held that the finding of a violation was sufficient just satisfaction for any non-pecuniary damage Mr Benedik might have suffered. It awarded him EUR 3,522 in respect of costs and expenses for both the domestic proceedings and those before the Court.

Separate opinions

Judge Yudkivska expressed a concurring opinion, which was joined by Judge Bošnjak, while Judge Vehabović expressed a dissenting opinion. The opinions are annexed to the judgment.

19. ECtHR, *Baydar v. the Netherlands*, No. 55385/14, Chamber judgment of 24 April 2018 (Article 6, Right to a fair trial - No violation). The applicant, a dual Dutch and Turkish national, unsuccessfully complained that the Dutch Supreme Court's refusal, based on summary reasoning, to refer a request for a preliminary ruling to the Court of Justice of the European Union (CJEU) violated his right to a fair trial. The Court concluded that in the context of accelerated procedures it was acceptable under the *European Convention on Human Rights* for an appeal in cassation which included a request for referral to be declared inadmissible or dismissed with a summary reasoning when it was clear from the circumstances of the case that the decision was not manifestly arbitrary or otherwise manifestly unreasonable.

**ECHR 162 (2018)
24.04.2018**

Press release issued by the Registrar

In today's **Chamber** judgment in the case of *Baydar v. the Netherlands* (application no. 55385/14) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 6 (right to a fair trial) of the European Convention on Human Rights.

The case concerned a complaint by Mr Baydar about the Supreme Court's refusal, based on summary reasoning, to refer his request for a preliminary ruling to the Court of Justice of the European Union (CJEU).

In October 2011 Mr Baydar, was convicted of transporting heroin and of people trafficking. The judgment was upheld on appeal with the Supreme Court sentencing him to 34 months' imprisonment. Mr Baydar, with reference to the people-trafficking conviction, requested the referral of a question to the CJEU on the definition of the word "residence" in EU law, as applied in the national Criminal Code, but the Supreme Court refused.

The Court found in particular that in the context of accelerated procedures it was acceptable under Article 6 § 1 of the Convention for an appeal in cassation which included a request for referral to be declared inadmissible or dismissed with a summary reasoning when it was clear from the circumstances of the case that the decision was not arbitrary or otherwise manifestly unreasonable.

Principal facts

The applicant, Ilkay Baydar, was born in 1968 and lives in Apeldoorn (The Netherlands). He holds both Dutch and Turkish nationality.

In October 2011 Mr Baydar was convicted by the Arnhem Court of Appeal of transporting heroin and of people trafficking and given a sentence of 40 months' imprisonment. The Court of Appeal found established that the applicant had, for purposes of financial gain, between November 2006 and January 2007 facilitated the unauthorised residence of 20 Iraqi migrants in the Netherlands, Germany and Denmark. The judgment was upheld on appeal (in cassation), although the Supreme Court reduced the sentence to 34 months on the grounds of the excessive length of the subsequent cassation proceedings.

When it came to the people-trafficking conviction, he contended that the evidence relied on by the Court of Appeal had not proven that the Iraqi migrants had had "residence" in the Netherlands, Germany or Denmark. Instead, the evidence had showed that the Iraqi migrants were to be transported by the applicant to Denmark *via* the Netherlands and Germany, but that they had been intercepted on each occasion in Germany. The migrants' stay in the Netherlands and in Germany had only been brief and transitory, thus there was no proof of "residence" in those countries. In that regard the applicant referred to EU Law (Council Directive 2002/90/EG and Council Framework Decision 2002/946/JBZ) and requested for a referral to the CJEU for a preliminary ruling about the interpretation of "residence".

The Supreme Court refused and dismissed the appeal in cassation, stating that – based on national law - no further reasoning was required as the grievances did not give rise to the need for a determination of legal issues in the interests of legal uniformity or legal development.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 1 August 2014. Relying on Article 6, the applicant complained that the Supreme Court refused to refer his request to the CJEU and that it failed to provide adequate reasoning for its decision although it had a duty to do so.

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

Helena **Jäderblom** (Sweden), *President*,
Branko **Lubarda** (Serbia),
Helen **Keller** (Switzerland),
Pere **Pastor Vilanova** (Andorra),
Alena **Poláčková** (Slovakia),
Georgios A. **Serghides** (Cyprus),
Jolien **Schukking** (the Netherlands),

and also Stephen **Phillips**, *Section Registrar*.

Decision of the Court

Article 6

The Court considered that it was not contrary to Article 6 § 1 of the Convention for superior courts to dismiss a complaint by mere reference to the relevant legal provisions if the matter raised no fundamentally important legal issue, especially in the context of accelerated procedures. The Court's competence was limited to ascertaining whether the decisions of national courts were not flawed by arbitrariness or were otherwise manifestly unreasonable.

The Court agreed with the national Supreme Court's explanation that it was clear that when an appeal in cassation was dismissed, there was no need to seek a preliminary ruling, as the matter did not raise a legal issue that needed to be determined.

The Court noted furthermore that the CJEU had ruled that domestic courts (within the meaning of Article 267 § 3 TFEU) were not obliged to refer a question about the interpretation of EU law raised before them if the question was not relevant, that is to say, if the answer could not have any effect on the outcome of the case.

As the Supreme Court had duly examined the grounds of the appeal on points of law by Mr Baydar and no appearance of unfairness in its proceedings was discerned by the Court, there had been no violation of Article 6 § 1 of the Convention. In particular, the Court noted that the request had been dismissed by three members of the Supreme Court with summary reasoning on the basis of national law, after having taken cognisance of the whole of the applicant's written grounds of appeal and the Advocate General's advisory opinion.

20. ECtHR, *Fatih Taş v. Turkey (No.3 and No.4)*, No. 45281/08 and No. 51511/08, Chamber judgment of 24 April 2018 (Article 6-1, Right to a fair trial within reasonable time - Violation; Article 10, Freedom of expression - No violation with respect to *Fatih Taş v. Turkey (No.3)*, Violation with respect to *Fatih Taş v. Turkey (No.4)*; Article 13, Right to an effective remedy - Violation). The applicant, a Turkish national, owner and editor-in-chief of a publishing house, claimed that the criminal proceedings brought against him following the publication of three books related to the Kurdistan Workers Party (PKK), an illegal armed organisation, and his subsequent charge with disseminating propaganda in favour of a terrorist organisation violated, among others, his right to freedom of expression.

ECHR 158 (2018)
24.04.2018

Press release issued by the Registrar

The applicant, Fatih Taş, is a Turkish national who was born in 1979 and lives in Istanbul.

The two cases concerned criminal proceedings brought against Mr Taş when he was the owner and editor-in-chief of a publishing house (Aram Basım ve Yayıncılık), following the publication of three books.

In the first case the book in question consisted of memoirs of 17 members of the PKK (the Kurdistan Workers Party), an illegal organisation in Turkey. The authorities seized copies of the book in September 2003 and Mr Taş was charged with disseminating propaganda in favour of a terrorist organisation. He was subsequently found guilty as charged, the domestic courts holding that certain passages in the book constituted incitement to violence and to terrorism. Ultimately, however, in April 2011 the proceedings were discontinued as time-barred. Mr Taş was not detained or remand, nor did he serve any sentence in the context of the proceedings against him.

In the second case, concerning another book, Mr Taş was again convicted of disseminating propaganda in favour of the PKK. The courts found that as publisher of the book he had been guilty of praising the PKK and its leader in order to attract more sympathisers to the organisation. Similarly however, the proceedings were discontinued in 2012 as time-barred. He was also given another conviction in 2002, upheld in 2003, for aiding and abetting the PKK as regards another book. Relying on Article 10 (freedom of expression) of the European Convention on Human Rights, Mr Taş alleged in particular that the criminal proceedings brought against him had breached his freedom of expression. In the first case he also alleged under Article 6 § 1 (right to a fair trial within a reasonable time) and Article 13 (right to an effective remedy) of the European Convention that the length of the proceedings had been excessive and that there had been no effective remedy under Turkish law for him to contest the length of the proceedings.

- case of *Fatih Taş v. Turkey (no. 3)*:

No violation of Article 10
Violation of Article 6 § 1
Violation of Article 13

Just satisfaction: EUR 4,500 (non-pecuniary damage) and EUR 1,000 (costs and expenses)

- case of *Fatih Taş v. Turkey (no. 4)*:

Violation of Article 10 – in so far as it concerns the criminal proceedings relating to the publication of the book entitled *Tufanda 33 Gün*

Just satisfaction: EUR 2,500 (non-pecuniary damage).

21. ECtHR, *Hoti v. Croatia*, No. 63311/14, Chamber judgment of 26 April 2018 (Article 8, Right to respect for private and family life - Violation). The applicant, a stateless migrant, successfully complained that the Croatian authorities' refusal to regularise his residence status since his arrival in the country in 1979, as according to his birth certificate he had no nationality, violated his right to respect for private and family life.
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ECHR 165 (2018)
26.04.2018

Press release issued by the Registrar

In today's **Chamber** judgment in the case of *Hoti v. Croatia* (application no. 63311/14) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private and family life and the home) of the European Convention on Human Rights.

The case concerned a migrant in Croatia who complained that he had been unable to regularise his residence status since his arrival in the country in 1979. His parents fled Albania in 1960 as political refugees and settled in Kosovo; he was born there a few years later. He has since been told by the Albanian authorities that he is not Albanian; according to his birth certificate, he has no nationality. He has been living and intermittently working in Croatia for almost 40 years and has no link with any other country as he has, in the meantime, lost contact with all his relatives. Currently unemployed because he has no residence status, he survives by carrying out occasional work on farms.

The Court found in particular that the Croatian authorities had not taken into account the complexity of Mr Hoti's situation in the various procedures he had tried to use to regularise his residence status. He had therefore found himself, aged 55, in a precarious situation, with little prospect of finding employment or securing health insurance or pension rights. Indeed, instead of helping Mr Hoti to contact the authorities of another country in view of the fact that he has no nationality, the Croatian authorities have insisted on his being a Kosovo national.

Principal facts

The applicant, Bedri Hoti, was born in Kosovo in 1962 to an Albanian couple who had fled their home country as political refugees. At the time Kosovo was an autonomous province of Serbia in the former Socialist Federal Republic of Yugoslavia ("the SFRY"). Aged 17, Mr Hoti left Kosovo and settled in Novska in Croatia, also a part of the SFRY at the time. He has been living there ever since. Although he has lived for a number of years under the temporary residence regime provided by the authorities in Kosovo related to his status as an Albanian refugee, a status which was recognized throughout the former SFRY, according to his birth certificate Mr Hoti actually has no nationality.

Throughout the years Mr Hoti has applied for Croatian citizenship and a permanent residence permit, without success. In particular, his application for a permanent residence permit was dismissed in 2003, essentially because he did not have three years of uninterrupted employment in Croatia.

Mr Hoti challenged these decisions by the Ministry of the Interior before the administrative courts, also without success. His constitutional complaint was dismissed in 2008.

He is currently trying to regularise his residence status in proceedings under the Aliens Act whereby it is possible to extend his stay every year on humanitarian grounds, either by providing a valid travel document or at the discretion of the Ministry. If he reaches a period of five years uninterrupted stay under this regime, he would qualify for a permanent residence permit. However, he has not so far qualified as his residence, which was temporarily extended on humanitarian grounds between 2011 and 2013, was interrupted in 2014 when the Ministry refused to allow an extension because he had failed to provide a valid travel document.

Most recently, in 2015 and 2016 the Ministry, considering Mr Hoti to be a national of Kosovo, gave its consent for an extension of his temporary stay.

Mr Hoti has no family in Croatia. His parents have died and he has lost contact over the years with two sisters who live in Germany and Belgium.

Throughout the 40 years he has lived in Croatia, he has worked intermittently, as a waiter and a car mechanic. He currently survives by helping out on farms in the Novska area.

Complaints, procedure and composition of the Court

Relying in particular on Article 8 (right to respect for private and family life and the home), Mr Hoti alleged that he had not had an effective possibility to regularise his residence status in Croatia, creating a situation of uncertainty for him, which had had an impact on his private life, namely difficulties in finding employment, contracting health insurance or regulating his pension rights.

The application was lodged with the European Court of Human Rights on 15 September 2014.

Third-party comments were submitted by the Office of the United Nations High Commissioner for Refugees (the UNHCR).

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

Linos-Alexandre **Sicilianos** (Greece), *President*,
 Aleš **Pejchal** (the Czech Republic),
 Krzysztof **Wojtyczek** (Poland),
 Ksenija **Turković** (Croatia),
 Armen **Harutyunyan** (Armenia),
 Pauliine **Koskelo** (Finland),
 Tim **Eicke** (the United Kingdom),

and also Abel **Campos**, *Section Registrar*.

Decision of the Court

First, the Court noted that there was no doubt that Mr Hoti had a private life in Croatia. He has been living and intermittently working in the country for almost 40 years and has no link with any other country as he has, in the meantime, lost contact with all his relatives. Currently unemployed because he has no residence status, he survives owing to farm work. He has therefore found himself, aged 55, in a precarious situation, with little prospect of finding employment or securing health insurance or pension rights.

Mr Hoti's situation was therefore complex and could not be considered to be on a par with other potential immigrants seeking admission to a host country. The complexity of his situation has further been compounded by the fact that he is stateless, and by the break-up of the SFRY, where his status as an Albanian refugee was previously recognised.

However, despite being aware of the special features of Mr Hoti's case and it being possible under the relevant legislation to grant permanent residence to foreigners "in view of particular personal reasons", the domestic authorities had not made any assessment of his personal circumstances and the situation in which he had found himself.

In particular, the authorities had refused his application for a permanent residence permit because he had not had three years of uninterrupted employment. According to records, he had in fact been employed between July 1986 and December 1989 with a 15-day interruption. Given Mr Hoti's personal circumstances, the Court found that such a decision, although formally correct, had been overly formalistic.

Similarly, no account has been taken of Mr Hoti's particular circumstances in the current proceedings through which he is trying to regularise his residence status. The Ministry gave no reasons for refusing to extend his temporary stay in 2014 or for consenting to an extension in 2015 and 2016. Thus, his right of temporary stay has been exercised inconsistently and has further delayed the prospect of him applying for a permanent residence permit after five years uninterrupted residence on humanitarian grounds, subject to the Ministry's consent. Nor would it appear that he could ever attain the five years uninterrupted residence on humanitarian grounds subject to him providing a valid travel document, namely a valid national biometric passport of the current country of origin, as this is a requirement that Mr Hoti, a stateless person, could never meet.

Moreover, the Croatian authorities had never considered providing administrative assistance to facilitate Mr Hoti's contact with the authorities of another country, despite having been aware of the fact that he is stateless. On the contrary, the authorities insisted that he was a national of Kosovo.

Having looked at all the procedures and circumstances cumulatively, and also bearing in mind that Mr Hoti has no criminal record and that his residence has been tolerated in Croatia for more than 40 years, the Court considered that Croatia had failed to provide an effective and accessible procedure to enable him to have his further stay and status in the country determined with due regard to his private life, in breach of Article 8.

Just satisfaction (Article 41)

The Court held that Croatia was to pay Mr Hoti EUR 7,500 in respect of non-pecuniary damage and EUR 3,000 in respect of costs and expenses.

22. ECtHR, *Ljatifi v. “the Former Yugoslav Republic of Macedonia”*, No. 19017/16, Chamber judgment of 17 May 2018 (Article 1 of Protocol 7, Procedural safeguards regarding the expulsion of aliens - Violation). The applicant, a Serbian national, successfully complained about the termination of her asylum by the authorities of “the Former Yugoslav Republic of Macedonia” on the grounds that she allegedly represented a threat to national security.

**ECHR 177 (2018)
17.05.2018**

Press release issued by the Registrar

In today’s **Chamber** judgment in the case of *Ljatifi v. “the former Yugoslav Republic of Macedonia”* (application no. 19017/16) the European Court of Human Rights held, by six votes to one, that there had been:

a violation of Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens) to the European Convention on Human Rights.

The case concerned a complaint brought by a Serbian national, who had been living in “the former Republic of Macedonia” from the age of eight, that she had been ordered to leave the country because she was a risk to national security and that she was thus under an imminent threat of forcible expulsion at any time.

The Court found that the domestic courts had failed to subject the executive’s assertion that the applicant posed a risk to national security to any meaningful scrutiny. In particular they had based their decision on a classified document which had never been available either to them or to the applicant. Even though the Government had provided a redacted version of the document in the proceedings before the Court, it was not sufficient to prove that the applicant had been a risk to national security. Nor has she ever had criminal proceedings brought against her for any offence.

Principal facts

The applicant, Gjilizare Ljatifi, is a Serbian national who was born in 1991. Aged eight, she fled Kosovo with her family and settled in “the former Yugoslav Republic of Macedonia”. She has been living in the country ever since, and at present resides in Skopje.

In 2005 she was granted asylum and a residence permit. The permit was extended every year until 2014 when the Ministry of the Interior terminated her right to asylum, holding that she was a risk to national security.

Her challenges to this decision before the administrative courts were all unsuccessful. The courts, referring to a classified note obtained from the National Intelligence Agency, accepted that she was a risk to national security.

Complaints, procedure and composition of the Court

Ms Ljatifi alleged that the proceedings in which she had been required to leave “the former Yugoslav Republic of Macedonia” had not provided the minimum procedural safeguards. In particular, she complained that she had not been shown or given the opportunity to comment on the evidence against her, namely the classified note. The Court decided to examine this complaint under Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens). She further relied on Article 13 (right to an effective remedy) to complain that the administrative courts had not provided an effective review of her case.

The application was lodged with the European Court of Human Rights on 1 April 2016.

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

Linos-Alexandre **Sicilianos** (Greece), *President*,
Aleš **Pejchal** (the Czech Republic),
Krzysztof **Wojtyczek** (Poland),
Ksenija **Turković** (Croatia),
Armen **Harutyunyan** (Armenia),
Tim **Eicke** (the United Kingdom),
Jovan **Ilievski** (“the former Yugoslav Republic of Macedonia”),

and also Abel **Campos**, *Section Registrar*.

Decision of the Court

The Court observed that, even where national security was at stake, deportation measures should be subject to some form of adversarial proceedings before an independent authority or court.

However, in the judicial review of the applicant’s case, the Ministry’s assertion that she was “a risk to (national) security” had simply been accepted without any other factual details to support that allegation. The courts only added that the Ministry had reached their decision on the basis of a classified document obtained from the Intelligence Agency, which was not available during the proceedings before the Ministry or the courts. Ms Ljatifi had not therefore been able to present her case adequately in the judicial proceedings and the courts had had to limit themselves to a purely formal examination of the expulsion order. In any event, the courts did not explain why the classified document had to remain confidential or the extent of the review they had carried out. The courts had thus failed to subject the executive’s assertion that the applicant posed a risk to national security to any meaningful scrutiny.

Even though the Government had produced a redacted version of the classified document in the proceedings before the Court, the only fact that had emerged from that document had been Ms Ljatifi’s alleged knowledge of and support for other people’s involvement in multiple thefts and acts of concealment. No other details had been provided to support the allegation that she had represented a security risk. Indeed, no proceedings have ever been brought against her in the commission of any offence.

There had therefore been a violation of Article 1 of Protocol No. 7 to the Convention.

Given that finding, the Court considered that it was not necessary to examine the complaint under Article 13.

Just satisfaction (Article 41)

The Court held, unanimously, that “the former Yugoslav Republic of Macedonia” was to pay Ms Ljatifi EUR 2,400 in respect of non-pecuniary damage, and EUR 1,600 in respect of costs and expenses.

Separate opinions

Judge Sicilianos expressed a concurring opinion, while Judge Eicke expressed a partially dissenting opinion. These opinions are annexed to the judgment.

23. ECtHR, *Pocasovschi and Mihaila v. the Republic of Moldova and Russia*, No. 1089/09, Chamber judgment of 29 May 2018 (Article 3, Prohibition of inhuman and degrading treatments – Violation by the Republic of Moldova; Article 13, Right to an effective remedy – Violation by the Republic of Moldova). The applicants, two Moldovan nationals, successfully complained about being held in poor conditions in a Moldovan prison whose electricity and water had been cut off by the self-proclaimed “Moldavian Republic of Transdnistria” (“MRT”). The Court found that although the municipal authority which ordered the utilities to be cut had been controlled by the “MRT”, the prison itself had been under the full control of the Republic of Moldova.

ECHR 190 (2018)
29.05.2018

Press release issued by the Registrar

In today’s **Chamber** judgment in the case of *Pocasovschi and Mihaila v. the Republic of Moldova and Russia* (application no. 1089/09) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the European Convention on Human Rights by Moldova, and

a violation of Article 13 (right to an effective remedy) in respect of the first of the two applicants by Moldova.

The case was declared inadmissible as concerned Russia.

The case concerned the applicants’ complaint about being held in poor conditions in a Moldovan prison whose electricity and water had been cut off by the separatist “Moldavian Republic of Transdnistria” (the “MRT”).

The Court found that although the municipal authority which ordered the utilities to be cut had been controlled by the “MRT”, the prison itself had been under full Moldovan Government control.

The Court agreed with the domestic findings that the men had been held in inhuman conditions between September 2002 and April 2004 owing to a lack of water, electricity, food and warmth.

The domestic courts had awarded compensation, however, the amount was below that normally given by the Court. The men had therefore suffered a violation of their rights under the Convention and the Court ordered each to be paid further amounts in respect of non-pecuniary damage.

Principal facts

The applicants, Ruslan Pocasovschi and Ion Mihăilă, are Moldovan nationals who were born in 1975 and 1976 respectively and live in Cahul and Cetireni.

Mr Pocasovschi and Mr Mihăilă were serving sentences in Prison no. 8 in the town of Tighina/Bender in the Transdnistria region. The prison is under Moldova’s jurisdiction, however, the town of Tighina/Bender is controlled by the separatist “MRT”.

In September 2002 the town cut off the prison’s water, power and heating supplies, with water and electricity not being reconnected until February 2003. The prison was cut off again in July of the same year, with the “MRT authorities” insisting that the prison had to be closed down.

Mr Pocasovschi and Mr Mihăilă, who had tuberculosis, remained at the prison throughout the period when the utilities were cut off. They were transferred to other prisons respectively in September 2004 and March 2004. They have both since been released on parole.

With the help of the Helsinki Committee for Human Rights in Moldova, the applicants and other detainees put pressure in 2003 and 2004 on the Moldovan authorities to improve conditions at the prison and to intervene with the “MRT authorities” to prosecute those responsible for cutting off its water and power, but no prosecution has taken place.

In March 2004 the Helsinki Committee launched civil compensations claim on behalf of detainees, including the applicants. The Bender Court of Appeal in June 2009 ultimately awarded the applicants EUR 1,266 in compensation, acknowledging a breach of their rights on the grounds of inhuman conditions of detention. The court found that after the utilities had been turned off, the prison had no longer been able to offer food or proper treatment for tuberculosis. There had been no access to showers and only two hours of power per day, supplied by a low-power generator.

Complaints, procedure and composition of the Court

The applicants complained about their conditions of detention under Article 3 (prohibition of torture and inhuman or degrading treatment). They also relied on Article 6 § 1 (right to a fair trial) in relation to their compensation proceedings and raised an issue under Article 13 (right to an effective remedy) in respect of their complaints about their conditions of detention.

The application was lodged with the European Court of Human Rights on 19 December 2008.

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

Robert **Spano** (Iceland), *President*,
 Paul **Lemmens** (Belgium),
 Ledi **Bianku** (Albania),
 Işıl **Karakaş** (Turkey),
 Nebojša **Vučinić** (Montenegro),
 Valeriu **Griţco** (the Republic of Moldova),
 Dmitry **Dedov** (Russia),

and also Hasan **Bakırcı**, *Deputy Section Registrar*.

Decision of the Court

The Court first found that the two men had lodged their application against Russia outside the six month time-limit and so the complaints against that country were inadmissible. It also found that Moldova had full jurisdiction over the prison, even if the town itself was controlled by the “MRT”.

Article 3

It then noted that the domestic courts in Moldova had found that the conditions in the prison between September 2002 and April 2004 had been inhuman. While the Government had stated that it had taken measures to improve the situation, those steps had only been taken after February 2004, towards the end of the applicants’ period of detention.

Agreeing with the domestic courts’ judgments, which were an acknowledgment of a violation of their rights, and noting the award of compensation to Mr Pocasovschi and Mr Mihăilă, the Court said that the question that remained was whether they could still claim to be victims of a violation of their rights under the Convention.

To answer that question it looked at the amount of compensation, which was the equivalent of EUR 1,266. The Court found that sum to be far below what it had awarded in similar cases, especially given the harsh

conditions in which Mr Pocasovschi and Mr Mihăilă had been held and the fact that they had been detained in such conditions for a relatively long time.

The two men could therefore still claim to be victims and the Court found that there had been a violation of their rights under Article 3.

Other articles

The Court found that the length of the civil compensation proceedings, six years, had not violated the men's rights to a fair trial under Article 6 § 1 as the case had been complex and the Helsinki Committee had contributed to the delay.

However, it found a violation of Article 13 in respect of the first applicant as domestic court action was not an effective remedy in improving conditions of detention, only providing compensation. The first applicant had still been in prison when he began his court action and had therefore had no effective remedy. Conversely, the second applicant had already been released and could not therefore ask for an improvement in his conditions.

Just satisfaction (Article 41)

The Court held that the Republic of Moldova was to pay EUR 3,000 in respect of non-pecuniary damage to the first applicant and EUR 1,800 to the second applicant. It awarded EUR 1,500 jointly in respect of costs and expenses.

24. ECtHR, *Al Nashiri v. Romania*, No. 33234/12, Chamber judgment of 31 May 2018 (Article 2, Right to life, taken together with Article 3, Prohibition of torture and of inhuman and degrading treatments and Article 1 of Protocol No. 6, Abolition of the death penalty – Violation; Article 3, Prohibition of torture and of inhuman or degrading treatments – Violation; Article 5, Right to liberty and security, Article 8, Right to respect of private life and Article 13, Right to an effective remedy, in conjunction with Articles 3, 5 and 8 – Violation; Article 6-1 – Right to a fair trial within a reasonable time – Violation). The applicant, a Saudi Arabian national of Yemeni descent who is being held in the internment facility at the United States Guantánamo Bay Naval Base, successfully complained that Romania had let the *United States Central Intelligence Agency* (CIA) transport him under the secret extraordinary rendition programme onto its territory and had allowed him to be subjected to ill-treatment and arbitrary detention in a CIA detention “black site”. He also complained that Romania had failed to carry out an effective investigation into his allegations.

ECHR 196 (2018)
31.05.2018

Press release issued by the Registrar

The case *Al Nashiri v. Romania* (application no. 33234/12) concerned the applicant’s allegations that Romania had let the United States Central Intelligence Agency (the CIA) transport him under the secret extraordinary rendition programme onto its territory and had allowed him to be subjected to ill-treatment and arbitrary detention in a CIA detention “black site”. He also complained that Romania had failed to carry out an effective investigation into his allegations.

The applicant in the case, Abd Al Rahim Husseyn Muhammad Al Nashiri, is facing capital charges in the US for his alleged role in terrorist attacks.

In today’s **Chamber** judgment in the case the European Court of Human Rights held, unanimously, that there had been:

violations of Article 3 (prohibition of torture) of the European Convention on Human Rights, because of the Romanian Government’s failure to effectively investigate Mr Al Nashiri’s allegations and because of its complicity in the CIA’s actions that had led to ill-treatment;

violations of Article 5 (right to liberty and security), Article 8 (right to respect for private life), and Article 13 (right to an effective remedy) in conjunction with Articles 3, 5 and 8,

violations of Article 6 § 1 (right to a fair trial within a reasonable time), and Articles 2 (right to life) and 3 taken together with Article 1 of Protocol No. 6 (abolition of the death penalty) because Romania had assisted in Mr Al Nashiri’s transfer from its territory in spite of a real risk that he could face a flagrant denial of justice and the death penalty.

The Court had no access to Mr Al Nashiri as he is still being held by the US authorities in very restrictive conditions so it had to establish the facts from various other sources. In particular, it gained key information from a US Senate report on CIA torture which was released in December 2014. It also heard expert witness testimony.

The Court concluded that Romania had hosted a secret CIA prison, which had the code name, Detention Site Black, between September 2003 and November 2005, that Mr Al Nashiri had been detained there for about 18 months, and that the domestic authorities had known the CIA would subject him to treatment contrary to the Convention. Romania had also permitted him to be moved to another CIA detention site located either in Afghanistan (Detention Site Brown) or in Lithuania (Detention Site Violet), as found in another judgment delivered today *Abu Zubaydah v. Lithuania*, thus exposing him to further ill-treatment.

The Court therefore found that Mr Al Nashiri had been within Romania's jurisdiction and that the country had been responsible for the violation of his rights under the Convention.

It also recommended that Romania conclude a full investigation into Mr Al Nashiri's case as quickly as possible and, if necessary, punish any officials responsible. The country should also seek assurances from the United States that Mr Al Nashiri will not suffer the death penalty.

Principal facts

The applicant, Abd Al Rahim Husseyn Muhammad Al Nashiri, is a Saudi Arabian national of Yemeni descent who was born in 1965 and is being held in the Internment Facility at the United States (US) Guantánamo Bay Naval Base in Cuba.

Mr Al Nashiri was one of the so-called "high-value detainees" ("HVD") detained by the CIA at the start of the "war on terror" launched by President Bush following the 11 September 2001 attacks. He was seized in Dubai (the United Arab Emirates) in October 2002. He is notably suspected of an attack on the US Navy ship USS Cole in the harbour of Aden (Yemen) in 2000 and on the French oil tanker MV Limburg in the Gulf of Aden in 2002. US Military prosecutors brought capital charges against him in 2011 for his alleged role in the attacks. The proceedings against him are still pending.

The European Court established in Mr Al Nashiri's first case (*Al Nashiri v. Poland* of 2014) that after his capture Mr Al Nashiri had been held in a CIA secret detention facility in Afghanistan and Thailand before being moved to another CIA "black site" in December 2002 in Poland. He was detained there until June 2003.

Mr Al Nashiri submitted in this case that in the following three years he was secretly transferred from Poland to five different CIA detention facilities, including Romania from April 2004 to October/November 2005. He was finally moved to Guantánamo Bay in September 2006.

According to Mr Al Nashiri, he was subjected to torture and other forms of ill-treatment prohibited by Article 3 of the Convention throughout his detention by the CIA.

He described his treatment in testimony in 2006 to the International Committee of the Red Cross (ICRC), and in partly declassified transcripts of evidence to the US military Combatant Status Review Tribunal in 2007.

It included interrogators hanging him upside down for almost a month; subjecting him to waterboarding; making him stand in a box for a week; slamming him into a wall; and keeping him in positions of stress.

He also alleged that he had been kept in continuous solitary confinement and incommunicado detention throughout his undisclosed detention. He had no knowledge of where he was being held and had no contact with persons other than his interrogators or guards.

According to the 2014 US Senate report on CIA torture, Mr Al Nashiri was subjected to rectal feeding at one point in 2004 when being held in Bucharest because he had tried to go on a hunger strike and in 2005 he was on the "verge of a breakdown". A psychological evaluation released in 2013 stated that he was suffering from Post-Traumatic Stress Syndrome.

In November 2005 the *Washington Post* revealed that eastern European countries had hosted secret CIA prisons. The 2014 US Senate report on CIA torture stated that the Romanian authorities had closed Detention Site Black within hours of the newspaper's revelations. In December 2005 *ABC news* confirmed that Romania was among the countries which had secretly held CIA high-value detainees, including Mr Al Nashiri.

Romania initiated a parliamentary inquiry in December 2005. It principally focused on whether a secret CIA prison had existed in the country, and whether there had been illegal transfer of detainees, suspicious movements of aircraft and possible participation of the domestic authorities in the scheme. A final report was

issued in March 2007, answering in the negative to those questions. A criminal investigation in Romania, launched in July 2012 following a complaint by Mr Al Nashiri, is still pending. No one who could be held responsible for Romania's role in the rendition programme has been identified and no information from the investigation has been made public.

Complaints, procedure and composition of the Court

Mr Al Nashiri complained that Romania had enabled the CIA to detain him secretly on its territory, subject him to torture, various other forms of mental and physical abuse and incommunicado detention, thus denying him the possibility to contact his family or the outside world.

He also complained that Romania had allowed him to be transported to other CIA-run secret detention sites, exposing him to years of further similar treatment, a flagrantly unfair trial and a risk of the death penalty.

Lastly, he complained of the lack of a prompt and thorough investigation into his allegations.

Mr Al Nashiri relied on Article 2 (right to life), Article 3 (prohibition of torture), Article 5 (right to liberty and security), Article 6 (right to a fair trial within a reasonable time), Article 8 (right to respect for private and family life), Article 13 (right to an effective remedy) and Article 1 of Protocol No. 6 (abolition of the death penalty).

The application was lodged with the European Court of Human Rights on 1 June 2012.

Amnesty International and the International Commission of Jurists, the Association for the Defence of Human Rights in Romania – the Helsinki Committee, twelve media organisations, represented by Howard Kennedy Fsi LLP, and the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism submitted comments as third parties.

A fact-finding hearing was held on 28 June 2016 and a public hearing on 29 June 2016.

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

Linos-Alexandre **Sicilianos** (Greece), *President*,
 Kristina **Pardalos** (San Marino),
 Robert **Spano** (Iceland),
 Aleš **Pejchal** (the Czech Republic),
 Mirjana **Lazarova Trajkovska** (“the former Yugoslav Republic of Macedonia”),
 Paul **Mahoney** (the United Kingdom) and,
 Florin **Streteanu** (Romania), *ad hoc Judge*,

and also Abel **Campos**, *Section Registrar*.

Decision of the Court

The Court first dealt with the Romanian Government's argument that there was no evidence to prove Mr Al Nashiri's allegations, and their doubts as to the credibility of the evidence and sources in the case.

The Court noted that it was not in a position to receive a direct account of the events from Mr Al Nashiri himself because he has had no contact with the outside world since October 2002, save the ICRC team in 2006, the military commission's members and his US counsel. The case before it was therefore largely based on circumstantial evidence.

The evidence included, in particular, the 2014 declassified executive summary of the US Senate report on CIA torture, which detailed the activities of the CIA in the HVD programme in the years 2001-2009. The Court also reviewed Mr Al Nashiri's testimony in the ICRC report and his statements to the Combatant Status Review Tribunal.

In addition, it took account of international inquiries, such as the three reports by Council of Europe Parliamentary Assembly rapporteur Dick Marty from Switzerland and redacted documents released by the CIA. It heard the testimony of Senator Marty, two experts on the CIA rendition programme, Mr J.G.S., a lawyer and investigator who has worked with Senator Marty, and Mr Crofton Black, an investigator with the Bureau of Investigative Journalism and *Reprieve*, a British non-governmental organisation representing the interests of some of the detainees held in Guantánamo. It also heard Giovanni Claudio Fava, rapporteur for an inquiry carried out by the European Parliament, and relied on an affidavit by Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights from 2006 to 2012.

The evidence included details of how detainees had been ill-treated, the movement of aeroplanes known to have been used by the CIA for rendition operations, how the CIA had paid foreign governments to host sites and how the programme had developed over the years.

In particular, the 2014 US Senate report on CIA torture provided information about the transfer dates and times, and the interrogation schedules of CIA detainees. It also spoke clearly of cooperation with the domestic authorities and of them being provided with millions of dollars for "support" for the CIA extraordinary rendition programme. The actual amount was redacted out of the report.

A careful reading of the report allowed the Court to conclude that the detention centre known as Detention Site Black, one of the places where Mr Al Nashiri had been held, was located in Romania.

Based on all the material, which was the result of extensive and meticulous work by experts and politicians of the highest integrity and competence, the Court concluded that it had been proved that a CIA secret detention centre had operated in Romania from September 2003 to November 2005 and that Mr Al Nashiri had been held there from April 2004 to at the latest November 2005.

Romania had known of the purpose of the CIA's activities on its territory and had cooperated. It must also have been clear such actions had threatened Mr Al Nashiri's rights.

Overall therefore, Mr Al Nashiri's allegations fell within Romania's jurisdiction and could make it answerable under the Convention.

Article 3 (inhuman and degrading treatment)

The Court subsequently found a violation of the **procedural aspect** of Article 3 because of deficiencies in both the parliamentary inquiry and criminal investigation in Romania.

The parliamentary inquiry had been limited in scope, failing to identify or hold to account Romanian officials who were possibly complicit in the CIA scheme, despite the fact that the Romanian Senate's investigation had overlapped with international inquiries whose findings pointed to a strong suspicion that a "black site" had existed in Romania.

The criminal investigation had similarly failed for the last five years to identify any individuals responsible for Romania's involvement in the scheme. Furthermore, the Court considered that the Romanian prosecution authorities should immediately have opened a criminal investigation in 2005 into the extremely grave allegations concerning their country, without waiting for a victim to bring a complaint. The long delay – seven years – in opening the criminal investigation meant that evidence had not been obtained in the aftermath of the closure of the "black site" in Romania, and important evidence such as flight data had even been erased.

On the **substantive aspect** of Article 3, the Court noted that Mr Al Nashiri had not been subjected to the harshest interrogation techniques in Romania, as described in his testimony to the Red Cross and the US military Combatant Status Review Tribunal. However, his prior suffering had to be taken into account when considering his detention in Romania because he would have been in constant fear of the previous cruel treatment being inflicted on him again. Indeed, the 2014 US Senate report on CIA torture confirmed that Mr Al Nashiri had been suffering from serious psychological problems as a result of his ill-treatment.

In any event, in Romania he had also had an extremely harsh detention regime, which, according to the 2007 ICRC report and the 2014 US Senate report on CIA torture, had as standard practice included blindfolding or hooding, solitary confinement, the continuous use of leg shackles and exposure to noise and light.

Such suffering amounted to inhuman treatment within the meaning of the Convention, which Romania had enabled by cooperating with the CIA. Moreover, it had allowed his rendition out of the country and exposed him to a foreseeable serious risk of further ill-treatment.

Article 5 (right to liberty and security)

Romania had enabled the CIA to transport Mr Al Nashiri in and out of the country and hold him in secret. Unacknowledged detention was a complete negation of the guarantees of the Convention and a serious violation of Article 5.

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

The interference with Mr Al Nashiri's rights had taken place in the context of fundamentally unlawful and undisclosed detention. There had been no justification for it under Article 8 and his rights under this provision had therefore been breached.

Article 13 (right to an effective remedy)

The Court observed that it had already found that the investigation into Mr Al Nashiri's allegations had fallen short of Convention standards. He had also had no effective remedy available to complain about violations of his rights. There had therefore been a breach of Article 13, in conjunction with Articles 3, 5 and 8.

Article 6 § 1 (right to a fair trial)

When Mr Al Nashiri had been transferred out of Romania, the authorities had to have been aware of widely expressed public concern that trials before the US military commission did not meet the most basic guarantees of a fair trial. Despite the real and foreseeable risk that he could face a flagrant denial of justice, Romania had assisted in his transfer from its territory, in breach of Article 6 § 1.

Articles 2 (right to life) and 3 and Article 1 of Protocol No. 6 (abolition of the death penalty)

Romania had enabled the CIA to transfer Mr Al Nashiri to the US military commission's jurisdiction where he had been indicted and was on trial and facing the death penalty. There had therefore been a violation of Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6.

Article 46 (binding force and implementation)

The outcome of the trial against Mr Al Nashiri still being uncertain, the Court considered that Romania should seek assurances from the US authorities that he will not suffer the death penalty. Furthermore, it recommended that Romania should clarify, where feasible, the circumstances in which Mr Al Nashiri had been brought to Romania, his treatment there and his removal, and bring to a close the criminal investigation as soon as possible. The investigation should also aim to identify and, where appropriate, punish those responsible.

Article 41 (just satisfaction)

The Court held that Romania was to pay Mr Al Nashiri EUR 100,000 in respect of non pecuniary damage. He made no claim for costs and expenses.

25. ECtHR, *Abu Zubaydah v. Lithuania*, No. 46454/11, Chamber judgment of 31 May 2018 (Article 3, Prohibition of torture – Violation; Articles 5, Right to liberty and security, Article 8 and Article 13, Right to an effective remedy, in conjunction with Article 3 – Violation). The applicant, a stateless man of Palestinian origin who was born in 1971 and is being held in the internment facility at the United States Guantánamo Bay Naval Base, successfully complained that Lithuania had let the *United States Central Intelligence Agency* (CIA) transport him onto its territory under the secret extraordinary rendition programme and had allowed him to be subjected to ill-treatment and arbitrary detention in a CIA detention “black site”. He also complained that Lithuania had failed to carry out an effective investigation into his allegations.

ECHR 195 (2018)

31.05.2018

Press release issued by the Registrar

The case *Abu Zubaydah v. Lithuania* (application no. 46454/11) concerned the applicant’s allegations that Lithuania had let the United States Central Intelligence Agency (CIA) transport him onto its territory under the secret extraordinary rendition programme and had allowed him to be subjected to ill-treatment and arbitrary detention in a CIA detention “black site”. He also complained that Lithuania had failed to carry out an effective investigation into his allegations.

The applicant was Zayn Al-Abidin Muhammad Husayn, who is also known as Abu Zubaydah.

In today’s **Chamber** judgment in the case the European Court of Human Rights held, unanimously, that there had been:

violations of Article 3 (prohibition of torture) of the European Convention on Human Rights, because of the Government’s failure to effectively investigate Mr Husayn’s allegations and because of its complicity in the CIA’s actions that had led to ill-treatment;

and violations of Article 5 (right to liberty and security), Article 8 (right to respect for private life), and Article 13 (right to an effective remedy), in conjunction with Article 3.

The Court had no access to Mr Husayn as he is still being held by the US authorities in very restrictive conditions so it had to establish the facts from various other sources. In particular, it gained key information from a US Senate Committee report on CIA torture which was released in December 2014. It also heard expert witness testimony.

The Court concluded that Lithuania had hosted a secret CIA prison between February 2005 and March 2006, that Mr Husayn had been detained there, and that the domestic authorities had known the CIA would subject him to treatment contrary to the Convention. Lithuania had also permitted him to be moved to another CIA detention site in Afghanistan, exposing him to further ill-treatment.

The Court found that Mr Husayn had been within Lithuania’s jurisdiction and that the country had been responsible for the violations of his rights under the Convention.

It recommended that Lithuania conclude a full investigation of Mr Husayn’s case as quickly as possible and, if necessary, punish any officials responsible. The country also had to make further representations to the United States to remove or limit the effects of the violations of his rights.

The Court has today also found in the case *Al Nashiri v. Romania* that Romania violated the rights of another CIA prisoner, Abd Al Rahim Husseyn Muhammad Al Nashiri, in similar circumstances.

Principal facts

Mr Husayn is a stateless Palestinian who was born in 1971 and is being held in the Internment Facility at the United States (US) Guantánamo Bay Naval Base.

He was initially considered by the US authorities as the “third or fourth man” in al-Qaeda and was seized in Faisalabad, Pakistan, in March 2002. He was suspected of being a planner of the 11 September 2001 attacks and a senior lieutenant to Osama bin Laden. He was the first so-called “high-value detainee” (“HVD”) detained by the CIA at the start of the “war on terror” launched by President Bush. He has never been charged with any offence.

The European Court established in Mr Husayn’s first case (*Husayn (Abu Zubaydah) v. Poland*) that after his capture he had been held in a CIA detention facility in Thailand before being moved to another “black site” in Poland in December 2002. He was detained there until September 2003.

The applicant submitted in this case that he had been secretly transferred from Poland to the prison at Guantánamo and then to Morocco in 2004. He had later been moved to Lithuania on 17 or 18 February 2005 and transferred out of that country to Afghanistan on 25 March 2006.

According to the applicant, he was subjected to torture and other forms of ill-treatment prohibited by Article 3 of the Convention throughout his detention by the CIA.

Mr Husayn described his treatment in testimony in 2006 to the International Committee of the Red Cross (ICRC) and in partly declassified transcripts of evidence to the US military Combatant Status Review Tribunal in 2007.

It included interrogators putting a black cloth over his face and pouring water over it so he could not breathe; slamming him into a wall and slapping his face; playing loud music while he was kept in a tall box; depriving him of food; and keeping him naked in cold conditions. He told the Tribunal that doctors had told him that he had nearly died four times during months of interrogation.

He also alleged that he had been kept in continuous solitary confinement and incommunicado detention throughout his undisclosed detention. He had no knowledge of where he was being held and no contact with persons other than his interrogators or guards.

He stated that he suffers from blinding headaches and an acute sensitivity to sound. He had more than 300 seizures between 2008 and 2011 and at some point during his captivity he lost an eye. International media reported in 2009 that Lithuania was among the eastern European countries which had hosted a secret CIA prison, at a former riding school near capital city Vilnius.

A subsequent Lithuanian Parliament committee inquiry found that CIA planes had landed in Lithuania in 2004, 2005 and 2006 and that the CIA and the domestic intelligence services had reconstructed two facilities together. However, Parliament could not determine whether any detainees had been flown in on the CIA planes or held at the bigger of the two facilities.

Finally, the inquiry found that senior Lithuanian officials had only known in general terms of cooperation with the CIA. A 2010 investigation by the Prosecutor General’s Office into abuse of office by officials in connection with the alleged CIA operations ended in 2011 without any prosecutions. The investigation was reopened in 2015 and is still ongoing.

Complaints, procedure and composition of the Court

Mr Husayn complained that Lithuania had enabled the CIA to detain him secretly on its territory and subject him to torture, various other forms of mental and physical abuse and incommunicado detention, thus denying him the possibility to contact his family or the outside world.

He also complained that Lithuania had allowed him to be transported to another foreign secret detention site, exposing him to years of further similar treatment. Lastly, he complained of the lack of a prompt and thorough investigation into his allegations.

Mr Husayn relied on Article 2 (right to life), Article 3 (prohibition of torture), Article 5 (right to liberty and security), Article 6 (right to a fair trial within a reasonable time), Article 8 (right to respect for private and family life), Article 13 (right to an effective remedy) and Article 1 of Protocol No. 6 (abolition of the death penalty).

The application was lodged with the European Court of Human Rights on 14 July 2011.

The Helsinki Foundation for Human Rights, Amnesty International and the International Commission of Jurists submitted comments as third parties.

A fact-finding hearing was held on 28 June 2016 and a public hearing on 29 June 2016.

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

Linos-Alexandre **Sicilianos** (Greece), *President*,
 Kristina **Pardalos** (San Marino),
 Robert **Spano** (Iceland),
 Aleš **Pejchal** (the Czech Republic),
 Egidijus **Kūris** (Lithuania),
 Mirjana **Lazarova Trajkovska** (“the former Yugoslav Republic of Macedonia”),
 Paul **Mahoney** (the United Kingdom),

and also Abel **Campos**, *Section Registrar*.

Decision of the Court

The Court first dealt with objections by the Government’s that Mr Husayn’s allegations were a restatement of inquiry reports and media articles. There was no proof the CIA had taken him to Lithuania and detained and ill-treated him there with the knowledge of the domestic authorities.

The Court observed that the case was largely based on circumstantial evidence, noting that only Mr Husayn’s US legal representative, with top-secret security clearance, was allowed to see him.

The evidence included, in particular, the 2014 declassified executive summary of the US Senate report on CIA torture, which detailed the activities of the CIA in the HVD programme in the years 2001-2009. The Court also reviewed Mr Husayn’s testimony in the ICRC report and his statements to the Combatant Status Review Tribunal.

In addition, it took account of international inquiries, such as the three reports by Council of Europe Parliamentary Assembly rapporteur Dick Marty from Switzerland and redacted documents released by the CIA. It heard the testimony of Senator Marty and two experts on the CIA rendition programme, Mr J.G.S., a lawyer and investigator who has worked with Senator Marty, and Mr Crofton Black, an investigator with the Bureau of Investigative Journalism and British NGO Reprieve, a British non-governmental organisation representing the interests of some of the detainees held in Guantánamo.

The evidence included details of how detainees had been ill-treated, the movement of airplanes known to have been used by the CIA for rendition operations, how the CIA had paid foreign governments to host sites and how the programme had developed over the years.

In particular, the 2014 US Senate Committee report on CIA torture provided information about the transfer dates and times, and the interrogation schedules of CIA detainees. It also spoke clearly of cooperation with the domestic authorities and of them being provided with millions of dollars to show appreciation for their

“support” for the CIA extraordinary rendition programme. The actual amount and the concrete recipients were redacted out of the report.

A careful reading of the report allowed the Court to conclude that the detention centre known as Site Violet, one of the places where Mr Husayn had been held, was located in Lithuania.

Based on all the material, the Court concluded that it was clear that Lithuania had hosted a CIA detention centre from 17 or 18 February 2005 to 25 March 2006 and that Mr Husayn had been held there.

The Lithuanian authorities had known of the purpose of the CIA’s activities on its territory and had cooperated. It must also have been clear that such actions had threatened Mr Husayn’s rights. Overall, his allegations fell within Lithuania’s jurisdiction and could make it answerable under the Convention.

Article 3

The Court found a violation of the **procedural aspect** of Article 3 as Lithuania had failed to carry out a proper investigation related to Mr Husayn. The investigation had tailed off from June 2010 and prosecutors had ignored Reprieve’s suggestions to trace US citizens who had been on board one of the airplanes which had landed in Lithuania and whose passport details they had possessed.

The reopened investigation, which included a request for legal assistance to the United States, had also made no meaningful progress.

On the **substantive aspect** of Article 3, the Court noted that Mr Husayn’s statements to the Tribunal in March 2007 and in the 2007 ICRC report provided a shocking account of the cruel treatment he had suffered in CIA custody. He had not been subjected to such severe ill-treatment in Lithuania, but his prior suffering had to be taken into account when considering his detention there.

In any event, in Lithuania he had also experienced an extremely harsh detention regime, which, according to CIA documents, had as standard practice included blindfolding or hooding, solitary confinement, the continuous use of leg shackles, and exposure to noise and light.

Such suffering amounted to inhuman treatment within the meaning of the Convention, which Lithuania had enabled by cooperating with the CIA. Moreover, it had allowed his rendition out of the country and exposed him to a foreseeable serious risk of further ill-treatment.

Article 5

Lithuania had enabled the CIA to transport Mr Husayn in and out of the country and hold him in secret. Unacknowledged detention was a complete negation of the guarantees of the Convention and a serious violation of Article 5.

Article 8

The interference with Mr Husayn’s rights had taken place in the context of fundamentally unlawful and undisclosed detention. There had been no justification for it under Article 8 and his rights under this provision had therefore been breached.

Article 13

The Court observed that it had already found that the investigation into Mr Husayn’s allegations had fallen short of Convention standards. He had also had no effective remedy available to complain about violations of his rights. There had been a breach of Article 13, in conjunction with Article 3.

Article 46

The Court noted that Lithuania had asked for some legal assistance from US officials during the reopened investigation. However, it recommended that the country make further representations to the United States to remove, or at the very least, seek to limit the effects of the violations of the applicant's rights.

In addition, the reopened domestic investigation should be concluded as swiftly as possible once the circumstances of Mr Husayn's transport, detention and removal from Lithuania had, as far as possible, been clarified. The investigation should also aim to allow the domestic authorities to identify and, where appropriate, punish those responsible.

Just satisfaction (Article 41)

The Court held that Lithuania was to pay the applicant EUR 100,000 in respect of non pecuniary damage, and EUR 30,000 in respect of costs and expenses.

26. ECtHR, *Amerkhanov v. Turkey and Batyrkhairov v. Turkey*, Nos. 16026/12 and 69929/12, Chamber judgments of 05 June 2018 (Article 3, Prohibition of torture and of inhuman or degrading treatments – Violation; Article 5, Right to liberty and safety – Violation; Article 13, Right to an effective remedy – Violation). The applicants, two Kazakhstani nationals detained in Atyrau, Kazakhstan, successfully complained about their deportation from Turkey to Kazakhstan on the ground that they posed a threat to national security - the deportations took place despite the risk of ill-treatment they faced if they were sent back to Kazakhstan.

ECHR 199 (2018)
05.06.2018

Press release issued by the Registrar

The cases essentially concerned the deportation of two asylum-seekers to Kazakhstan.

The applicant in the first case, Samat Amerkhanov, is a Kazakhstani national who was born in 1989 and is currently detained in Atyrau, Kazakhstan. He arrived in Turkey in May 2011. Shortly afterwards he was detained with a view to his deportation because he was considered a national security risk. He was transferred to the Foreigners' Removal Centre in Kumkapı in June 2011. While there, he claimed asylum, and was released in September 2011 pending the outcome of his claim. His asylum claim was however rejected in March 2012 and he was deported to Kazakhstan. After his deportation, he brought proceedings before the administrative courts challenging the rejection of his asylum application and the decision to deport him, without success.

The applicant in the second case, Arman Batyrkhairov, is a Kazakhstani national who was born in 1980 and is also detained in Atyrau. He arrived in Turkey in June 2011. The Kazakh authorities subsequently requested his extradition on terrorism-related charges and he was arrested in January 2012 while trying to leave the country. A month later the domestic courts rejected the extradition request and ordered his release from prison. He was, however, immediately transferred to the Foreigners' Removal Centre in Kumkapı where he was held until his deportation in March 2012. He had in the meantime applied for asylum, but the courts rejected his claim as well as his objection to this decision.

Throughout the asylum/extradition proceedings both applicants claimed before the domestic authorities that they feared ill-treatment or even death if sent back to Kazakhstan.

The applicants brought a number of complaints under Article 3 (prohibition of torture and of inhuman or degrading treatment) and Article 5 §§ 1, 2, 4, and 5 (right to liberty and security) about their deportation to Kazakhstan and detention at the Kumkapı Foreigners' Removal Centre.

In particular, they alleged that they had been unlawfully deported without any assessment of their asylum claims, despite the risk of them being subjected to torture and other ill-treatment.

As concerns their detention, they alleged that it had been unlawful, that they had not been informed of the reasons for it, and could not have it reviewed by a court or request compensation under the domestic law. They further complained that they had been held in poor conditions at the Foreigners' Removal Centre on account of overcrowding and lack of outdoor exercise.

Lastly, they alleged under Article 13 (right to an effective remedy) that they had no effective remedies to complain about most of allegations.

In the case of *Amerkhanov*:

Violation of Article 3 - on account of Mr Amerkhanov's deportation to Kazakhstan on 19 March 2012;

Violation of Article 5 § 1

Violation of Article 5 § 2

Violation of Article 5 §§ 4 and 5

Violation of Article 3 - on account of the conditions of Mr Amerkhanov's detention at the Kumkapı Foreigners' Removal Centre;

Violation of Article 13 in conjunction with Article 3 - on account of the absence of effective remedies to complain about the conditions of detention at the Kumkapı Foreigners' Removal Centre

Just satisfaction: EUR 6,500 (non-pecuniary damage) and EUR 3,370 (costs and expenses)

In the case of *Batyrkhairov*:

Violation of Article 3 - on account of Mr Batyrkhairov's deportation to Kazakhstan on 12 March 2012;

Violation of Article 5 § 1**Violation of Article 5 §§ 4 and 5**

Violation of Article 3 - on account of the conditions of the applicant's detention at the Kumkapı Foreigners' Removal Centre;

Violation of Article 13 in conjunction with Article 3 - on account of the absence of effective remedies to complain about the conditions of detention at the Kumkapı Foreigners' Removal Centre;

Just satisfaction: EUR 6,500 (non-pecuniary damage) and EUR 3,345 (costs and expenses).

27. ECtHR, *Gaspar v. Russia and Zezev v. Russia*, Nos. 23038/15 and 47781/10, Chamber judgment of 12 June 2018 (Article 8, Right to respect for private and family life – Violation). The applicants, an American national and a Kazakh national, married to Russian nationals with whom they had children, successfully claimed that their exclusion from the Russian Federation on national security grounds violated their right to respect for private and family life.

ECHR 210 (2018)
12.06.2018

Press release issued by the Registrar

Both cases concerned the exclusion of foreign nationals from Russia on national security grounds.

The first applicant, Jennifer Suzanne Gaspar, is an American national who was born in 1971 and now lives in Prague (the Czech Republic). She lived in Russia from 2004 to 2014 on the basis of regularly extended residence permits, marrying a Russian national and having a daughter with him. However, on applying for Russian citizenship in 2013, a report was issued about her by the security services finding that she posed a threat to national security and recommending that the migration authorities reject her application and revoke her residence permit. The migration authorities followed these recommendations and informed Ms Gaspar that she had to leave the country, which she did on 23 August 2014. She brought two sets of proceedings attempting to obtain a judicial review of the decision to revoke her residence permit, without success.

The second applicant, Aleksandr Zezev, is a Kazakh national who was born in 1979 and apparently now lives in Kazakhstan. He moved to Russia in 2005 to live with his parents and brother, who are Russian nationals, living there on the basis of visas and temporary residence permits. He later married a Russian national and had two children with her. In 2009 the migration authorities also rejected his application for Russian nationality owing to a report by the security services which found that he was a threat to national security. He was asked to leave, but continued to reside in the country until he was eventually detained and deported in 2013, all his appeals before the courts against the exclusion order having been rejected.

Relying in particular on Article 8 (right to respect for private and family life) of the European Convention on Human Rights, the applicants complained of a disruption to their family life because of being forced to leave Russia. They both stressed in particular that they could not refute the security services' reports which had been used to exclude them because the documents had been kept secret during the judicial review of their cases.

- case of *Gaspar*:

Violation of Article 8

Just satisfaction: EUR 12,500 (non-pecuniary damage) and EUR 1,642 (costs and expenses).

- case of *Zezev*:

Violation of Article 8

Just satisfaction: EUR 12,500 (non-pecuniary damage) to be paid to Ms M.K., Mr Zezev's wife.

28. ECtHR, *Centrum för rättvisa v. Sweden*, No. 35252/08, Chamber judgment of 19 June 2018 (Article 8, Right to respect of private and family life, the home and correspondence – No violation). The applicant, a foundation, unsuccessfully claimed that legislation permitting the bulk interception of electronic signals in Sweden for foreign intelligence purposes breached its privacy rights. Among others, the Court based their judgment on the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)* of 28 January 1981 and on the *Resolution A/RES/68/167, on The Right to Privacy in the Digital Age*, adopted by the General Assembly of the United Nations on 18 December 2013.

ECHR 224 (2018)
19.06.2018

Press release issued by the Registrar

In today's **Chamber** judgment in the case of *Centrum för rättvisa v. Sweden* (application no. 35252/08) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 8 (right to respect for private and family life, the home and the correspondence) of the European Convention on Human Rights.

The case concerned a complaint brought by a public interest law firm alleging that legislation permitting the bulk interception of electronic signals in Sweden for foreign intelligence purposes breached its privacy rights.

The Court considered that the relevant legislation amounted to a system of secret surveillance that potentially affected all users of mobile telephones and the Internet, without their being notified. Also, there was no domestic remedy providing detailed grounds in response to a complainant who suspected that his or her communications had been intercepted. On that basis, the Court found it justified to examine the legislation in the abstract. The law firm could claim to be a victim of a violation of the Convention, although it had not brought any domestic proceedings or made a concrete allegation that its communications had actually been intercepted. The mere existence of the legislation amounted in itself to an interference with its rights under Article 8.

The Court went on to say that, although there were some areas for improvement, overall the Swedish system of bulk interception provided adequate and sufficient guarantees against arbitrariness and the risk of abuse. In particular, the scope of the signals intelligence measures and the treatment of intercepted data were clearly defined in law, permission for interception had to be by court order after a detailed examination, it was only permitted for communications crossing the Swedish border and not within Sweden itself, it could only be for a maximum of six months, and any renewal required a review. Furthermore, there were several independent bodies, in particular an inspectorate, tasked with the supervision and review of the system. Lastly, the lack of notification of surveillance measures was compensated for by the fact that there were a number of complaint mechanisms available, in particular via the inspectorate, the Parliamentary Ombudsmen and the Chancellor of Justice.

When coming to that conclusion, the Court took into account the State's discretionary powers in protecting national security, especially given the present-day threats of global terrorism and serious cross-border crime.

Principal facts

The applicant, Centrum för rättvisa, is a non-profit foundation which was set up in 2002 and represents clients in rights litigation, in particular against the State. It is based in Stockholm.

The applicant foundation believes that, because of the sensitive nature of its activities, there is a risk that its communications through mobile telephones and mobile broadband has been or will be intercepted and examined by way of signals intelligence.

Signals intelligence can be defined as intercepting, processing, analysing and reporting intelligence from electronic signals. In Sweden the collection of electronic signals is one form of foreign intelligence and is regulated by the Signals Intelligence Act. This legislation authorises the National Defence Radio Establishment (FRA), a Government agency organised under the Ministry of the Defence, to conduct the signals intelligence.

For all signals intelligence, the FRA must apply for a permit to the Foreign Intelligence Court, which is regulated by the Foreign Intelligence Court Act and composed of a permanent judge and other members appointed on four-year terms. The court's activities are in practice covered by complete secrecy.

The Foreign Intelligence Court is overseen by the Foreign Intelligence Inspectorate and the Data Protection Authority.

Complaints, procedure and composition of the Court

The foundation alleged that Swedish legislation and practice in the field of signals intelligence had violated and continued to violate its rights under Article 8 (right to respect for private and family life, the home and the correspondence) of the European Convention. It had not brought any domestic proceedings, arguing under Article 13 (right to an effective remedy) that there was no effective remedy in Sweden for its Convention complaints.

The application was lodged with the European Court of Human Rights on 14 July 2008.

The International Commission of Jurists, Norwegian Section, was granted leave to submit written comments in the proceedings.

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

Branko **Lubarda** (Serbia), *President*,
Helena **Jäderblom** (Sweden),
Helen **Keller** (Switzerland),
Pere **Pastor Vilanova** (Andorra),
Alena **Poláčková** (Slovakia),
Georgios A. **Serghides** (Cyprus),
Jolien **Schukking** (the Netherlands),

and also Stephen **Phillips**, *Section Registrar*.

Decision of the Court

Even though the applicant foundation had not exhausted domestic remedies and could not give a concrete example of its communications having been intercepted, the Court nonetheless considered it justified for it to examine the Swedish legislation on signals intelligence. This was because there was, in practice, no remedy in Sweden providing detailed grounds in response to a complainant who suspected that his or her communications had been intercepted and the legislation amounted to a system of secret surveillance that potentially affected all users of mobile telephones and the Internet, without their being notified. The mere existence of the legislation amounted in itself to an interference with the foundation's rights under Article 8.

The Court found that it was clear that the surveillance system, as it stood at the present moment in time, had a basis in domestic law and was justified by national security interests.

Indeed, given the present-day threats of global terrorism and serious cross-border crime, as well as the increased sophistication of communications technology, the Court held that Sweden had considerable power of discretion (“wide margin of appreciation”) to decide on setting up such a system of bulk interception.

The State’s discretion in actually operating such an interception system was, nevertheless, narrower and the Court had to be satisfied that there were adequate and effective guarantees against abuse.

Following a careful assessment of the minimum safeguards that should be set out in law to avoid abuse of power, as developed in its case-law (see the 2014 Grand Chamber judgment *Roman Zakharov v. Russia*), the Court was of the opinion that the system revealed no significant shortcomings in its structure and operation.

Overall, while the Court found certain shortcomings in the system, notably the regulation of the communication of personal data to other States and international organisations and the practice of not giving public reasons following a review of individual complaints, it noted that the regulatory framework had been reviewed several times with a view notably to enhancing protection of privacy and that it had in effect developed in such a way that it minimised the risk of interference with privacy and compensated for the lack of openness of the system.

More specifically, the scope of the interception (which was only permitted for communications crossing the Swedish border and not within Sweden itself) and the treatment of intercepted data were clearly defined in law; the duration of the measures were clearly regulated (any permit is valid for a maximum of six months and renewal requires a review); the authorisation procedure was detailed and entrusted to a judicial body, the Foreign Intelligence Court; there were several independent bodies, in particular the Foreign Intelligence Inspectorate and the Data Protection Authority, tasked with the supervision and review of the system; and, on request the inspectorate had to investigate individual complaints of intercepted communications, as did the Parliamentary Ombudsmen and the Chancellor of Justice.

The Court therefore found that the Swedish system of signals intelligence provided adequate and sufficient guarantees against arbitrariness and the risk of abuse. The relevant legislation met the “quality of law” requirement and the “interference” established could be considered as being “necessary in a democratic society”. Furthermore, the structure and operation of the system were proportionate to the aim sought to be achieved.

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

Given those findings, the Court considered that there were no separate issues under Article 13 and held that there was no need to examine the foundation’s complaint in that respect.

29. ECtHR, *S.Z. v. Greece*, No. 66702/13, Chamber judgment of 21 June 2018 (Article 3, Prohibition of inhuman or degrading treatments – Violation; Article 5, Right to liberty and safety – Violation). The applicant, a Syrian national who was born in 1984 and lives in Athens, successfully complained about being detained for expulsion even though it had been impossible to deport him owing to the war in Syria and that the conditions of his detention in a police station had been poor.

**ECHR 225 (2018)
21.06.2018**

Press release issued by the Registrar

The applicant, S.Z., is a Syrian national who was born in 1984 and lives in Athens.

The case concerned his being detained for expulsion even though it had been impossible to deport him owing to the war in Syria and that the conditions of his detention in a police station had been poor.

Mr. Z. was arrested in Athens in September 2013 for possession of a fake French passport and sentenced to 10 months' imprisonment. Later in the same month the authorities ordered that he be expelled, keeping him in detention until the expulsion order could be carried out.

In administrative and court proceedings he argued that he could not be deported as he was Syrian and there was a civil war going on in that country. He also applied for asylum and asked to be released. He was eventually granted refugee status in November 2013 and released. He was held throughout his detention in a cell in the basement of Zografou police station.

Relying on Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights, he complained about the conditions of detention at the police station. He alleged under Article 5 § 1 (f) (right to liberty and security) of the European Convention that his detention had been arbitrary, and complained under Article 5 § 4 (right to have lawfulness of detention decided speedily by a court) that he had not had an effective remedy at his disposal to challenge the lawfulness of his detention.

Violation of Article 3 (treatment)

Violation of Article 5 § 1 – on account of Mr S.Z.'s detention from 23 October 2013 onwards

Violation of Article 5 § 4 – in respect of Mr S.Z.'s objections lodged on 23 October and 8 November 2013

Just satisfaction: EUR 4,000 (non-pecuniary damage) and EUR 1,500 (costs and expenses)

30. ECtHR, *X v. The Netherlands*, No. 14319/17, Chamber judgment of 10 July 2018 (Article 3, Prohibition of inhuman or degrading treatments – No violation). The applicant, a Moroccan national, left Morocco and went to stay with family in the Netherlands, overstaying his tourist visa. He was arrested on suspicion of planning terrorist attacks in the Netherlands and convicted of preparing terrorist offences. He unsuccessfully claimed that his expulsion to Morocco, where he was considered a terror suspect, would violate his right not to be subjected to inhuman or degrading treatments.

ECHR 251 (2018)
10.07.2018

Press release issued by the Registrar

The applicant, Mr X, is a Moroccan national who was born in 1988 and is currently in the Netherlands.

The case concerned his possible expulsion from the Netherlands to Morocco.

He left Morocco in 2012 and went to stay with family in the Netherlands, overstaying his tourist visa. In 2014 he was arrested on suspicion of planning terrorist attacks in the Netherlands and placed in police custody. In June 2016 he was convicted of preparing terrorist offences and sentenced to 12 months' imprisonment.

In the meantime, he had applied for asylum, claiming that he would be at risk of being detained and ill-treated if he were removed to Morocco where he was considered a terror suspect. His application was rejected in July 2016, the Netherlands authorities finding that he had not made out a plausible case. In particular he was not being searched for by the Moroccan authorities, nor had he been charged with any criminal offences there. His fears were based on general reports and assumptions. The courts upheld this decision and rejected the applicant's appeal in February 2017.

The Dutch authorities scheduled the applicant's removal to Morocco in March 2017. However, his deportation was stayed on the basis of an interim measure granted by the European Court of Human Rights under Rule 39 of its Rules of Court, which indicated to the Dutch Government that he should not be deported for the duration of the proceedings before it.

Relying on Article 3 (prohibition of torture and of inhuman or degrading treatment), the applicant alleged in particular that, as a known terror suspect, he belonged to a group systematically exposed to torture and/or ill-treatment in Morocco. He alleged that the Moroccan authorities must be aware of his conviction for a terrorism offence in the Netherlands and his links to a dismantled terrorist cell in Morocco, because he had been personally named in a Moroccan judgment convicting nine members of the cell.

No violation of Article 3 in the event of X's removal to Morocco

Interim measure (Rule 39 of the Rules of Court) – not to expel X – still in force until judgment becomes final or until further order.

31. ECtHR, *Mangîr and others v. the Republic of Moldova and Russia*, No. 50157, Chamber judgment of 17 July 2018 (Article 3, Prohibition of torture and inhuman or degrading treatments – No violation by the Republic of Moldova, Violation by the Russian Federation in respect to the case of Mr. Mangîr and in respect to the condition of detention; Article 5, Right to liberty and security – No violation by the Republic of Moldova, Violation by the Russian Federation; Article 13, Right to an effective remedy, in conjunction with Article 3 – No violation by the Republic of Moldova, Violation by the Russian Federation). The applicants, all Moldovan police officers, complained about unlawful detention and ill-treatment in the self-proclaimed “Moldovan Republic of Transdniestria” (“MRT”), where they were arrested by “the MRT secret service” while carrying out a criminal investigation in Tiraspol. One of the applicants was allegedly beaten up and injected with an unknown substance while in detention.

**ECHR 258 (2018)
17.07.2018**

Press release issued by the Registrar

The applicants, Ștefan Mangîr, Vitalie Vasiliev, Igor Dațco, Constantin Condrea and Alexandru Pohila, are Moldovan nationals who were born in 1967, 1978, 1976, 1979, and 1964 respectively. Mr Mangîr and Mr Vasiliev live in Chișinău and Caușeni while Mr Dațco, Mr Condrea, and Mr Pohila live in Bender (all in the Republic of Moldova).

The applicants are all Moldovan police officers and the case concerned their complaints of unlawful detention and ill-treatment in the self-proclaimed “Moldovan Republic of Transdniestria” (“MRT”).

Officers Mangîr, Vasiliev and Condrea were carrying out a criminal investigation in Tiraspol in the “MRT” in June 2006 when they were arrested by “the MRT secret service”. Officers Dațco and Pohila were also arrested when they went to Tiraspol to find out what had happened to their colleagues. The men were eventually released later in June but Officer Mangîr was allegedly beaten up and injected with an unknown substance while in detention.

The applicants were accused in the “MRT” media of being members of “black squadrons” whose aim was to kidnap politicians and other people who were an annoyance to the Moldovan authorities.

The men complained about their arrest and detention under Article 5 §§ 1 (c), 3 and 4 (right to liberty and security / entitlement to trial within a reasonable time or to release pending trial / right to have lawfulness of detention decided speedily by a court). Relying on Article 3 (prohibition of inhuman or degrading treatment), they complained about ill-treatment, their conditions of detention, such as a lack of natural light and overcrowding, and that they had not been given the requisite medical assistance. They also raised a complaint under Article 13 (right to an effective remedy) taken in conjunction with Article 3 and Article 5.

No violation of Article 3 (treatment) by the Republic of Moldova in respect of Mr Mangîr

Violation of Article 3 (treatment) by the Russian Federation in respect of Mr Mangîr

No violation of Article 3 by the Republic of Moldova in so far as the poor conditions of detention of the applicants were concerned

Violation of Article 3 by the Russian Federation in so far as the poor conditions of detention of the applicants were concerned

No violation of Article 5 § 1 by the Republic of Moldova

Violation of Article 5 § 1 by the Russian Federation

No violation of Article 5 §§ 3 and 4 by the Republic of Moldova

No violation of Article 13 in conjunction with Article 3 by the Republic of Moldova

Violation of Article 13 in conjunction with Article 3 by the Russian Federation

Just satisfaction: The Court held that the Russian Federation was to pay: EUR 25,000 to Mr Mangîr, EUR 20,000 to Mr Condrea and EUR 15,000 each to Mr Vasiliev, Mr Datço and Mr Pohila in respect of non-pecuniary damage; and EUR 3,000 jointly to all applicants in respect of costs and expenses.

32. ECtHR, *Sandu and Others v. the Republic of Moldova and Russia*, No. 21034/05, Chamber judgment of 17 July 2018 (Article 13, Right to an effective remedy – No violation by the Republic of Moldova, Violation by the Russian Federation; Article 1 of Protocol No. 1, Protection of property – No violation by the Republic of Moldova, Violation by the Russian Federation). The applicants, 1,646 individual Moldovan nationals and three companies, successfully complained that they had not been able to access land in the self-proclaimed region of the “Moldovan Transdniestrian Republic” (“MRT”) or had suffered other restrictions. They had worked the land without hindrance between 1992 and 1998, when “the MRT authorities” set up “border” checkpoints and the applicants had to pay various taxes and fees. In 2004 “the MRT” declared that the land in question was its property and demanded rent from the applicants. The Court found in particular that there had been no legal basis for the “MRT” to deprive the applicants of access to their land and there had been a violation of their property rights.

**ECHR 262 (2018)
17.07.2018**

Press release issued by the Registrar

In today’s **Chamber** judgment in the case of *Sandu and Others v. the Republic of Moldova and Russia* (application no. 21034/05) the European Court of Human Rights held, by six votes to one, that there had been:

a violation of Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights by Russia, and,

a violation of Article 13 (right to a remedy) of the European Convention by Russia.

It found **no violation** of either Article by the Republic of Moldova.

The case concerned complaints by 1,646 individual Moldovan applicants and three companies that they had not been able to access land in the separatist region of the “Moldovan Transdniestrian Republic” (“the MRT”) or had suffered other restrictions.

The Court found in particular that there had been no legal basis for the “MRT” to deprive the applicants of access to their land and there had been a violation of their property rights. Given Russia’s effective control over “the MRT”, it had to take responsibility for the violations the applicants had suffered. For its part, Moldova had fulfilled its duty to help the applicants by negotiating their access to the land and granting them compensation for losses.

Principal facts

The case originated in eight applications by 1,646 individuals and three companies, Posedo-Agro S.R.L., Agro-Tiras S.R.L. and Agro-S.A.V.V.A. S.R.L.

The individual applicants live in five villages on the left bank of the River Dniester and are under Moldovan control. They own land which is on the other side of a road which has been claimed by “the MRT” as its territory.

They worked the land without hindrance between 1992 and 1998, when “the MRT authorities” set up “border” checkpoints and the applicants had to pay various taxes and fees. In 2004 “the MRT” declared that the land in question was its property and demanded rent from the applicants.

The applicants refused to sign rental contracts for property that was already theirs and as a result they no longer had access to their land. The 2004 harvest was lost and some agricultural machinery was seized. The

applicants complained to “the MRT authorities”, the Moldovan authorities, the Russian Embassy in Moldova and to the Organisation for Security and Co-operation in Europe.

The three applicant companies rented land from individuals in the same five villages. The issues they had with “the MRT” authorities included being fined for taking equipment across the road without declaring it to “the MRT”, having equipment seized or being denied access to the land.

The Moldovan authorities took various measures to help people affected by various actions of the “MRT”. The measures included compensation for lack of access to the land in question and the negotiation in 2006 of a temporary “MRT” registration system for its owners, which allowed them to cultivate the land and be exempt from making payments to the “MRT”. The temporary registration system is renewed each year in negotiations between Moldova and the “MRT”.

Complaints, procedure and composition of the Court

Relying on Article 1 of Protocol No. 1 to the European Convention, the applicants complained that by not allowing them access to their land or by making it conditional on them paying rent, the “MRT” authorities had breached their rights. Under Article 13, they also complained that they had no effective remedy to resolve the alleged breach of Article 1 of Protocol No. 1.

The eight applications (nos. 21034/05, 41569/04, 41573/04, 41574/04, 7105/06, 9713/06, 18327/06 and 38649/06) were lodged against the Republic of Moldova and the Russian Federation with the European Court of Human Rights on 25, 26 and 28 October 2004, 24 May 2005, 20 January, 8 February, 14 April and 6 September 2006 respectively.

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

Robert **Spano** (Iceland), *President*,
 Paul **Lemmens** (Belgium),
 Ledi **Bianku** (Albania),
 Işıl **Karakaş** (Turkey),
 Valeriu **Griţco** (the Republic of Moldova),
 Dmitry **Dedov** (Russia),
 Jon Fridrik **Kjølbro** (Denmark),

and also Stanley **Naismith**, *Section Registrar*.

Decision of the Court

Article 1 of Protocol No. 1

The Court struck out 172 applications owing to a lack of detailed information on those cases.

Basing itself on earlier applications involving “the MRT”, such as *Ilaşcu and Others v. Moldova and Russia*, and *Catan and Others v. the Republic of Moldova and Russia*, it found that both Moldova and Russia had jurisdiction in the case and could therefore be made answerable for the complaints.

The Court held that the applicants’ property rights had been breached as there had been no legal basis for “the MRT authorities” to demand that they conclude rental agreements for the land, which they already owned, or to deny them access to that land.

In determining each respondent country’s responsibility for the breach, it held that Moldova, although it had no effective control over “the MRT”, still had a “positive obligation” to take the diplomatic, economic, judicial and other measures that were both in its power and in accordance with international law.

Looking at Moldova's actions, the Court found that it had taken such measures, both generally aimed at seeking to re-establish control over the region and at compensating those affected by the restrictions imposed by the "MRT". Moldova had therefore fulfilled its obligations under the Convention.

As far as Russia was concerned, the Court found that it provided vital help to "the MRT", both militarily and financially, such that "the MRT" could not survive without such support. That fact engaged Russia's responsibility under the Convention and that State was therefore responsible for the violation of the applicants' property rights that had been found in this case.

Article 13

The Court first found that there had been a violation of the applicants' rights under this provision as they had had no effective legal remedy for their problem.

For its part, Moldova had not been responsible for the violation as it had created a set of judicial, investigative and civil service authorities which worked in parallel with those created by the "MRT". The Moldovan authorities had also negotiated various methods of protecting the rights of the applicants and had obtained an improvement in their situation in 2006.

The Court rejected an objection raised by the Russian Government that the applicants had not exhausted the legal remedies available to them in Russia. It noted that the Government had not stated which of its courts had jurisdiction over the "MRT" or what the legal basis would be for examining such complaints. In addition, it had continued to deny that it had any direct involvement in the conflict in the region.

The Court therefore concluded that the Russian Federation was also responsible for a violation of Article 13 taken in conjunction with Article 1 of Protocol No. 1.

Just satisfaction (Article 41)

The Court held that Russia was to pay each individual applicant EUR 1,500 in respect of nonpecuniary damage, except for three applicants who withdrew their applications.

It awarded EUR 115,300 to Agro-Tiras S.R.L. and EUR 80,500 to Agro-S.A.V.V.A. S.R.L. in respect of pecuniary damage and EUR 50,000 under the same head to Posedo-Agro S.R.L., to be paid to its successor, Serghei Popa FP. It also awarded each applicant company EUR 5,000 in respect of non-pecuniary damage.

It ordered that Russia was to pay costs and expenses of EUR 20,000 for all the applicants.

Separate opinion

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

33. ECtHR, *Dadayan v. Armenia* No. 14078/12, Chamber judgment of 6 September 2018 (Article 6-1, Right to a fair trial –Violation; Article 6-3(d), Right to obtain attendance and examination of witnesses – Violation). The applicant, an Armenian national, was prosecuted and convicted in Armenia for the smuggling of enriched uranium on the basis of two other accused smugglers' witness statements, prosecuted and convicted in Georgia, and whom the Armenian trial court never heard in person due to the Georgian authorities' refusal to authorise their transfer to Armenia. The applicant successfully claimed his right to a fair trial.

**ECHR 295 (2018)
06.09.2018**

Press release issued by the Registrar

In today's **Chamber** judgment in the case of *Dadayan v. Armenia* (application no. 14078/12) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 §§ 1 and 3 (d) (right to a fair trial and right to obtain attendance and examination of witnesses) of the European Convention on Human Rights.

The case concerned criminal proceedings brought against an Armenian national, Garik Dadayan, for aiding and abetting the smuggling of enriched uranium into Georgia. The two smugglers were prosecuted and convicted in Georgia, while Mr Dadayan was prosecuted and convicted in Armenia, essentially on the basis of the smugglers' witness statements to the Georgian authorities.

The Court found in particular that Mr Dadayan's defence rights had been substantially affected because the Armenian trial court had never heard the smugglers in person. The Georgian authorities had refused their transfer to Armenia pending the criminal proceedings against them in Georgia. This was despite the fact that those witness statements had been the sole basis on which the courts could decide whether or not Mr Dadayan had been involved in selling the radioactive substance.

Principal facts

The applicant, Garik Dadayan, is an Armenian national who was born in 1954 and lives in Yerevan (Armenia).

On 11 March 2010 the Georgian law-enforcement authorities arrested two men, H.O. and S.T., when they tried to sell 15g of enriched uranium which they had just transported from Armenia by train. The Georgian authorities informed the Armenian security services that H.O. and S.T. had bought the radioactive substance from the applicant, Mr Dadayan.

The two accused smugglers were questioned as witnesses in Georgia in April 2010. They both stated that they had paid Mr Dadayan to travel from Russia to Armenia and bring them the uranium to Yerevan railway station.

H.O. and S.T. were then prosecuted in Georgia and convicted in March 2011, while Mr Dadayan was arrested and prosecuted in Armenia.

During his trial, he requested that H.O. and S.T. be brought before court for questioning. However, the Georgian authorities refused because the two men's convictions were still open to appeal on points of law.

Mr Dadayan was found guilty in May 2011 and sentenced to seven years' imprisonment. The trial court relied on H.O. and S.T.'s witness statements; forensic examinations carried out in Georgia and Armenia confirming that the smuggled substance contained enriched uranium; records of telephone calls between Mr

Dadayan and H.O.; and the exit and entry stamps in Mr Dadayan's passport proving that he had arrived in Yerevan from Moscow on 10 March 2010.

The Court of Appeal subsequently upheld Mr Dadayan's conviction, without addressing his complaint about not being able to cross-examine S.T. and H.O. He also lodged an appeal on points of law, without success.

Complaints, procedure and composition of the Court

Relying on Article 6 §§ 1 and 3 (d) (right to a fair trial and right to obtain attendance and examination of witnesses), Mr Dadayan complained in particular that he had not been given the opportunity at trial to question the only witnesses, S.T. and H.O., whose statements could prove that it had been him who had sold them enriched uranium.

The application was lodged with the European Court of Human Rights on 5 March 2012.

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

Linos-Alexandre **Sicilianos** (Greece), *President*,
Kristina **Pardalos** (San Marino),
Aleš **Pejchal** (the Czech Republic),
Krzysztof **Wojtyczek** (Poland),
Armen **Harutyunyan** (Armenia),
Tim **Eicke** (the United Kingdom),
Jovan **Ilievski** ("the former Yugoslav Republic of Macedonia"),

and also Renata **Degener**, *Deputy Section Registrar*.

Decision of the Court

The Court noted that one of the requirements of a fair trial was the possibility for the accused to confront witnesses in the presence of the judge who ultimately had to decide the case. This was because a judge's observations on the demeanour and credibility of a witness could have consequences for the accused.

In Mr Dadayan's case, the witnesses S.T. and H.O. had been absent from his trial because the Georgian authorities had refused to authorise their transfer to Armenia. However, there had been no good reason for the trial court to then admit the statements of those absent witnesses as evidence without them being examined in court. Indeed, the trial court had not made any further attempts to try to find out whether it would be possible to transfer the two witnesses to Armenia if and when their convictions became final. Nor had any other means of examining them been contemplated, for example via video link.

Moreover, their statements had been fundamental for the case because it was the sole basis on which the courts could decide whether Mr Dadayan had been involved in selling enriched uranium. Not hearing those witnesses in person had therefore substantially affected his defence rights. Instead, the courts had based its conclusions on witness evidence which had never even been examined.

Lastly, there had not been sufficient procedural safeguards in place to compensate for those handicaps to the defence. Although he had had the possibility to challenge the admissibility of S.T. and H.O.'s testimony, he had not been able to challenge their statements during the investigation stage, which had taken place in Georgia, while his prosecution and conviction had been in Armenia. There was nothing to indicate that the trial court had approached the untested evidence with any specific caution.

The Court therefore concluded that, overall, Mr Dadayan had not had a fair trial, in breach of Article 6 §§ 1 and 3 (d).

Just satisfaction (Article 41)

The Court held that Armenia was to pay Mr Dadayan EUR 2,400 in respect of non-pecuniary damage and EUR 1,000 in respect of costs and expenses.

34. ECtHR, *Big Brother Watch and Others v. the United Kingdom* Nos. 58170/13, 62322/14 and 24960/15 Chamber judgment of 13 September 2018 (Article 6, Right to a fair trial – No violation; Article 8, Right to respect for private life and family life – Violation; Article 10, Freedom of expression – Violation; Article 14, Prohibition of discrimination – No violation). The applicants, journalists and rights organisation, complained about the bulk interception of communication, intelligence sharing with foreign governments, and the obtaining of communication data from communications service providers by the UK intelligence services. Their claims were successful regarding the system of bulk interception of communication, which violated Article 8 as there was insufficient oversight and safeguards regarding the data collected, and the system of obtaining communication data from communications service providers, which also violated Article 8 as it was not in accordance with the law. Additionally, both systems violated Article 10 as there were insufficient safeguards in respect of confidential journalistic material. However, the Court found that the system of intelligence sharing with foreign governments did not violate Article 8 or Article 10.

ECHR 299 (2018)
13.09.2018

Press release issued by the Registrar

The case of *Big Brother Watch and Others v. the United Kingdom* (applications nos. 58170/13, 62322/14 and 24960/15) concerned complaints by journalists and rights organisations about three different surveillance regimes: (1) the bulk interception of communications; (2) intelligence sharing with foreign governments; and (3) the obtaining of communications data from communications service providers.

Both the bulk interception regime and the regime for obtaining communications data from communications service providers have a statutory basis in the Regulation of Investigatory Powers Act 2000. The Investigatory Powers Act 2016, when it comes fully into force, will make significant changes to both regimes. In considering the applicants' complaints, the Court had regard to the law in force at the date of its examination. As the provisions of the IPA which will amend the regimes for the bulk interception of communications and the obtaining of communications data from communications service providers were not in force at that time, the Court did not consider them in its assessment.

In today's **Chamber** judgment the European Court of Human Rights held, **by five votes to two**, that:

the bulk interception regime **violated Article 8 of the European Convention on Human Rights (right to respect for private and family life/communications)** as there was insufficient oversight both of the selection of Internet bearers for interception and the filtering, search and selection of intercepted communications for examination, and the safeguards governing the selection of "related communications data" for examination were inadequate.

In reaching this conclusion, the Court found that the operation of a bulk interception regime did not in and of itself violate the Convention, but noted that such a regime had to respect criteria set down in its case-law.

The Court also held, **by six votes to one**, that:

the regime for obtaining communications data from communications service providers **violated Article 8** as it was not in accordance with the law; and

that both the bulk interception regime and the regime for obtaining communications data from communications service providers **violated Article 10 of the Convention** as there were insufficient safeguards in respect of confidential journalistic material.

It further found that the regime for sharing intelligence with foreign governments **did not violate either Article 8 or Article 10**.

The Court **unanimously** rejected complaints made by the third set of applicants under **Article 6 (right to a fair trial)**, about the domestic procedure for challenging secret surveillance measures, and under **Article 14 (prohibition of discrimination)**.

Principal facts

The three joined applications are *Big Brother Watch and Others v. the United Kingdom* (no. 58170/13); *Bureau of Investigative Journalism and Alice Ross v. the United Kingdom* (no. 62322/14); and *10 Human Rights Organisations and Others v. the United Kingdom* (no. 24960/15). The 16 applicants are organisations and individuals who are either journalists or are active in campaigning on civil liberties issues.

The applications were lodged after Edward Snowden, a former US National Security Agency (NSA) contractor, revealed the existence of surveillance and intelligence sharing programmes operated by the intelligence services of the United States and the United Kingdom.

The applicants believed that the nature of their activities meant that their electronic communications and/or communications data were likely to have been intercepted or obtained by the UK intelligence services.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life and correspondence), the applicants complained about the regimes for the bulk interception of communications, intelligence sharing and for the acquisition of data from communications service providers.

The second and third applications also raised complaints under Article 10 (freedom of expression) related to their work, respectively, as journalists and non-governmental organisations.

The third application relied in addition on Article 6 (right to a fair trial), in relation to the domestic procedure for challenging surveillance measures, and on Article 14 (prohibition of discrimination), combined with Articles 8 and 10, alleging the regime for the bulk interception of communications discriminated against people outside the United Kingdom, whose communications were more likely to be intercepted and, if intercepted, selected for examination.

The applications were lodged on 4 September 2013, 11 September 2014 and 20 May 2015 respectively. They were communicated to the Government on 9 January 2014, 5 January 2015 and 24 November 2015, together with questions from the Court. Various third parties were allowed to intervene in the proceedings and a public hearing was held in November 2017.

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

Linos-Alexandre **Sicilianos** (Greece), *President*,
 Kristina **Pardalos** (San Marino),
 Aleš **Pejchal** (the Czech Republic),
 Ksenija **Turković** (Croatia),
 Armen **Harutyunyan** (Armenia),
 Pauliine **Koskelo** (Finland),
 Tim **Eicke** (the United Kingdom),

and also Abel **Campos**, *Section Registrar*

Decision of the Court

Admissibility

The Court first considered whether the first and second set of applicants had exhausted domestic remedies, part of the process of admissibility, as they had not raised their complaints with the Investigatory Powers

Tribunal, a special body charged with examining allegations of wrongful interference with communications by the security services.

It found that while the IPT has shown itself to be an effective remedy which applicants had to use, at the time these two sets of applicants lodged their applications with this Court there existed special circumstances absolving them from that requirement and they could not be faulted for relying on the Court's 2010 judgment in *Kennedy v. the United Kingdom* as authority for the proposition that the IPT was not an effective remedy for a complaint about the general Convention compliance of a surveillance regime.

Article 8

Interception process under section 8(4) of RIPA

The Court noted that the bulk interception of communications was regulated by section 8(4) of the Regulation of Investigatory Powers Act (RIPA) 2000.

Operating a bulk interception scheme was not *per se* in violation of the Convention and Governments had wide discretion (“a wide margin of appreciation”) in deciding what kind of surveillance scheme was necessary to protect national security. However, the operation of such systems had to meet six basic requirements, as set out in *Weber and Saravia v. Germany*. The Court rejected a request by the applicants to update the *Weber* requirements, which they had said was necessary owing to advances in technology.

The Court then noted that there were four stages of an operation under section 8(4): the interception of communications being transmitted across selected Internet bearers; the using of selectors to filter and discard – in near real time – those intercepted communications that had little or no intelligence value; the application of searches to the remaining intercepted communications; and the examination of some or all of the retained material by an analyst.

While the Court was satisfied that the intelligence services of the United Kingdom take their Convention obligations seriously and are not abusing their powers, it found that there was inadequate independent oversight of the selection and search processes involved in the operation, in particular when it came to selecting the Internet bearers for interception and choosing the selectors and search criteria used to filter and select intercepted communications for examination.

Furthermore, there were no real safeguards applicable to the selection of related communications data for examination, even though this data could reveal a great deal about a person's habits and contacts.

Such failings meant section 8(4) did not meet the “quality of law” requirement of the Convention and could not keep any interference to that which was “necessary in a democratic society”. There had therefore been a violation of Article 8 of the Convention.

Acquisition of data from communications service providers under Chapter II of RIPA

The Court noted that the second set of applicants had complained that Chapter II of RIPA allowed a wide range of public bodies to request access to communications data from communications companies in various ill-defined circumstances.

It first rejected a Government argument that the applicants' application was inadmissible, finding that as investigative journalists their communications could have been targeted by the procedures in question. It then went on to focus on the Convention concept that any interference with rights had to be “in accordance with the law”.

It noted that European Union law required that any regime allowing access to data held by communications service providers had to be limited to the purpose of combating “serious crime”, and that access be subject to prior review by a court or independent administrative body. As the EU legal order is integrated into that of the UK and has primacy where there is a conflict with domestic law, the Government had conceded in a recent domestic case that a very similar scheme introduced by the Investigatory Powers Act 2016 was incompatible with fundamental rights in EU law because it did not include these safeguards. Following this

concession, the High Court ordered the Government to amend the relevant provisions of the Act. The Court therefore found that as the Chapter II regime also lacked these safeguards, it was not in accordance with domestic law as interpreted by the domestic authorities in light of EU law. As such, there had been a violation of Article 8.

Intelligence sharing procedures

The Court found that the procedure for requesting either the interception or the conveyance of intercept material from foreign intelligence agencies was set out with sufficient clarity in the domestic law and relevant code of practice. In particular, material from foreign agencies could only be searched if all the requirements for searching material obtained by the UK security services were fulfilled. The Court further observed that there was no evidence of any significant shortcomings in the application and operation of the regime, or indeed evidence of any abuse.

The intelligence sharing regime therefore did not violate Article 8.

Article 10

The Court declared complaints by the third set of applicants under this provision to be inadmissible but found a violation of the rights of the second set of applicants, who had complained that the bulk surveillance regimes under section 8(4) and Chapter II of RIPA did not provide sufficient protection for journalistic sources or confidential journalistic material.

In respect of the bulk interception regime, the Court expressed particular concern about the absence of any published safeguards relating both to the circumstances in which confidential journalistic material could be selected intentionally for examination, and to the protection of confidentiality where it had been selected, either intentionally or otherwise, for examination. In view of the potential chilling effect that any perceived interference with the confidentiality of journalists' communications and, in particular, their sources might have on the freedom of the press, the Court found that the bulk interception regime was also in violation of Article 10.

When it came to requests for data from communications service providers under Chapter II, the Court noted that the relevant safeguards only applied when the purpose of such a request was to uncover the identity of a journalist's source. They did not apply in every case where there was a request for a journalist's communications data, or where collateral intrusion was likely. In addition, there were no special provisions restricting access to the purpose of combating "serious crime". As a consequence, the Court also found a violation of Article 10 in respect of the Chapter II regime.

Article 6

The third set of applicants complained that the IPT lacked independence and impartiality. However, the Court noted that the IPT had extensive power to consider complaints concerning wrongful interference with communications, and those extensive powers had been employed in the applicants' case to ensure the fairness of the proceedings. Most notably, the IPT had access to open and closed material and it had appointed Counsel to the Tribunal to make submissions on behalf of the applicants in the closed proceedings. Furthermore, the Court accepted that in order to ensure the efficacy of the secret surveillance regime, which was an important tool in the fight against terrorism and serious crime, the restrictions on the applicants' procedural rights had been both necessary and proportionate and had not impaired the essence of their Article 6 rights.

Overall, the applicants' complaint was manifestly ill-founded and had to be rejected.

Other Articles

The third set of applicants complained under Article 14, in conjunction with Articles 8 and 10, that those outside the United Kingdom were disproportionately likely to have their communications intercepted as the law only provided additional safeguards to people known to be in Britain.

The Court rejected this complaint as manifestly ill-founded. The applicants had not substantiated their argument that people outside the UK were more likely to have their communications intercepted. In addition, any possible difference in treatment was not due to nationality but to geographic location, and was justified.

Just satisfaction (Article 41)

The applicants did not claim any award in respect of pecuniary or non-pecuniary damage and the Court saw no reason to make one. However, it made partial awards in respect of the costs and expenses claimed by the applicants in the first and second of the joined cases. The applicants in the third joined case made no claim for costs and expenses.

Separate opinions

Judges Pardalos and Eicke expressed a joint partly dissenting and partly concurring opinion, and Judge Koskelo, joined by Judge Turković, expressed a partly concurring, partly dissenting opinion. These opinions are annexed to the judgment.

35. ECtHR, *Kolobychko v. the Republic of Moldova, Russia and Ukraine*, No. 36724/10, Chamber judgment of 18 September 2018 (Article 2, Right to life – No violation by the Republic of Moldova, No violation by Ukraine, No violation by the Russian Federation; Article 2, Right to investigation – Violation by the Russian Federation). The applicant, a Ukrainian national, complained about the death of his son during his military service in the self-proclaimed “Moldavian Republic of Transdniestria” (“MRT”) and about the investigation into the circumstances of the death. The Court found a violation of the right to an effective investigation by the Russian Federation, since the investigation led by the “MRT” had not been adequate, and the Russian Federation had effective control over the “MRT”.

ECHR 302 (2018)
18.09.2018

Press release issued by the Registrar

The applicant, Ivan Kolobychko, is a Ukrainian national who was born in 1963 and lives in Tiraspol (Transdniestrian region of the Republic of Moldova).

The case concerned the death of the applicant’s son, Evgueni Kolobychko, while he was doing his compulsory military service. The events had taken place in an area that was under the exclusive control of the authorities of the “Moldavian Republic of Transdniestria” (“MRT”), self-proclaimed as such.

In July 2007 the “MRT” army conscripted Mr Kolobychko’s son into a military unit located in Tiraspol. Some two months later, Evgueni Kolobychko left the unit of his own accord and went to live with his cousin for one month. According to statements by his parents and cousin, Evgueni Kolobychko had numerous bruises on his body at that time, and he explained to them that soldiers had bullied and ill-treated him.

In October 2007 Evgueni Kolobychko was taken back to the barracks from which he fled again one week later. His decomposing body was found on the bank of the Dniestr in January 2008. The forensic medical report concluded that he had drowned. The “MRT” military prosecutor’s office opened a criminal investigation but subsequently suspended it, as nobody who could be charged had been identified. Mr Kolobychko also filed a complaint for murder with the Moldovan authorities and the office of the Prosecutor General of the Russian Federation. The investigation opened by the Moldovan Prosecutor General was suspended for the same reason as the MRT investigation.

Relying in particular on Article 2 (right to life), Mr Kolobychko complained about the death of his son during his military service and about the investigation into the circumstances of the death.

No violation of Article 2 by the Republic of Moldova
Violation of Article 2 (investigation) by Russia
No violation of Article 2 (right to life) by Russia
 Part of the application against Ukraine declared **inadmissible**

Just satisfaction: The Court held that the Russia was to pay Mr Kolobychko EUR 20,000 for non-pecuniary damage and EUR 2,400 for costs and expenses.

- 36. ECtHR, *Stomatii v. the Republic of Moldova and Russia* No. 69528/10, Chamber judgment of 18 September 2018 (Article 2, Right to life – No violation by the Republic of Moldova, Violation by the Russian Federation; Article 2, Right to investigation – Violation by the Russian Federation).** The applicant, a Ukrainian national, complained about the death of her son, accidentally killed during his military service in the self-proclaimed “Moldavian Republic of Transdniestria” (“MRT”) by a soldier under the influence of alcohol, who then benefited from an amnesty law, and about the investigation into the circumstances of the death. The Court found violations of the right to life and the right to an effective investigation by the Russian Federation, which had effective control over the “MRT”, since the investigation had not been adequate and the “MRT” had not taken the necessary measures to prevent such accident.

**ECHR 302 (2018)
18.09.2018**

Press release issued by the Registrar

The applicant, Svetlana Somatii, is a Ukrainian national who was born in 1963 and lives in Vărăncău (Transnistrian region of the Republic of Moldova).

The case concerned the death of the applicant’s son, Alexander Somatii, while he was on guard duty during his compulsory military service in the army of the “Moldavian Republic of Transdniestria” (“MRT”).

In May 2010 Alexander Somatii was found lying on the ground, on his back, around 10 p.m., about five metres from the barracks. The forensic medical examiner concluded that he had died from a bullet wound to the head – the bullet probably having been fired from a Kalashnikov – and another bullet wound in the back. One month later the “MRT” military prosecutor informed Mrs Somatii that the investigation had revealed that her son’s death had been the result of imprudent actions by conscript F., who had confessed. According to F., Alexander Somatii had been drunk while on guard duty and in the presence of other soldiers had pointed his weapon at his chin. F. had then tried to deflect the gun but accidentally pressed the trigger, thus causing the death of Alexander Somatii. Two to three minutes later, F. had decided to move the gun, which was on the ground, but in mishandling it he had fired another bullet which struck the victim in the back.

In March 2011, F., on trial for manslaughter, was found guilty of that charge and sentenced to two years’ imprisonment. The sentence was upheld by the “MRT” Supreme Court in May 2011. F. was, however, discharged from serving it under an amnesty law.

The complaints filed by Mrs Somatii with the Moldovan and Russian authorities were unsuccessful. The Russian authorities did not reply and the Moldovans suspended the proceedings a number of times on the ground that nobody who could be charged had been identified.

Relying in particular on Article 2 (right to life), Mrs Somatii complained about her son’s death and the investigation into the circumstances of his death.

No violation of Article 2 by the Republic of Moldova
Violation of Article 2 (investigation) by Russia
Violation of Article 2 (right to life) by Russia

Just satisfaction: The Court held that Russia was to pay Ms Somatii EUR 50,000 for non-pecuniary damage and EUR 3,000 for costs and expenses.

37. ECtHR, *Assem Hassan Ali v. Denmark*, No. 25593/14, Chamber judgment of 23 October 2018 (Article 8, Right to respect for private and family life – No violation). The applicant, a Jordanian national, contested a deportation order issued following serious crimes he had committed in Denmark, invoking Article 8 of the *European Convention on Human Rights* and citing his links to his wife and child remaining in Denmark. His claim was unsuccessful as the Court recognised that the domestic courts had carefully balanced the competing interests and had explicitly taken into account the criteria set out in the Court’s case law regarding Article 8.

**ECHR 357 (2018)
23.10.2018**

Press release issued by the Registrar

In today’s **Chamber** judgment in the case of *Assem Hassan Ali v. Denmark* (application no. 25593/14) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The case concerned the expulsion from Denmark of a Jordanian national, who has six children of Danish nationality. He was deported in 2014 following convictions for drugs offences.

The Court was not convinced that the best interests of the applicant’s six children had been so adversely affected by his deportation that they should outweigh the other criteria to be taken into account, such as the prevention of disorder or crime.

Overall, the domestic courts had carefully balanced the competing interests and explicitly taken into account the criteria set out in the Court’s case-law when deciding to expel the applicant.

Principal facts

The applicant, Ahmad Assem Hassan Ali, is a Jordanian national who was born in 1977.

He entered Denmark in 1997 when he was 20 years old and was granted residence after marrying a stateless Palestinian woman with Danish nationality. They had three children together between 1997 and 2001. After divorcing in 2001, he married an Iraqi woman of Kurdish origin. They divorced in 2013 after having three children between 2003 and 2009. All six children have Danish nationality.

After a first conviction in 2006 for assault and drugs offences, he was found guilty in 2009 of trafficking cocaine into Denmark and was jailed. Given the seriousness of the crime, the District Court ordered his expulsion and a permanent ban on his return. The decision was upheld on appeal.

In proceedings against the deportation order, he asserted his strong links to his children, wife and ex-wife, stated that they visited him in prison, and that he would lose contact if he were deported.

In June 2013 the District Court refused to revoke the expulsion order, finding that his crime constituted “a major problem for Danish society”. Under domestic law expulsion could only be revoked if an applicant’s personal circumstances had changed, and the District Court found that his allegation of a deterioration in his children’s health since the expulsion order was unsubstantiated.

The High Court upheld that decision in January 2014. It found that his argument that he intended to re-marry his first ex-wife was not a change in circumstance either. He was deported in April 2014.

Complaints, procedure and composition of the Court

The applicant complained that his expulsion from Denmark had separated him from his six children, in breach of his right to respect for private and family life under Article 8.

The application was lodged with the European Court of Human Rights on 27 March 2014.

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

Robert **Spano** (Iceland), *President*,
Ledi **Bianku** (Albania),
Işıl **Karakaş** (Turkey),
Paul **Lemmens** (Belgium),
Jon Fridrik **Kjølbro** (Denmark),
Stéphanie **Mourou-Vikström** (Monaco),
Ivana **Jelić** (Montenegro),

and also Hasan **Bakırcı**, *Deputy Section Registrar*.

Decision of the Court

The Court reiterated that States had the right to control the entry and residence of aliens on their territory, including the right to expel an alien convicted of a criminal offence. However, any such decision had to respect Article 8 and be in line with Convention case-law.

The Court recognised that the domestic courts had carefully balanced the competing interests and had explicitly taken into account the criteria set out in its case-law.

Looking at his social, cultural and family ties with Denmark and Jordan, the Court noted that in the proceedings leading to the expulsion order, the District Court had found that he spoke only a little Danish, had never had a job in Denmark and that his parents and siblings had remained in Jordan.

As for his family situation, the Court decided that the Convention criterion on possible difficulties for spouses in the country of expulsion did not apply to him. When he had stated that he planned to remarry his first ex-wife, he was in prison and facing expulsion. He could not therefore have had a justified expectation of exercising his right to a family life in Denmark with her. He had already divorced his second ex-wife by the time the District Court had refused to revoke the expulsion order.

As concerned the criterion of the best interests of the children, the issue was the difficulties they might encounter in Denmark due to separation from their father, given that the mothers planned to remain in the country. The domestic courts had examined that issue and found that the children's health had not deteriorated since the 2009 expulsion order. The courts had also found that his maintaining contact with his children since the expulsion order could not change matters either.

The Court was not therefore convinced that the best interests of the children had been so adversely affected by his deportation that they should outweigh the other criteria to be taken into account, such as the prevention of disorder or crime.

As he had committed a serious drugs crime, the Court found that the expulsion decision had been based on relevant and sufficient reasons. Moreover, the measure had been proportionate in that a fair balance had been struck between his right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other. Overall, there had been no violation of Article 8.

38. ECtHR, *Levakovic v. Denmark*, No. 7841/14, Chamber judgment of 23 October 2018 (Article 8, Right to respect for private and family life – No violation). The applicant, a Croatian national, contested a deportation order issued following serious crimes he had committed in Denmark, invoking Article 8 of the *European Convention on Human Rights* and citing his links to Denmark where he lived most of his life. His claim was unsuccessful as the Court recognised that the domestic courts had carefully balanced the competing interests and had explicitly taken into account the criteria set out in the Court's case law regarding Article 8.

**ECHR 358 (2018)
23.10.2018**

Press release issued by the Registrar

The case of *Levakovic v. Denmark* (application no. 7841/14) concerned a decision to expel the applicant to Croatia, with which he had no ties apart from nationality, after he was tried and convicted for crimes committed in Denmark, where he had lived most of his life.

In its **Chamber** judgment in the case the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The Court found that the domestic courts had made a thorough assessment of his personal circumstances, balancing the competing interests and taking Strasbourg case-law into account. The domestic courts had been aware that very strong reasons were necessary to justify the expulsion of a migrant who has been settled for a long time, but had found that his crimes were serious enough to warrant such a measure.

The courts had found that he did not have any children whose interests needed to be taken into account and that he was poorly integrated into society as he had lived a life of crime and shown a lack of will to comply with Danish law. Overall, the authorities had based their decisions on relevant and sufficient reasons and there was no sign his Roma origin had influenced them.

Principal facts

The applicant, Jura Levakovic, is a Croatian national who was born in 1987 and lives in Croatia.

Mr Levakovic was taken from the Netherlands to Denmark when he was nine months old, living there with his parents and three brothers. As a youth he was convicted four times for crimes including robbery and drugs offences. He was also convicted several times after he reached the age of 18 and received two expulsion orders, which were both suspended.

In November 2011, while on probation during the period of the second suspended expulsion order, he was arrested on charges including robbery and the possession of arms.

The case came before the City Court, where he pleaded not guilty. He stated that he had lived all his life in Denmark, where all his family lived, and that he had never been to Croatia or the former Yugoslavia. He had no family there and did not speak the language. He had been diagnosed with ADHD and was on medication. He also wanted to marry his girlfriend.

In December 2012 the City Court sentenced him to five years in jail and ordered his expulsion, with a permanent ban on his return. The judgment was upheld on appeal by five votes to one.

It appears that Mr Levakovic was expelled in December 2017 after serving his sentence and reentered shortly afterwards, in breach of the ban.

Complaints, procedure and composition of the Court

The applicant complained that his expulsion was in breach of Article 8 (right to respect for private life).

The application was lodged with the European Court of Human Rights on 13 January 2014.

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

Robert **Spano** (Iceland), *President*,
Ledi **Bianku** (Albania),
Işıl **Karakaş** (Turkey),
Paul **Lemmens** (Belgium),
Valeriu **Griţco** (the Republic of Moldova),
Jon Fridrik **Kjølbro** (Denmark),
Stéphanie **Mourou-Vikström** (Monaco),

and also Hasan **Bakırcı**, *Deputy Section Registrar*.

Decision of the Court

Mr Levakovic submitted that the first-instance court had failed to take all the relevant circumstances into account when carrying out its balancing test, in particular the fact that all his ties were in Denmark. His family and girlfriend lived there and he had had jobs in that country. He was as well integrated as any Danish national with convictions and his crimes had not been particularly serious.

The Government argued that the expulsion order had been “in accordance with the law”, had pursued a legitimate aim and that the courts had struck a fair balance.

The third-party intervener, the European Roma Rights Centre, said the national courts should have applied European Union law on expulsion, which had stricter conditions than the European Convention. It also drew the Court’s attention to anti-Roma sentiment in Denmark.

The Court reiterated that States had the right to control the entry and residence of aliens on their territory, including the right to expel an alien convicted of a criminal offence.

However, any such decision had to respect Article 8 and be in line with Convention case-law. The Court therefore had to examine whether the authorities had presented “very serious reasons” to expel Mr Levakovic or whether it had to substitute its own view for that of the domestic courts.

The Court recognised that the first-instance court, the City Court, had carefully balanced the competing interests and explicitly taken account of Strasbourg case-law. That balancing test had been approved on appeal by the High Court.

The Court held that the authorities had been entitled to find that Mr Levakovic’s crimes warranted expulsion, unless there were counterbalancing criteria. On that issue, the Court noted that the expulsion did not interfere with his family rights as he is an adult with no additional elements of dependence with his siblings and parents. He also has no children. Looking at his social and cultural ties with Denmark, the Court noted that the domestic courts had found that his criminal record and his lack of respect for the law showed that he was not well integrated.

The decision to expel Mr Levakovic had thus been based on relevant and sufficient reasons and there had been no indication whatsoever that stereotypes about Roma had influenced the process. The expulsion had not been disproportionate given all the circumstances, with the courts also having examined whether it would contravene Denmark’s international obligations. Overall, there had been no violation of the Convention.

39. ECtHR, *Arrozpide Sarasola and Other v. Spain*, No. 65101/16, Chamber judgment of 23 October 2018 (Article 5-1, Right to liberty and security – No violation; Article 6, Right of access to a court – Violation; Article 7, No punishment without law – No violation). The case concerned the calculation of the maximum length of prison terms to be served in Spain by members of the terrorist organisation ETA and the question of whether time already served in France should be taken into account.

ECHR 356 (2018)

23.10.2018

Press release issued by the Registrar

In today's **Chamber** judgment in the case of *Arrozpide Sarasola and Other v. Spain* (application no. 65101/16) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (right of access to a court) of the European Convention on Human Rights,

no violation of Article 7 (no punishment without law)

and

no violation of Article 5 § 1 (right to liberty and security)

The case concerned the calculation of the maximum length of prison terms to be served in Spain by members of the terrorist organisation ETA and the question of whether time already served in France should be taken into account.

The Court observed that the Constitutional Court's decisions to declare inadmissible *amparo* appeals lodged by the applicants against judgments of the Supreme Court were based on the non-exhaustion of ordinary judicial remedies. However, the fact that the *amparo* appeals had been declared inadmissible on that ground, whereas the Supreme Court had previously declared actions to set aside as inadmissible for lack of relevance, and had moreover given notice of its decisions after the thirty-day time-limit allowed for the appeal, had to be regarded as entailing a lack of legal certainty.

The Court observed, however, that the decisions of the Supreme Court had not changed the maximum length of the total term of imprisonment, which had always been set at thirty years. The discrepancies between the various courts concerned as to the possibility of combining sentences had lasted for only about ten months, until the adoption by the Supreme Court of its leading judgment, which had settled the matter in the negative.

The solutions adopted in the applicants' cases had merely followed the judgment of the plenary formation of the Supreme Court. There had thus been no violation of Article 7. Lastly, given that the impugned decisions had not led to any alteration in the sentences, the disputed prison terms could not be regarded as unforeseeable or unlawful within the meaning of Article 5 § 1 of the Convention.

Principal facts

The applicants, Mr Santiago Arrozpide Sarasola, Mr Alberto Plazaola Anduaga and Mr Francisco Múgica Garmendia, are three Spanish nationals who were born in 1948, 1956 and 1953 respectively.

Mr Arrozpide Sarasola was arrested and placed in detention in France for membership of the ETA terrorist organisation. He was sentenced to ten years' imprisonment for offences committed in France in 1987. On 21 December 2000 he was surrendered to the Spanish judicial authorities pursuant to an extradition request. In Spain he was sentenced to over three thousand years' imprisonment after eleven different sets of criminal

proceedings for several terrorist attacks and murders committed in Spain between 1980 and 1987, including a booby-trapped car attack on a shopping centre.

The *Audiencia Nacional* set at thirty years the maximum length of the prison sentences to be served by Mr Arrozpide Sarasola in respect of all the custodial sentences imposed on him in Spain. Following the Court's judgment in the case of *Del Rio Prada*, the applicant requested and obtained the recalculation of the time to be served. The sentence reductions to which the applicant was entitled were deducted from the thirty-year maximum prison term.

Subsequently, the applicant requested that the prison sentence passed by the French courts, which he had already served in France, be combined with the thirty-year maximum term set in Spain. He relied on the Supreme Court's judgment no. 186/2014 of 13 March 2014, which had acknowledged the possibility of taking into consideration a sentence served in France, on the basis of Framework Decision no. 2008/675/JHA of the Council of the European Union of 27 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

On 2 December 2014 the *Audiencia Nacional* acceded to that request. The State Prosecutor lodged an appeal on points of law against that decision with the Supreme Court, for the protection of legality. On 10 March 2015 the Supreme Court allowed the appeal on points of law, considering that there was no need to include the prison sentence served in France in the calculation, with reference to the reasoning set out in its leading judgment (plenary Criminal Chamber) of 27 January 2015.

The applicant brought an action to set aside the Supreme Court's judgment and asked for the proceedings to be dealt with under an urgent procedure so he could lodge an *amparo* appeal with the Constitutional Court within the thirty-day time-limit. He then withdrew his action on the grounds that the Supreme Court had already had an opportunity to respond to his allegations of a violation of his fundamental rights. On 26 May 2015 the applicant lodged an *amparo* appeal with the Constitutional Court, which declared it inadmissible for failure to exhaust available legal remedies.

The second and third applicants had also been arrested and convicted in France for terrorist offences linked to ETA. They had served their sentences in France and then been extradited to Spain, where they were convicted of a terrorist attack carried out in Spain in 1987 (the second applicant) and several terrorist attacks and murders committed in Spain between 1987 and 1993 (the third applicant). They requested the inclusion of the prison sentence passed and served in France in calculating the thirty-year maximum prison terms set by law. The *Audiencia Nacional* first of all allowed their request, and then the State Prosecutor lodged an appeal on points of law with the Supreme Court, which upheld that appeal, using the same reasoning as in the judgment delivered in Mr Arrozpide Sarasola's case. The second applicant brought an action to set aside the judgment before the Supreme Court, and then withdrew it on the grounds that the Supreme Court had already responded to his allegations of a violation of his fundamental rights. On the same grounds as for the first applicant, the Constitutional Court declared the two applicants' *amparo* appeals inadmissible.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right of access to a court), the applicants complained that the decisions given by the Constitutional Court declaring their *amparo* appeals inadmissible had deprived them of their right of access to a court. Relying on Article 7 (no punishment without law), they complained of what they saw as the retrospective application of new Supreme Court case-law and of a new law which had come into force after their conviction, which they submitted had extended the actual length of their sentences. Relying on Article 5 § 1 (right to liberty and security) they complained that their imprisonment had been extended by twelve, seven and ten years respectively owing to the retrospective application of the law to their detriment.

The applications were lodged with the European Court of Human Rights on 4 November 2016, 23 November 2016 and 21 November 2016, respectively.

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

Vincent A. **De Gaetano** (Malta), *President*,
 Branko **Lubarda** (Serbia),
 Helen **Keller** (Switzerland),
 Pere **Pastor Vilanova** (Andorra),
 Alena **Poláčková** (Slovakia),
 Georgios A. **Serghides** (Cyprus),
 María **Elósegui** (Spain),

and also Stephen **Phillips**, *Section Registrar*.

Decision of the Court

Article 6 § 1

The Court observed that the Constitutional Court's decisions to declare inadmissible the applicants' *amparo* appeals against the judgments of the Supreme Court had been based on the non-exhaustion of ordinary judicial remedies: in particular, the Constitutional Court found that the applicants had not brought an action to set aside under section 241(1) of the Institutional Law on the Courts.

The Court noted that the first two applicants had actually brought actions to set aside in the Supreme Court, requesting that their cases be dealt with urgently, in order to be able to lodge an *amparo* appeal with the Constitutional Court. Even though the applicants had withdrawn their actions in the Supreme Court before appealing to the Constitutional Court, the former had notified them of decisions declaring their actions inadmissible on grounds of a lack of relevance. That notice had been sent to them after the statutory thirty-day time-limit for an *amparo* appeal and after they had actually lodged such an appeal. Therefore, if the two applicants had waited for the notification of those decisions before preparing and lodging their *amparo* appeals, it would have been open to the Constitutional Court to declare the appeals inadmissible as out of time.

Moreover, the Court found that the Constitutional Court's decisions to declare the *amparo* appeals inadmissible, as regards the first and second applicants, for failure to exhaust ordinary judicial remedies, were at odds with the decisions of the Supreme Court, which had previously declared the actions to set aside inadmissible for lack of relevance, taking the view that most of the complaints submitted by those two applicants had already been examined in the cassation judgments appealed against. In addition, the Court found that the Government had relied on a 2013 judgment of the Constitutional Court which indicated that an action to set aside was not required when the court which had delivered the decision appealed against, at last instance, had already ruled on the alleged violations of the fundamental rights of which protection would then be sought in the *amparo* appeal.

The fact that the *amparo* appeals had been declared inadmissible for non-exhaustion of domestic remedies, whereas the Supreme Court had previously declared the actions to set aside of the first and second applicants inadmissible for lack of relevance, and had moreover given notice of its decisions after the thirty-day time-limit allowed for the appeal, had to be regarded as entailing a lack of legal certainty to the detriment of the applicants. The decisions as to the inadmissibility of the *amparo* appeals, on grounds of non-exhaustion, had thus deprived the applicants of their right of access to a court.

Article 7

The Court began by observing that the Supreme Court impugned decisions had not changed the maximum length of the total term of imprisonment, which had always been thirty years.

The subject-matter of the dispute was the question whether it was necessary to take account of the time already spent in France on the basis of the sentences handed down in respect of offences committed in France. The decisions of the *Audiencia Nacional* in favour of taking this previous time into account had never become final, because they had been appealed against by the public prosecutor before the Supreme Court. The Court also noted that, at the time when the applicants had committed the criminal offences and

when the decisions were taken to calculate the total length of their aggregate prison sentences, the relevant Spanish law, as a whole, did not provide, to a reasonable extent, for time already served in another State to be taken into account.

The Court attached weight to the fact that the applicants had sought the combining of their sentences with those already served in France only after the delivery of the Supreme Court judgment in which it had observed that it was in favour of taking account of time already served in another State on the basis of the EU Council Framework Decision no. 2008/675/JHA.

In accordance with that approach, some Sections of the Criminal Division of the *Audiencia Nacional* had combined sentences served in France with those handed down in Spain. But all those decisions, except for three isolated cases, had been annulled by the Supreme Court following appeals by the public prosecutor on points of law and the delivery of judgment no. 874/2014 of 27 January 2015 by the plenary formation of the Criminal Division of the Supreme Court. That judgment had dismissed the possibility of taking into account sentences handed down and served in another EU member State when calculating prison sentences to be served in Spain within the maximum term.

The Court observed that the discrepancies between the various courts concerned as to the possibility of combining the terms of prison sentences, had lasted for only about ten months, until the adoption by the Supreme Court of its leading judgment no. 874/2014, which had settled the matter in the negative. The solutions adopted in the applicants' cases had merely followed the judgment of the plenary of the Supreme Court. There had thus been no violation of Article 7.

Article 5 § 1

The Court considered that when the applicants' prison sentences had been handed down, and later on, when they had requested that the time spent in France be taken into account, Spanish law, as a whole, did not provide, to a reasonable extent, for time already served in another State to be taken into account for the purposes of the calculation within the maximum thirty-year term. Given that the impugned decisions had not led to any alteration in the sentences, the disputed prison terms could not be regarded as unforeseeable or as not being in accordance with a procedure prescribed by law, within the meaning of Article 5 § 1. Accordingly there had been no violation of Article 5 § 1.

Just satisfaction (Article 41)

The Court held that Spain was to pay the representative of the first applicant EUR 2,000 in respect of costs and expenses and the representatives of the second and third applicants EUR 1,000 each also in respect of costs and expenses.

40. ECtHR, *Khanh v. Cyprus*, No. 43639/12, Chamber judgment of 4 December 2018 (Article 3, Prohibition of torture and of inhuman or degrading treatment – Violation). The applicant, a Vietnamese national, successfully argued that her conditions of detention at the Limassol police station violated Article 3 of the *European Convention on Human Rights*. The Court considered that the conditions of the applicant's detention subjected her to hardship beyond the unavoidable level of suffering inherent in detention.

[A press release has not been issued on this judgment.]