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Appendix II

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 INTERNATIONAL LAW

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(PRESS RELEASES)

1. **ECtHR, *Gjini v. Serbia*, No. 1128/16, Chamber judgment of 15 January 2019 (Article 3, Prohibition of torture – Violation).** The applicant, a Croatian national of Albanian origin incarcerated in Serbia, successfully claimed that he had been subjected to degrading treatment by his cellmates because of his origins and that the prison's administration had failed to meet their duty to protect him and to investigate it when he complained.

ECHR 013 (2019)
15.01.2019

Press release issued by the Registrar

In today's **Chamber** judgment in the case of Gjini v. Serbia (application no. 1128/16) 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 owing to the authorities' failure to protect the applicant from being ill-treated by his prison cell mates**, and**

a violation of Article 3 because of the lack of an investigation into his complaints.

The case concerned inter-prisoner violence, in particular, the applicant's complaint that he was assaulted, raped and humiliated by his cell mates in prison, that the prison failed to protect him and that the prison authorities failed to investigate his complaints properly.

The Court found in particular that the applicant had made credible claims of being a victim of violence from his cellmates in prison. It should have been obvious to prison staff at the time of the events that he was being ill-treated, but they had done nothing to protect him.

The State had also failed to carry out an investigation or launch a prosecution over his complaints, even though the authorities must have been aware of them because he won compensation in civil proceedings and complained to various bodies about what had happened to him.

Principal facts

The applicant, Fabian Gjini, is a Croatian national who was born in 1972 and lives in Crikvenica (Croatia).

Mr Gjini was arrested in August 2008 for trying to use an allegedly counterfeit 10 euro note at a Serbian Croatian border toll. Unable to pay the required 6,000 euros (EUR) in bail, he was placed in detention pending the outcome of the investigation. He spent 31 days in Sremska Mitrovica Prison before being released when the criminal case was ended after the 10 Euro note was found to be genuine.

Mr Gjini stated that during his period in detention he was subjected to assault and humiliation by his cellmates, including being raped after he was drugged.

The ill-treatment and humiliation allegedly began as soon as he was placed in prison, with his cellmates forcing him to mop the floor, not allowing him to raise his head and kicking him from time to time. He was also made to stand in cold water, which caused the skin to peel off his feet. The cellmates, who apparently thought he was a police informer, said they would stage his suicide if he informed the authorities about the ill-treatment.

His cellmates later found out about his Croatian and Albanian origin and began to treat him even worse. They forced his head into a bucket of water and then made him take a cold shower. He was made to fight another prisoner and was then beaten by his cellmates for hitting a Serb. He was also made to sing Serbian nationalist songs. He stated that the prison guards knew what was going on.

He could not remember exactly when the rape happened but recounted that he was given a glass of water and then lost consciousness. When he came to, his eyebrows had been shaved – a sign in prison that someone has been raped – and he had a painful anus with blood in his stools. His head had also been shaved.

His lawyer, noticing a change in Mr Gjini's behaviour, asked for him to be moved to another cell, after which the ill-treatment ended. After his release Mr Gjini began civil proceedings for compensation for the fear, physical pain and mental anxiety caused by his treatment in prison. In judgments delivered in 2013 he was awarded approximately EUR 2,350 in compensation.

He lodged a constitutional appeal in January 2014, which was rejected in June 2015.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of torture and inhuman and degrading treatment), the applicant complained about being subjected to ill-treatment by his cellmates and that the authorities had failed to protect him or provide an effective response to his allegations.

The application was lodged with the European Court of Human Rights on 12 December 2015.

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),
Jolien Schukking (the Netherlands),

and also Stephen Phillips, Section Registrar.

Decision of the Court

Admissibility

The Government objected that Mr Gjini could no longer claim to be a victim of a violation of the Convention as he had been awarded compensation. The applicant argued that the sum he had been given was not sufficient. The Court found that the domestic award was less than the level of just satisfaction it awarded in such cases and Mr Gjini could legimately pursue his case in Strasbourg.

The Government also argued that Mr Gjini had not exhausted domestic remedies as he had failed properly to substantiate his Constitutional Court complaint. The Court found that the applicant had specifically complained of ill-treatment that had happened with "the silent approval of officials" who had known the situation they had placed him in. He had therefore formulated his constitutional complaints properly and the Government's objection had to be rejected.

The Government objected in addition that Mr Gjini had not exhausted domestic remedies for his submission that the authorities had failed to react in an effective manner as he had never lodged a criminal complaint against those responsible for ill-treating him. The Court held that this objection went to the heart of the applicant's complaint and joined it to the merits of the case.

Merits

The Court noted that the parties were in dispute over whether the applicant had been ill-treated by his cellmates or not. However, the domestic courts had found that Mr Gjini had lost 10% of his physical capacity owing to the events in the prison and the Court held that that conclusion was enough to establish that he had suffered such ill-treatment and that Article 3 applied to his case.

The Government had denied any responsibility for what had happened to Mr Gjini through any failure or omission on the part of the prison authorities, in particular because he had not lodged any official complaint at the time.

However, the Court noted that the Committee for the Prevention of Torture (CPT) had reported serious incidences of inter-prisoner violence at Sremska Mitrovica Prison and that no action whatsoever had been taken by the prison or State authorities to deal with that problem. The CPT had also criticised the failure of prison medical personnel to record injuries caused by such violence.

Furthermore, prison staff should have been aware of incidents involving Mr Gjini, in particular that his eyebrows had been shaved off, that he had a strange haircut and that his skin had been damaged. The authorities had either failed to notice or had failed to react to such signs, and had not provided a safe environment for him. They had thus failed to detect, prevent, or monitor the violence against him. For those reasons there had been a violation of Article 3.

The Court went on to examine whether the authorities had investigated the applicant's complaints properly, under the heading of the procedural requirement of Article 3. While it was true that the applicant had never lodged a criminal complaint with the police, prosecutor's office or prison, his lawyer had turned to the prison authorities at the time of the events in question and Mr Gjini had been moved to another cell.

Furthermore, the applicant had later complained to the civil courts and written to the President, the Ombudsman and the Ministry of Justice about his ill-treatment, but no official investigation had ever taken place. There had been nothing in Serbian law to prevent such an investigation, indeed, the law required that public authorities had to report prosecutable offences they became aware of.

The Court concluded by dismissing the Government's objection of non-exhaustion of domestic remedies owing to the absence of a criminal complaint by the applicant and found that there had been another violation of Article 3 owing to the lack of an effective investigation.

Just satisfaction (Article 41)

Taking account of the domestic award, the Court held by five votes to two that Serbia was to pay the applicant 25,000 euros (EUR) in respect of non-pecuniary damage and EUR 2,000 for costs and expenses.

Separate opinions

Judges Pastor Vilanova and Serghides expressed a joint partly dissenting opinion which is annexed to the judgment.

2. **ECtHR, *Güzelyurtlu and Others v. Cyprus and Turkey*, No. 36925/07, Grand Chamber judgment of 29 January 2019 (Article 2, Right to life – No violation by Cyprus, Violation by Turkey).** The case concerned the investigation into the killings of three Cypriot nationals of Turkish Cypriot origin in the Cypriot-Government controlled area of Cyprus in 2005. The Court concluded that the Cypriot authorities had used all the means reasonably available to them to obtain the suspects' surrender/extradition from Turkey. Turkey, on the other hand, had not made the minimum effort required in the circumstances of the case to comply with its obligation to cooperate with Cyprus for the purposes of an effective investigation into the murder of the applicants' relatives.

ECHR 042 (2018)
29.01.2019

Press release issued by the Registrar

In today's **Grand Chamber** judgment1 in the case of Güzelyurtlu and Others v. Cyprus and Turkey (application no. 36925/07), the European Court of Human Rights held:

by 15 votes to two, that there had been

no violation of Article 2 (right to life/investigation) of the European Convention on Human Rights by Cyprus, and unanimously, that there had been

a violation of Article 2 of the Convention by Turkey.

The case concerned the investigation into the killing of three Cypriot nationals of Turkish Cypriot origin in the Cypriot-Government controlled area of Cyprus in 2005. The killers fled back to the "Turkish Republic of Northern Cyprus" (the "TRNC"). Parallel investigations into the murders were conducted by the authorities of the Cypriot Government and the Turkish Government, including those of the "TRNC". Both investigations reached an impasse in 2008.

In their case before the European Court, the applicants, the victims' relatives, alleged that the refusal of Turkey and Cyprus to co-operate meant that the killers had not faced justice.

The Court considered that both States had had an obligation to cooperate with each other. It found that Cyprus had done all that could reasonably have been expected of it to obtain the surrender/extradition of the suspects from Turkey, submitting "Red notice" requests to Interpol and, when this proved unsuccessful, extradition requests to Turkey. The Cypriot authorities could not be criticised for refusing to submit all the evidence and to transfer the proceedings to the authorities of the "TRNC" or Turkey. That would have amounted to Cyprus waiving its criminal jurisdiction over a murder committed in its controlled area in favour of the courts of an unrecognised entity set up within its territory.

Turkey, on the other hand, had not made the minimum effort required in the circumstances of the case. They had ignored Cyprus's extradition requests, returning them without reply, contrary to their obligation under Article 2, read in the light of other international agreements, to cooperate by informing the requesting State of its decision and, in the case of rejection, to give reasons.

Principal facts

The applicants are Cypriot nationals of Turkish Cypriot origin who live in the "Turkish Republic of Northern Cyprus" ("TRNC") or in the United Kingdom.

The applicants are all relatives of Elmas, Zerrin, and Eylül Güzelyurtlu, who were shot dead on the Nicosia-Larnaca highway in the Cypriot-Government controlled areas of the island on 15 January 2005. Elmas was found dead in a ditch and his wife, Zerrin, and daughter, Eylül, in the back seat of their car, which was parked on the hard shoulder. The three victims were all Cypriot nationals of Turkish Cypriot origin. The killers fled back to the "TRNC".

The authorities of the Cypriot Government and the Turkish Government, including those of the "TRNC", carried out parallel investigations into the murders.

The Cypriot authorities, among other things, secured evidence at the scene of the crime and at the victims' house, carried out post-mortem examinations, took statements from witnesses (including the victims' relatives), and performed ballistics examination and DNA tests. The authorities concluded that the victims had been kidnapped and murdered in the early hours of 15 January 2005 and identified eight suspects. Domestic and European arrest warrants were issued and the Cypriot police asked Interpol to search for and arrest the suspects with a view to extradition. Red notices were published by Interpol on all the suspects and they were added to the Cypriot Government's "stop list" of individuals whose entry into and exit from Cyprus is monitored or banned. In April 2008 the case file was classified as "otherwise disposed of" pending future developments.

The Turkish (including the "TRNC") authorities also took a number of investigative steps and by the end of January 2005 all of the suspects had been arrested. They denied any involvement in the crimes and were released on or around 11 February 2005 owing to a lack of evidence connecting them to the murders. The file was classified as "non-resolved for the time being" in March 2007.

The "TRNC" authorities requested that the case file with the evidence against the suspects be handed over so that they could conduct a prosecution. The Cypriot authorities refused and in November 2008 they sought the extradition of the suspects who were within Turkey's jurisdiction (either in the "TRNC" or in mainland Turkey) with a view to a trial. The extradition requests were returned to the Cypriot authorities without reply. The investigations of both respondent States thus reached an impasse and have remained open since.

The Cypriot Government, the "TRNC" and the applicants were in contact with the United Nations Peacekeeping Force in Cyprus ("UNFICYP") about the case. Meetings were held and there was an exchange of telephone calls and correspondence. However, UNFICYP's efforts to assist the sides to bring the suspects to justice have proved unsuccessful.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 16 August 2007.

Relying on Article 2 (right to life) of the European Convention on Human Rights, the applicants complained that both the Cypriot and Turkish authorities (including those of the "TRNC") had failed to conduct an effective investigation into the killings. They further alleged that the refusal of Turkey and Cyprus to cooperate meant that the killers had not faced justice. Relying on Article 13 (right to an effective remedy) in conjunction with Article 2, they complained of a lack of an effective remedy in respect of their Article 2 complaint.

In its Chamber judgment of 4 April 2017, the Court held, by five votes to two, that there had been a violation of Article 2 by Cyprus and, unanimously, that there had been a violation of the same provision by Turkey. The Chamber found in particular that neither Government had been prepared to compromise and find a middle ground, despite various options having been put forward, including by the United Nations. A

situation had resulted in which the respondent Governments' investigations – which the Chamber found adequate up until the impasse – remained open. The Court saw no need to examine separately the complaint under Article 13 in conjunction with Article 2.

On 18 September 2017 the Grand Chamber Panel accepted the requests of the Governments of Cyprus and Turkey that the case be referred to the Grand Chamber.

The AIRE Centre organisation was granted leave to intervene in the written proceedings as a third party.

A Grand Chamber hearing was held in Strasbourg on 28 March 2018.

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),
Robert **Spano** (Iceland),
Vincent A. **De Gaetano** (Malta),
Işıl **Karakaş** (Turkey),
Kristina **Pardalos** (San Marino),
André **Potocki** (France),
Aleš **Pejchal** (the Czech Republic),
Yonko **Grozev** (Bulgaria),
Gabriele **Kucsko-Stadlmayer** (Austria),
Pauliine **Koskelo** (Finland),
Georgios A. **Serghides** (Cyprus),
Marko **Bošnjak** (Slovenia),
Jolien **Schukking** (the Netherlands),
Lado **Chanturia** (Georgia),
and also Roderick **Liddell**, *Registrar*.

Decision of the Court

Article 2 (alleged failure to conduct an effective investigation into the killings)

First, the Court dismissed the Turkish Government's argument that it did not have jurisdiction to deal with the applicants' complaints under Article 2 in respect of Turkey because the murders had occurred in Cyprus.

The Court reiterated that, as a rule, the obligation to ensure an effective investigation into a murder applied to the State in whose jurisdiction the victim was found to be at the time of death. However, a departure from this general approach could be justified if there were "special features". It considered that there had been two "special features" related to the situation in Cyprus which justified making Turkey answerable under the Convention in the applicants' case. Firstly, the northern part of Cyprus was under the effective control of Turkey. Secondly, the suspects had fled to the northern part of Cyprus, and the Cypriot authorities had thus been prevented from pursuing their own case.

In addition, the "TRNC" authorities had in any event instituted a criminal investigation into the murder of the applicants' relatives.

Next, the Court endorsed the Chamber's findings that both Cyprus and Turkey had conducted adequate parallel investigations into the murder.

The crux of the case was therefore whether and to what extent the two States had had a duty to cooperate under Article 2 of the Convention as regards their investigations. The Court considered that, given the European Convention's special character as a collective enforcement treaty, both States had had an obligation to cooperate, involving both seeking as well as providing assistance.

The Court then went on to examine whether Cyprus and Turkey had taken all reasonable steps they could to cooperate with one another in the light of both international treaties or agreements applicable between them as well as any informal or *ad hoc* channels of cooperation, given the fact that the States had no formal diplomatic relations.

Cyprus

The Court concluded that the Cypriot authorities had used all the means reasonably available to them to obtain the suspects' surrender/extradition from Turkey.

At the early stages of the investigation, they had submitted "Red Notice" requests to Interpol in order to locate the suspects and have them arrested with a view to their extradition and had further tried to negotiate the suspects' surrender by the "TRNC" through UNFICYP. The Cypriot Bureau of Interpol had also sent emails to the Turkish authorities along the same vein. Cyprus could not be criticised for first trying negotiations via UNFICYP and only submitting the extradition requests to Turkey when their efforts had proved unsuccessful, even if that meant that three and half years had passed after publication of the Red Notices.

Although the Turkish Government alleged that the extradition requests had not been valid, the Court accepted that their delivery through the staff of the Cypriot and Turkish embassies in Athens had been the only channel available, given the absence of diplomatic relations. Indeed, the Turkish Government had not referred to any alternative that Cyprus could have used.

There had also been no breach by Cyprus of its duty to cooperate under Article 2 by refusing to submit all the evidence and to transfer the proceedings to the authorities of the "TRNC" or Turkey. Cyprus had sent the DNA results to the "TRNC" via UNFICYP and had been ready to hand over all the evidence to UNFICYP, subject to the undertaking by the "TRNC" authorities that the suspects would be surrendered to them. However, no such undertaking was forthcoming and the "TRNC"'s stance throughout, which became even more evident in the proceedings before the European Court, had indicated its intention to prosecute and try the suspects before its courts rather than surrendering/extraditing them to Cyprus.

Supplying the whole investigation file to the "TRNC" with the possibility that the evidence would be used for the purposes of trying the suspects there, without any guarantee that they would be surrendered to the Cypriot authorities, would have gone beyond mere cooperation between police or prosecuting authorities. It would have amounted in substance to Cyprus waiving its criminal jurisdiction over a murder committed in its controlled area in favour of the courts of an unrecognised entity set up within its territory. The Court therefore agreed with the Cypriot Government that, in the specific situation of the case, it had not been unreasonable to refuse to waive its criminal jurisdiction in favour of the "TRNC" courts. That position was also consistent with the tenor of the relevant Council of Europe agreements to which both States were parties and the legislation of some member States.

Lastly, the Court found that Cyprus had not been required to use the alternative options for cooperation suggested by UNFICYP, such as the possibility of arranging an *ad hoc* trial at a neutral venue. It had not

been established that those alternatives would have had a sufficiently solid basis in domestic or international law.

Turkey

Turkey, on the other hand, had not made the minimum effort required in the circumstances of the case to comply with its obligation to cooperate with Cyprus for an effective investigation into the murder of the applicants' relatives.

During the attempts to find an agreement through UNFICYP, the "TRNC" authorities had made it clear from the outset that they could not surrender the suspects to Cyprus since there was no legal or constitutional basis to do so.

Furthermore, the "TRNC" authorities' insistence on obtaining all the evidence from Cyprus had been more to do with them justifying the continued detention of the suspects with a view to bringing proceedings against them, rather than as a precondition for considering the extradition requests.

Turkey had even ignored Cyprus's extradition requests, returning them to the Cypriot embassy in Athens without reply. It would have been expected that the Turkish authorities indicate why they considered that the extradition had not been acceptable under their legislation or under the Council of Europe's European Convention on Extradition of 1957, which both States had ratified.

The Court was of the opinion that the obligation to cooperate under Article 2, read in the light of the Extradition Convention, should involve the State examining and providing a reasoned reply to any extradition request from another Contracting State regarding suspects wanted for murder who were known to be present on its territory or within its jurisdiction.

Other articles

The Court held, unanimously, that there was no need to examine separately the complaint under Article 13 in conjunction with Article 2.

Just satisfaction (Article 41)

The Court held that Turkey was to pay each applicant 8,500 euros (EUR) in respect of non-pecuniary damage. It further awarded the applicants a combined sum of EUR 10,000 in respect of costs and expenses.

Separate opinions

Judge Serghides expressed a concurring opinion, while Judges Karakaş and Pejchal expressed a joint dissenting opinion. These opinions are annexed to the judgment.

3. **ECtHR, *Georgia v. Russia (I)*, No. 13255/07, Grand Chamber judgment of 31 January 2019 (Article 41, Just satisfaction – Violation).** The Court found that the Article 41 of the Convention applied in the framework of an inter-State case and that Russia had to pay just satisfaction to Georgia after the 3 July 2014 judgment of the Court in which it had condemned Russia following the establishment in the Russian Federation of a coordinated policy of arresting, detaining and expelling Georgian nationals, amounting to an administrative practice.

ECHR 050 (2019)
31.01.2019

Press release issued by the Registrar

In today's **Grand Chamber** judgment1 in the case of **Georgia v. Russia (I)** (application no. 13255/07) the European Court of Human Rights held, by sixteen votes to one,

that **Russia had to pay Georgia 10,000,000 euros (EUR) in respect of non-pecuniary damage** suffered by a group of at least 1,500 Georgian nationals;

that that amount was to be distributed to the individual victims by paying EUR 2,000 to the Georgian nationals who had been victims only of a violation of Article 4 of Protocol No. 4 (collective expulsion), and EUR 10,000 to EUR 15,000 to those among them who had also been victims of a violation of Article 5 § 1 (unlawful deprivation of liberty) and Article 3 (inhuman and degrading conditions of detention) of the European Convention on Human Rights, taking into account the length of their respective periods of detention.

Principal facts

In a judgment on the merits, delivered on 3 July 2014, the Court held that in the autumn of 2006 a coordinated policy of arresting, detaining and expelling Georgian nationals had been put in place in the Russian Federation and had amounted to an administrative practice for the purposes of Convention case-law.

The Court also held that there had been a violation of, *inter alia*, Article 4 of Protocol No. 4, Article 5 §§ 1 and 4 and Article 3 of the Convention, and of Article 13 taken in conjunction with Article 5 § 1 and with Article 3.

As the question of the application of Article 41 of the Convention was not ready for decision, the Court had reserved it and invited the applicant Government and the respondent Government to submit their observations on the matter and, in particular, to notify the Court of any agreement that they might reach. As the parties had not reached an agreement, the applicant Government had submitted their claims for just satisfaction and the respondent Government had submitted their observations.

On 6 November 2015 the President of the Grand Chamber invited the applicant Government to submit a list of the Georgian nationals who had been victims of a "coordinated policy of arresting, detaining and expelling Georgian nationals" put in place in the Russian Federation in the autumn of 2006. The applicant Government filed a list of 1,795 alleged victims on 1 September 2016.

On 13 September 2016 the President of the Grand Chamber also asked the respondent Government to submit their comments on the list filed by the applicant Government, which the respondent Government did on 13 April 2017.

Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 26 March 2007 under Article 33 (Inter-State cases) of the Convention. Following a hearing on 16 April 2009, the application was declared admissible by a Chamber on 30 June 2009 and relinquished to the Grand Chamber on 15 December 2009. From 31 January to 4 February 2011 a witness hearing was held in Strasbourg. A Grand Chamber hearing took place in public in the Human Rights Building, Strasbourg, on 13 June 2012. A judgment on the merits was delivered on 3 July 2014.

Judgment on just satisfaction 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),
Robert **Spano** (Iceland),
Vincent A. **De Gaetano** (Malta),
André **Potocki** (France),
Dmitry **Dedov** (Russia),
Jon Fridrik **Kjølbro** (Denmark),
Branko **Lubarda** (Serbia),
Mārtiņš **Mits** (Latvia),
Gabriele **Kucsko-Stadlmayer** (Austria),
Pauliine **Koskelo** (Finland),
Georgios A. **Serghides** (Cyprus),
Marko **Bošnjak** (Slovenia),
Lətif **Hüseynov** (Azerbaijan),
Lado **Chanturia** (Georgia),

and also Lawrence **Early**, *Jurisconsult.*

Decision of the Court

Just satisfaction (Article 41)

The Court observed that it was the first time since the just satisfaction judgment in *Cyprus v. Turkey* (just satisfaction) that it was required to examine the question of just satisfaction in an inter-State case. In that judgment the Court had referred, *inter alia*, to the principle of public international law relating to a State's obligation to make reparation for violation of a treaty obligation, and to the case-law of the International Court of Justice, before concluding that Article 41 of the Convention did, as such, apply to inter-State cases.

In that judgment the Court had also set out three criteria for establishing whether awarding just satisfaction was justified in an inter-State case: the type of complaint made by the applicant Government, which had to concern the violation of basic human rights of its nationals or other victims; whether the victims could be identified; and the main purpose of bringing the proceedings.

In the present case the Court noted that the applicant Government had submitted in their application that the respondent Government had permitted or caused to exist an administrative practice of arresting, detaining and collectively expelling Georgian nationals from the Russian Federation in the autumn of 2006, resulting in a violation of Articles 3, 5, 8, 13, 14 and 18 of the Convention, and of Articles 1 and 2 of Protocol No. 1, Article 4 of Protocol No. 4 and Article 1 of Protocol No. 7. Following the adoption of the principal judgment, the applicant Government had submitted claims for just satisfaction in compensation for violations of the Convention committed with regard to Georgian nationals. At the Court's request, the applicant Government had also submitted a detailed list of 1,795 alleged and identifiable victims of the violations found in the principal judgment. Just satisfaction was thus sought with a view to compensating individual victims.

As the three criteria referred to above were satisfied in the present case, the Court found that the applicant Government were entitled to submit a claim under Article 41 and that an award of just satisfaction was justified in the present case.

After carrying out a preliminary examination of the list submitted by the applicant Government and of the comments in reply submitted by the respondent Government, the Court considered that it could in the present case base itself on a "sufficiently precise and objectively identifiable" group of at least 1,500 Georgian nationals who had been victims of a violation of Article 4 of Protocol No. 4 (collective expulsion). Among these, a certain number had also been victims of a violation of Article 5 § 1 (unlawful deprivation of liberty) and Article 3 (inhuman and degrading conditions of detention).

Having regard to all the relevant circumstances of the present case, the Court deemed it reasonable to award the applicant Government a lump sum of 10,000,000 euros (EUR) in respect of nonpecuniary damage suffered by that group of at least 1,500 Georgian nationals. The Court considered that this sum must be distributed by the applicant Government to the individual victims of the violations found in the principal judgment, with EUR 2,000 payable to the Georgian nationals who had been victims only of a violation of Article 4 of Protocol No. 4 and an amount ranging from EUR 10,000 to EUR 15,000 payable to those among them who had also been victims of a violation of Article 5 § 1 and Article 3 of the Convention.

The Court also considered that it must be left to the applicant Government to set up, under the supervision of the Committee of Ministers, an effective mechanism for distributing the sums in question to the individual victims of the violations found in the principal judgment, having regard to the indications given by the Court.

Separate opinions

Judges Yudkivska, Mits, Hüseynov and Chanturia expressed a joint partly concurring opinion. Judge Dedov expressed a dissenting opinion. These opinions are annexed to the judgment.

4. **ECtHR, *Ndayegamiye-Mporamazina v. Switzerland*, No. 16874/12, Chamber judgment of 5 February 2019 (Article 6, Right to a fair trial – No violation).** The applicant, a Burundian national living in France, argued unsuccessfully that in her dispute with the Permanent Mission of the Republic of Burundi to the United Nations Office at Geneva about her dismissal, she had been deprived of her right of access to a court on account of the immunity from jurisdiction raised by the Republic of Burundi. The Court did not retain the application of the exceptions to immunity invoked by the applicant, considering that the restriction on the right of access to a court could not be considered disproportionate.

ECHR 056 (2019)
05.02.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of **Ndayegamiye-Mporamazina v. Switzerland** (application no. 16874/12) the European Court of Human Rights held, unanimously, that there had been:

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

The case concerned the immunity from jurisdiction of the Republic of Burundi.

The Court held that granting sovereign immunity to a State in civil proceedings pursued the legitimate aim of complying with international law in order to promote comity and good relations among States by respecting each State's sovereignty.

The express consent criterion laid down in Article 7 § 1 (b) of the United Nations Convention of 2 December 2004 on Jurisdictional Immunities of States and their Property (UNCJIS) was lacking in the present case. It followed that the Republic of Burundi had not waived its immunity from jurisdiction.

The applicant, a national of the employer State at the time of her application to the Swiss courts, had been permanently resident not in Switzerland but in France. Consequently, the case fell within the scope of Article 11 § 2 (e) UNCJIS.

The Court found that the Swiss courts had not departed from the principles of international law as recognised in the sphere of State immunities and that the restriction on the right of access to a court had not been disproportionate in the instant case.

Principal facts

The applicant, Marie-Louise Ndayegamiye-Mporamazina, is a national of the Republic of Burundi who was born in 1960 and lived in France at the material time.

On 9 June 1995 the applicant entered the employment of the permanent mission of the Republic of Burundi to the United Nations Headquarters in Geneva as a secretary on the basis of a "local employment contract". The document stated that the contract of employment was renewable. From 1996 onwards the applicant was responsible, in addition to her secretarial duties, for the permanent mission's bookkeeping. During the ambassador's absences, she dealt with the permanent mission's current business, with the approval of the Ministry of Foreign Affairs of the Republic of Burundi; she was also responsible for consular affairs. In a letter of 9 August 2007 the permanent mission informed the applicant that it had decided not to renew her

employment contract. On 27 November 2007 the applicant brought an action for unfair dismissal against the Republic of Burundi before the employment tribunal of the Republic and the Canton of Geneva.

In their submissions of 5 March 2008, the Republic of Burundi asserted, in particular, that the relations between the parties were covered by diplomatic immunity. In addition, it argued that the applicant had not carried out subordinate duties, that she received a higher salary than that paid to the diplomats in post, and that, given that she had Burundian nationality and was resident in France, she had few ties with Switzerland. In a judgment of 15 March 2010 the employment tribunal held that the applicant was not a diplomat and carried out lower-level tasks. The tribunal noted that the employment contract included a clause recognising local jurisdiction and that, consequently, there were no grounds to grant the defending State immunity from jurisdiction. The tribunal ordered the Republic of Burundi to pay the applicant about 40,707 euros. The Republic of Burundi lodged an appeal with the Court of Justice of the Republic and the Canton of Geneva. On 18 April 2011 the Court of Justice set aside the employment tribunal's judgment of 15 March 2010 and granted the Republic of Burundi's plea of immunity from jurisdiction. The Court of Justice added that the applicant could bring her case without difficulty before the relevant courts in her country. The Swiss Federal Supreme Court dismissed an appeal by the applicant, holding that the Republic of Burundi could legitimately rely on immunity from jurisdiction.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right of access to a court), the applicant complained that she had been deprived of her right of access to a court on account of the immunity from jurisdiction raised by the Republic of Burundi and upheld by the domestic courts.

The application was lodged with the European Court of Human Rights on 16 February 2012.

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

Vincent A. **De Gaetano** (Malta), *President*,
Branko **Lubarda** (Serbia),
Helen **Keller** (Switzerland),
Dmitry **Dedov** (Russia),
Pere **Pastor Vilanova** (Andorra),
Georgios A. **Serghides** (Cyprus),
Jolien **Schukking** (the Netherlands),

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

Decision of the Court

Article 6 § 1

On 16 April 2010 Switzerland ratified the United Nations Convention of 2 December 2004 on Jurisdictional Immunities of States and their Property (UNCJIS), which recognises the general principle of the immunity of a State and its property before the courts of another State.

The Court noted that the applicant's contract of employment comprised an article concerning litigation, which, according to the applicant, constituted an advance waiver by the Republic of Burundi of its immunity from jurisdiction.

The Court held that granting sovereign immunity to a State in civil proceedings pursued the legitimate aim of complying with international law in order to promote comity and good relations among States by respecting each State's sovereignty. However, a State could waive its right to immunity before the courts of another State, in particular by means of contractual clauses. The Court took note of the applicant's view that Article 8 of her contract of employment constituted an advance waiver by the Republic of Burundi of its immunity from jurisdiction.

The Court observed that the Federal Court and the Court of Justice had allowed the Republic of Burundi's plea of immunity from jurisdiction, which it had consistently raised throughout the proceedings in question. A total of three national authorities had interpreted the clause set out in Article 8 of the applicant's contract of employment in widely diverging ways. Consequently, the Court deduced that it was not a contractual clause clearly and unequivocally stating the intention of the Republic of Burundi to waive its immunity from jurisdiction, and the Federal Court could indeed have presumed that the clause in question was not an expression of a clear and unequivocal desire on the part of the Republic of Burundi. Therefore, since the express consent criterion laid down in Article 7 § 1 (b) UNCJIS had been lacking in the present case, it followed that the Republic of Burundi had not waived its immunity from jurisdiction.

The Court also observed that the circumstances of the case fell within the ambit of Article 11 § 2 (e) UNCJIS because the applicant had been a national of the employer State when the action had been brought and she had never been permanently resident in Switzerland.

Finally, the Court noted that there were other remedies available to the applicant. Assurances had been provided by the Republic of Burundi that should the Court of Justice uphold its immunity from jurisdiction the applicant could apply to the Bujumbura Court Administrative, and that there would be no problem of statutory limitation since the application to a Swiss court had stopped the limitation period running.

The Court took the view therefore that the Swiss courts had not departed from the principles of international law recognised in the sphere of State immunities and that the restriction on the right of access to a court could not be considered disproportionate.

There had been no violation of Article 6 § 1.

5. **ECtHR, *Narjis v. Italy*, no. 57433/15, Chamber judgment of 14 February 2019 (Article 8, Right to respect for private and family life – No violation).** The applicant, a Moroccan national living in Italy, argued unsuccessfully that the refusal to renew his residence permit and the resulting expulsion to Morocco motivated by his numerous criminal convictions, had violated his right to respect for his private and family life.

ECHR 065 (2019)
14.02.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of Narjis v. Italy (application no. 57433/15) the European Court of Human Rights held, unanimously, that there had been:

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

The case concerned the Italian authorities' refusal to renew the residence permit of a Moroccan national (Mr Narjis) who had lived in Italy for 20 years, on the grounds that he posed a danger to society, and his expulsion to Morocco.

The Court decided to examine Mr Narjis's complaint under the "private life" limb of Article 8 on the grounds that the applicant's situation - as an unmarried 39-year-old adult with no children, who had no specific bonds of dependency with his family members (all of whom were adults) - did not fall within the ambit of "family life" protected by Article 8 of the Convention.

The Court held that the national courts, which had specifically referred to Article 8, had taken all the circumstances into account in weighing up Mr Narjis's interest in the protection of his private life against the State's interest in protecting public order, in application of the criteria laid down by the Court. In particular, it noted that, in view of the applicant's criminal record, his regular use of drugs and his apparent inability to integrate into professional life, the Italian authorities had had legitimate grounds to doubt the solidity of his social and cultural ties with the host country.

Principal facts

The applicant, Mohamed Narjis, is a Moroccan national who was born in 1979 and lives in Morocco. Mr Narjis was admitted to Italy in 1989 under a family reunion procedure. His father had obtained a residence permit as an itinerant trader. On the father's death in 2009 his trading activities were taken over by Mr Narjis's mother and one of his sisters.

In 1995 Mr Narjis dropped out of school and began to take drugs. He remained in Italy on the basis of renewable work permits. His police record has 19 entries, including some convictions, in particular for aggravated theft and armed robbery.

In January 2010, while he was imprisoned following a conviction for a robbery, Mr Narjis applied for the renewal of his residence permit. His application was twice turned down by the Milan Head of Police, in March and July 2010, on the grounds of the danger posed to society. Mr Narjis appealed to the administrative court.

In July 2010 the Prefect of Milan ordered his expulsion. Mr Narjis appealed to the Milan Justice of the Peace, who stayed the proceedings pending the administrative court's decision. Meanwhile Mr Narjis had

left Italy for Morocco. In February 2012 the administrative court dismissed his appeal and the *Consiglio di Stato* upheld that judgment.

In April 2016 a new wanted notice was issued against Mr Narjis after a conviction for receiving stolen property. He is currently in Morocco.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), Mr Narjis complained that he had been forced to leave Italy despite the fact that his mother, sisters and brother all lived there.

The application was lodged with the European Court of Human Rights on 11 November 2015.

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

Linos-Alexandre **Sicilianos** (Greece), *President*,
Ksenija **Turković** (Croatia),
Guido **Raimondi** (Italy),
Krzysztof **Wojtyczek** (Poland),
Armen **Harutyunyan** (Armenia),
Tim **Eicke** (the United Kingdom),
Gilberto **Felici** (San Marino),
and also Abel **Campos**, *Section Registrar*.

Decision of the Court

Article 8 (right to respect for private life)

The Court reiterated that the Convention did guarantee any right right to an alien to enter or reside within the territory of a particular State. However, the removal of a person from a country where close members of his or her family were living could amount to an infringement of the right to respect for family life. In addition, the totality of social ties between settled migrants and the community in which they were living constituted part of the concept of private life.

In the present case, the Court considered that, given the very long period (20 years) that Mr Narjis had been resident in Italy, the refusal to renew his residence permit and the decision to remove him from the national territory had amounted to an interference with his right to respect for private life.

However, considering the fact that Mr Narjis was an unmarried and childless adult of 39 years and that he had not demonstrated additional elements of dependence other than normal emotional ties towards his mother, sisters and brother (all of whom were adults), the Court decided not to examine his complaint under the "family life" head.

The Court also noted that the interference with Mr Narjis's right to respect for private life was in accordance with the law2 and had pursued a legitimate aim, namely the "prevention of disorder or crime".

With regard to the necessity of the interference in a democratic society, the Court noted, firstly, that Mr Narjis's criminal record contained a series of convictions, at final instance, for serious offences which indicated a clear and growing tendency towards repeat offending.

In addition, the applicant was an unmarried and childless 39-year-old adult, who had no particular relationship of dependency towards his family. Thus, the Court noted that, in view of his criminal record, regular use of drugs and his apparent inability to integrate into professional life, the Italian authorities had had legitimate grounds to doubt the solidity of his social and cultural ties with the host country.

Moreover, if Mr Narjis were to return to Italy, he would be immediately rearrested and imprisoned in order to serve a sentence of four years and seven months for receiving stolen goods. At the same time, the Court noted that the *Consiglio di Stato*, in a judgment that was reasoned at length, which contained no hint of arbitrariness and referred specifically to Article 8 of the Convention, had taken all the circumstances into account in weighing up Mr Narjis's interest in the protection of his private life against the State's interest in protecting public order, in application of the criteria laid down by the Court.

That judgment had been pronounced following lengthy proceedings in which the Administrative Court had initially suspended the decision not to renew Mr Narjis's residence permit, on the grounds that the police authorities had not sufficiently weighed up the different interests at stake, as required by the Court's case law. The Administrative Court had subsequently held that the police authorities, in execution of their first decision, had complied with the requirements of Article 8 by weighing up the various interests at stake and taking due account of the length of Mr Narjis's residence in Italy, his family situation and the social ties that he had forged with the country.

In consequence, the Court saw no strong reason to substitute its own view for that of the national courts. It therefore concluded that there had been no violation of Article 8 of the Convention.

6. **ECtHR, *H.A. and Others v. Greece*, No. 19951/16, Chamber judgment of 28 February 2019 (Article 3, Prohibition of torture – Violation regarding the detention in the police stations, No violation regarding the living conditions in the Diavata centre; Article 5-1-4, Right to liberty and security - Violation)**. The applicants, unaccompanied minors from Syria, Iraq and Morocco, successfully argued that the detention conditions to which they had been subjected in different police stations amounted to degrading treatment. The Court found that the Government had failed to explain why the authorities first placed the applicants in a multitude of police stations and in degrading conditions of detention and not in temporary accommodation. Furthermore, as they did not have the official status of prisoner, the applicants were unable to take legal action and part in proceedings before the Administrative Court in order to lodge objections against detention.

ECHR 077 (2019)
28.02.2019

Press release issued by the Registrar

The case concerned the placement of nine migrants, unaccompanied minors, in different police stations in Greece, for periods ranging between 21 and 33 days. The migrants were subsequently transferred to the Diavata reception centre and then to special facilities for minors.

In today's **Chamber** judgment1 in the case of H.A. and Others v. Greece (application no. 19951/16) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights on account of the conditions of the applicants' detention in the police stations;

no violation of Article 3 as regards the living conditions in the Diavata centre;

a violation of Article 13 (right to an effective remedy) taken together with Article 3;

a violation of Article 5 §§ 1 and 4 (right to liberty and security / right to a speedy decision on the lawfulness of a detention measure).

The Court found, first, that the detention conditions to which the applicants had been subjected in the various police stations represented degrading treatment, and explained that detention on those premises could have caused them to feel isolated from the outside world, with potentially negative consequences for their physical and moral well-being. The Court also held that the living conditions in the Diavata centre, which had a safe zone for unaccompanied minors, had not exceeded the threshold of seriousness required to engage Article 3. It further took the view that the applicants had not had an effective remedy.

Secondly, the Court found that the applicants' placement in border posts and police stations could be regarded as a deprivation of liberty which was not lawful within the meaning of Article 5 § 1. The Court also noted that the applicants had spent several weeks in police stations before the National Service of Social Solidarity ("EKKA") recommended their placement in reception centres for unaccompanied minors; and that the public prosecutor at the Criminal Court, who was their statutory guardian, had not put them in contact with a lawyer and had not lodged an appeal on their behalf for the purpose of discontinuing their detention in the police stations in order to speed up their transfer to the appropriate facilities.

Principal facts

The applicants are six Syrian nationals, two Iraqi nationals and one Moroccan national who entered Greece just before the signing of the migration agreement concluded in 2016 between the member States of the European Union and Turkey, the "EU-Turkey Declaration". They were seeking to travel on to other European countries. They were between 14 and 17 years of age at the material time and were unaccompanied.

On various dates they were placed under "protective custody"2 in police stations of northern Greece, for periods of between 21 and 33 days. They complained about overcrowding in their cells, a lack of heating, ventilation and lighting, and the poor quality of the food, adding that they had not been allowed to go outside for a walk and that they had slept on the floor in dirty sheets. One of them claimed to have suffered from asthma. They were subsequently transferred to the Diavata open reception centre, which since April 2016 has had a safe zone for unaccompanied minors, and is run by the NGO ARSIS. They were later taken to a special facility for unaccompanied minors.

The applicants complained about the conditions of their detention. The public prosecutor at the Criminal Court shelved their complaint after questioning three adults who were held in the police stations concerned. Two of the applicants also complained of ill-treatment at the Kilkis police station. The criminal and disciplinary proceedings conducted in that connection were discontinued in 2017.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment) and Article 13 (right to an effective remedy), all the applicants complained of their detention conditions and of a lack of an effective remedy by which to complain about those conditions.

Under Article 3, two of the applicants claimed to have been ill-treated by police officers at Kilkis police station.

Relying on Article 5 §§ 1 (d), and 4 (right to liberty and security / right to a speedy decision on the lawfulness of a detention measure), all the applicants complained that they had been placed in police cells and had been unable to lodge an appeal challenging the lawfulness of their detention.

The application was lodged with the European Court of Human Rights on 13 April 2016.

The Office of the UN High Commissioner for Refugees (UNHCR), the AIRE Centre, the Dutch Council for Refugees, the European Council for Refugees and Exiles (ECRE), and the International Commission of Jurists (ICJ), were given leave to make written submissions as third parties.

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

Ksenija **Turković** (Croatia), *President*,
Linos-Alexandre **Sicilianos** (Greece),
Krzysztof **Wojtyczek** (Poland),
Armen **Harutyunyan** (Armenia),
Pauliine **Koskelo** (Finland),
Tim **Eicke** (the United Kingdom),
Jovan **Ilievski** ("the former Yugoslav Republic of Macedonia"),
and also Abel **Campos**, *Section Registrar*.

Decision of the Court

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

The applicants' detention in police stations*:* The Court found that the police stations had features which could make detainees feel lonely (no outer courtyard for walks or physical exercise, no catering facility, no radio or television for communication with the outside world) and were not suited to lengthy periods of imprisonment. Thus detention on those premises was capable of arousing in them a feeling of isolation from the outside world, with potentially negative consequences for their physical and moral well-being. The Court found that the applicants had been unable to go outside and that this situation was aggravated by the fact that they were all minors. It further pointed out that, in its report of 26 September 2017, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) had emphasized that the practice of detaining unaccompanied or separated minors, for "protective" purposes, for several days or even weeks, without any psychological or social assistance, was unacceptable. Consequently, the Court took the view that the detention conditions to which the applicants had been subjected in the various police stations could be regarded as degrading treatment and found that there had been a violation of Article 3.

As regards the Diavata centre*:* The Court noted that this centre was an open facility where the applicants could go in and out as they pleased. It also found that, between January 2015 and March 2016, the flow of migrants into Greece had created an unprecedented migratory and humanitarian crisis, triggering a sudden increase in the demand for accommodation from asylum seekers and unaccompanied minors. Thus the "safe zone" of the Diavata centre, which was run by an NGO, had been set up in order to meet the needs of unaccompanied minors who had reached certain areas of northern Greece. In that connection, the Court noted that in its submissions to the Court, the UNHCR had not made any criticism of the "safe zones", including that of Diavata. Consequently, the living conditions in the Diavata centre had not exceeded the threshold of seriousness required to engage Article 3 and there had been no violation of that provision.

As to the complaint of two applicants alleging ill-treatment at Kilkis police station, the Court took the view that it was manifestly ill-founded because the applicants had not substantiated their allegations by appropriate evidence. The medical certificate issued by the hospital concerning the applicant who claimed to have broken his arm – after being kicked in the chest and falling over – made no mention of his arm being in plaster. In addition, the neurologist and cardiologist who examined him had indicated that he had no health problems. The doctor who had examined the other applicant – who claimed to have been hit on the head – had found that he did not need any treatment.

Article 13 (right to an effective remedy)

The Court took the view that the domestic remedy available3, namely an appeal to the public prosecutor, had not been an effective one, neither for the applicants' transfer to the open facility of the Diavata centre, nor for an examination of their complaints concerning the conditions of their detention. The report drawn up in the domestic procedure4 had not mentioned, as required, the date of the end of the "protective custody" period. Thus the applicants and the NGO which had been helping them were not able to know the duration of the placement in order to report it to the public prosecutor, and it had taken them several days to realise that this "protective custody" was being prolonged beyond a reasonable time. Moreover, while the applicants had been transferred to Diavata on the day after their complaint, it was thanks to the intervention of the NGO ARSIS. Lastly, over six months after the applicants had filed a criminal complaint about the

conditions of their detention, the public prosecutor had shelved that complaint, after questioning three adults who had been held in the same police stations. There had thus been a violation of Article 13, taken together with Article 3.

Article 5 § 1 (right to liberty and security)

The Court found that the applicants' placement in border posts and police stations could be regarded as a deprivation of liberty. In that connection it noted that the authorities had automatically applied Article 118 of Decree no. 141/1991 providing for "protective custody". However, that legislation had not been intended for unaccompanied minor migrants and did not provide for any time-limit, thus potentially leading to situations where the deprivation of liberty of such minors could be prolonged for lengthy periods. This was all the more problematic as they were detained in police stations, where the conditions were incompatible with lengthy periods of imprisonment. In addition, the Court pointed out that Article 13 § 6 (b) of Decree no. 114/2010, which transposed into Greek law Directive 2005/85/EC of the Council of the European Union, provided that the authorities should avoid the detention of minors. Section 32 of Law no. 3907/2011 provided that unaccompanied minors could only be held as a last resort, for the shortest period possible.

Lastly, Article 3 of the UN Convention on the Rights of the Child, of 1989, obliged States to take into consideration the best interests of children in taking decisions concerning them. The Court therefore took the view that the Government had failed to explain why the authorities had initially placed the applicants in a number of police stations and in degrading conditions of detention and not in other temporary accommodation facilities. It found that the applicants' detention had not been "lawful" within the meaning of Article 5 § 1 and that there had been a violation.

Article 5 § 4 (right to a speedy decision on the lawfulness of a detention measure)

The Court was of the view that "protective custody" in police stations could last for long periods during which the minors concerned could not be identified by lawyers working for NGOs in order to bring, within a reasonable time, an appeal against what they regarded as a detention measure. The applicants had spent several weeks in police stations before the National Service of Social Solidarity ("EKKA") recommended their placement in reception centres for unaccompanied minors. Moreover, the public prosecutor at the Criminal Court of Kilkis, who was the applicants' statutory guardian, had not put them in contact with a lawyer and had not lodged an appeal on their behalf for the purpose of discontinuing their detention in the police stations in order to speed up their transfer to the appropriate facilities. Moreover, as they had not officially been given the status of detainee, the applicants had been unable to bring – or take part in – a case before the Administrative Court in order to challenge their detention. The Court consequently found that there had been a violation of Article 5 § 4.

Just satisfaction (Article 41)

The Court held that Greece was to pay 4,000 euros (EUR) to each applicant in respect of nonpecuniary damage and EUR 1,500 to all the applicants jointly in respect of costs and expenses.

7. **ECtHR, *Beghal v. the United Kingdom*, No. 4755/16, Chamber judgment of 28 February 2019 (Article 8 of the Convention - Violation).** The applicant, a French national who had been arrested on arrival at a British airport and questioned under a national anti-terrorist law, successfully complained that these procedures had violated her right to private life.

ECHR 075 (2019)
28.02.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of Beghal v. the United Kingdom (application no. 4755/16) the European Court of Human Rights held, unanimously, that there had been:

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

The case concerned the use of counter-terrorism legislation giving immigration officers the power to stop, search and question passengers at ports, airports and international rail terminals. The applicant, Sylvie Beghal, had been stopped and questioned at East Midlands Airport in 2011.

The Court found that the legislation in force at that time had not been sufficiently circumscribed nor were there adequate legal safeguards against abuse. In particular, people could be subjected to examination for up to nine hours and compelled to answer questions, without being formally detained or having access to a lawyer.

In reaching that conclusion the Court did not consider amendments since made to the legislation. In particular, as of 2014, border officials have been required to take a person into detention if they wish to examine him or her for longer than an hour, to only commence questioning after the arrival of a solicitor, and to release those being questioned after six hours.

No award of damages was made to the applicant as the Court considered that the finding of a violation was sufficient.

Principal facts

The applicant, Sylvie Beghal, is a French national who was born in 1969 and lives in Leicester (United Kingdom).

On 4 January 2011 Mrs Beghal arrived at East Midlands Airport following a visit to her husband, who was in prison in France for terrorism offences. Her flight landed at 8.05pm.

She was stopped under counter-terrorism legislation, namely Schedule 7 of the Terrorism Act 2000, giving police and immigration officers the power to stop, search and question passengers at ports, airports and international rail terminals. The legislation does not require prior authorisation and the power to stop and question may be exercised without suspicion of involvement in terrorism.

Mrs Beghal was told by border officials that she was not under arrest and that they did not suspect her of being a terrorist, but that they needed to speak to her to establish if she might be "a person concerned in the commission, preparation or instigation of acts of terrorism".

After being given time to pray, she was searched, allowed to speak with her lawyer by telephone and then taken to an examination room where she was questioned for about 30 minutes. She refused to answer questions without her lawyer present. She was told that she was "free to go" at around 10 p.m.

She was subsequently charged with, in particular, wilfully failing to comply with a duty under Schedule 7. She pleaded guilty in December 2011 and was conditionally discharged.

She challenged the powers given to the police under Schedule 7 before both the High Court and the Supreme Court, alleging a violation of her rights under the European Convention. However, the national courts found in particular that the Schedule 7 powers were "in accordance with the law" and proportionate. In reaching this conclusion, the Supreme Court considered the law as it stood on the date of its examination and therefore took into account amendments to the legislation which had been made in 2014 by the Anti-Social Behaviour, Crime and Policing Act 2014 and the updated Code of Practice. Those amendments included requiring examining officers to take a person into detention if they wished to examine him or her for longer than an hour, to only commence questioning after the arrival of a solicitor, and to release those being questioned after six hours.

Complaints, procedure and composition of the Court

Ms Beghal alleged that the police powers under Schedule 7 of the counter-terrorism legislation had breached her rights under Article 5 (right to liberty and security), Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life).

The application was lodged with the European Court of Human Rights on 14 January 2016.

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

Linos-Alexandre **Sicilianos** (Greece), *President*,
Krzysztof **Wojtyczek** (Poland),
Armen **Harutyunyan** (Armenia),
Pauliine **Koskelo** (Finland),
Tim **Eicke** (the United Kingdom),
Jovan **Ilievski** (North Macedonia),
Gilberto **Felici** (San Marino),

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

Decision of the Court

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

The Government conceded, and the Court therefore accepted, that there had been an interference with the applicant's right to respect for her private and family life.

The Court went on to examine whether the scheme had contained sufficient safeguards to protect the applicant against arbitrary interference at the time she had been stopped at East Midlands Airport.

It considered that the scope of the Schedule 7 powers and the discretion given to examining officers to exercise them had been broad. In particular, the powers had been permanently applied at all ports and border controls and border officials had not been required to demonstrate that they had a reasonable suspicion that a person had been involved in terrorism.

The wide scope of the powers and the absence of a requirement of "reasonable suspicion" did not in themselves though run contrary to the principle of legality, bearing in mind the very real threat of international terrorism currently faced by Contracting States. Indeed, there was clear evidence2 that the Schedule 7 powers had been of real value in protecting national security and had not, in fact, been abused. In 2011, for example, only 0.03% of passengers travelling through ports had been examined under Schedule 7.

However, there were other factors which meant that the legislation had not been sufficiently circumscribed nor were there adequate legal safeguards against abuse in 2011. In particular, people could be subjected to examination for up to nine hours and compelled to answer questions, without being formally detained or having access to a lawyer. Furthermore, the possibility to seek judicial review of the exercise of the Schedule 7 powers was limited because the border official was not obliged to show "reasonable suspicion".

Taking into account those insufficient safeguards, considered together with the absence of any requirement of "reasonable suspicion", the Court found that at the time the applicant had been stopped the Schedule 7 powers had not been "in accordance with the law". It followed that there had been a violation of Article 8 of the Convention.

In reaching that conclusion the Court – unlike the Supreme Court – did not consider the amendments to the legislation in 2014 by the Anti-Social Behaviour, Crime and Policing Act 2014 and the updated Code of Practice.

Nor had the Court examined the power to detain under Schedule 7, which had the potential to result in a much more significant interference with a person's rights under the Convention.

Article 5 (right to liberty and security)

The Court considered that there was no need to examine the applicant's complaint under Article 5 as it was based on the same facts as her Article 8 complaint.

Article 6 (right to a fair trial)

The applicant argued that the exercise of coercive police powers to compel her to provide answers that might have been incriminating, without any assurance that her answers would not be used against her in a criminal trial, had breached her Article 6 rights.

The Court, however, found that the applicant had neither been arrested nor charged with any criminal offence. The mere fact that she had been selected for examination could not be understood as meaning that she had been suspected of involvement in any criminal offence. On the contrary, police officers had explicitly told her that she was not under arrest and that the police did not suspect her of being a terrorist.

The Court therefore considered that the applicant's examination under the Schedule 7 scheme could not engage Article 6 of the Convention and rejected that part of her complaint as inadmissible.

Article 41 (just satisfaction)

The Court held that the finding of a violation constituted in itself sufficient just satisfaction for nonpecuniary damage sustained by the applicant. It awarded 25,000 euros in respect of costs and expenses, to be paid to the applicant's lawyer.

8. **ECtHR, *Khan v. France*, No. 12267/16, Chamber judgment of 28 February 2019 (Article 3, Prohibition of torture – Violation).** The applicant, an unaccompanied migrant minor from Afghanistan, successfully argued that the French authorities had failed to take care of him before and after the dismantling of the migrant camp in Calais.

ECHR 076 (2019)
28.02.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of Khan v. France (application no. 12267/16) the European Court of Human Rights held, unanimously, that there had been:

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

The case concerned the failure by the French authorities to provide an unaccompanied foreign minor with care before and after the dismantling of the makeshift camps set up in the southern section of the "lande de Calais" ("Calais heath"). Large numbers of people hoping to seek asylum in the United Kingdom had for many years been living there in tents or huts, in overcrowded conditions without even the most basic sanitation.

The Court was not convinced that the authorities had done all that could reasonably be expected of them to fulfil the obligation of protection and care incumbent on the respondent State *vis-à-vis* an unaccompanied foreign minor unlawfully present on French territory, that is to say an individual belonging to the category of the most vulnerable persons in society. For several months the applicant had thus lived in the "lande de Calais" shanty town, in an environment completely unsuited to his status as a child and in a situation of insecurity rendered unacceptable by his young age.

The Court held that the extremely negative circumstances prevailing in the makeshift camps and the failure to enforce the court order intended to secure protection for the applicant amounted to a violation of the respondent State's obligations, and that the Article 3 severity threshold had been reached. It deduced that on account of the failure of the French authorities to take the requisite action, the applicant had found himself in a situation tantamount to degrading treatment.

Principal facts

The applicant, Jamil Khan, is an Afghan national who was born in 2004 and lives in Birmingham (United Kingdom).

By order of 2 November 2015 the Lille urgent applications judge, at the prompting, in particular, of a number of non-governmental organisations (NGOs), instructed the Pas-de-Calais Prefect to ascertain the number of unaccompanied minors in distress and to co-operate with the Pas-de-Calais Département in placing them in care. The judge also ordered her to install sanitary facilities on the "lande de Calais" site.

The Government submitted that all the amenities and sanitary and security facilities ordered by the urgent applications judge had been installed. The applicant stated that the Ombudsman's General Recommendation of 20 April 2016 had mentioned that although the numbers of unaccompanied minors had indeed been ascertained as of January 2016, the counting exercise had not led to the actual provision

of care for those minors. The Département Council had merely organised patrols by under-trained individuals, without the assistance of translators to prepare for the details of care provision.

On 12 February 2016 the Pas-de-Calais Prefect announced her decision to order the evacuation of the southern section of the "lande de Calais" site. The evacuation took place between 29 February and 16 March 2016. The northern section was evacuated at the end of October 2016.

The applicant submits that he left Afghanistan at the end of August 2015 for the United Kingdom, and that he reached Calais by following refugees in the hope of finding some way of crossing to England. He therefore settled into a hut in the southern section of the "lande de Calais" and contacted a number of NGOs, including "Cabane juridique" ("the Legal Hut"). On 19 February 2016 that NGO lodged with the Children's Judge an application for a provisional care order for the applicant. The Children's Judge appointed a statutory representative and ordered the applicant's provisional placement at the Calais Department for Children's and Family Affairs as of 23 February 2016.

The applicant pointed out that neither the Département nor the Prefecture had taken any action to provide for him. The Government observed that the social welfare services had been unable to enforce the placement order because the applicant had failed to attend the welfare offices and his lawyer, his statutory representative and the NGO involved had not informed them of his whereabouts.

During the week of 20 March 2016 the applicant had left the "lande" site and entered Britain illegally, where he had been taken into care by the UK child welfare agencies.

Complaints, procedure and composition of the Court

Relying, in particular, on Article 3 of the Convention (prohibition of inhuman and degrading treatment), the applicant complained of the French authorities' failure to comply with their duty to protect unaccompanied foreign minors like himself on the "lande de Calais" site. He complained that the order provisionally placing him in the child welfare centre had not been enforced

The application was lodged with the European Court of Human Rights on 3 March 2016.

On 2 March 2016, during the operations to dismantle the southern section of the "lande de Calais", 15 unaccompanied foreign minors, including the applicant, as well as two NGOs, lodged a request for the application of Rule 39 of the Rules of Court. They requested, in particular, a stay of the evacuation order and an indication to the State to detail the action taken to support and rehouse the persons evacuated. On 9 March 2016, upon receipt of the parties' replies, the Court decided not to indicate to the Government the interim measures requested. It took note of the fact that the Government was undertaking to provide care for the minors in question as soon as they had been located, pursuant to the provisional placement orders issued by the Children's Judge.

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

Angelika **Nußberger** (Germany), *President*,
Yonko **Grozev** (Bulgaria),
André **Potocki** (France),
Mārtiņš **Mits** (Latvia),
Gabriele **Kucsko-Stadlmayer** (Austria),
Lətif **Hüseynov** (Azerbaijan),
Lado **Chanturia** (Georgia),

and also Milan **Blaško**, *Deputy Section Registrar*.

Decision of the Court

The Court noted the applicant's young age, having arrived in France as an 11-year-old. He had been 12 when the southern section of the "lande de Calais" had been dismantled and he had left the country. The Court observed that he had lived in the "lande de Calais" for some six months.

The Court noted that the Government did not dispute the fact that the applicant had not been provided with care by the authorities.

The Court noted that in its order of 23 November 2015 the *Conseil d'Etat* urgent applications judge had used the word "shanty town" to describe the "lande de Calais" site, had found that the provision for the applicants' basic needs in terms of hygiene and supplies of drinking water had been "manifestly inadequate", and had pointed to "negligence such as to expose them to patently inhuman and degrading treatment, thus seriously, and manifestly unlawfully, infringing a fundamental freedom". Following the evacuation of the southern section of the site, many of the occupants had moved to the northern section, which had exacerbated the overcrowding there.

Owing to the failure of the authorities to protect the applicant, and despite support from various NGOs, he had therefore spent six months living in an environment manifestly unsuitable for children, characterised by insalubrity, precariousness and insecurity. On 22 February 2016, on the grounds of the applicant's perilous situation, the Children's Judge of the Boulogne-sur-Mer Regional Court had ordered his placement with the child welfare department. The Court considered that the failure to provide care, which had already been extremely problematic before the southern section of the site had been dismantled, had become even worse after that operation because of the demolition of the hut in which he had been living and the general deterioration of living conditions on the site.

The very fact that the applicant had had to wait for the Children's Judge to order his placement before his case could actually be considered by the competent authorities raised questions as to the respondent State's compliance with the obligation under Article 3 of the Convention to protect and provide care for unaccompanied foreign minors. It followed that the competent authorities had not even identified the applicant as such, even though he had been present on the "lande de Calais" for several months and, as a young child, should have been very conspicuous. It would therefore appear that the means employed to identify unaccompanied foreign minors present on the site had been inadequate.

The Court observed that the unaccompanied foreign minors present on the site had not always accepted the provision offered to them. Nevertheless, it noted that the Ombudsman, in particular, took the view that the reason for the minors' reluctance to accept the measures was that the system of providing shelter for them was unsuited to their situation and that the reluctance in question could not in any case justify inaction on the part of the authorities, which, being responsible for protecting the children, ought to have carefully considered the means of doing so, with due regard to the specific nature of such cases.

The Court noted that the applicant, for his part, stated that he would have accepted official protection. The Court repeated that he had been a 12-year-old child who, moreover, probably had limited knowledge of the French language. It was therefore not convinced by the Government's argument that it had been incumbent on the applicant in person to take the requisite steps to secure official protection. Nor did it consider that the NGOs, the lawyer who had represented the applicant in the proceedings leading up to the order of 22 February 2016 or his statutory representative could be blamed for not having taken him to the reception centre designated by the authorities, since that task had manifestly been a matter for the authorities themselves.

The Court was aware of the complexity of the task facing the domestic authorities in view of the difficulty of identifying minors among all the persons present on the site and of providing them with appropriate care, given that they did not always want the latter. The Court also noted the ambiguity of the applicant's attitude, in that, although he had applied to the Children's Judge for provisional placement, he had not intended to remain in France but rather had been planning to reach the United Kingdom.

The Court further observed that the domestic authorities had not remained completely inactive since they had taken steps to enforce the Children's Judge's order of 22 February 2016. Nevertheless, the Court was not convinced that the authorities had done all that could reasonably be expected of them to fulfil the obligation of protection and care incumbent on the respondent State *vis-à-vis* an unaccompanied foreign minor who was unlawfully present in French territory, that is to say an individual belonging to the category of the most vulnerable persons in society.

For several months the applicant had thus lived in the "lande de Calais" shanty town, in an environment completely unsuited to his status as a child and in a situation of insecurity rendered unacceptable by his young age.

The Court found that the particularly serious circumstances of the case and the failure to enforce the Children's Judge's order geared to protecting the applicant, taken in conjunction, amounted to a breach of the respondent State's obligations. On account of the failure of the French authorities to take the requisite action, the applicant had found himself in a situation which had amounted to degrading treatment. There had therefore been a violation of Article 3 of the Convention.

Just satisfaction (Article 41)

The Court held that France was to pay the applicant 15,000 euros (EUR) in respect of non-pecuniary damage.

9. **ECtHR, *Drėlingas v. Lithuania*, No. 28859/16, Chamber judgment of 12 March 2019, Article 7 (No punishment without law – No violation).** The applicant, a Lithuanian national and a former officer of the KGB who had been convicted for being an accessory to genocide in March 2015, unsuccessfully complained that the interpretation of the crime of genocide, as adopted by the Lithuanian courts, did not comply with public international law. The Court recognised that the statutory obligation on the domestic courts to take into account the Supreme Court's case-law provided an important safeguard for the future, and that the applicant's conviction for genocide could be regarded as foreseeable.

ECHR 089 (2019)
12.03.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of **Drėlingas v. Lithuania** (application no. 28859/16) the European Court of Human Rights held, **by five votes to two**, that there had been:

no violation of Article 7 (no punishment without law) of the European Convention on Human Rights.

The case concerned the applicant's conviction for genocide for taking part in a 1956 operation to arrest two partisans who had resisted Soviet rule.

The Court concluded that Lithuania's Supreme Court had now resolved previously existing legal discrepancies in domestic practice on such genocide trials, discrepancies which had led to the Court finding a violation in the similar case of *Vasiliauskas v. Lithuania* in 2015.

In particular, the Supreme Court had explained why the partisans who had resisted Soviet rule could be considered as an important part of the nation and thus be covered by international law, Article II of the Genocide Convention, at the time of the events.

The applicant had to have been aware in the 1950s that he could be prosecuted for genocide and his conviction had been foreseeable. There had therefore been no violation of the Convention.

Principal facts

The applicant, Stanislovas Drėlingas, is a Lithuanian national born in 1931 who lives in Utena (Lithuania).

Mr Drėlingas, who served in the MGB and KGB Soviet security forces, took part in an operation in 1956 to detain two partisans, Adolfas Ramanauskas (whose code name was Vanagas) and his wife Birutė Mažeikaitė (code name Vanda), who were opposed to Soviet rule in Lithuania.

The two were arrested, which led to Mr Ramanauskas being severely ill-treated in detention and then executed in 1957 while Ms Mažeikaitė had to serve eight years in a prison camp in Siberia.

In 2014, after Lithuania had regained its independence, Mr Drėlingas was charged under the Criminal Code with genocide for his role in the operation against Mr Ramanauskas and Ms Mažeikaitė and was found guilty by Kaunas Regional Court in March 2015.

The court held that Mr Ramanauskas had been a prominent partisan who had led resistance to Soviet rule, and that the partisans were representatives of the Lithuanian nation. The aim of the arrest operation had been to eliminate part of a national group and Mr Drėlingas had thus been guilty of genocide, for which there was no domestic statute of limitations.

The court rejected his arguments that he could not be held responsible for the fate of the two partisans as he had not personally arrested or sentenced them. He was given a five-year term of imprisonment. The appeal court and the Supreme Court, in April 2016, upheld his conviction, the Supreme Court reducing his sentence to five months' detention and releasing him for time served.

In particular, the Supreme Court examined the Strasbourg Court's 2015 Grand Chamber judgment in *Vasiliauskas v. Lithuania*, which had found a violation of Article 7 as the courts had defined partisans as a separate "political group". However, such a group was not protected by international law under the 1948 Genocide Convention and Mr Vasiliauskas's conviction had not been foreseeable.

In Mr Drėlingas's case, the Supreme Court provided an explanation for why Mr Ramanauskas and Ms Mažeikaitė had to be considered as members of a distinct national and ethnic group and so fall under the Genocide Convention. At the time of the events Mr Drėlingas therefore had to have been aware that he could face criminal liability for genocide.

In another set of proceedings in 2016 the Supreme Court also quashed Mr Vasiliauskas's domestic conviction. It noted that he had been found guilty of genocide in relation to a "separate political group", which was not a term found in the Genocide Convention but one which had been introduced into Lithuanian law after the re-establishment of independence. He had therefore been prosecuted retroactively, which was a violation of his rights.

Complaints, procedure and composition of the Court

Relying on Article 7 (no punishment without law), Mr Drėlingas complained that his conviction for genocide had violated his rights because the national courts' broad interpretation of that crime had had no basis in international law.

The application was lodged with the European Court of Human Rights on 18 May 2016.

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

Ganna **Yudkivska** (Ukraine), *President*,
Paulo **Pinto de Albuquerque** (Portugal),
Faris **Vehabović** (Bosnia and Herzegovina),
Egidijus **Kūris** (Lithuania),
Iulia Antoanella **Motoc** (Romania),
Carlo **Ranzoni** (Liechtenstein),
Péter **Paczolay** (Hungary),
and also Marialena **Tsirli**, *Section Registrar*.

Decision of the Court

The applicant argued in particular that there had been no basis in public international law for his conviction, which had been based on a retroactive application of domestic law, violating Article 7.

The Court first rejected his arguments that he could not be held liable for the fates of the two partisans as he had neither directly arrested them nor taken part in the decision-making procedure.

The Court observed that the domestic courts had examined the first part of his submission thoroughly and the Court saw no reason to question their findings. As regards the second point, the Court reiterated its finding in *Vasiliauskas* that even private soldiers could not show total, blind obedience to orders which infringed recognised human rights. As an officer of the security forces he must have known what would happen to the two resistance members.

The Court then examined whether the lack of clarity in domestic law on the crime of genocide, which it had identified in *Vasiliauskas*, had now been dispelled.

It noted that the Supreme Court judgment in Mr Drėlingas's case had analysed *Vasiliauskas* and had drawn the conclusion that the finding of a violation of Article 7 had been due to the domestic courts' failure to substantiate their findings that the partisans had constituted a significant part of a national group and had thus come under Article II of the Genocide Convention.

In Mr Drėlingas's case the Supreme Court had provided a detailed explanation of the significance of the partisans, noting, among other things, that they had played an essential role when protecting the national identity, culture and national self-awareness of the Lithuanian nation. The Supreme Court had concluded that the partisans were a significant part of a protected national and ethnic group within the meaning of both the 1948 Genocide Convention and domestic law under Article 99 of the Criminal Code.

The Supreme Court had also referred to a 2014 Constitutional Court ruling which had added to the historical context on the partisan movement and its significance for the Lithuanian nation.

Furthermore, the Supreme Court had re-opened the domestic proceedings in Mr Vasiliauskas's case and had acknowledged the Strasbourg Court's findings without reservation. It had also held that Mr Vasiliauskas could not be prosecuted for the genocide of members of a political group.

The Court concluded that the Supreme Court had in Mr Drėlingas's case removed the lack of clarity which the Court had identified in *Vasiliauskas*, caused by the discrepancy between Article 99 of the Criminal Code and its reference to political groups and Article II of the Genocide Convention.

The Supreme Court had also clarified the scope of review of charges of genocide, including a prohibition on the retroactive prosecution for the genocide of people belonging to a political group and the need to establish intent.

Given such developments, the domestic system, based on international law in the shape of the Genocide Convention and the case-law of the Constitutional and Supreme Courts, no longer showed the shortcomings identified in *Vasiliauskas*. Mr Drėlingas's conviction for genocide had thus been foreseeable and had not resulted in a violation of Article 7.

Separate opinions
Judges Motoc and Ranzoni expressed dissenting opinions which are annexed to the judgment.

10. **ECtHR, *O.S.A. and Others v. Greece*, No. 39065/16, Chamber judgment of 21 March 2019 (Article 5 § 2, Right to a speedy decision on the lawfulness detention – Violation; Article 3, Prohibition of inhuman or degrading treatment – No violation).** The applicants, four Afghan nationals, successfully argued that that they had been unable to obtain a judicial decision on the lawfulness of their detention at the Vial Centre in Greece. Indeed, the Court found that they had not had access to remedies by which they could have challenged the decisions which ordered their expulsion and the extension of their detention, neither received any information on the reasons of it. In addition, the Court found that there had been no violation of Article 3 during their detention period.

ECHR 103 (2019)
21.03.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of O.S.A. and others v. Greece (application no. 39065/16) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 5 § 4 (right to a speedy decision on the lawfulness of detention) of the European Convention on Human Rights**, and**

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

The case concerned the applicants' conditions of detention in the Vial centre on the island of Chios, and the issues of the lawfulness of their detention, the courts' review of their case, and the information provided to them.

The Court considered that, in view of the circumstances, the applicants had not had access to remedies by which to challenge the decisions ordering their expulsion and the extension of their detention. The applicants were Afghan nationals who understood only Farsi and they had had no lawyers to assist them. The documents issued to them by the authorities had been written in Greek and had not specified which administrative court had jurisdiction.

As in the case of J.R. and Others v. Greece (no. 22696/16), the Court held that the applicants' detention had nevertheless been lawful and that the threshold of seriousness for it to be characterised as inhuman or degrading treatment had not been attained.

Principal facts

The applicants, O.S.A., M.A.A., A.M. and A.A.S., are Afghan nationals who were born in 1967, 1990, 1982 and 1968 respectively.

On 21 March 2016 the four applicants arrived on Chios with their families. They were arrested and placed in the Vial centre for the reception, identification and registration of migrants. On the same day the Chios chief of police ordered the applicants' detention. On 24 March 2016 he ordered their expulsion and the extension of their detention pending expulsion for a maximum six-month period.

Those decisions, written in Greek, were served on the applicants the same day. On 4 April 2016 the applicants stated their intention to apply for asylum. On 22 April and 7 May 2016 the police commissioner for the North Aegean decided to suspend the applicants' expulsion until consideration of their asylum

applications was complete. The applicants were issued with receipts valid as temporary registration certificates and the order prohibiting them from leaving the island of Chios was lifted. As the third and fourth applicants did not report to the competent authorities on the date set for the registration of their asylum applications, their applications were archived.

Complaints, procedure and composition of the Court

Relying on Article 5 § 4 (right to a speedy decision on the lawfulness of detention), the applicants complained that they had been unable to obtain a judicial decision on the lawfulness of their detention. Under Article 5 § 2 (right to be informed promptly of the charges), they complained that they had not received any information on the reasons for their detention. Relying on Article 5 § 1 (right to liberty and security), they alleged that their detention had been arbitrary. Lastly, under Article 3 (prohibition of inhuman or degrading treatment), the applicants complained of the conditions of detention in the Vial centre.

The application was lodged with the European Court of Human Rights on 5 July 2016.

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

Ksenija **Turković** (Croatia), *President*,
Linos-Alexandre **Sicilianos** (Greece),
Krzysztof **Wojtyczek** (Poland),
Armen **Harutyunyan** (Armenia),
Tim **Eicke** (the United Kingdom),
Jovan **Ilievski** (North Macedonia),
Gilberto **Felici** (San Marino),

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

Decision of the Court

Article 5 § 4 (right to a speedy decision on the lawfulness of detention)

The issue to be addressed by the Court was whether the applicants could have lodged an appeal unhindered on 24 March 2016, the date on which the decisions ordering their expulsion and the extension of their detention were adopted.

In that connection the Court noted that the applicants, who were Afghan nationals, understood only Farsi and that the decisions served on them had been written in Greek. Furthermore, it was not clear that the applicants, who had not been assisted by a lawyer in the Vial centre, had sufficient legal knowledge to understand the information brochure provided to them, and which referred in general terms to an "administrative court" without specifying which one. In fact, there was no administrative court on the island of Chios, where the applicants were; the closest court was on the island of Lesbos. Lastly, the applicants had not been represented by a lawyer from the NGO present in the centre. The Government did not supply any details of the procedure for obtaining legal aid and, in particular, did not specify whether the number of lawyers and the funds available to the NGOs had been adequate to meet the needs of all the occupants of the Vial centre, which at the relevant time had housed over a thousand people.

Even assuming that the remedies had been effective, the Court did not see how the applicants could have exercised them. It considered that, in the circumstances of the case, the legal remedies in question had not been accessible to the applicants. There had therefore been a violation of Article 5 § 4.

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

In view of its finding concerning Article 5 § 4, the Court considered it unnecessary to examine the complaint from the standpoint of this provision.

Article 5 § 1 (right to liberty and security)

The Court observed that it had previously examined the lawfulness of the detention of asylum-seekers in the Vial centre, in its judgment in J.R. and Others v. Greece (no. 22696/16). In that case the Court had found that the applicants' detention had not been arbitrary and could not be considered unlawful for the purposes of Article 5 § 1 (f) of the Convention.

The Court noted that the applicants in the present case had been detained for one month, from 21 March to 21 April 2016, in the same circumstances as the applicants in *J.R. and Others*, and that they had been released no more than one month after stating their intention to apply for asylum. The complaint was therefore manifestly ill-founded and had to be rejected.

Article 3 (prohibition of inhuman or degrading treatment)

The Court observed that it, in *J.R. and Others*, it had examined the conditions of detention in the Vial centre and had found that there had been no violation of Article 3 regarding the same period of detention. Like *J.R. and Others*, the present case was characterised by the shortness of the period for which the applicants had been detained. They had been placed in the Vial centre on 21 March 2016, and from 21 April 2016 onwards had been able to go out during the day and return at night, as the centre had become a semi-open facility on that date. As the applicants' detention had lasted for thirty days, the Court considered that the threshold of seriousness for it to be characterised as inhuman or degrading treatment had not been attained.

Just satisfaction (Article 41)

The Court held that Greece was to pay the applicants 650 euros (EUR) each in respect of non-pecuniary damage and EUR 1,000 jointly in respect of costs and expenses.

11. ECtHR, *Haghilo v. Cyprus*, No. 47920/12, Chamber judgment of 26 March 2019 (Article 3, Prohibition of inhuman or degrading treatment – Violation; Article 5 § 1, Right to liberty and security – Violation). The applicant, an Iranian national, successfully complained that the conditions under which he was detained for a long duration at three police stations in Cyprus constituted inhuman and degrading treatment according to Article 3. Moreover, the Court found that he did not have any effective remedy at his disposal.

ECHR 105 (2019)
26.03.2019

Press release issued by the Registrar

The applicant, Mustafa Haghilo, is an Iranian national who was born in 1973 and is currently living in Armenia.

The case concerned his detention pending deportation for over 18 months in three Cypriot police stations.

Mr Haghilo left Iran in March 2011 and entered Cyprus unlawfully. Shortly after, he was arrested at Larnaca airport when trying to take a flight to London on a forged passport and was placed in detention.

In April 2011 the Ministry of the Interior informed him of a decision to deport him because he was an illegal immigrant. From then, he was kept in holding facilities for immigration detainees at three different police stations. He was released in October 2012 because he had not been deported within the 18-month time-limit under the relevant European Union directive, as transposed into domestic law.

He had previously been briefly released after a court hearing by the Supreme Court in December 2011 because it found that his detention had been unlawful as of October 2011, but was immediately rearrested when leaving the court and detained on the same grounds as the previous deportation orders against him.

Mr Haghilo challenged the lawfulness of the new detention and deportation orders with the Supreme Court, but his recourse was dismissed in July 2012. The Supreme Court upheld that judgment in 2018 on appeal, noting that he had in the meantime left Cyprus for Armenia of his own free will and no longer had any legitimate interest in pursuing his appeal.

Relying in particular on Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights, Mr Haghilo complained that he had been held in inadequate conditions in facilities which had not been designed for prolonged detention.

Also relying, in particular, on Article 5 § 1 (right to liberty and security), he alleged that his detention from April 2011 to October 2012 had been unlawful and that he had not had an effective remedy at his disposal to challenge the lawfulness of his detention.

Violation of Article 3 (degrading treatment) – concerning the conditions of detention
Violation of Article 5 § 1

Just satisfaction: 30,000 euros (EUR) for non-pecuniary damage and EUR 4,124 for costs and expenses

12. **ECtHR, *Aboya Boa Jean v. Malta*, No. 62676/16, Chamber judgment of 2 April 2019 (Article 5-1-4, Right to liberty and security – No violation).** The applicant, a national of Ivory Coast, had informed the Maltese authorities, upon his arrival on the territory, that he had obtained refugee status in Armenia and wanted to apply for asylum. He was then held in in immigration detention on the grounds that he could flee before his request was treated. The applicant unsuccessfully claimed that his detention had been illegal and arbitrary.

ECHR 116 (2019)
02.04.2019

Press release issued by the Registrar

The applicant, Serge Aboya Boa Jean, is a national of the Ivory Coast who was born in 1978.

The case concerned his immigration detention in Safi Barracks detention centre in Malta for two months in 2016.

Mr Aboya Boa Jean arrived in Malta by plane in September 2016. Presenting his national passport, he told the immigration authorities that he was recognised as a refugee in Armenia and intended to seek asylum in Malta.

He was however denied entry and placed in immigration detention on the ground that he might abscond before the authorities could examine his asylum application.

In October 2016 the immigration Appeals Board confirmed the legality of his detention, specifying that his refugee status in Armenia had not yet been determined and that he had been found in possession of a travel ticket for Italy and a forged Italian passport. Within the same month, other courts also upheld the legality of his detention.

He was released from immigration detention on 8 November 2016, and had to report to a police station daily.

Relying on Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights, Mr Aboya Boa Jean alleged that his detention had beenunlawful and arbitrary. Further relying on Article 5 § 4 (right to have lawfulness of detention decided speedily by a court), he also alleged that the remedy available to him to challenge his detention had not been speedy or effective.

No violation of Article 5 § 1
No violation of Article 5 § 4

13. **ECtHR, *G.S. v. Bulgaria*, No. 36538/17, Chamber judgment of 4 April 2019 (Article 3, Prohibition of inhuman and degrading treatment – Violation if extradite to Iran).** The applicant, a Georgian national, successfully complained that the Bulgarian authorities had not properly assessed the risk of ill-treatment to which he would be exposed if extradited to Iran, because the punishment which the applicant stood accused in Iran was also punishable with flogging.

ECHR 119 (2019)
04.04.2019

Press release issued by the Registrar

The case G.S. v. Bulgaria (application no. 36538/17) concerned a Georgian national's complaint that if extradited to Iran, where he faced theft charges, he would be at risk of being flogged.

In today's **Chamber** judgment1 in the case the European Court of Human Rights held, unanimously, that there would be **a violation of Article 3 (prohibition of torture and of inhuman or degrading treatment)** of the European Convention on Human Rights if the applicant were extradited to Iran because of the possible punishment that awaited him there.

The Court found in particular that the Bulgarian courts had simply assumed that the only penalty for the applicant in Iran would be imprisonment.

However, the offence of which he stood accused, namely theft, was also punishable by flogging. Indeed, there was a risk that he would be sentenced to up to 74 lashes, taking into account international reports and other information showing that flogging was commonplace in Iran, and considered by the Iranian authorities as a legitimate form of punishment.

Moreover, unlike the Bulgarian authorities, the Court had profound misgivings about trusting assurances against torture given by a State where such treatment was endemic or persistent.

Principal facts

The applicant, Mr G.S., is a Georgian national who was born in 1951. He is currently being detained in Sofia Prison pending his extradition to Iran on theft charges.

In December 2016, when arriving in Bulgaria from Georgia, Mr G.S. was arrested at Sofia Airport on the basis of an Interpol red notice. According to the red notice, he had stolen 50,000 euros in 2016 from a foreign-exchange office in Teheran, an offence punishable with imprisonment under Article 656 of the Iranian Penal Code.

He was detained pending receipt of a formal extradition request from the Iranian authorities. The request arrived in January 2017, specifying that according to the text of Article 656 § 4 of the Iranian Penal Code, the punishment envisaged was imprisonment.

In April 2017 the Sofia City Court allowed the extradition request, finding that it met all the formal requirements and that it was permissible to proceed on the basis of the *de facto* reciprocity between Bulgaria and Iran. It also noted that the Iranian authorities had given assurances that the applicant would not face torture or inhuman treatment and that Iranian law only envisaged imprisonment for the alleged offence. The decision was upheld on appeal.

The applicant's extradition was, however, stayed in May 2017 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 Bulgarian Government that the applicant should not be extradited for the duration of the proceedings before it.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of torture and of inhuman or degrading treatment), Mr G.S. alleged in particular that the Bulgarian authorities had not assessed the risk of his being ill-treated if extradited to Iran, even though it was well-known that the punishment for theft in that country was up to 74 lashes.

The application was lodged with the European Court of Human Rights on 22 May 2017.

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

Angelika **Nußberger** (Germany), *President*,
Yonko **Grozev** (Bulgaria),
Síofra **O'Leary** (Ireland),
Mārtiņš **Mits** (Latvia),
Gabriele **Kucsko-Stadlmayer** (Austria),
Lətif **Hüseynov** (Azerbaijan),
Lado **Chanturia** (Georgia),
and also Milan **Blaško**, *Deputy Section Registrar*.

Decision of the Court

It was scarcely in doubt that the corporal punishment alleged to await the applicant in Iran, up to 74 lashes, was contrary to Article 3 of the European Convention.

First, the Court noted that the alleged offence of which the applicant stood accused in Iran was also punishable with flogging. Although neither the red notice nor the extradition request had referred to flogging as a form of punishment, websites ran by the Iranian legislature and judiciary confirmed that Article 656 § 4 of the Iranian Penal Code, under which the applicant was being prosecuted, did provide for a punishment of up to 74 lashes. Other publicly available sources also confirmed this.

The Bulgarian courts' decisions were of no assistance in assessing whether the applicant was at a real risk of being given such a sentence or of having it carried out because they had simply assumed that the only penalty awaiting the applicant in Iran was imprisonment.

The Court, on the other hand, found there was a real risk of flogging. It took into account various international reports that flogging sentences were commonplace in Iran. It also examined reasonably recent information showing that sentences of flogging had been imposed and carried out in a number of cases concerning theft.

Moreover, it had profound misgivings about the Iranian authorities' assurances. First, the extradition request had omitted to specify that Article 656 § 4 of the Iranian Penal Code had envisaged not only imprisonment but also flogging. Secondly, the Iran authorities had recently publicly stated in response to a United Nations report that they considered flogging a legitimate form of punishment, which had been "interpreted wrongfully, by the West, as ... degrading". Indeed, Iran apparently regarded flogging and other forms of corporal punishment as an important aspect of its sovereignty and legal tradition.

More importantly, assurances against torture by a State in which it was endemic or persistent were to be treated with caution.

It was clear that the decision to extradite the applicant to Iran would, if implemented, give rise to a breach of Article 3 of the Convention owing to the possible punishment of flogging that awaited him there.

Other complaints

The Court further held that it was not necessary to examine whether the applicant's extradition to Iran would give rise to other issues under Article 3, such as poor detention conditions or ill-treatment in detention. Nor was it necessary to rule on his complaints that if extradited to Iran, he would risk a flagrant denial of justice and suffer discrimination because he was a Christian.

Just satisfaction (Article 41)

The Court held that the finding of a potential breach of Article 3 constituted in itself sufficient just satisfaction.

Rule 39

The Court also decided to continue to indicate to the Bulgarian Government under Rule 39 not to extradite the applicant until such time as this judgment became final or until further order.

14. **ECtHR, *Sarwari and Others v. Greece*, No. 38089/12, Chamber judgment of 11 April 2019 (Article 3, Prohibition of inhuman and degrading treatment – Violation in its procedural aspect for applicants no. 1 to 8 and 10, Violation in its material aspect for applicants no. 2, 3, 6 and 10, No violation in its material aspect for applicants no. 1, 4, 5, 7, and 8).** The applicants, ten Afghan nationals, alleged that they had been ill-treated by the police officers, and complained as well about the investigation and the judicial proceedings, as well as the length of those proceedings. The Court found that there had been no violation of the substantive aspect of Article 3 in respect of five applicants, and a violation of the substantive aspect of Article 3 in respect of four applicants.

ECHR 136 (2019)
11.04.2019

Press release issued by the Registrar

The case concerned ten Afghan nationals who complained of being subjected to ill-treatment by police officers searching for an Afghan fugitive who had escaped from a courtroom. Nine of the applicants complained of being ill-treated in the building in which they were living, and a tenth alleged ill-treatment at a police station.

In today's **Chamber** judgment1 in the case of Sarwari and Others v. Greece (application no. 38089/12) the European Court of Human Rights held, unanimously, that there had been:

A violation of the procedural aspect of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights in respect of nine applicants**.**

The Court noted, among other findings, that the proceedings had lasted for around seven years and that the preliminary stage of the criminal investigation had included a period of inactivity of more than one year. Furthermore, the possibility of a racist motive had not been examined thoroughly and the courts had not given due weight to certain factors, including the fact that the police officers had been acting in the context of an informal operation; the applicants had not attempted to attack the police officers and had not engaged in violent behaviour; and one of the applicants had been a minor at the relevant time.

A violation of the substantive aspect of Article 3 in respect of four applicants**.**

The Court considered that the treatment to which four of the applicants had been subjected constituted inhuman and degrading treatment.

No violation of the substantive aspect of Article 3 in respect of five applicants.

The Court noted that the medical reports concerning five of the applicants were inconclusive as to the possible cause of their injuries and that this was due in large part to the lack of a thorough and effective investigation by the national authorities. Lastly, the Court declared the application inadmissible with regard to one of the applicants.

Principal facts

The applicants are ten Afghan nationals who were born between 1975 and 1988.
In December 2004 R.A.N. (an Afghan national) escaped from a courtroom while under the supervision of police officers H.D. and E.K.

Subsequently, H.D. and E.K. searched for the fugitive, both alone and with colleagues from the police station, including in a building where some Afghan nationals were living. A few days later a television station broadcast a report containing allegations that police officers had ill-treated a number of Afghan nationals after violently forcing their way into the hotel where they were staying.

The facts, which occurred on 14 and 15 December 2004, were established as follows by the Athens Criminal Court of Appeal. The two police officers – together with other police officers who could not be identified and who were in civilian dress – went to a building where a number of Afghan nationals were living, to search for the fugitive (R.A.N.). They woke up all the people staying there, led them into the living room of the building and forced them to face the wall. They then showed them a photograph of the fugitive, asking them if they knew him and if they had seen him in the area.

Finally, they punched them, kicked them and hit them with sticks. The next day they returned to the building and repeated their actions. In addition, one of the applicants alleged that he had been illtreated at the police station on 15 December 2004.

On different dates the applicants underwent medical examinations and some of them were found to have bodily injuries. Nine of the applicants lodged complaints and all the applicants also brought an action for damages against the State.

An administrative investigation and disciplinary proceedings were carried out. In June 2006 the disciplinary board imposed a six-month temporary suspension on H.D. and E.K. The penalties were not enforced as H.D. was not in active service and E.K. had left the service.

Criminal proceedings were also commenced. In March 2012 the Court of Appeal sentenced H.D. to 20 months' imprisonment and E.K. to 25 months' imprisonment for unprovoked assault. Both sentences were suspended.

Complaints, procedure and composition of the Court

Relying, in particular, on Article 3 (prohibition of torture and inhuman or degrading treatment) and Article 6 (right to a fair trial), the applicants alleged that they had been ill-treated by the police officers. They also complained about the investigation and the judicial proceedings, as well as the length of those proceedings.

The application was lodged with the European Court of Human Rights on 19 June 2012.

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

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

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

Decision of the Court

Article 3 (prohibition of inhuman or degrading treatment)

Regarding the admissibility of the application, the Court declared it admissible with regard to nine applicants and inadmissible with regard to one applicant who had applied to the Court out of time and had not lodged a complaint with the domestic authorities.

As to the effectiveness of the investigations the Court found a violation of the procedural aspect of Article 3 in respect of nine applicants, noting in particular the following.

The proceedings had lasted for seven years and for seven years and three months. In addition, the preliminary stage of the criminal investigation, which had lasted for five years, included a period of inactivity of more than one year, which may have compromised the effectiveness of the investigation. The passing of time inevitably eroded the amount and quality of the evidence available, and the appearance of a lack of diligence cast doubt on the good faith of the investigative efforts.

The reports of the forensic doctors had lacked precision and their quality had fallen well short of the CPT's recommended standards and the Istanbul Protocol guidelines. In particular, they had not contained an account of the incidents reported by the applicants or any indications as to when they had occurred. They had merely stated that no injuries had been found, without indicating whether the examination had been carried out with the assistance of an interpreter, as the applicants did not speak Greek.

The possibility of a racist motive had not been thoroughly examined by the Assize Court or the Court of Appeal. Moreover, H.D. and E.K. had not been questioned at any stage about their general attitude towards the ethno-cultural group to which the victims belonged. Likewise, the investigative bodies had not sought to ascertain, for example, whether the accused had been involved in violent incidents with a racial connotation in the past or whether they had affinities, for instance, with extremist or racist ideologies.

The courts had not lent due weight to certain factors, including the fact that the police officers had been acting in the context of an informal operation; they had not had an arrest or search warrant; there had been no causal link between the use of force by the police officers and the conduct of the applicants (who had not attempted to attack the police officers and had not engaged in violent behaviour); and one of the applicants had been a minor at the relevant time.

The domestic courts had acknowledged the existence of extenuating circumstances and had imposed suspended sentences, with the result that the police officers had not served their sentences. Lastly, the disciplinary sanctions (a six-month temporary suspension) had not been enforced.

One of the applicants had not been involved in the proceedings to a sufficient degree, and the applicant who alleged ill-treatment at the police station had not had the benefit of an effective investigation.

As to the allegations of torture and ill-treatment (substantive aspect), the Court found no violation of the substantive aspect of Article 3 in respect of five applicants and a violation of the substantive aspect of Article 3 in respect of four applicants. It observed the following points in particular.

Firstly, the Court noted that the medical reports concerning five of the applicants were inconclusive regarding the possible origin of their injuries, and that the evidence in the file did not provide sufficient certainty, beyond reasonable doubt, as to what had caused them. This was largely due to the absence of a thorough and effective investigation by the national authorities. There was therefore insufficient evidence to conclude beyond reasonable doubt that these applicants had been subjected to the alleged treatment.

Secondly, the Court noted that the Court of Appeal has clearly established that an assault had been committed against four of the applicants. In particular, the Court of Appeal found that H.D. and E.K. had kicked and punched the applicants concerned and had hit them with sticks on different parts of their bodies, causing simple bodily harm. Furthermore, it had found the perpetrators guilty of unprovoked assault of the applicants and had classified the acts as "bodily harm". In the Court's view, the treatment to which these four applicants had been subjected constituted inhuman and degrading treatment.

Just satisfaction (Article 41)

The Court held that Greece was to pay 26,000 euros (EUR) to one of the applicants, EUR 19,500 each to four of the applicants and EUR 16,000 each to a further four applicants in respect of non-pecuniary damage. It was also to pay the applicants EUR 1,500 jointly in respect of costs and expenses.

15. **ECtHR, *Harisch v. Germany*, No. 50053/16, Chamber judgment of 11 April 2019 (Article 6, Right to a fair hearing – No violation).** The applicant, a German national, unsuccessfully complained that his right to a fair trial was violated after the refusal from the domestic courts to refer questions to the Court of Justice of the European Union for a preliminary ruling.

ECHR 133 (2019)
11.04.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of Harisch v. Germany (application no. 50053/16) the European Court of Human Rights held, unanimously, that there had been: **no violation of Article 6 (right to a fair hearing)** of the European Convention on Human Rights.

The case concerned civil proceedings, during which the applicant requested a referral to the Court of Justice of the European Union (CJEU).

The Court found in particular that the domestic courts' refusal of the referral, which had not appeared arbitrary, had had sufficient reasons.

Principal facts

The applicant, Klaus Harisch, is a German national who was born in 1964 and lives in Munich (Germany). Mr Harisch was one of the two founders of T.AG, a directory enquiries service. The T.AG received, for a fee, the required subscriber information from DTAG. In 2007 and 2008 DTAG was ordered to refund the TAG part of the fees paid as they had been excessive.

Mr Harisch brought an action against DTAG, claiming that as a result of the excessive prices paid by the T.AG, he and his cofounder had had to reduce their shares in the company before its stock market launch. For that reason, and also because of a lower valuation of the company on the day of the launch, he had sustained damage. In May 2013 the Regional Court dismissed the claim.

Mr Harisch appealed. During an oral hearing before the Court of Appeal he called for the proceedings to be suspended and for a preliminary CJEU ruling to be obtained. In July 2014 the Court of Appeal dismissed his appeal by giving a detailed reasoning why his legal opinion was not supported by the CJEU's case-law. It also saw no reason to grant leave to appeal on points of law since there was no need to clarify the legal questions raised.

He filed a complaint against the refusal of leave to appeal on points of law, in which he repeated his request for a referral to the CJEU. The Federal Court of Justice rejected it, briefly indicating the reasons for refusing leave to appeal on points of law and dispensed with any further reasoning pursuant to Article 544 § 4 of the Code of Civil Procedure, to which it referred in its decision.

Mr Harisch further filed a complaint concerning a violation of his right to be heard (*Anhörungsrüge*).
The Federal Court of Justice also rejected this complaint, stating that a decision by a court of last instance did not require more detailed reasoning. In February 2016 the Federal Constitutional Court declined to consider Mr Harisch's constitutional complaint.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair hearing) Mr Harisch complained about the domestic courts' refusal to refer questions to the CJEU for a preliminary ruling and of a failure to provide adequate reasoning.

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

Judgment was given by a Chamber of seven judges, composed as follows:
Yonko **Grozev** (Bulgaria), *President*,
Angelika **Nußberger** (Germany),
André **Potocki** (France),
Mārtiņš **Mits** (Latvia),
Gabriele **Kucsko-Stadlmayer** (Austria),
Lətif **Hüseynov** (Azerbaijan),
Lado **Chanturia** (Georgia),
and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court
Article 6 § 1

The Court reiterated that the Convention did not guarantee, as such, the right to have a case referred to the CJEU for a preliminary ruling. However, a refusal to grant a referral might be deemed arbitrary in cases where the applicable rules allowed no exception to the granting of a referral or where the refusal was based on reasons other than those provided for by the rules, or where the refusal was not duly reasoned.

The obligation for domestic courts to provide reasons for their judgments was accordingly a vital safeguard against arbitrariness. However, the question of whether or not a court had failed to fulfil this obligation could only be determined in the light of the circumstances of the case. In the Court's view it was acceptable under Article 6 § 1 for national superior courts to dismiss a complaint by mere reference to the relevant legal provision if the matter raised no fundamentally important legal issue, particularly in cases concerning applications for leave to appeal.

The Court firstly observed that the Federal Court of Justice was the court of last resort within the meaning of Article 267 § 3 of the Treaty on the Functioning of the European Union (TFEU), and that it had only given brief reasons for its decision, in accordance with national law.

The Court also observed that the Court of Appeal had earlier examined EU law in detail and had referred extensively to the CJEU's case-law. Moreover, during an oral hearing the issue of EU law had been discussed and the Court of Appeal had explained why there was no reasonable doubt concerning the correct application of German and EU law.

The Court further noted that, based on domestic case-law, a refusal of leave to appeal on points of law included the consideration that a referral to the CJEU was not required in the case in question. It concluded that the Court of Appeal had therefore considered Mr Harisch's referral request and had denied it by refusing leave to appeal on points of law.

Moreover, having regard to the fact that the Court of Appeal had provided detailed reasoning for its decision, after discussing the issue of EU law with the parties, the Court considered that Mr Harisch had been able to understand the Federal Court of Justice's decision.

After examining the proceedings as a whole, the Court held that in the specific circumstances of the case it was acceptable that the Federal Court of Justice had dispensed with providing more comprehensive reasoning and had merely referred to the relevant legal provisions when deciding on Mr Harisch's complaint against the refusal of leave to appeal on points of law. Accordingly, there had been no violation of Article 6 § 1.

16. **ECtHR, *Alparslan Altan v. Turkey*, No. 12778/17, Chamber judgement of 16 April 2019 (Article 5-1, Right to liberty and security – Violation).** The applicant, a former judge of the Turkish Constitutional Court, had been arrested and taken into police custody, his detention was based on mere suspicion of membership of an illegal organisation (FETÖ/PDY). The applicant successfully challenged the lawfulness of the order for his detention.

ECHR 141 (2019)
16.04.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of **Alparslan Altan v. Turkey** (application no. 12778/17) the European Court of Human Rights held, by a majority, that there had been:

a violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights on account of the unlawfulness of the applicant's initial pre-trial detention, and

a violation of Article 5 § 1 on account of the lack of reasonable suspicion, at the time of the applicant's initial pre-trial detention, that he had committed an offence.

The case concerned the detention of a Turkish Constitutional Court judge following the attempted coup of 15 July 2016.

Mr Altan was deprived of his liberty primarily on suspicion of membership of an armed terrorist organisation, FETÖ/PDY. The Constitutional Court found that this constituted the factual and legal basis for a case of discovery *in flagrante delicto*. In a judgment adopted on 10 October 2017 the Court of Cassation had held that a situation of discovery *in flagrante delicto* arose at the time of a judge's arrest on suspicion of membership of an armed organisation. The Court found that this extension by the courts of the scope of the concept of *in flagrante delicto* meant that Mr Altan could not have known that the fact of being suspected of membership of a criminal organisation was sufficient to deprive him of the procedural safeguards afforded to Constitutional Court members.

Regarding the order for Mr Altan's pre-trial detention on 20 July 2016, the Court found that the evidence before it did not support the conclusion that there had been a reasonable suspicion at the time of his initial detention. That being so, the suspicion against him at that time had not reached the minimum level of "reasonableness" required by Article 5 § 1 (c). Although it had been imposed under judicial supervision, the detention order had been based on a mere suspicion of membership of a criminal organisation, independently of any pending criminal proceedings. Such a degree of suspicion could not be sufficient to justify an order for the detention of a judge serving on a highlevel court, in this instance the Constitutional Court.

The Court also observed that the measures taken against the applicant could not be said to have been strictly required by the exigencies of the situation for the purposes of Article 15 (derogation in time of emergency) of the Convention.

Principal facts

The applicant, Alparslan Altan, a former member of the Turkish Constitutional Court, is a Turkish national who was born in 1968 and lives in Ankara (Turkey). He is currently detained.

During the night of 15 to 16 July 2016 a group of members of the Turkish armed forces calling themselves the "Peace at Home Council" attempted to carry out a military coup aimed at overthrowing the Parliament, Government and President of Turkey. The day after the coup attempt, the national authorities blamed the network linked to Fetullah Gülen, a Turkish citizen living in Pennsylvania (United States of America) and considered to be the leader of an organisation known as FETÖ/PDY ("Gülenist Terror Organisation/Parallel State Structure"). Several criminal investigations were subsequently initiated by the appropriate prosecuting authorities in respect of suspected members of that organisation.

On 20 July 2016 the Government declared a state of emergency. On 21 July 2016 the Turkish authorities gave notice to the Secretary General of the Council of Europe of a derogation from the Convention under Article 15. The Government stated that during and after the coup attempt, the prosecuting authorities had initiated criminal investigations in respect of individuals involved in the attempt and others who had links to the FETÖ/PDY organisation, including members of the judiciary. On 16 July 2016 some 3,000 judges and prosecutors, including two judges of the Constitutional Court and more than 160 judges of the Court of Cassation and the Supreme Administrative Court, were taken into police custody and subsequently placed in pre-trial detention. In addition, warrants were issued for the arrest of 30 judges of the highest courts who were deemed to be fugitives. The state of emergency was lifted on 18 July 2018.

On 16 July 2016, in the course of a criminal investigation opened by the Ankara public prosecutor's office, Mr Altan was arrested and taken into police custody on the instructions of the same office, which described him as a member of the FETÖ/PDY organisation and urged that he be placed in pre-trial detention.

On 20 July 2016 Mr Altan, together with 13 other suspects, appeared before a magistrate on suspicion of attempting to overthrow the constitutional order and being members of the FETÖ/PDY organisation. Mr Altan denied all the accusations against him. On the same day, the magistrate ordered the pre-trial detention of Mr Altan and the other suspects. Mr Altan immediately lodged an objection against the order for his pre-trial detention, arguing that there was no concrete evidence that could justify his detention, and that such a measure did not comply with domestic law. He asked for alternative measures to be applied on the grounds that his son was severely disabled and dependent on his personal assistance.

On 4 August 2016 the Constitutional Court, meeting in plenary session, dismissed Mr Altan from his post. It found, on the basis of Article 3 of Legislative Decree no. 667, that "information from the social environment" and the "common opinion emerging over time" among members of the Constitutional Court suggested that he had links to the organisation in question and was no longer fit to practise his profession.

On 9 August 2016 the magistrate dismissed Mr Altan's objection against the order for his detention. Mr Altan made several applications for release on bail, which were refused by the competent magistrates. On several occasions the Criminal Division of the Court of Cassation reviewed whether it was necessary to keep him in pre-trial detention and ordered the extension of that measure. On 7 September 2016 Mr Altan lodged an individual application with the Constitutional Court.

On 11 January 2018 the Constitutional Court gave judgment, finding that the accusation had been based on statements by anonymous witnesses and a suspect, messages exchanged via the ByLock messaging service and mobile telephone signals. Addressing the complaint about the lawfulness of Mr Altan's initial detention, it held that this issue should be examined under Article 15 of the Constitution, by which, in a state of emergency, the exercise of fundamental rights and freedoms could be partially or fully suspended, or measures derogating from the guarantees enshrined in the Constitution for those rights could be taken. As to the merits of the complaint, it noted that the alleged offence – membership of an armed terrorist organisation – was an ordinary offence punishable by a heavy sentence and falling within the jurisdiction of the assize courts. The Constitutional Court also observed that, in view of the very specific circumstances surrounding the attempted coup and the extent to which FETÖ/PDY had infiltrated the administrative and

judicial authorities, the order for Mr Altan's pre-trial detention could be said to have been proportionate and based on justifiable grounds.

On 15 January 2018 the public prosecutor's office at the Court of Cassation filed a bill of indictment in respect of Mr Altan, charging him in particular, under Article 314 of the Criminal Code, with being a member of an armed terrorist organisation, namely FETÖ/PDY.

In a summary judgment of 6 March 2019 the 9th Criminal Division of the Court of Cassation sentenced Mr Altan to 11 years and three months' imprisonment for membership of an armed terrorist organisation. Two further individual applications lodged by Mr Altan with the Constitutional Court are currently pending.

Complaints, procedure and composition of the Court

The applicant complained that he had been arbitrarily placed in pre-trial detention, in breach of domestic law, namely Law no. 6216. He argued that there had been no specific evidence giving rise to a reasonable suspicion that he had committed a criminal offence necessitating pre-trial detention.

He maintained that the domestic courts had given insufficient reasons for the decisions ordering his detention. He complained on that account of a violation of Article 5 of the Convention, without specifying the exact provisions on which he was relying.

The Court considered it appropriate to examine these complaints under Article 5 §§ 1 and 3 (right to liberty and security) of the Convention.

The application was lodged with the European Court of Human Rights on 16 January 2017.

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

Robert **Spano** (Iceland), *President*,
Paul **Lemmens** (Belgium),
Julia **Laffranque** (Estonia),
Ivana **Jelić** (Montenegro),
Arnfinn **Bårdsen** (Norway),
Darian **Pavli** (Albania), and
Harun **Mert** (Turkey), ad hoc *judge*,

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

Decision of the Court

Article 5 §§ 1 and 3

Lawfulness of the applicant's pre-trial detention

The Court observed that it had not been alleged that Mr Altan had been arrested and placed in pre-trial detention while in the process of committing an offence linked to the attempted coup of 15 July 2016, although the Ankara public prosecutor's office, in its instructions of 16 July 2016, had also mentioned the offence of attempting to overthrow the constitutional order. The latter offence had not been taken into consideration by the magistrate who had subsequently questioned Mr Altan and ordered his pre-trial detention.

The applicant had therefore been deprived of his liberty primarily on suspicion of membership of FETÖ/PDY, considered by the investigating authorities and the Turkish courts to be an armed terrorist organisation that had planned the attempted coup. The Constitutional Court found that this constituted the factual and legal basis for the finding by the investigating authorities that there had been a case of discovery *in flagrante delicto*.

The Court noted that in its leading judgment adopted on 10 October 2017, the Court of Cassation had held that a situation of discovery *in flagrante delicto* arose when a judge was arrested on suspicion of the offence of membership of an armed organisation. The leading judgment indicated that in cases involving an alleged offence of membership of a criminal organisation, it was sufficient that the conditions laid down in Article 100 of the Code of Criminal Procedure (CCP) were satisfied in order for a suspect who was a member of the judiciary to be placed in pre-trial detention on the grounds that there was a case of discovery *in flagrante delicto*.

The Court observed, however, that Article 2 of the CCP provided a conventional definition of the concept of *in flagrante delicto*, linked to the discovery of an offence while it was being committed or immediately afterwards. Yet according to the above-mentioned precedent of the Court of Cassation, a suspicion of membership of a criminal organisation could be sufficient to characterise a case of discovery *in flagrante delicto* without the need to establish any current factual element or any other indication of an ongoing criminal act. Furthermore, from a reading of the Court of Cassation's judgment of 10 October 2017 it was not clear how that court's settled case-law concerning the concept of a continuing offence could have justified extending the scope of the concept of discovery *in flagrante delicto*, which related to the existence of a current criminal act, as provided in Article 2 of the CCP. In the Court's view, the national courts' extension of the scope of that concept and their application of domestic law in the present case were not only problematic in terms of the principle of legal certainty, but also appeared manifestly unreasonable.

Accordingly, the applicant's detention, ordered on the basis of Article 100 of the CCP in conditions depriving him of the procedural safeguards afforded to members of the Constitutional Court, had not taken place in accordance with a procedure prescribed by law, as required by Article 5 § 1.

The Court found that an extensive interpretation of the concept of *in flagrante delicto* could clearly not be regarded as an appropriate response to the state of emergency. Such an interpretation, which, moreover, had not been adopted in response to the exigencies of the state of emergency, was not only problematic in terms of the principle of legal certainty, but also negated the procedural safeguards which members of the judiciary were afforded in order to protect them from interference by the executive. It had legal consequences reaching far beyond the context of the state of emergency, and was in no way justified by the special circumstances arising in that context.

The Court concluded that the decision to place the applicant in pre-trial detention, which had not been taken "in accordance with a procedure prescribed by law", could not be said to have been strictly required by the exigencies of the situation.

There had therefore been a violation of Article 5 § 1 on account of the unlawfulness of the applicant's pre-trial detention.

Alleged lack of reasonable suspicion that the applicant had committed an offence

The Court had to have regard to all the relevant circumstances in order to determine whether there had been any objective information showing that the suspicion against the applicant had been "reasonable" at the time of his initial detention.

The Court found that the very specific context of the case called for a high level of scrutiny of the facts. It took into account the difficulties facing Turkey in the aftermath of the attempted military coup and accepted that the coup attempt had posed a major threat to democracy in Turkey. The Government had emphasised the atypical nature of the organisation in question – considered by the Turkish courts to have premeditated the coup attempt of 15 July 2016 – and argued that it had extensively infiltrated influential State institutions and the judicial system under the guise of lawfulness. In the Court's view, such alleged circumstances might mean that the "reasonableness" of the suspicion justifying detention could not be judged according to the same standards as were applied in dealing with conventional offences.

Nevertheless, the exigencies of dealing with organised crime could not justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Article 5 § 1 (c) of the Convention was impaired. The Court's task in the present case was to ascertain whether there had been sufficient objective elements at the time of Mr Altan's initial detention to satisfy an objective observer that he could have committed the offence of which he had been accused by the prosecuting authorities. In so doing, it had to assess whether the measure in question had been justified on the basis of the facts and information available at the relevant time that had been submitted to the scrutiny of the judicial authorities ordering the measure.

The Court noted that after describing the characteristics of the FETÖ/PDY organisation and its covert structure within the judiciary, the Constitutional Court had referred to the statements of two anonymous witnesses; statements by a former rapporteur of the Constitutional Court accused of belonging to FETÖ/PDY; messages exchanged via ByLock between other individuals; information about telephone lines; and records of journeys abroad. These items of evidence had been gathered long after the applicant's initial detention. The first item to be obtained had been recorded on 4 August 2016, more than two weeks after the applicant had been placed in pre-trial detention. The other statements and evidence had been obtained a considerable time afterwards. The applicant had repeatedly drawn the national courts' attention to that fact, arguing in particular that there had been no concrete evidence that could have justified his detention. However, in the reasoning that had led it to dismiss Mr Altan's application, the Constitutional Court had not addressed that argument. Likewise, the Government had remained silent on the matter.

Accordingly, unlike the Constitutional Court, the Court did not consider it necessary to examine these items of evidence, which had been obtained long after the applicant's initial detention, to ascertain whether the suspicion grounding the detention order had been "reasonable". It had to be borne in mind that the Court's task was to examine whether Mr Altan's initial detention on 20 July 2016 had been based on a reasonable suspicion, and not whether such a suspicion had persisted during his ongoing detention. In any event, the Court considered that the subsequent gathering of evidence did not release the national authorities from their obligation to provide a sufficient factual basis that could justify an applicant's detention. To conclude otherwise would defeat the purpose of Article 5 of the Convention, namely to prevent arbitrary or unjustified deprivation of liberty.

The Court observed that Mr Altan had clearly not been suspected of having been involved in the events of 15 July 2016. On 16 July 2016 the Ankara public prosecutor's office had issued instructions describing him as a member of the FETÖ/PDY terrorist organisation and calling for his pre-trial detention; however, the Government had not produced any facts or information capable of serving as a factual basis for the prosecutor's instructions.

In particular, the Court noted that it did not appear from the order by the magistrate for the applicant's detention that that measure had been based on any factual evidence indicating the existence of a strong suspicion, such as witness statements or any other fact or information giving cause to suspect the applicant of having committed the offence in question. In the Court's view, the magistrate's vague and general references to the wording of Article 100 of the CCP and to the evidence in the file could not be viewed as

sufficient to justify the "reasonableness" of the suspicion on which the detention order was supposed to have been based, in the absence either of a specific assessment of the individual items of evidence in the file, or of any information that could have justified the suspicion against the applicant, or of any other kinds of verifiable material or facts.

The Court thus found that no specific facts or information giving rise to a suspicion justifying Mr Altan's detention had been mentioned or produced during the initial proceedings, which had nevertheless concluded with the order for his pre-trial detention.

On the basis of the above analysis, the Court held that the evidence before it was insufficient to support the conclusion that there had been a reasonable suspicion against the applicant at the time of his initial detention. It found that the Government's explanations did not meet the requirements of Article 5 § 1 (c) regarding the reasonableness of a suspicion justifying an individual's detention.

As regards the notion of "reasonableness" of the suspicion on which arrest or detention had to be based during the state of emergency, the Court observed that the difficulties facing Turkey in the aftermath of the attempted military coup of 15 July 2016 were undoubtedly a contextual factor which had to be fully taken into account in interpreting and applying Article 5 of the Convention in the present case. This did not mean, however, that the authorities had *carte blanche* under Article 5 to order an individual's detention during the state of emergency without any verifiable evidence or information or without a sufficient factual basis satisfying the minimum requirements of Article 5 § 1 (c) regarding the reasonableness of a suspicion. After all, the "reasonableness" of the suspicion on which deprivation of liberty had to be based formed an essential part of the safeguard laid down in Article 5 § 1 (c).

Concerning the order for the applicant's pre-trial detention on 20 July 2016, the Court observed that it had been based on a mere suspicion of membership of a criminal organisation, although it had been imposed under judicial supervision. Such a degree of suspicion could not be sufficient to justify an order for a person's detention. In such circumstances, the measure in issue could not be said to have been strictly required by the exigencies of the situation. To conclude otherwise would negate the minimum requirements of Article 5 § 1 (c) regarding the reasonableness of a suspicion justifying deprivation of liberty and would defeat the purpose of Article 5 of the Convention. Moreover, the Court found these considerations to be especially important in the present case, given that it involved the detention of a judge serving on a high-level court, namely the Constitutional Court.

The Court therefore concluded that there had been a violation of Article 5 § 1 on account of the lack of reasonable suspicion, at the time of the applicant's initial pre-trial detention, that he had committed the offence in question. Having regard to that finding, the Court considered that it was unnecessary to examine whether the authorities had satisfied the requirement to give relevant and sufficient reasons for depriving the applicant of his liberty.

Just satisfaction (Article 41)

The Court held that Turkey was to pay the applicant 10,000 euros in respect of non-pecuniary damage.

Separate opinion

Judge Mert expressed a partly dissenting opinion. The opinion is annexed to the judgment.

17. **ECtHR, *A.M. v. France*, No. 12148/18, Chamber judgment of 29 April 2019 (Article 3, Prohibition of torture and inhuman and degrading treatment – No violation).** The applicant is an Algerian national who had been condemned to six years of imprisonment by the Paris criminal court due to his participation in an association planning a terrorist attack, followed by an order of permanent exclusion from France and a house arrest. The applicant unsuccessfully complained that if the French authorities would send him back to Algeria, he would be subject to treatment contrary to Article 3.

ECHR 156 (2019)
29.04.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of **A.M. v. France** (application no. 12148/18) the European Court of Human Rights held, unanimously, that:

if the decision to deport the applicant to Algeria is enforced there would be no violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the European Convention on Human Rights.

The case concerns the applicant's planned deportation to Algeria after he was convicted in France in 2015 for participating in acts of terrorism and was permanently banned from French territory.

The Court found that the general situation in Algeria as regards the treatment of individuals linked to terrorism did not in itself preclude the applicant's deportation.

The Court agreed with the conclusion of the French courts. It found that their assessment had been appropriate and sufficiently substantiated by domestic data and information from other reliable and objective sources.

The Court took the view that there were no serious, proven grounds to believe that if he were returned to Algeria the applicant would run a real risk of being subjected to treatment in breach of Article 3 of the Convention and it found that his deportation would not entail a violation of that provision.

Principal facts

The applicant, A.M., is an Algerian national who was born in 1985. He is currently confined to a locality in France under a compulsory residence order (since September 2018).

He settled in France in 2008 and obtained a 10-year residence permit.

On 25 September 2015 he was sentenced by the Paris Criminal Court to a six-year prison term for his participation in a criminal conspiracy to commit an act of terrorism, together with an order of permanent exclusion from France. The judgment indicated that the applicant had been, at least in 2012, wanted by the Algerian authorities.

On 21 February 2018 an order was issued by the Prefect of the Loire indicating his destination country as Algeria. It was notified to him two days later.

On 5 March 2018 A.M. lodged an application for urgent proceedings with the Lyons Administrative Court to obtain the immediate suspension of his deportation to Algeria. The judge rejected his application on the ground that he had not produced any specific, recent or detailed evidence to show clearly that he would be exposed, in Algeria, to treatment prohibited by Article 3 of the Convention. On 12 March 2018 A.M. sought the indication of an interim measure by the European Court of Human Rights, under Rule 39, to have his deportation to Algeria suspended. On 13 March 2018 the Court granted his request and instructed the Government not to enforce the measure until the end of the proceedings before it. On 19 March 2018, A.M., who was then being held in administrative detention, submitted an asylum application to obtain the status of refugee. The French Authority for the protection of refugees and stateless persons (OFPRA) rejected that application. On 4 July 2018 the National Asylum Court (CNDA) delivered a judgment rejecting an appeal by A.M. against the OFPRA's decision. The applicant appealed on points of law.

On 27 July 2018 the Lille Administrative Tribunal dismissed the appeal against the prefect's order indicating the destination country, on the ground that there was no evidence that A.M. would be exposed to treatment in breach of Article 3 of the Convention if deported to Algeria. A.M. appealed against that judgment. On 10 September 2018 A.M.'s administrative detention ended and he was confined to a locality in France under a compulsory residence order.

Complaints, procedure and composition of the Court

The applicant alleged that his deportation to Algeria would entail a breach by France of its obligations under Article 3 (prohibition of torture and inhuman or degrading treatment) of the European Convention on Human Rights. The application was lodged with the European Court of Human Rights on 12 March 2018.

Judgment was given by a Chamber of seven judges, composed as follows:
Angelika **Nußberger** (Germany), *President*,
Yonko **Grozev** (Bulgaria),
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

The Court observed that since 2015 there had been many institutional and legislative developments in Algeria. It took note in particular of the revision of the Algerian Constitution in 2016 and the better safeguarding of a certain number of fundamental rights and freedoms. That same year the Intelligence and Security Department (DRS) was disbanded. It had been designated in 2008 by the United Nations Committee against Torture as potentially being responsible for many cases of cruel, inhuman or degrading treatment. The Court further observed that, since 2016, the Directorate General of National Security (DGSN) had regularly organised human rights training for police officers.

The Court found that most of the reports available on Algeria for 2017 and 2018 no longer mentioned any allegations that individuals linked to terrorism had been tortured. Human rights organisations had declared in 2017 to the British Embassy in Algiers that they had no evidence of treatment in breach of Article 3 of the Convention. The Court emphasised, on this point, that A.M. did not seem to be able to establish that any third party in a situation comparable to his own had actually been subjected to inhuman or degrading

treatment in 2017 or 2018. The Court further observed that the French Government had provided it with a detailed list of deportations to Algeria that had been ordered and implemented against Algerian nationals on account of their links to terrorist or radical Islamist factions. None of those deportees had reported ill-treatment on the part of the Algerian authorities.

The Court also found noteworthy the fact that a number of domestic courts of Council of Europe member States, after an in-depth examination of the general situation in Algeria and the individual situations of those concerned, had recently concluded that there would be no violation of Article 3 of the Convention in the event of the return to that country of individuals linked to terrorism. While certain features of Algerian criminal procedure could possibly raise doubts as to the guarantee in that country of the right to a fair trial, they did not in themselves show that there was a general risk of ill-treatment under Article 3 for any given category of individuals. The Court concluded that the general situation as regards individuals linked to terrorism in Algeria did not, in itself, preclude the applicant's deportation.

As regards the allegation that the applicant might be wanted by the authorities as a result of his links with a jihadi cell in Annaba, the Court noted that the judgment of 25 September 2015 clearly established that this had been the case, at least for the year 2012. However, there was no evidence that the applicant was still wanted for the same offences, over seven years after they had been committed.

Moreover, the French Government had provided the Court with a *note verbale* from the Algerian authorities dated 28 November 2018 stating that A.M. did not face criminal proceedings in Algeria and showing that he had no criminal record. In any event, the Court found that the Annaba jihadi cell in question had been dismantled. Its members had been arrested, convicted and then released, without claiming to have been ill-treated, even though they had been operating within Algeria.

Therefore, there was no evidence to suggest that the Algerian authorities showed any particular interest in the applicant. Algeria had never sought his extradition from France or requested a copy of the judgment convicting him for terrorism offences. There was no hard evidence to substantiate the allegation that he was still wanted by the Algerian authorities. While it was still possible that A.M.'s terrorist background might justify his being placed under surveillance on his return to Algeria, or that his return might even entail criminal proceedings, such measures would not constitute prohibited treatment under Article 3 of the Convention. The Court found, in conclusion, that A.M. had not provided any indications to show that, if he were returned to Algeria, he would be exposed to a real risk of treatment in breach of Article 3.

The Court thus agreed with the findings of the OFPRA, the CNDA and the Administrative Courts of Lyons and Lille. It found that their assessment had been appropriate and sufficiently substantiated by domestic data and information from other reliable and objective sources. Taking account of the general situation in Algeria, neither the applicant's past links with a jihadi cell in Annaba nor the fact that the authorities were aware of his conviction sufficed to persuade the Court that he ran a real risk of being exposed to treatment prohibited by Article 3 on his return to that country.

The Court explained that this conclusion was not undermined by the absence of diplomatic assurances from Algeria, such guarantees not being necessary. It had only been in the context of its examination of the applicant's request for an interim measure that the Court had asked the French Government to obtain precise assurances from Algeria that he would be not be subjected to treatment in breach of the Convention after his arrival there. At that stage, the Court had not yet been able to proceed with an in-depth examination of the situation in Algeria or A.M.'s individual situation.

The Court took the view that there were no series or proven grounds to believe that if he were returned to Algeria the applicant would run a real risk of being subjected to treatment in breach of Article 3 of the Convention. It thus found that his deportation would not entail a violation of Article 3 of the Convention.

18. **ECtHR, *Repcevirág Szövetkezet v. Hungary*, No. 70750/14, Chamber judgment of 30 April 2019 (Article 6, Right to a fair trial – No violation).** The applicant, a cooperative registered under Hungarian law, unsuccessfully complained that the domestic courts breached its right to a fair trial the moment they rejected its requests to refer questions raised by its case to the Court of Justice of the European Union for a preliminary ruling.

ECHR 158 (2019)
30.04.2019

Press release issued by the Registrar

In today's **Chamber** judgment in the case of **Repcevirág Szövetkezet v. Hungary** (application no. 70750/14) 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 the applicant company's complaint about the domestic courts refusing to refer questions to the Court of Justice of the European Union for a preliminary ruling.

The Court found that the domestic courts' decisions had been neither arbitrary nor manifestly unreasonable. In particular, the *Kúria* had found that the applicant company had not raised any issues of EU law in its first set of proceedings, and could not subsequently rely on such issues in a separate case for damages against the Supreme Court.

Principal facts

The applicant company, Repcevirág Szövetkezet, is registered under Hungarian law as a cooperative based in Aranyosgadány.

In 2008 the tax office fined the company for unjustifiably deducting the Value-Added Tax it had paid on agricultural machines which it lent to cooperative members.

The applicant company unsuccessfully challenged the decision in court. The Supreme Court in November 2009 confirmed the first-instance court decision, referring to the case-law of the Court of Justice of the European Union (CJEU) on consideration for services in *Aardappelenbewaarplats*.

In 2010 the applicant company began proceedings in Budapest Regional Court for damages from the Supreme Court, relying on the CJEU's judgment in *Gerhard Köbler v Republik Österreich*.

The company alleged that the Supreme Court had violated EU law by failing of its own motion to apply the correct provisions to the first set of proceedings, which it alleged to be Article 17 of the Sixth Council Directive of 1978 rather than Article 8 of the Second Council Directive of 1967.

It asked Budapest Regional Court to seek a preliminary CJEU ruling on whether the Supreme Court's decision had been in line with EU law and under what circumstances the Supreme Court could be held liable for a wrongful judgment. In May 2011 the Regional Court rejected the claim against the Supreme Court and did not request a preliminary ruling. That decision was upheld in August 2012 by, the Budapest Court of Appeal, which also refused to refer a question to the CJEU.

The applicant company asked the *Kúria* (the Supreme Court from 2012) to review the appeal judgment and also requested that it refer four questions to the CJEU. The *Kúria* rejected the referral request and upheld the final judgment.

It found in particular that it was not possible to bring damages proceedings against the Supreme Court on the grounds of an incorrect application of EU law because such issues should have been raised in the first set of proceedings, but the applicant company had failed to do so. It was therefore not possible to rely on a question of EU law in the damages case.

The applicant company lodged a constitutional complaint, along with another request for a referral to the CJEU. The Constitutional Court rejected the complaint in May 2014 as inadmissible, without referring a question.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (access to court) of the European Convention on Human Rights, the applicant company complained about the courts' failure, particularly that of the *Kúria* and the Constitutional Court, to refer questions raised by its case to the CJEU for a preliminary ruling.

The application was lodged with the European Court of Human Rights on 28 October 2014.

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

Jon Fridrik **Kjølbro** (Denmark), *President*,
Robert **Spano** (Iceland),
Faris **Vehabović** (Bosnia and Herzegovina),
Egidijus **Kūris** (Lithuania),
Carlo **Ranzoni** (Liechtenstein),
Georges **Ravarani** (Luxembourg),
Marko **Bošnjak** (Slovenia),

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

Decision of the Court

The Court noted that the *Kúria* had given reasons for its refusal to refer questions to the CJEU and had therefore met one of the criteria in the CJEU's key judgment on preliminary references, *Srl Cilfit and Lanificio di Gavardo SpA v. Ministry of Health* (*Cilfit*). The Court's role was to assess whether those reasons had been arbitrary or manifestly unreasonable.

The Court noted that the *Kúria* had considered the first of the four questions suggested by the applicant company for referral to be irrelevant and that the second and fourth questions were outside the scope of the damages claim against the Supreme Court as they had concerned the interpretation of EU law.

The third proposed question had been whether a State could be held liable for infringing EU law if a complainant had not relied on any piece of EU legislation in initial proceedings.

The *Kúria* had dealt with that issue in an implicit way by pointing out that the applicant company had relied on domestic legislation, the Civil Code, in the first set of proceedings, which had been against the tax office, rather than EU law. As a consequence, the Supreme Court had been prevented from taking up issues of EU

law in its judgment in those proceedings. The *Kúria* had thus found that there could be no subsequent State liability for an infringement of EU law.

The Court stated that the *Kúria* could have stated more explicitly why it had refused to make a preliminary reference, but implicit reasoning could also be considered sufficient. It was not the Court's function to deal with errors of fact or law allegedly committed by a domestic court, unless they had infringed the rights and freedoms protected by the Convention. It therefore did not have to assess whether the *Kúria*'s approach had been compliant with EU law.

It also noted the *Kúria*'s view that the applicant company's action against the Supreme Court had been a way of making up for its omission in the first set of proceedings, where it had not relied on any piece of EU legislation or sought a preliminary reference to the CJEU.

In turn, the Constitutional Court had provided reasoning why it lacked jurisdiction over the applicant company's complaint and the Court could not challenge the Constitutional Court's view that requests for a preliminary reference to the CJEU should be made in the ordinary courts. Article 6 § 1 did not require a supreme court to give more detailed reasoning when it was applying a specific legal provision to dismiss an appeal on points of law as having no prospects of success.

The Court held that the domestic courts' refusals to make a reference for a preliminary ruling by the CJEU had been neither arbitrary nor manifestly unreasonable and that there had been no violation of Article 6§1.

19. ECtHR, *Forcadell i Lluis and Others v. Spain*, No. 75147/17, Decision of 28 May 2019 (Article 10, Freedom of expression, read in conjunction with Article 11, Freedom of assembly and association; Article 3 of Protocol No. 1, Right to free elections; Article 6, Right to a fair trial – application inadmissible). The case concerned the Spanish Constitutional Court's decision to suspend the plenary sitting of the Parliament of the Autonomous Community of Catalonia on 9 October 2017. The Court considered that the interference with the 76 applicants' right to freedom of assembly could have reasonably been considered as meeting a "pressing social need" and had been "necessary in a democratic society".

ECHR 195 (2019)
28.05.2019

Press release issued by the Registrar

In its decision in the case of **Forcadell i Lluis and Others v. Spain** (application no. 75147/17) the European Court of Human Rights has unanimously declared the application inadmissible.

The Court held that the interference with the applicants' right to freedom of assembly could reasonably be considered as meeting a "pressing social need". The suspension of the plenary sitting of the Parliament of the Autonomous Community of Catalonia had been "necessary in a democratic society", in particular in the interests of public safety, for the prevention of disorder and for the protection of the rights and freedoms of others, within the meaning of Article 11 § 2 of the Convention.

Furthermore, the Court observed that the decision by the Bureau of the Parliament to convene a plenary sitting had involved a manifest infringement of the decisions previously given by the Constitutional Court, pursuing the aim of protecting the Constitutional order.

The decision is final.

Principal facts

The applicants are 76 Spanish nationals who live in Barcelona. The case concerns the Constitutional Court's decision to suspend the plenary sitting of the Parliament of the Autonomous Community of Catalonia on 9 October 2017.

On 1 October 2017 an unauthorised referendum was held to decide on Catalonia's secession from Spanish territory. On 4 October 2017 two parliamentary groups (representing 56.3% of all seats in Parliament) requested that the Bureau of the Parliament of Catalonia convene a plenary sitting of Parliament, during which the President of the Government of Catalonia was to have assessed the results of the 1 October referendum and the effects of those results, pursuant to section 4 of Law no. 19/2017 on "the self-determination referendum". The Bureau granted the request, and the meeting was programmed for 10 a.m. on 9 October. Three other parliamentary groups (representing 43.7 % of the seats) contested the convening of that sitting on the grounds that it would infringe the Rules of the Parliament of Catalonia. Sixteen socialist MPs applied to the Constitutional Court for the issuing of an interim measure suspending the plenary sitting.

The Constitutional Court declared the application admissible and ordered the provisional suspension of the plenary sitting. On 10 October 2017 (the day after the date originally scheduled for the sitting), the President of the Catalan Government appeared before a plenary session of Parliament and declared the independence of Catalonia as a separate republic, inviting Parliament immediately to suspend the effects of that declaration. On 26 April 2018 the Constitutional Court, judging on the merits, observed that the procedure

followed by the Bureau of the Parliament to convene the plenary sitting had disregarded the provisional suspension of Law no. 19/2017 declared by the Constitutional Court on 7 September 2017 and had prevented the complainant MPs from discharging their duties. The Constitutional Court pointed out that it was the task of the Parliament of Catalonia to represent the whole population and not merely specific political factions, even if the latter represented the majority.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 11 October 2017.

Relying on Article 10 (freedom of expression) read in conjunction with Article 11 (freedom of assembly and association) of the Convention, and Article 3 of Protocol No. 1 (right to free elections), the applicants complain that the Constitutional Court's decision to suspend the convener of the plenary sitting amounts to a violation of their rights as secured under those articles inasmuch as they were prevented from expressing the will of the voters having participated in the referendum of 1 October 2017. Relying on Article 6 (right to a fair trial), the applicants submit that neither the Parliament nor they themselves had had access to a court to put forward their grievances.

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

Vincent A. **De Gaetano** (Malta), *President*,
Georgios A. **Serghides** (Cyprus),
Paulo **Pinto de Albuquerque** (Portugal),
Helen **Keller** (Switzerland),
Alena **Poláčková** (Slovakia),
María **Elósegui** (Spain),
Gilberto **Felici** (San Marino),

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

Decision of the Court

Victim status

The Court at the outset considered the question whether there had been an infringement of the rights invoked in respect of the applicants themselves or else of the Parliament of the Autonomous Community of Catalonia. In the light of the circumstances of the case, it considered that the rights and freedoms relied upon by the applicants concerned them personally and were not attributable to the Parliament of Catalonia as an institution. It followed that the applicants could be designated as a "group of private individuals" claiming to be victims of a violation of the rights set forth in the Convention, within the meaning of Article 34 of the Convention.

Articles 10 and 11

The Court considered it appropriate to assess the applicants' complaint under Article 11. It observed in that connection that the right to freedom of assembly, like that to freedom of expression, was a fundamental right and one of the foundations of a democratic society.

The Court observed that the Constitutional Court's 5 October 2017 decision to provisionally suspend the 9 October plenary sitting had had a legal basis in Spanish law, namely section 56 of the Organic Law on the Constitutional Court, which provides for the possibility of adopting preventive measures geared to

preventing an appeal before that court from being rendered nugatory. Those measures could be appealed within five days from notification. Furthermore, as regards foreseeability, the plenary sitting had been convened pursuant to Law No. 19/2017, which had been provisionally suspended by the Constitutional Court on 7 September 2017, which decision had been notified personally to all MPs. The Court took the view that the suspension of the plenary sitting had pursued, *inter alia*, the legitimate aims of "ensuring public security", "preventing disorder" and "protecting the rights and freedoms of others".

It emerged from the case-law of the Court that only convincing and pressing reasons could justify restrictions on the freedom of association. The Court observed that Parliament's decision to authorise the holding of the plenary sitting had stemmed, *inter alia*, from the failure to comply with the suspension of Law no. 19/2017. By adopting a suspension order, therefore, the Constitutional Court had been endeavouring to ensure compliance with its own decisions. That suspension appeared justified because, as the Court pointed out, constitutional courts were empowered to take the necessary action to guarantee compliance with their judgments.

The Court agreed with the Constitutional Court that a political party could campaign for a change in the State's legislation or legal or constitutional structures provided that it used lawful and democratic means to do so and proposed changes compatible with the fundamental principles of democracy. It also considered that it was necessary to avoid situations whereby parliamentarians representing a minority in Parliament were prevented from discharging their duties, as pointed out in the Constitutional Court's judgment of 26 April 2018.

The Court concluded that the interference with the applicants' right to freedom of assembly could therefore be considered as meeting a "pressing social need" and was accordingly "necessary in a democratic society". The Court dismissed the complaint as being manifestly ill-funded.

Article 3 of Protocol No. 1

The Court pointed out that for a case concerning referendums to fall within the scope of Article 3 of Protocol No. 1, the proceedings in question had to be conducted under conditions such as to ensure the free expression of the people's opinion in the choice of the legislature.

The Court considered that those conditions had not been fulfilled in the instant case. The plenary sitting of Parliament had been convened in pursuance of a law which had been suspended by the Constitutional Court and had therefore been temporarily inapplicable. The decision taken by the Bureau of the Parliament had therefore been prompted by a manifest failure to comply with decisions given by the Constitutional Court aimed at protecting the Constitutional order. Consequently, the Court declared the complaint inadmissible.

Article 6

The Court considered that this complaint had not been substantiated, and therefore dismissed it as being manifestly ill-founded.

20. ECtHR, *Ozdil and Others v. the Republic of Moldova*, No. 42305/18, Chamber judgment of 11 June 2019 (Article 5-1, Right to liberty and security – Violation; Article 8, Right to respect for private and family life – Violation). The applicants, five Turkish nationals who worked as teachers in Moldova, had been arrested and taken to Turkey on the grounds of their presumed relation to the Fetullah Gülen movement. The Court considered that the applicants' deprivation of liberty had been neither lawful nor necessary, nor devoid of arbitrariness

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ECHR 213 (2019)
11.06.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of **Ozdil and Others v. the Republic of Moldova** (application no. 42305/18) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights**,** and

a violation of Article 8 (right to respect for private and family life).

It further declared the complaint under **Article 6 § 1 (right to a fair trial)** inadmissible**.**

The case concerned the disguised extradition of five Turkish nationals sought by the Turkish authorities for alleged ties with the Fethullah Gülen movement.

The Court found in particular that arresting the applicants and extraditing them to Turkey had amounted to an extra-legal transfer from the territory of the respondent State to Turkey which had circumvented all the guarantees offered to the applicants by domestic and international law.

Principal facts

The applicants, Yasin Ozdil, Mujdat Celebi, Riza Dogan, Sedat Hasan Karacaoglu, and Mehmet Feridun Tufekci, are five Turkish nationals who were born in 1976, 1972, 1976, 1970, and 1976 respectively. They are currently detained in Turkey.

The applicants were secondary school teachers in a chain of schools in Moldova called Orizont. In connection with the attempted military coup of 15/16 July 2016 in Turkey, the Turkish ambassador to Moldova accused the Orizont schools of ties to the Gülen movement and accused the teachers in those schools of terrorism.

In March 2018 the principal of the Chişinău-based Orizont school was arrested and questioned by the Moldovan secret services concerning allegations of supporting terrorist organisations. In connection with the above events, in April 2018 all the applicants applied to the Moldovan Bureau for Migration and Asylum ("the BMA") for asylum. They sought to obtain refugee status in Moldova because they feared reprisals in their country of origin, Turkey, on the grounds of their political views. The applicants were informed in June 2018 by the prosecutor's office that there were no pending criminal investigations involving them.

In September 2018 seven teachers from the Orizont schools – among them the applicants – were arrested in the course of a joint operation conducted by the Moldovan and Turkish services. They were taken directly

to Chişinău Airport, where a specially chartered aeroplane was waiting for them and which took them immediately to Turkey. The applicants' families had no knowledge of their fate for several weeks.

Shortly afterwards their families received letters from the BMA containing decisions in which the applicants' applications for asylum were rejected and in which the applicants were banned from entering Moldovan territory for a period of five years and their expulsion under supervision from Moldova was ordered. The BMA concluded that the applicants fulfilled the legal requirements to be granted asylum in Moldova, but found nevertheless, on the basis of a secret note received from the Moldovan secret services, that they presented a threat to national security.

In September and October 2018 the applicants' representative, who had received powers of attorney from their wives, contested the BMA's decisions in court. However, their actions were dismissed on the grounds that the powers of attorney had not been signed by the applicants.

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (f) (right to liberty and security), Article 6 § 1 (right to a fair trial), Article 8 (right to respect for private and family life), and Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens) to the European Convention, the applicants complained, in particular, that they had been unlawfully deprived of their liberty and extradited to Turkey.

The application was lodged with the European Court of Human Rights on 6 September 2018.

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

Robert **Spano** (Iceland), *President*,
Marko **Bošnjak** (Slovenia),
Julia **Laffranque** (Estonia),
Valeriu **Griţco** (the Republic of Moldova),
Egidijus **Kūris** (Lithuania),
Ivana **Jelić** (Montenegro),
Darian **Pavli** (Albania),

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

Decision of the Court

Article 5 § 1

The Government submitted that the Moldovan authorities had not been aware of the applicants' fears of travelling to Turkey. However, the Court noted that the applicants had clearly expressed their fear of criminal prosecution in Turkey in their asylum applications. Moreover, the Moldovan authorities had not only failed to give the applicants a choice of jurisdiction to be expelled to, but had deliberately transferred them directly into the hands of the Turkish authorities.

Since the applicants had been transported to Turkey in a specially chartered aeroplane, it was also clear that the joint operation of the Moldovan and Turkish secret services had been prepared well in advance of September 2018. The facts of the case showed that the operation had been organised in such a manner as to take the applicants by surprise so that they would have no time or possibility to defend themselves.
The Court further noted that the BMA had not served its decisions on the applicants, but had posted them to their families after the applicants' removal.

Viewing the circumstances of the case and having regard to the evidence and to the speed with which the Moldovan authorities had acted, the Court concluded that depriving the applicants' of their liberty in September 2018 had been neither lawful nor necessary within the meaning of Article 5 § 1 (f), nor devoid of arbitrariness. Depriving the applicants of their liberty in this way amounted to an extra-legal transfer of persons from the Moldovan territory to Turkey which circumvented all guarantees offered to them by domestic and international law. There had therefore been a breach of Article 5 § 1.

Article 8

Since the applicants had been integrated into Moldovan society and had had genuine family lives there, the Court considered that their exclusion from Moldova had radically disrupted their private and family lives. Accordingly, there had been an interference with their rights under this heading.

The Court noted that Moldovan law regulated expulsion and extradition. Nevertheless, the applicants had been removed by way of an extra-legal transfer which had circumvented domestic and international legal guarantees. Since this forcible transfer had lacked a sufficient legal basis, it had not been in "accordance with the law" within the meaning of paragraph 2 of Article 8.

The Court reiterated that a person subjected to a measure based on national security considerations must be able to have it scrutinised by an independent and impartial body.

The Court observed that no proceedings had been brought against the applicants for participating in the commission of an offence. In breach of domestic law, they had not been served with the decisions declaring their presence undesirable until after they had been expelled. As the applicants had not enjoyed the minimum degree of protection against arbitrariness on the part of the authorities, the Court concluded that the interference with their private and family lives had not been in accordance with the law. There had accordingly been a violation of Article 8.

Article 6 § 1 and Article 1 of Protocol No. 7

Decisions regarding the entry, stay and deportation of aliens did not concern the determination of civil rights or obligations or of a criminal charge within the meaning of Article 6**.** Thus, since the complaint under Article 6 § 1 was incompatible *ratione materiae* with the provisions of the Convention, the Court declared it inadmissible.

Having regard to the findings under Articles 5 § 1 and 8, the Court held that there was no need to separately examine the complaint under Article 1 of Protocol No. 7.

Just satisfaction (Article 41)

The Court held that the Republic of Moldova was to pay each applicant 25,000 euros (EUR) in respect of non-pecuniary damage.

21. ECtHR, *Sh.D. and Others v. Greece, Autriche, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, No. 14165/16, Chamber judgment of 13 June 2019 (Article 3, Prohibition of inhuman or degrading treatment – Violation; Article 5-1, Right to liberty and security – Violation). The applicants, five unaccompanied migrant minors from Afghanistan, successfully complained that the conditions of detention they had been subjected to in various police stations amounted to degrading treatment. The Court also found that the applicants' detention had not been lawful.

ECHR 218 (2019)
13.06.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia (application no. 14165/16) concerning the living conditions in Greece of five unaccompanied migrant minors from Afghanistan, the European Court of Human Rights, unanimously:

- declared the complaints against Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia inadmissible as being manifestly ill-founded;

- declared the complaints against Greece under Articles 3 and 5 § 1 of the European Convention on Human Rights admissible;

- held that there had been:

A violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention. Firstly, the Court held that the conditions of detention of three of the applicants in various police stations amounted to degrading treatment, observing that being detained in these places was liable to arouse in the persons concerned feelings of isolation from the outside world, with potentially negative repercussions on their physical and mental well-being. Secondly, the Court held that the authorities had not done all that could reasonably be expected of them to fulfil the obligation to provide for and protect four of the applicants, who had lived for a month in the Idomeni camp in an environment unsuitable for adolescents. That obligation was incumbent on the Greek State with regard to persons who were particularly vulnerable because of their age.

A violation of Article 5 § 1 (right to liberty and security) with regard to three applicants. The Court held that the placement of these three applicants in the police stations amounted to a deprivation of liberty as the Greek Government had not explained why the authorities had first placed the applicants in police stations – and in degrading conditions of detention – rather than in alternative temporary accommodation. The detention of those applicants had therefore not been lawful.

Principal facts

The applicants are five Afghan nationals who entered Greece as unaccompanied migrant minors in 2016, when they were between 14 and 17 years of age. They alleged that they had fled Afghanistan because they feared for their lives as members of the Ismaili religious minority. In February 2016 they were apprehended by the police. Orders were made for their deportation and they were given one month to leave Greek territory. Some of them attempted to cross the border between Greece and North Macedonia but were stopped by the border guards. Sh.D. was arrested by the Greek police and placed in "protective custody" at Polykastro police station for 24 days. A.A., S.M., M.M. and A.B.M. were arrested on the island of Chios

and their deportation was ordered; they subsequently crossed to the Greek mainland and made their way to Idomeni, a settlement on the border between Greece and North Macedonia. For approximately one month they were accommodated at the makeshift camp in Idomeni.

In March 2016, accompanied by their lawyer, they were escorted to the Central Asylum Service in Athens to apply for asylum. In May 2016 they moved into a squatted hotel in the centre of Athens. In July 2016 S.M., M.M. and A.B.M. were taken into the Faros shelter for unaccompanied minors, a facility operating under the supervision of the Norwegian Embassy and the International Organization for Migration. In August 2016 S.M. and M.M. were transferred to the Mellon special facility for unaccompanied minors, run by the Office of the United Nations High Commissioner for Refugees (UNHCR). In December 2016 M.M. was arrested by the police on account of his status as a minor and was placed in "protective custody" for eight days. A.A. hid under a lorry in an attempt to reach Italy but was arrested and likewise placed in "protective custody" in July 2016 at Igoumenitsa Port police station, and later, after a suicide attempt, at Filiata police station. S.M. and A.A. were granted refugee status in October 2016 and January 2017 respectively.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment), all the applicants complained about their living conditions in Greece. More specifically, two of the applicants complained about their living conditions at Polykastro and Filiata police stations, where they had been held in "protective custody", while four applicants complained about their living conditions at the camp in Idomeni.

Relying on Article 5 (right to liberty and security), three of the applicants argued that their placement in protective custody at the police stations in Polykastro, Filiata and Aghios Stefanos had been incompatible with this provision of the Convention.

The application was lodged with the European Court of Human Rights on 15 March 2016.

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

Ksenija **Turković** (Croatia), *President*,
Linos-Alexandre **Sicilianos** (Greece),
Aleš **Pejchal** (the Czech Republic),
Armen **Harutyunyan** (Armenia),
Pere **Pastor Vilanova** (Andorra),
Tim **Eicke** (the United Kingdom),
Raffaele **Sabato** (Italy),

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

Decision of the Court

Article 3 (prohibition of inhuman or degrading treatment)

1. The police stations
The Court stressed that the police stations had features that were liable to give those detained there a feeling of solitude (no outdoor access to take a walk or have physical exercise, no internal catering arrangements and no radio or television to allow contact with the outside world) and were unsuited to prolonged detention. Hence, being detained there was apt to arouse in the persons concerned feelings of isolation from the outside world, with potentially negative repercussions on their physical and mental well-being. Consequently, the

conditions of detention to which three of the applicants had been subjected in various police stations amounted to degrading treatment. The Court therefore found a violation of Article 3 of the Convention.

2. The Idomeni camp

The Court noted that four of the applicants had spent around one month in the Idomeni camp, with the aim of travelling on to Germany or Switzerland in order to join other family members. They had not been in detention, having themselves chosen to go there, and could leave at any time. The applicants in question stated, among other things, that the camp, with a capacity of 1,500, had housed 13,000 people and had no sanitation.

According to the Court's case-law, States Parties to the Convention were required to protect and provide for unaccompanied foreign minors. More specifically, in cases concerning the reception of foreign minors, whether accompanied or unaccompanied, it had to be borne in mind that the child's extreme vulnerability was the decisive factor and took precedence over considerations relating to the status of illegal immigrant. Thus, the obligation to provide for and protect the applicants was apt to be imposed automatically on the domestic authorities.

The Court was conscious of the fact that the Idomeni camp (a makeshift camp set up by refugees themselves) was wholly outside the control of the State authorities. The camp's occupants lived in a very precarious situation, in deplorable physical conditions, and were dependent for their survival on the assistance given by the non-governmental organisations present at the site. The expansion of the camp and the worsening of living conditions there were attributable to some extent to the time taken by the State to dismantle the camp and especially to the fact that the State itself had not provided the resources needed to alleviate the humanitarian crisis that had been ongoing since the camp was set up. The efforts of a few non-governmental organisations alone were not sufficient to tackle the scale of the problems.

The Court also noted that Article 19 of Decree no. 220/2007 on unaccompanied minors required the competent authorities, among other things, to inform the prosecutor with responsibility for minors or the prosecutor at the first-instance court with territorial jurisdiction, who acted as a temporary guardian and took the necessary steps to appoint a guardian. However, the authorities which had originally arrested the applicants concerned on the island of Chios had released them in a bid to ensure that they left the country within one month, and there was nothing in the case file to indicate that a prosecutor had been informed of their presence in the country. Had the prosecutor been informed, he or she would have had to take the necessary steps to have the applicants transferred to an appropriate reception facility and ensure that they did not have to live for several days in an environment that was patently unsuitable for unaccompanied minors. The applicants in question had thus spent one month in the Idomeni camp, in an environment unsuitable for adolescents – in terms of security, accommodation, hygiene and access to food and care – and in precarious circumstances incompatible with their young age.

Consequently, the Court was not persuaded that the authorities had done everything that could reasonably be expected of them to fulfil the obligation to provide for and protect the applicants in question, an obligation that was incumbent on the respondent State with regard to persons who were particularly vulnerable because of their age. There had therefore been a violation of Article 3 of the Convention on account of the living conditions of these four applicants.

Article 5 (right to liberty and security)

The Court considered that the placement of three of the applicants in police stations amounted to a deprivation of liberty. It noted that the authorities had automatically applied Article 118 of Decree no. 141/1991 providing for "protective custody". That instrument had not been designed with unaccompanied migrant minors in mind and did not establish any time-limits; situations could thus arise in which the

detention of unaccompanied minors was extended for quite long periods. The Court also pointed out that Decree no. 114/2010 stipulated that the authorities should avoid detaining minors. Furthermore, Law no. 3907/2011 provided that unaccompanied minors should be placed in immigration detention only as a last resort and for the shortest time possible. Lastly, Article 3 of the 1989 United Nations Convention on the Rights of the Child placed States under an imperative duty to take the best interests of the child into consideration in any decisions concerning him or her. Accordingly, the Court considered that the Government had not explained why the authorities had first placed these three applicants in police stations, in degrading conditions of detention, rather than in alternative temporary accommodation. The applicants' detention had therefore not been lawful and there had been a violation of Article 5 § 1 of the Convention.

Just satisfaction (Article 41)

The Court held that Greece was to pay 4,000 euros (EUR) to one applicant and EUR 6,000 each to four applicants in respect of non-pecuniary damage, and EUR 1,500 to the applicants jointly in respect of costs and expenses.

22. **ECtHR, *Al Husin v. Bosnia and Herzegovina (no. 2)*, No. 10112/16, Chamber judgment of 25 June 2019 (Article 5-1, Right to liberty and security – Violation as regards the applicant's detention from August 2014 to February 2016 and No violation over the applicant's detention between July 2012 and March 2013 and March 2014 to August 2014; Article 5-4, Right to liberty and security/proceedings on lawfulness of detention – No violation).** The applicant, a Syrian national living in Bosnia and Herzegovina, had been held in detention while the authorities were seeking a third country to send him to. The Court found that no country had been willing to admit him and concluded that the grounds for his detention had not been valid for the whole period he had been deprived of his liberty.

ECHR 234 (2019)
25.06.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of Al Husin v. Bosnia and Herzegovina (no. 2) (application no. 10112/16) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights as regards the applicant's detention from August 2014 to February 2016, and,

no violation of Article 5 § 1 over his detention between July 2012 and March 2013 and March 2014 to August 2014, and

no violation of Article 5 § 4 (right to liberty and security/proceedings on lawfulness of detention).

The case concerned a man who was held in detention pending possible deportation for extended periods while the authorities sought a safe third country to remove him to. This case concerned his detention from July 2012.

The Court found in particular that from August 2014 it should have been obvious to the authorities that no country was willing to admit the applicant, who had been classed as a national security risk.

He had not been released until February 2016 as the search for a country to accept him had continued, however, that period of detention had led to a violation of his rights as the grounds to justify it had no longer been valid.

Principal facts

The applicant, Imad Al Husin, was born in Syria in 1963 and currently lives in Ilidža, Sarajevo Canton (Bosnia and Herzegovina).

Mr Al Husin studied in the former Yugoslavia in the 1980s and fought as part of a foreign mujahedin unit on the Bosnian side during the 1992-95 war. At some point he obtained citizenship of Bosnia and Herzegovina, but this was revoked in 2007. He was placed in an immigration detention centre in October 2008 as a threat to national security. He claimed asylum, but this was dismissed and a deportation order was issued in February 2011.

The applicant lodged a first application with the Court in January 2008. In February 2012 it found that he faced a violation of his rights under Article 3 (prohibition of torture) if he were to be deported to Syria and that his detention between October 2008 and the end of January 2011 had violated Article 5 § 1 (right to liberty and security) as there had been no deportation order.

The authorities issued a new deportation order in March 2012 and proceeded over the following years to extend his detention on national security grounds, despite appeals by the applicant in which, among other things, he denied being a security risk.

In the meantime, the authorities tried to find a safe third country to deport him to, but many countries in Europe and the Middle East refused to accept him.

In February 2016 he was released subject to restrictions, such as a ban on leaving his area of residence and having to report to the police.

Complaints, procedure and composition of the Court

The applicant complained about his detention under Article 5 § 1 (right to liberty and security), Article 5 § 4 (proceedings on lawfulness of detention) and Article 5 § 5 (enforceable right to compensation) of the European Convention on Human Rights. He also alleged that his conditions of detention had violated Article 3 (prohibition of torture or inhuman or degrading treatment).

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

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

Jon Fridrik **Kjølbro** (Denmark), *President*,
Faris **Vehabović** (Bosnia and Herzegovina),
Paul **Lemmens** (Belgium),
Iulia Antoanella **Motoc** (Romania),
Stéphanie **Mourou-Vikström** (Monaco),
Georges **Ravarani** (Luxembourg),
Jolien **Schukking** (the Netherlands),

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

Decision of the Court

Article 5 § 1

The Court upheld an objection by the Government that the applicant could no longer claim to be a victim of a violation of his rights owing to his detention between 21 March 2013 and 14 March 2014 as the Constitutional Court had acknowledged a violation of Article 5 § 1 for that period and he could reasonably have been expected to seek compensation at domestic level for it.

It went on to consider two admissible periods of detention: 9 July 2012 to 21 March 2013 and 14 March 2014 to 17 February 2016.

Mr Al Husin argued that he had been kept in detention for more than eight years, from October 2008 to February 2016. As he had been classified as a security risk, the authorities had known that no third country would accept him and that his removal had thus been impossible.

The Government submitted that the detention decisions had been duly ordered under the law and had been reviewed in court. It had also all long regarded his removal as a realistic prospect.

The Court noted its findings in Mr Al Husin's first case and that an interim measure to prevent his deportation to Syria had remained in force until 9 July 2012, when the first judgment had become final. That date was thus the starting point for considering his second application while 17 February 2016 was the end point. It held that Mr Al Husin's detention for the periods under consideration had been "in accordance with the law" within the meaning of the Convention. It noted that detention could be justified under Article 5 § 1 (f) of the Convention if there had been active efforts by a country's authorities to organise removal to a third country, and that was indeed the key question in the applicant's case.

The Court noted that the authorities had from September 2012 begun to seek a safe third country to accept the applicant. However, by August 2014 a total of 38 countries had refused to admit him and it had to have been clear at the latest from that date that his removal in that way was bound to fail.

The authorities had contacted more countries after August 2014, including Canada and Kazakhstan, sent fresh requests to the United Arab Emirates and Turkey and had tried unsuccessfully to organize a meeting at the embassy of Saudi Arabia. Those efforts had failed and he had finally been released in February 2016 as, under a new Aliens Act, he had reached the maximum period of detention.

The Court concluded that the grounds for Mr Al Husin's detention had not remained valid for the whole period of his detention owing to the lack of a realistic prospect of his expulsion. There had therefore been a violation of his rights under Article 5 § 1 (f) for the period from August 2014 to 17 February 2016, but no violation for 9 July 2012 to 21 March 2013 and 14 March 2014 to August 2014.

Article 5 § 4

Mr Al Husin alleged that he had not been able to challenge the lawfulness of his detention because he had not had access to evidence related to national security issues. The Government submitted in particular that both the State Court and the Constitutional Court had reviewed the decisions to extend his detention and that those courts had had access to restricted material. The Court reiterated that issues of procedural fairness had to be balanced against the public interest of national security.

It found that Mr Al Husin had been given access to evidence that had been classified as open evidence, had had legal representation, and had benefited from reviews in the State Court, the Appeals Chamber of the State Court and the Constitutional Court. Furthermore, some of the allegations against him had been quite specific, allowing him to challenge them.

Overall he had been given a reasonable opportunity to present his case and there had been no violation of Article 5 § 4 of the Convention.

Other Articles

The Court held that the applicant's complaint under Article 5 § 5 was inadmissible for non-exhaustion of domestic remedies as he had not used any of the available domestic provisions to seek compensation for the period of detention that had violated his rights. It found that his allegations under Article 3 about the conditions of his detention at the Immigration Centre were general, vague, and unsubstantiated. The complaint was therefore manifestly ill-founded and had to be rejected.

Just satisfaction (Article 41)

The Court held that Bosnia and Herzegovina was to pay the applicant 9,000 euros (EUR) in respect of non-pecuniary damage.

23. ECtHR, *Romeo Castaño v. Belgium*, No. 8351/17, Chamber judgment of 9 July 2019 (Article 2, Right to life – Violation). The applicants, five Spanish nationals, complained that the refusal from the Belgian authorities to execute the European arrest warrants was preventing the Spanish authorities from prosecuting the suspected perpetrator of their father's murder. The Court found that the lack of sufficient basis for such a refusal constituted a violation of Article 2. However, the Court stressed that Belgium's fai.re in its obligation to co-operate did not necessarily imply that Belgium was required to surrender the suspected perpetrator to the Spanish authorities.

ECHR 257 (2019)
09.07.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of **Romeo Castaño v. Belgium** (application no. 8351/17) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 2 (right to life) of the European Convention on Human Rights under its procedural aspect (effective investigation).

In this case the applicants complained that their right to an effective investigation had been breached as a result of the Belgian authorities' refusal to execute the European arrest warrants issued by Spain in respect of N.J.E., the individual suspected of shooting their father, Lieutenant Colonel Ramón Romeo, who was murdered in 1981 by a commando unit claiming to belong to the terrorist organisation ETA. The Belgian courts had held that N.J.E.'s extradition would infringe her fundamental rights under Article 3 of the Convention.

The Court observed that a risk to the person whose surrender was requested of being subjected to inhuman or degrading treatment could constitute a legitimate ground for refusing to execute a European arrest warrant and thus for refusing the cooperation requested. However, the finding that such a risk existed had to have a sufficient factual basis.

The Court held, in particular, that the scrutiny performed by the Belgian courts during the surrender proceedings had not been sufficiently thorough for the Court to find that the ground they relied on in refusing to surrender N.J.E., to the detriment of the applicants' rights, had had a sufficient factual basis. Among other things, the Belgian authorities had not sought to identify a real and individual risk of a violation of N.J.E.'s Convention rights or any structural shortcomings with regard to conditions of detention in Spain.

However, the Court stressed that the finding of a violation did not necessarily imply that Belgium was required to surrender N.J.E. to the Spanish authorities. It was the lack of sufficient factual support for the refusal to surrender her that had led the Court to find a violation of Article 2. That in no way lessened the obligation for the Belgian authorities to verify that N.J.E. would not run a risk of treatment contrary to Article 3 of the Convention if she were surrendered to the Spanish authorities.

Principal facts

The applicants are five Spanish nationals who were born between 1959 and 1964 and live in Spain.

They are the children of Lieutenant Colonel Ramón Romeo, who was murdered in Bilbao in 1981 by a commando unit claiming to belong to the terrorist organisation ETA.

In 2004 and 2005 a Spanish judge of the *Audiencia Nacional* issued two European arrest warrants in respect of N.J.E., a Spanish national of Basque origin suspected of shooting the applicants' father.

In 2013 N.J.E., who was in Belgium, was placed in detention by an investigating judge of the Ghent Court of First Instance. A few days later the Committals Division of the same court declared the arrest warrants to be enforceable. However, on appeal, the Indictments Division refused execution of the warrants, finding that there were substantial reasons to believe that execution would infringe N.J.E.'s fundamental rights. N.J.E. was released. The Federal Prosecutor's Office lodged an appeal on points of law which was dismissed by the Court of Cassation.

In 2015 an investigating judge of the *Audiencia Nacional* issued a new European arrest warrant in respect of N.J.E. The Belgian authorities refused to execute it on the same grounds as before.

Complaints, procedure and composition of the Court

Relying, in particular, on Article 2 (right to life) of the European Convention on Human Rights, the applicants alleged that the decision of the Belgian authorities not to execute the European arrest warrants was preventing the Spanish authorities from prosecuting the suspected perpetrator of their father's murder.

The application was lodged with the European Court of Human Rights on 16 January 2017.

The Spanish Government exercised their right to intervene. Observations were also received from N.J.E. and from the association *Colectivo de víctimas del terrorismo* ("COVITE"), both of whom had been given leave to intervene as third parties in the written procedure.

Judgment was given by a Chamber of seven judges, composed as follows:
Robert **Spano** (Iceland), *President*,
Paul **Lemmens** (Belgium),
Julia **Laffranque** (Estonia),
Valeriu **Griţco** (the Republic of Moldova),
Stéphanie **Mourou-Vikström** (Monaco),
Ivana **Jelić** (Montenegro),
Darian **Pavli** (Albania),
and also Stanley **Naismith**, *Section Registrar*.

Decision of the Court

Article 2 (right to life)

Spain had requested Belgium's cooperation in the context of the Framework Decision on the European arrest warrant. In that regard, the Court considered that it should examine (1) whether the Belgian authorities had responded properly to the request for cooperation, and (2) whether the refusal to cooperate had been based on legitimate grounds.

As to the first question, the Court observed that the Belgian authorities had provided their Spanish counterparts with a properly reasoned response.

In 2013 the Belgian Court of Cassation had held that the refusal to execute the European arrest warrants had been legally justified because of the risk that N.J.E.'s fundamental rights would be infringed in the event of her surrender to Spain, and in particular the risk that she would be detained in conditions contrary to Article 3 of the Convention. In 2016 the Indictments Division had found that the fresh information relied on in the new arrest warrant did not lead to a different assessment, and that the earlier assessment had in fact been confirmed by the observations issued by the United Nations Human Rights Committee in 2015 (the Committee's sixth periodic report on Spain, which, among other things, urged the Spanish authorities to put an end to incommunicado detention).

The Court therefore considered that the approach taken by the Belgian courts was compatible with the principles set out by the Court in its judgment in *Pirozzi v. Belgium*, according to which, in the context of execution of a European arrest warrant by a European Union member State, the mutual recognition mechanism should not be applied automatically and mechanically to the detriment of fundamental rights.

As to the second question, the Court emphasised that a risk to the person whose surrender was requested of being subjected to inhuman or degrading treatment on account of the conditions of detention in Spain could constitute a legitimate ground for refusing to execute the European arrest warrant and thus for refusing cooperation with Spain. Nevertheless, the finding that such a risk existed had to have a sufficient factual basis, in view also of the presence of third-party rights. In that regard the Court made the following observations.

In 2013 the Indictments Division had based its decision mainly on international reports and on the context of "Spain's contemporary political history". It had also referred to the report prepared following the CPT's periodic visit in 2011. In 2016, despite the information provided in support of the European arrest warrant issued on 8 May 2015, particularly regarding the characteristics of incommunicado detention, the Indictments Division had found that the information received did not enable it to depart from the assessment it had made in 2013, but had not conducted a detailed, updated examination of the situation as it applied in 2016. Likewise, it had not sought to identify a real and individual risk of a violation of N.J.E.'s Convention rights or any structural shortcomings with regard to conditions of detention in Spain. Furthermore, the Belgian authorities had not availed themselves of the possibility under Belgian law (section 15 of the European Arrest Warrant Act) to request further information concerning the application of the prison regime in N.J.E.'s case, and in particular concerning the place and conditions of detention, in order to verify whether her surrender would entail a real and concrete risk of a violation of the Convention. Consequently, the scrutiny performed by the Belgian courts during the surrender proceedings had not been sufficiently thorough for the Court to find that the ground they relied on in refusing N.J.E.'s surrender, to the detriment of the applicants' rights, had had a sufficient factual basis. Accordingly, Belgium had failed in its obligation to cooperate arising out of the procedural aspect of Article 2 of the Convention.
There had therefore been a violation of that provision.

However, the Court stressed that the finding of a violation did not necessarily imply that Belgium was required to surrender N.J.E. to the Spanish authorities. It was the lack of sufficient factual basis for the refusal to surrender her that had led the Court to find a violation of Article 2. That in no way lessened the obligation for the Belgian authorities to verify that N.J.E. would not run a risk of treatment contrary to Article 3 of the Convention if she were surrendered to the Spanish authorities.

More generally, the Court's judgment could not be construed as diminishing States' obligation to refrain from extraditing a person to a requesting country where there were substantial reasons for believing that the person concerned, if extradited to that country, would run a real risk of being subjected there to treatment contrary to Article 3, and hence to verify that no such risk existed.

Just satisfaction (Article 41)

The Court held that Belgium was to pay the applicants 5,000 euros (EUR) each in respect of non-pecuniary damage and EUR 7,260 jointly in respect of costs and expenses.

Separate opinion

Judge Spano expressed a concurring opinion, joined by Judge Pavli.

24. ECtHR, *Selahattin Demirtaş v. Turkey (no.3)*, No. 8732/11, Chamber judgment of 9 July 2019 (Article 10, Freedom of expression – Violation). The applicant, a Turkish national and politician, successfully complained that the criminal proceedings instituted against him on charges of disseminating propaganda in favour of a terrorist organisation, in the context of statements made during a television broadcast, had interfered with his right to freedom of expression. The Court considered that the applicant had been conveying his ideas and opinions on an issue of indisputable public concern in a democratic society, and that the speech could not be regarded as amounting to incitement to violence, armed assistance or rebellion, nor constituted a hate speech.

ECHR 256 (2019)
09.07.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of **Selahattin Demirtaş v. Turkey (no. 3)** (application no. 8732/11) 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 Mr Demirtaş's criminal conviction for statements made during a television broadcast. The statements by Mr Demirtaş had essentially urged the authorities and the public to consider the potential role of Mr Öcalan, the imprisoned leader of the PKK (Workers' Party of Kurdistan, an illegal armed organisation), in finding a peaceful solution to the Kurdish problem, and had called for an improvement in the conditions of his detention. Following a detailed examination of the statements in question, the Court found that, taken as a whole, they could not be regarded as amounting to incitement to engage in violence, armed resistance or rebellion, nor did they constitute hate speech.

The Court held that the criminal proceedings instituted against the applicant on charges of disseminating propaganda in favour of a terrorist organisation had not met a pressing social need, had not been proportionate to the legitimate aims pursued and had consequently not been necessary in a democratic society.

Principal facts

The applicant, Selahattin Demirtaş, is a Turkish national who was born in 1973 and was living in Diyarbakır at the time the application was lodged. The case concerned his criminal conviction for statements made during a television broadcast. On 20 December 2005 the Diyarbakır public prosecutor charged Mr Demirtaş with disseminating propaganda in favour of a terrorist organisation, following comments he had made by telephone, during a television programme, in his capacity as President of the Human Rights Association and spokesman of the Diyarbakır Democratic Platform.

On 28 September 2010 the Diyarbakır 5th Assize Court found Mr Demirtaş guilty and sentenced him to 10 months' imprisonment, before deciding to suspend delivery of its judgment for five years under Article 231 of the Code of Criminal Procedure. The Assize Court found that the comments in question were not covered by the right to freedom of expression protected by the Convention, that they amounted to propaganda in favour of the terrorist organisation PKK/Kongra-Gel and that they publicly defended its imprisoned leader, Öcalan, and its members. The Assize Court dismissed an objection by Mr Demirtaş against its decision to suspend delivery of the judgment. On 29 July 2013 the Diyarbakır 5th Assize Court, taking note of the entry into force of Law no. 6352, decided to set aside its judgment of 28 September 2010 and to suspend the proceedings against the applicant for three years.

Complaints, procedure and composition of the Court

Relying on Articles 9 (right to freedom of thought) and 10 (freedom of expression), the applicant alleged that the criminal proceedings against him had infringed his rights under those provisions of the Convention.

The application was lodged with the European Court of Human Rights on 23 December 2010. Judgment was given by a Chamber of seven judges, composed as follows:
Robert **Spano** (Iceland), *President*,
Marko **Bošnjak** (Slovenia),
Işıl **Karakaş** (Turkey),
Julia **Laffranque** (Estonia),
Valeriu **Griţco** (the Republic of Moldova),
Arnfinn **Bårdsen** (Norway),
Darian **Pavli** (Albania),
and also Stanley **Naismith**, *Section Registrar*.

Decision of the Court
Article 10

In the particular circumstances of the present case, the Court found that the criminal proceedings in question and the decisions taken in that context to suspend delivery of the judgment and to stay the proceedings had amounted, in view of their potential chilling effect, to interference with the exercise of Mr Demirtaş's right to freedom of expression.

Next, the Court observed that the interference had been prescribed by section 7(2) of Law no. 3713. It had pursued legitimate aims, namely the protection of national security and public safety and the prevention of disorder and crime.

The Court reiterated that there was little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest. Where the views expressed did not constitute incitement to violence, the Contracting States could not restrict the right of the public to be informed of them, even with reference to the aims set out in Article 10 § 2, namely the protection of territorial integrity or national security or the prevention of disorder or crime.

In the present case, the Court observed that Mr Demirtaş had been conveying his ideas and opinions on an issue of indisputable public concern in a democratic society, namely the potential role of the imprisoned PKK leader – who, according to Mr Demirtaş, was viewed by the Kurds as the leader of their people – in finding a peaceful solution to the Kurdish problem and the need to provide him with the means to perform that role by improving the conditions of his detention. Following a detailed examination of the statements made by Mr Demirtaş, the Court found that, taken as a whole, they could not be regarded as amounting to incitement to engage in violence, armed resistance or rebellion, nor did they constitute hate speech.

The Court therefore considered that the criminal proceedings instituted against the applicant on charges of disseminating propaganda in favour of a terrorist organisation had not met a pressing social need, had not been proportionate to the legitimate aims pursued and had consequently not been necessary in a democratic society. There had accordingly been a violation of Article 10.

Just satisfaction (Article 41) - The Court held that Turkey was to pay the applicant 2,500 euros (EUR) in respect of non-pecuniary damage and EUR 1,000 in respect of costs and expenses.

25. **ECtHR, *Kislov v. Russia*, No. 3598/10, Chamber judgment of 9 July 2019 (Article 5 -1-4-5, Right to liberty and security – Violation).** The applicant, a Belarussian national, successfully complained that the extradition from Russia to Belarus he was subjected to would have exposed him to a risk of inhuman and degrading treatment.

ECHR 254 (2019)
09.07.2019

Press release issued by the Registrar

The applicant, Vladimir Kislov, is a Belarusian national who was born in 1974. His current whereabouts are not known but he is apparently in Russia.

The case concerned the applicant's complaint about proceedings in Russia to extradite him to Belarus.

A Belarus court convicted Mr Kislov in December 2005 of accepting a bribe in return for making a favourable decision in his role as an employee at the Minsk district office of a State affiliated enterprise and he was sentenced to seven years in a strict-regime prison. He alleged that the proceedings had been brought against him in retaliation for denouncing his superior at the company for various corrupt activities and that the case was fabricated.

The applicant arrived in Russia in March 2005. He stated that he had left Belarus owing to persecution and harassment by the domestic authorities.

He was arrested in Russia in July 2009 and in October 2009 the Prosecutor General's Office approved his extradition to Belarus. He appealed, arguing in particular that the Russian authorities had not assessed whether extradition had to be refused as being based on the enforcement of a sentence which had been imposed without the minimum guarantees of a fair trial.

His lawyer submitted at a hearing that he could face the kind of ill-treatment prohibited by Article 3 of the Convention. The Russian courts upheld the extradition order. The applicant went into hiding but as of March 2016 he was apparently still in Russia.

The Belarus courts reduced his sentence in July 2010 to four years under legislative changes that had occurred subsequently. Requests to the Belarus Supreme Court for further reviews were dismissed.

The applicant raised various complaints under in particular Article 5 (right to liberty and security) about his detention in Russia pending extradition from 16 August to 13 November 2009.

Violation of Article 5 § 1
Violation of Article 5 § 4
Violation of Article 5 § 5

Interim measure (Rule 39 of the Rules of Court) – not to remove Mr Kislov to Belarus – lifted.

Just satisfaction: EUR 10,000 for non-pecuniary damage

26. ECtHR, *T.I. and Others v. Greece*, No. 40311/10, Chamber judgement of 18 July 2019 (Article 4, Prohibition of slavery and forced labour – Violation). The applicants, three Russian nationals, had obtained visas through the Consulate General of Greece in Moscow. The case concerned the failure by the authorities, among other things, to conduct an effective investigation into the issuing of visas by public officials, which had allegedly enabled human trafficking. The Court found that the competent authorities had not dealt with the case with the level of diligence required.

ECHR 272 (2019)
18.07.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of T.I. and Others v. Greece (application no. 40311/10) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 4 (prohibition of slavery and forced labour) of the European Convention on Human Rights.

In this case, three Russian nationals claimed that they had been victims of human trafficking. In particular, they alleged that they had been forced to work as prostitutes in Greece.

The Court held in particular that the legal framework governing the proceedings had not been effective and sufficient either to punish the traffickers or to ensure effective prevention of human trafficking. It further held that the competent authorities had not dealt with the case with the level of diligence required by Article 4 of the Convention.

Principal facts

The three applicants are Russian nationals who were born in 1978, 1979 and 1981. Between June and October 2003 they arrived in Greece after obtaining visas through the Consulate General of Greece in Moscow. They alleged that employees of the consulate had been bribed by Russian traffickers and had issued visas enabling them to be brought to Greece for the purposes of sexual exploitation. The three applicants were recognised as "victims of human trafficking" and the authorities instituted two sets of criminal proceedings against the persons suspected of exploiting them. Proceedings were also started in relation to the issuing of the visas.

In September 2003 one of the applicants was arrested by the police for prostitution. She stated that she had been forced to work as a prostitute. The following month, proceedings were brought against three individuals. In June 2011 the Thessaloniki Court of Appeal sentenced two of them to an unsuspended term of five years and ten months' imprisonment for criminal conspiracy, living on the earnings of prostitution and human trafficking. They were also ordered to pay 30 euros (EUR) to the applicant. The third individual was acquitted.

In December 2003 the other two applicants reported to the security directorate of the Ermoupoli police, complaining that they were victims of human trafficking. An investigation was opened. The applicants identified three individuals as the perpetrators and criminal proceedings were brought against them. In March 2010 the Athens Criminal Court sentenced two individuals to prison terms for, among other offences, forgery, use of forged documents and falsification of certificates. The sentences were commuted to pecuniary penalties of EUR 10 for each day's detention. Two other persons were acquitted of the same

charges. In March 2013 the Athens Criminal Court of Appeal acquitted two individuals who had been prosecuted for criminal organisation and human trafficking.

In May 2005 the applicants applied to the public prosecutor at the criminal court responsible for matters relating to human trafficking, stating that the documents used to obtain the visas had contained false information. They accused employees of the consulate and the companies concerned of facilitating their transfer to Greece. Proceedings were started relating to the issuing of the visas. In particular, criminal proceedings were brought against several individuals, including three consular employees, for human trafficking. However, in February 2016 the Indictments Division of the Criminal Court terminated the proceedings, ruling that prosecution of the offences of human trafficking allegedly committed by two individuals was time-barred. The Indictments Division also noted that there was no substantial evidence that the offences of which a further individual was accused had been committed.

Complaints, procedure and composition of the Court

Relying, in particular, on Article 4 (prohibition of slavery and forced labour), the applicants complained that the Greek authorities had failed to fulfil their obligations to criminalise and prosecute acts relating to human trafficking. They further complained of inadequacies and shortcomings in the investigation and the judicial proceedings.

The application was lodged with the European Court of Human Rights on 28 June 2010.

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

Ksenija **Turković** (Croatia), *President*,
Linos-Alexandre **Sicilianos** (Greece),
Aleš **Pejchal** (the Czech Republic),
Pauliine **Koskelo** (Finland),
Tim **Eicke** (the United Kingdom),
Jovan **Ilievski** (North Macedonia),
Raffaele **Sabato** (Italy),

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

Decision of the Court
Article 4 (prohibition of slavery and forced labour)

Regarding the existence of an appropriate legal and regulatory framework, the Court observed that there had been some shortcomings in the applicable legislation prior to the entry into force of Law no. 3064/2002 on 15 October 2002.

The Court noted in particular that, in the context of the proceedings concerning the issuing of the visas to the applicants, the domestic courts had been obliged to apply Article 351 of the Criminal Code prior to the amendments made in 2002, and that the applicable legislation had been inadequate in some respects. The Greek Criminal Code had prohibited forced prostitution and classified it as a lesser indictable offence, punishable by a prison term of between one and three years. Human trafficking for the purposes of sexual exploitation had not constituted a separate criminal offence. Hence, the fact that the alleged acts of human trafficking constituted lesser indictable offences at the material time had led the Indictments Division of the Athens Criminal Court to terminate the proceedings against two of the accused as being time-barred.
Accordingly, the Court was unable to conclude that the legal framework governing those proceedings had been effective and sufficient either to punish the traffickers or to ensure effective prevention of human

trafficking. There had therefore been a violation of Article 4 on that account. Nevertheless, the Court noted that since 15 October 2002 the Greek Criminal Code had expressly prohibited trafficking for sexual purposes. Several amendments had been made to the Criminal Code under Law no. 3064/2002 in order to impose stiffer penalties for human trafficking, which was henceforth classified as a serious crime, and the legislation also provided for specific measures to protect the victims of such trafficking.

As to the operational measures taken to protect the applicants, the Court noted that the authorities had not failed to take operational measures apt to protect the applicants as victims of human trafficking. Among other things, the applicants had been recognised as victims of human trafficking shortly after the authorities had been alerted to their situation, and the enforcement of the orders for their expulsion had been suspended.

Regarding the effectiveness of the police investigations and the judicial proceedings concerning the alleged exploitation, in response to the applicants' complaints, the Court noted that the criminal proceedings had lasted for seven years and nine months in the case of one of the applicants. The authorities had therefore not dealt with the case with the requisite level of diligence. As to the other two applicants, the Court observed that the criminal proceedings had lasted for nine years and three months with regard to two of the accused. Furthermore, the proceedings concerning a third individual were still suspended 15 years after the complaint had been made. These two applicants had therefore not had the benefit of an effective investigation and there had thus been a violation of the procedural aspect of Article 4.

As to the effectiveness of the proceedings concerning the issuing of the visas, the Court considered that an effective investigation should have been conducted to ascertain whether the competent authorities had subjected the applicants' applications to close scrutiny before issuing the visas. Given the seriousness of the applicants' allegations and the fact that they had accused public officials of involvement in human-trafficking networks, the authorities had been under a duty to act with special diligence in order to verify that the acts in question were subjected to detailed scrutiny and thus to dispel the doubts as to the probity of the public officials. However, owing to certain shortcomings that had not been the case.

In particular, an investigation had been ordered on 14 February 2006 although the facts had been drawn to the attention of the public prosecutor responsible for matters relating to human trafficking on 26 May 2005. Furthermore, the security directorate of the Athens police had forwarded the case file to the competent prosecutor approximately two years and seven months after receiving it, and the preliminary investigation stage had lasted for over three years.

By the time the preliminary investigation had been concluded, prosecution of the offences concerning forgery and the use of forged documents had already become time-barred. The same was true of the acts of human trafficking with which two individuals had been charged, which were declared time-barred in February 2016 (at the time of the events and prior to the entry into force of Law no. 3064/2002, human trafficking had been a lesser indictable offence to which a shorter limitation period applied). Lastly, attempts to serve summonses on the applicants, who had applied to join the proceedings as civil parties, had failed; the applicants had given their home address but no attempt had been made to trace them at that address.

Consequently, the Court held that the competent authorities had not dealt with the case with the level of diligence required by Article 4 of the Convention and that the applicants had not been involved in the investigation to the extent required under the procedural limb of that provision.

Just satisfaction (Article 41)
The Court held that Greece was to pay the applicants 15,000 euros (EUR) each in respect of non-pecuniary damage and EUR 3,000 jointly in respect of costs and expenses.

27. **ECtHR, *Miller v. United Kingdom*, No. 32001/18, Decision of 25 July 2019 (Article 2, Right to life – application inadmissible).** The applicant, a British national, complained that UK authorities had failed to carry out an effective investigation into the killing of his son and other members of the Royal Military Police while they were in duty in Iraq. The Court did not consider that the refusal by the Attorney General to authorise an application to the High Court to grant a fresh inquest had indicated that the State had failed to follow a reasonable line of enquiry. The Court concluded that the application was inadmissible as being manifestly ill-founded.

ECHR 286 (2019)
25.07.2019

Press release issued by the Registrar

The European Court of Human Rights has unanimously declared the application Miller v. the United Kingdom (application no. 32001/18) inadmissible in a decision which is final.

The case concerned the applicant's complaint under **Article 2 of the European Convention on Human Rights (right to life)** that the UK authorities had failed to carry out an effective investigation into the killing of his son, Corporal Simon Miller, and other members of the Royal Military Police (RMP) in Iraq in 2003.

The Court noted in particular that there had been several investigations into the deaths and a coroner's inquest, measures which had met the State's duty under Article 2 to carry out an effective investigation.

It did not consider that a refusal by the Attorney General in 2017, upheld in 2018, to authorise an application to the High Court to grant a fresh inquest had indicated that the State had failed to follow a reasonable line of enquiry or to take reasonable steps to ensure an effective and independent investigation.

Principal facts

The applicant, John George Miller, is a British national who was born in 1951 and lives in Washington, the United Kingdom.

His son, Corporal Simon Miller was serving in Iraq after the U.S.-led invasion of the country in 2003. Along with five other RMP members, he was killed after a crowd invaded a police station in Majar al- Kabir in Maysan Province, south east Iraq, on 24 June 2003. The RMP group had been working with the local police force as part of a mission to restore and maintain law and order.

Between July 2003 and February 2005 several Army investigations took place, including a Joint Commander's investigation, a Special Investigation Branch investigation and a Board of Inquiry probe. The Special Investigation Branch investigation resulted in a report to the Central Criminal Court in Baghdad in April 2004 and seven suspects were eventually charged, though none were convicted over the deaths.

A UK coroner's inquest held in March 2006 returned a narrative verdict of unlawful killing. The coroner found in particular that the RMP had had cordial relations with the local police and that there had apparently been no signs of potential trouble at the location. It noted also that the RMP men had not been supplied with iridium satellite telephones, despite earlier orders that all patrols should have them. The coroner found that the men had been killed by members of an Iraqi crowd at the police station.

In 2008 relatives of the families applied to the Strasbourg Court over a refusal by the Metropolitan Police to investigate whether military personnel had failed to protect the soldiers, but the application was rejected for failure to exhaust domestic remedies.

Requests by the applicant to the Minister of State for the Armed Forces for an independent inquiry were rejected in late 2010 and July 2012. An action for judicial review by the mother of one of the other RMP officers was rejected by the High Court, a decision that was upheld on appeal in July 2015. The Court of Appeal held in particular that the State's Article 2 effective investigation obligation had been met by the Board of Inquiry and the coroner's inquest and that issues surrounding the failure to issue the men with iridium telephones had also been dealt with.

In 2013 the applicant's solicitor asked the Attorney General to authorise applications to the High Court for a fresh inquest into the deaths of four of the six men, relying on alleged new evidence about intelligence on possible violence in the area and on the timing and circumstances of the deaths. In June 2017 the Attorney General refused to authorise the application for a fresh inquest, a decision he upheld in January 2018.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 2 July 2018.

Relying on Article 2 (right to life), the applicant complained that the investigations into the deaths of the RMP men had failed to comply with the procedural duty under that provision to conduct an effective investigation capable of leading to the establishment of the facts.

The decision was given by a Committee of three judges, composed as follows:

Aleš **Pejchal** (the Czech Republic), *President*,
Tim **Eicke** (the United Kingdom),
Raffaele **Sabato** (Italy),

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

Decision of the Court

Article 2

The applicant argued that the domestic investigations had been inadequate and that there were evidential leads which showed that key findings by the coroner had been flawed. He pointed in particular to potential fresh evidence which army personnel could provide and to the failure of the authorities to interview those people.

The Court reiterated its case-law on the requirement for an effective investigation under Article 2, noting that such a step was a distinct procedural obligation inherent in that provision. Even where a death had occurred in conditions of generalised violence, armed conflict or insurgency, all reasonable steps still had to be taken to ensure an effective and independent investigation.

The Court observed that there had been seven investigations or reports on the deaths of the military policemen. An inquest had also been held, returning a narrative verdict of unlawful killing, as well as judicial review proceedings to seek a declaration that there had been an insufficient investigation into the killings, in breach of Article 2. Those proceedings had been dismissed by the courts.

The Court's task was to examine whether the domestic authorities had submitted the events which had led to the deaths to the careful scrutiny required by Article 2.

It noted that the various British Army investigations had begun promptly. One of them in particular, the Board of Inquiry, had received evidence from 157 witnesses, including oral testimony from over 100 people. The applicant had not challenged the independence of those investigations.

There had also been an independent judge-led investigation in the form of inquest proceedings in 2006, which the Court had found previously could satisfy the procedural obligation of Article 2 and in which the coroner had also taken account of the results of earlier investigations.

Overall, the Court found that the investigations and the inquest had complied with the State's duty under the Convention for an effective investigation.

Nor did the Court consider that the Attorney General's refusal to grant an authorisation for a fresh inquest had shown a failure by the State to follow a reasonable line of enquiry or to take reasonable steps to ensure an effective and independent investigation.

In particular and with respect to the proposed new evidence pointed to by the applicant, the Ministry of Defence and the Attorney General had noted a lack of detail concerning the assertions of one officer, and a lack of consistency between another officer's assertions and the coroner's findings.

The Court observed that the nature and degree of scrutiny required under Article 2 depended on the circumstances of a particular case. The deaths of the military policemen had occurred more than 15 years ago, in a difficult security situation, and had been the subject of proceedings led by a coroner who had had access to all the available information.

The coroner had noted problems in determining the time of death and he had considered witness statements by Iraqis, despite the difficulties in obtaining such testimony. The coroner's findings had been well-reasoned and based on extensive evidence and the fact that the identity of the killers had not been determined did not mean that no effective investigation had taken place. Furthermore, the Iraqi authorities had pursed criminal proceedings over the deaths.

The Court noted that the obligation for an effective investigation was one of means rather than results. It found that none of the new evidence proposed by the applicant, which itself raised various problematic issues, or the criticisms of the original inquest, cast doubt on the adequacy of the State's investigations or the coroner's findings.

The State had thus carried out an effective investigation for the purposes of Article 2 and the application was inadmissible as being manifestly ill-founded.

28. ECtHR, *Iovcev and Others v. the Republic of Moldova and Russia*, No. 40942/14, Committee judgement of 19 September 2019 (Article 2 of Protocol No. 1, Right to education – Violation by Russia / No violation by the Republic of Moldova; Article 8, Right to respect for private life – Violation by Russia / No violation by the Republic of Moldova; Article 5-1, Right to liberty and security – Violation by Russia / No violation by the Republic of Moldova; Article 8, Right to respect for private and family life – violation by Russia / No violation by the Republic of Moldova). The applicants are 18 Moldavian nationals, among them five pupils, three parents and ten members of staff from Romanian/Moldovan-speaking schools in an area under the control of the authorities of the self-proclaimed "Moldavian Republic of Transdniestria" (the "MRT"). The Court noted that the Russian Federation had exercised effective control over the MRT during the period in question and that, in view of its continuing military, economic and political support for the "MRT", without which the latter could not have survived, the responsibility of Russia was engaged under the Convention. Nevertheless, the Court found that the Republic of Moldova had not failed to fulfil its positive obligations

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ECHR 313 (2019)
17.09.2019

Press release issued by the Registrar

The case concerned complaints about pressure that had been brought to bear in 2013-14 by the authorities of the self-proclaimed "Moldavian Republic of Transdniestria" (the "MRT"), on four Romanian/Moldovan-speaking schools in that Region which used the Latin alphabet. The applicants were five pupils, three parents and 10 members of staff of those schools.

In its Committee judgment in the case of **Iovcev and Others v. the Republic of Moldova and Russia** (application no. 40942/14) the European Court of Human Rights unanimously held that there had been:

- a violation by Russia of Article 2 of Protocol No. 1 (right to education) to the Convention in respect of 8 applicants (5 pupils and 3 parents of pupils in the schools concerned);

- a violation by Russia of Article 8 (right to respect for private life) in respect of 10 applicants (staff members of the schools concerned) on account of harassment by the "MRT" authorities;

- a violation by Russia of Article 5 § 1 (right to liberty and security) in respect of 3 applicants (staff members of one of the schools concerned);

- a violation by Russia of Article 8 (right to respect for private and family life) on account of searches imposed on 3 applicants (staff members of one of the schools concerned) and the seizure of their property by the "MRT" authorities.

The Court also found, unanimously, that there had been:

- no violation by the Republic of Moldova of Article 2 of Protocol No. 1 (right to education) to the Convention in respect of 8 applicants (5 pupils and 3 parents of pupils in the schools concerned);

- no violation by the Republic of Moldova of Article 8 (right to respect for private life) in respect of 10 applicants (staff members of the schools concerned) on account of alleged harassment by the "MRT" authorities;

- no violation by the Republic of Moldova of Article 5 § 1 (right to liberty and security) in respect of 3 applicants, staff members in one of those schools;

- no violation by the Republic of Moldova of Article 8 (right to respect for private and family life) on account of searches imposed on 3 applicants (staff members of one of the schools concerned) and the seizure of their property by the "MRT" authorities.

In particular the Court found that the Russian Federation had exercised effective control over the "MRT" during the period in question and that, in view of its continuing military, economic and political support for the "MRT", without which the latter could not have survived, the responsibility of Russia was engaged under the Convention on account of the interference with the applicants' rights. The Court found, by contrast, that the Republic of Moldova had not failed, in respect of the complaints raised by the applicants, to fulfil its positive obligations.

The judgment is final.

Principal facts

The applicants are 18 Moldovan nationals: 5 pupils, 3 parents of pupils and 10 members of staff from Romanian/Moldovan-speaking schools in an area under the control of the authorities of the self-proclaimed "Moldavian Republic of Transdniestria" (the "MRT"). The schools in question used the Latin script and followed a curriculum approved by the Moldovan Ministry of Education with which they were registered. Article 12 of the "MRT" Constitution provides that the official languages within the MRT are Moldovan, Russian and Ukrainian. Article 6 of the "MRT Law on languages" states that Moldovan must be written with the Cyrillic alphabet and that the use of the Latin alphabet may amount to an offence.

The applicants alleged that they had been subjected to pressure by the "MRT" authorities as part of a campaign of harassment and intimidation against the schools in 2013-2014. They complained in particular about tax and health inspections; the levying of duties; rent increases; the freezing of bank accounts preventing them from pay teachers' wages; stoppages in the electricity and gas supply; arrests and customs searches of staff members from the schools when they tried to bring in cash in order to pay wages and the seizure of some of their property. Two pupils said that they had been subjected to searches and identity checks, of between 10 minutes and two hours every day, because they went by bus to a school that had been moved to an area under the control of the Republic of Moldova after the school premises had been taken over by the "MRT" police.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 28 May 2014.

Relying on Article 2 of Protocol No. 1 (right to education) to the European Convention on Human Rights, 8 applicants (5 pupils and 3 parents of pupils) complained that measures had been taken to harass and intimidate them because of their choice to pursue their or their children's education at Romanian/Moldovan-language schools.

Relying on Article 8 (right to respect for private life) of the Convention, 10 applicants (members of staff of the schools) complained that they had been subjected to harassment because of their choice to use the Romanian/Moldovan language, and that their right to cultural identity had thereby been infringed.

Relying on Article 5 § 1 (right to liberty and security), 3 applicants (members of staff) complained that they had been unlawfully deprived of their liberty. Relying in addition on Article 8 (right to respect for private life), these 3 applicants complained of searches and seizures of their possessions.

Judgment was given by a Committee of three judges, composed as follows:

Julia **Laffranque** (Estonia), *President*,
Paul **Lemmens** (Belgium),
Arnfinn **Bårdsen** (Norway),

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

Decision of the Court

Article 2 of Protocol No. 1 (right to education) – Five pupils and three parents of pupils had complained that they had been harassed and intimidated because of their choice to pursue their or their children's education at Romanian/Moldovan-speaking schools.

1. The interference and whether there was a legitimate aim

The Court began by referring to its case-law from *Catan and Others*. It went on to find that there had been an interference with the rights of the applicant pupils and parents guaranteed by Article 2 of Protocol No. 1 to the Convention. Moreover, it pointed out that in the *Catan and Others* judgment it had found that there was no evidence to suggest that the measures taken by the "MRT" authorities in respect of the schools in question pursued a legitimate aim. Further, it had taken the view that the "MRT"'s language policy, as applied to those schools, was intended to enforce the Russification of the language and culture of the Moldovan community living in the Transdniestria Region, in accordance with the "MRT"'s overall political objectives of uniting with Russia and separating from Moldova. In the present case it did not see any reason to reach a different conclusion. Accordingly, the Court found that the interference with the rights of the applicant pupils and parents guaranteed by Article 2 of Protocol No. 1 pursued no legitimate aim and that there had therefore been a violation of that provision in respect of those applicants.

2. The issue of State responsibility

As regards the Republic of Moldova, the Court referred to the principles set out in its *Mozer* caselaw. In this connection it noted in particular that the Moldovan authorities had made considerable efforts to protect the applicants' interests, by funding the Romanian/Moldovan-language schools in Transdniestria to allow them to continue operating and so that the children could continue their schooling. Consequently it took the view that the Republic of Moldova had not failed, in respect of the applicants, to fulfil its positive obligations and had not breached Article 2 of Protocol No. 1.

As regards the Russian Federation the Court had established that this State exercised effective control over the "MRT" in the period in question. Having regard to this conclusion, and in accordance with its case-law, the Court took the view that there was no need to determine whether Russia had been in specific control of the policies and acts of the local subordinated administration. In view of its continuing military, economic and political support for the "MRT", without which the latter could not have survived, the responsibility of Russia was engaged under the Convention on account of the interference with the applicants' rights.
Consequently there had been a violation of Article 2 of Protocol No. 1 by the Russian Federation in respect of those applicants. Article 8 (right to respect for private life) – 10 staff members of the schools had complained that their right to cultural identity had been infringed.

The Court found that the harassment by the "MRT" against the schools of which the abovementioned applicants were staff members had given rise to well-founded feelings of fear and humiliation. It further took the view that the pressure on the schools was part of a broader campaign of intimidation against Romanian/Moldovan-speaking schools in the Transdniestrian Region and that this had necessarily affected the feelings of self-esteem and self-confidence of the staff of these schools, including the applicants. Thus, the harassment measures taken by the "MRT" authorities had necessarily affected, in a particularly significant way, the private life, within the meaning of Article 8 of the Convention, of these 10 applicants through their ethnic identity and professional activities. Consequently, the Court held that there had been an interference with the right to respect for the private life of these 10 applicants and that such interference did not pursue any legitimate aim. There had thus been a violation of Article 8 of the Convention in respect of these 10 applicants by the Russian Federation.

The Court found, however, that there had been no violation of Article 8 of the Convention by the Republic of Moldova.

Articles 5 § 1 (right to liberty and security) and 8 (right to respect for private and family life)

The Court first took the view that the three applicants in question, who had remained for several hours under the control of the "MRT" authorities, which had arrested and searched them, had been deprived of their liberty within the meaning of Article 5 of the Convention. The Court drew attention to its *Mozer* case law, in which it had found that the Transdniestrian Region did not have a system which reflected a Convention-compliant judicial tradition. Therefore, neither the courts of the "MRT" nor, by implication, any other authority of the "MRT", had been entitled to order that the applicants should be "arrested and detained [lawfully]" within the meaning of Article 5 § 1 (c) of the Convention. Consequently, there had been a violation of Article 5 § 1 of the Convention in respect of these three applicants.

Further, the Court found that the searches imposed on these applicants and the seizure of their personal property constituted an interference with the exercise of their right to respect for their private life and home, as guaranteed by Article 8 § 1 of the Convention. It noted that there was no evidence in the present case to suggest that the interference in question had a legal basis. There had thus been a violation of Article 8 of the Convention in respect of these three applicants.

The Court lastly took the view that the Republic of Moldova had not failed in respect of these complaints to fulfil its positive obligations. It found, however, that these provisions had been breached by the Russian Federation.

Just satisfaction (Article 41)

The Court held that Russia was to pay 12,000 euros (EUR) each to three applicants in respect of nonpecuniary damage; EUR 6,000 each to 15 applicants in respect of non-pecuniary damage; and EUR 5,000 jointly to all the applicants in respect of costs and expenses.

29. ECtHR, *Savran v. Denmark*, No. 57467/15, Chamber judgment of 1 October 2019 (Article 3, Prohibition of inuman treatment or torture – Violation). The applicant, a Turkish national who moved to Denmark in 1991, successfully complained that owing to his mental health his rights would be violated if he were to be returned to Turkey after a crime he committed. The Court considered that the Danish authorities, before deciding on expulsion, needed to obtain sufficient and individual assurances concerning the care which the applicant would receive in the event of his return to Turkey.

ECHR 329 (2019)
01.10.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of **Savran v. Denmark** (application no. 57467/15) the European Court of Human Rights held, by **four votes to three**, that there would be: **a violation of Article 3 (prohibition of inhuman treatment and torture)** of the European Convention on Human Rights if the applicant was removed to Turkey.

The case concerned the applicant's complaint that owing to his mental health his rights would be violated if he were to be returned to Turkey. The Court found in particular that psychiatrists had recommended that the applicant receive close monitoring and follow-up in order to make his treatment effective and allow for his reintegration into society after committing a serious offence.

The Court had doubts about the applicant receiving such care in Turkey, where moreover he had no family network and would need a regular and personal contact person to help him. Given such doubts, the Danish authorities needed to obtain sufficient and individual assurances on his care, otherwise removing him would violate Article 3.

Principal facts

The applicant, Arıf Savran, is a Turkish national who was born in 1985. He moved to Denmark as a six year old with his family in 1991. After being convicted of aggravated assault committed with other people, which had led to the victim's death, the applicant was in 2008 placed in the secure unit of a residential institution for the severely mentally impaired for an indefinite period and ordered to be expelled. In January 2012 the applicant's guardian *ad litem* asked that the prosecution review his sentence and the prosecution brought the case before the City Court in December 2013. On the basis of medical reports, Immigration Service opinions and statements by the applicant, the City Court in October 2014 changed Mr Savran's sentence to treatment in a psychiatric department. It also held that despite the severity of his crime it would be inappropriate to enforce the expulsion order.

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

Complaints, procedure and composition of the Court

The applicant complained that owing to his mental health it would breach his rights under Article 3 (prohibition of inhuman treatment or torture) and Article 8 (right to respect for private and family life) to send him to Turkey.

The application was lodged with the European Court of Human Rights on 16 November 2015. Judgment was given by a Camber of seven judges, composed as follows:

Paul **Lemmens** (Belgium), *President*,
Jon Fridrik **Kjølbro** (Denmark),
Faris **Vehabović** (Bosnia and Herzegovina),
Iulia Antoanella **Motoc** (Romania),
Carlo **Ranzoni** (Liechtenstein),
Stéphanie **Mourou-Vikström** (Monaco),
Jolien **Schukking** (the Netherlands),
and also Marialena **Tsirli**, *Section Registrar*.

Decision of the Court

Article 3

The Court reiterated the principles in *Paposhvili v. Belgium* on the removal of seriously ill people and the factors to be taken into consideration by domestic courts. In particular, the authorities had to determine on a case-by-case basis whether the care generally available in the receiving State was sufficient and appropriate to treat an applicant's illness to prevent suffering that was contrary to Article 3. There was a high threshold for the application of that provision in such cases. Important factors were actual access to the necessary care, involving considerations such as the cost of treatment, the existence of a social and family network and the distance to be travelled for treatment. If serious doubts remained on the impact of removal, the returning State had to obtain individual and sufficient assurances about accessibility and availability as a precondition for removal. The Court noted that a key element in Mr Savran's case was the need for follow-up and control to prevent a worsening of his psychotic symptoms when discharged.

The City Court had doubted that he would have such facilities and had ruled against his return, although the High Court had overturned that finding. It had held that the necessary medicines were available, and that access to care would be possible if he lived, as expected, in a village which was 100 km from the nearest city, Konya. He would also be able to speak Kurdish to medical staff. The Court, however, noted that the need for Mr Savran to receive follow-up and control was an important additional element in his case. Psychiatrists had stated that he needed to take medication on a daily basis and that the prospects for his reintegration into society were good if he had suitable home and intensive outpatient treatment, otherwise the prospects were bad.

However, the High Court had not developed on that issue. Furthermore, the applicant had no family network in Turkey. While that issue had not been highlighted in the medical reports, the Court found that the absence of such a network would cause him additional hardship and make it all the more crucial that he have the necessary follow-up and control. For that purpose, he would need at least assistance in the form of a regular and personal contact person and the Danish authorities should have assured themselves that such a person would be available for him. Overall, the Court shared the concerns of the City Court about Mr Savran being able to receive the necessary treatment in Turkey. That uncertainty raised serious doubts as to the impact of removal on him, which the returning State had to dispel by obtaining individual and sufficient assurances

from the receiving State as a precondition to removal. The assurances had to show that the appropriate care would be available and accessible and that the person would not find themselves in a situation which was contrary to Article 3.

The Court concluded that removing Mr Savran to Turkey without the Danish authorities receiving such individual and sufficient assurances would violate that provision of the Convention.

Other articles

The Court found that it did not need to carry out a separate examination of a complaint by the applicant under Article 8.

Just satisfaction (Article 41)

The Court held that the finding in the judgment constituted sufficient just satisfaction for any non-pecuniary damage suffered by the applicant.

Separate opinions

Judges Kjølbro, Motoc and Mourou-Vikström expressed a joint dissenting opinion which is annexed to the judgment.

30. ECtHR, *Pastörs v. Germany*, No. 55225/14, Chamber judgment of 3 October 2019 (Article 10, Freedom of expression – complaint ill-founded and rejected; Article 6-1, Right to a fair trial – No violation). The case concerned the statements of the applicant, a German national and deputy in the *Land* Parliament of Mecklenburg-Western Pomerania, the day after the commemoration of the Holocaust. Following his conviction by the national authorities, he complained that the proceedings were not impartial. The Court considered that there had not been any violation of his right to a fair trial.

ECHR 331 (2019)
03.10.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of **Pastörs v. Germany** (application no. 55225/14) the European Court of Human Rights held, **unanimously**, that

the applicant's complaint under Article 10 (freedom of expression) was manifestly ill-founded and had to be rejected, and,

by four votes to three that there had been no violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights.

The case concerned the conviction of a *Land* deputy for denying the Holocaust during a speech in the regional Parliament.

The Court found in particular that the applicant had intentionally stated untruths to defame Jews.

Such statements could not attract the protection for freedom of speech offered by the Convention as they ran counter to the values of the Convention itself. There was thus no appearance of a violation of the applicant's rights and the complaint was inadmissible.

The Court also examined a complaint by the applicant of judicial bias as one of the Court of Appeal judges who had dealt with his case was the husband of the first-instance judge. It found no violation of his right to a fair trial because an independent Court of Appeal panel with no links to either judge had ultimately decided on the bias claim and had rejected it.

Principal facts

The applicant, Udo Pastörs, is a German national who was born in 1952 and lives in Lübtheen (Germany).

On 28 January 2010, the day after Holocaust Remembrance Day, Mr Pastörs, then a member of the *Land* Parliament of Mecklenburg-Western Pomerania, made a speech stating that "the so-called Holocaust is being used for political and commercial purposes". He also referred to a "barrage of criticism and propagandistic lies" and "Auschwitz projections".

In August 2012 he was convicted by a district court, formed of Judge Y and two lay judges, of violating the memory of the dead and of the intentional defamation of the Jewish people.

In March 2013 the regional court dismissed his appeal against the conviction as ill-founded. After reviewing the speech in full, the court found that Mr Pastörs had used terms which amounted to denying the systematic, racially motivated, mass extermination of the Jews carried out at Auschwitz during the Third Reich. The

court stated he could not rely on his free speech rights in respect of Holocaust denial. Furthermore, he was no longer entitled to inviolability from prosecution as the Parliament had revoked it in February 2012.

He appealed on points of law to the Court of Appeal which, in August 2013, also rejected his case as ill-founded. At that stage he challenged one of the judges adjudicating his appeal, Judge X, claiming he could not be impartial as he was the husband of Judge Y, who had convicted him at first instance.

A three-member bench of the Court of Appeal, including Judge X, dismissed the complaint, finding in particular that the fact that X and Y were married could not in itself lead to a fear of bias.

Mr Pastörs renewed his complaint of bias against Judge X before the Court of Appeal, adding the other two judges on the bench to his claim. In November 2013 a new three-judge Court of Appeal panel, which had not been involved in any of the previous decisions, rejected his complaint on the merits. Lastly, the Federal Constitutional Court declined his constitutional complaint in June 2014.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression) and Article 6 § 1 (right to a fair trial), Mr Pastörs complained about his conviction for the statements he had made in Parliament and alleged that the proceedings against him were unfair because one of the judges on the Court of Appeal panel was married to the judge who had convicted him at first instance and could therefore not be impartial.

The application was lodged with the European Court of Human Rights on 30 July 2014.

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

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

and also Milan **Blaško**, *Deputy Section Registrar*.

Decision of the Court

Article 10 (freedom of expression)

As with earlier cases involving Holocaust denial or statements relating to Nazi crimes, the Court examined Mr Pastörs' complaint under both Article 10 and Article 17 (prohibition of abuse of rights).

It reiterated that Article 17 was only applicable on an exceptional basis and was to be resorted to in cases concerning freedom of speech if it was clear that the statements in question had aimed to use that provision's protection for ends that were clearly contrary to the Convention.

The Court noted that the domestic courts had performed a thorough examination of Mr Pastörs' utterances and it agreed with their assessment of the facts. It could not accept, in particular, his assertion that the courts had wrongfully selected a small part of his speech for review. In fact, they had looked at the speech in full and had found much of it did not raise an issue under criminal law.

However, those other statements had not been able to conceal or whitewash his qualified Holocaust denial, with the Regional Court stating that the impugned part had been inserted into the speech like "poison into a glass of water, hoping that it would not be detected immediately".

The Court placed emphasis on the fact that the applicant had planned his speech in advance, deliberately choosing his words and resorting to obfuscation to get his message across, which was a qualified Holocaust denial showing disdain to its victims and running counter to established historical facts. It was in this context that Article 17 came into play as the applicant had sought to use his right to freedom of expression to promote ideas that were contrary to the text and spirit of the Convention. Furthermore, while an interference with freedom of speech over statements made in a Parliament deserved close scrutiny, such utterances deserved little if any protection if their context was at odds with the democratic values of the Convention system.

Summing up, the Court held that Mr Pastörs had intentionally stated untruths in order to defame the Jews and the persecution that they had suffered. The interference with his rights also had to be examined in the context of the special moral responsibility of States which had experienced Nazi horrors to distance themselves from the mass atrocities.

The response by the courts, the conviction, had therefore been proportionate to the aim pursued and had been "necessary in a democratic society". The Court found there was no appearance of a violation of Article 10 and rejected the complaint as manifestly ill-founded.

Article 6 § 1 (right to a fair trial)

The Court reiterated its subjective and objective tests for a court or judge's lack of impartiality: the first focused on a judge's personal convictions or behaviour while the second looked at whether there were ascertainable facts which could raise doubts about impartiality. Such facts could include links between a judge and people involved in the proceedings. It held that the involvement in the case of two judges who were married, even at levels of jurisdiction which were not consecutive, might have raised doubts about Judge X lacking impartiality.

It was also difficult to understand how the applicant's complaint of bias could have been deemed as inadmissible in the Court of Appeal's first review, which had included Judge X himself.

However, the issue had been remedied by the review of Mr Pastörs' second bias complaint, which had been aimed at all the members of the initial Court of Appeal panel and had been dealt with by three judges who had not had any previous involvement in the case. Nor had the applicant made any concrete arguments as to why a professional judge married to another professional judge should be biased when deciding on the same case at a different level of jurisdiction.

There were thus no objectively justified doubts about the Court of Appeal's impartiality and there had been no violation of Article 6.

Separate opinions

Judges Grozev and Mits expressed a joint dissenting opinion which is annexed to the judgment.

31. ECtHR, *Kaak and Others v. Greece*, No. 34215/16, Chamber judgment of 3 October 2019 (Article 3, Prohibition of inhuman or degrading treatment – No violation; Article 5-1, Right to liberty and security – No violation; Article 5-4, Right to a speedy decision on the lawfulness of detention – Violation). The applicants, 49 adults, teenagers and children of Syrian, Afghan and Palestinian nationalities, complained about the conditions of detention in the Vial and Souda camps. The Court considered that the remedies in question had not been accessible to the applicants.

ECHR 334 (2019)
03.10.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of **Kaak and Others v. Greece** (application no. 34215/16) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 3 (**prohibition of inhuman and degrading treatment)** of the European Convention on Human Rights;

no violation of Article 5 § 1 (right to liberty and security); and

a violation of Article 5 § 4 (right to a speedy decision on the lawfulness of detention).

The case concerned the conditions of detention of Syrian, Afghan and Palestinian nationals in the "hotspots" of Vial and Souda (Greece), and the lawfulness of their detention in those camps.

The Court considered that the authorities had done all that could reasonably be expected of them in the Vial camp to meet the obligation to provide care and protection to unaccompanied minors. The other applicants had been transferred immediately – or within ten days – from the Vial camp to the Souda camp. The Court also held that the conditions of detention in the Souda camp did not amount to inhuman or degrading treatment.

The Court reiterated its previous finding that a period of one month's detention in the Vial camp should not be considered excessive, given the time needed to comply with the relevant administrative formalities. In addition, the length of the applicants' detention once they had expressed their wish to apply for asylum had been relatively short.

In contrast, the applicants, who did not have legal assistance, had not been able to understand the content of the information brochure; in particular, they were unable to understand the material relating to the various appeal possibilities available under domestic law.

Principal facts

The applicants, 49 adults, teenagers and children of Syrian, Afghan and Palestinian nationalities, unlawfully entered Greece, landing on the island of Chios by boat between 20 March and 15 April 2016.

The applicants were all arrested by the police on the day of their arrival and placed in the Vial reception, identification and registration centre; some were subsequently transferred to the Souda camp. Expulsions orders were issued against them. The expulsion orders mentioned, firstly, that the persons concerned were

to be detained with a view to their immediate return to Turkey, and secondly, that they were to remain in detention until their eventual expulsion, in view of the alleged risk of absconding.

Nevertheless, although some of the applicants were sent to other European Union countries for the purposes of family reunion or consideration of their asylum requests, others, having submitted an asylum request in Greece, had their expulsion orders revoked, with the result that they remained in detention.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment), the applicants complained about the conditions of detention in the Vial and Souda camps, which they alleged to be a danger to their physical and mental wellbeing. They complained both of the quantity and quality, in health terms, of the meals distributed to them and of the inadequacy of the medical provision. They also highlighted the overcrowding in the camps, which rendered the material conditions of accommodation dangerous. Lastly, they noted the lack of facilities capable of guaranteeing the security and safety of women and children, who constituted particularly vulnerable categories of persons. Relying on Articles 5 §§ 1, 2 and 4 (right to liberty and security), they complained about a lack of free legal aid and the fact that there was no administrative court on Chios, which, in their view, rendered any complaints about their detention impossible in practice, and consequently arbitrary.

The application was lodged with the European Court of Human Rights on 16 June 2016.

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

Ksenija **Turković** (Croatia), *President*,
Krzysztof **Wojtyczek** (Poland),
Linos-Alexandre **Sicilianos** (Greece),
Aleš **Pejchal** (the Czech Republic),
Armen **Harutyunyan** (Armenia),
Pere **Pastor Vilanova** (Andorra),
Pauliine **Koskelo** (Finland),

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

Decision of the Court

Article 5 § 1

The Vial camp
The Court noted that the unaccompanied under-age applicants had been placed in the "safe zone" within the Vial camp. As soon as they had been registered, the director of the centre had sent a request to the National Service of Social Solidarity ("EKKA"), inviting it to provide care and to identify appropriate reception facilities. He had also contacted the prosecutor at the Chios court in order to organise the transfer of certain applicants, under escort, to the reception facilities. The director of the Vial camp had also contacted the asylum services in order to take action on requests to lodge asylum applications.

The Court was not therefore convinced that the authorities had not done everything that could reasonably be expected of them to meet the obligation on the respondent State to provide care and protection for those applicants on account of their age and vulnerability.

With regard to the other applicants, the Court noted that some had spent a total of 30 days in the centre, others 24 days. All of the other applicants had been transferred, either immediately or within ten days, from the Vial camp to the Souda camp.

In consequence, the Court held that there had been no violation of Article 3.

The Souda camp
The Court noted that this camp had always been an open structure. In their allegations concerning the living conditions in this camp, the applicants did not specify how they had been affected by the specific conditions, described by them in a very summary manner.

The Court was unable to conclude that the conditions of detention in the Souda camp amounted to inhuman or degrading treatment.

It followed that there had been no violation of Article 3 in this respect.

Article 5 § 1

The Court reiterated its previous finding that a period of one month's detention for applicants in the Vial camp was not to be considered excessive, given the time necessary for the relevant administrative formalities. The Court also noted that the length of the applicants' detention once they had expressed their wish to lodge an application for asylum had been relatively short. Indeed, the camp had become a semi-open structure from 21 April 2016.

For these reasons, the Court considered that the applicants' detention had not been arbitrary and that it could not be considered unlawful for the purposes of Article 5 § 1 (f) of the Convention. It followed that there had been no violation of Article 5 § 1.

Article 5 § 4

The Court noted that the expulsion orders, which indicated the possibility of lodging an appeal, were written in Greek. It was not certain that the applicants, who had no legal assistance in either camp, had sufficient legal knowledge to understand the content of the information brochure distributed by the authorities, and especially the material relating to the various remedies available under domestic law.

The Court also noted that the information brochure in question referred in a general way to an "administrative court", without specifying which one. However, there was no administrative court on the island of Chios, where the applicants were detained, and the nearest one was on the island of Mytilene.

Even assuming that the remedies were effective, the Court did not see how the applicants could have exercised them. Having regard also to the findings of other international bodies, the Court considered that, in the circumstances of the case, the remedies in question had not been accessible to the applicants. There had therefore been a violation of Article 5 § 4.

Just satisfaction (Article 41)

The Court held that Greece was to pay each of the applicants 650 euros (EUR) in respect of nonpecuniary damage.

32. ECtHR, *R.K. v. Russia*, No. 30261/17, Chamber judgment of 8 October 2019 (Article 3, Prohibition of inhuman or degrading treatment – No violation; Article 5-1(f) and 5-4, Right to liberty and security / Right to have lawfulness of detention decided speedily by a court – Violation). The applicant, a national of the Democratic Republic of the Congo (the DRC), had been held in a detention centre for foreigners. The applicant complained that the expulsion to the DRC would have put him at risk of ill-treatment, even death. He successfully complained that the proceedings on his detention pending expulsion had been arbitrary and too long and that he had had no access to effective judicial review of his detention.

ECHR 336 (2019)
08.10.2019

Press release issued by the Registrar

The applicant, Mr R.K., is a national of the Democratic Republic of the Congo ("the DRC") who was born in 1990 and, according to the latest information available, is being held in a detention centre for foreigners in the Moscow Region.

The case concerned his complaint that his forced removal to the DRC would put him at risk of ill-treatment, even death.

Mr R.K. arrived in Moscow in 2015 on a student visa. In 2016 he applied for temporary asylum, which both the migration and judicial authorities refused to grant. They found that he had failed to provide evidence that he was involved in any DRC opposition groups and for this reason could fear persecution and/or ill treatment if returned.

During those proceedings he was arrested in March 2017 for outstaying his visa. A Moscow district court examined his case immediately and found that he had breached migration rules. The court ordered that he be held at a centre for the temporary detention of foreigners until he could be removed to the DRC.

His removal was, however, stayed in April 2017 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 Russian Government that he should not be removed for the duration of the proceedings before it.

Relying in particular on Article3 (prohibition of inhuman or degrading treatment), Mr R.K. alleged that he was wanted by the authorities in the DRC for his participation in the protests by the political opposition and he feared persecution and ill treatment if returned to the DRC. He also complained under Article 5 §§ 1 (f) and 4 (right to liberty and security/right to have lawfulness of detention decided speedily by a court) that the proceedings on his detention pending expulsion had been arbitrary and too long and that he had had no access to effective judicial review of his detention.

No violation of Article 3 – in the event of Mr R.K.'s forced return to the DRC
Violation of Article 5 §§ 1 (f) and 4

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

Just satisfaction: EUR 5,000 (non-pecuniary damage) and EUR 1,500 (costs and expenses)

33. ECtHR, *Szurovecz v. Hungary*, No. 15428/16, Chamber judgment of 8 October 2019 (Article 10, Freedom of expression – Violation). The case concerned the denied access for a journalist to conduct interviews about living conditions in reception centre for asylum-seekers. The Court found that the reasons given for such a restriction by the Hungarian authorities had not been sufficient. The authorities' decision to refuse access had not taken into account the applicant's interest as a journalist in carrying out research or the public's interest in receiving such information.

ECHR 340 (2019)
08.10.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of **Szurovecz v. Hungary** (application no. 15428/16) 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 media access to reception facilities for asylum-seekers. The applicant in the case, a journalist for an Internet news portal, complained about the authorities' refusal of his request to carry out interviews and take photographs at the Debrecen Reception Centre, thus preventing him from reporting on the living conditions there.

The Court stressed that research work was an essential part of press freedom and had to be protected.

It was not convinced that restricting the applicant's ability to carry out such research work, which had prevented him from reporting first-hand on a matter of considerable public interest, namely the refugee crisis in Hungary, had been sufficiently justified.

In particular, the authorities had only given summary reasons, namely possible problems for the safety and private lives of asylum-seekers, for their refusal, without any real weighing up of the interests at stake.

Principal facts

The applicant, Illés Szurovecz, is a Hungarian national who was born in 1993 and lives in Mezőberény (Hungary).

While working as a journalist for abcug.hu, an Internet news portal, he lodged a request with the immigration authorities in September 2015 to have access to the Debrecen Reception Centre to write a report on the living conditions of asylum-seekers. He specified that he would only take photographs of those who gave prior consent and would obtain a written authorisation from them if need be.

His request was, however, rejected for reasons concerning the private life and security of asylum-seekers. In particular, many of those in reception centres had fled some form of persecution and could therefore be put at risk if exposed in the media.

Mr Szurovecz sought a judicial review, without success. The administrative court declared his action inadmissible because the refusal was not an administrative decision under the relevant domestic law and was not therefore subject to judicial review.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression) and Article 13 (right to an effective remedy) of the European Convention, Mr Szurovecz complained that the authorities had prevented him from reporting first-hand on conditions at the Debrecen Reception Centre at the peak of the refugee crisis in Hungary.

The application was lodged with the European Court of Human Rights on 12 March 2016.

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

Ganna **Yudkivska** (Ukraine), *President*,
Vincent A. **De Gaetano** (Malta),
Paulo **Pinto de Albuquerque** (Portugal),
Iulia Antoanella **Motoc** (Romania),
Georges **Ravarani** (Luxembourg),
Marko **Bošnjak** (Slovenia),
Péter **Paczolay** (Hungary),
and also Marialena **Tsirli**, *Section Registrar*.

Decision of the Court

The Court reiterated that an essential part of protecting freedom of the press was ensuring journalists' ability to carry out research work. Creating obstacles to journalists' access to information could discourage or even prevent them from providing accurate and reliable information to the public and consequently from playing their vital role as "public watchdogs".

Such had been the situation of the applicant when not being allowed to conduct interviews and take photographs inside the Reception Centre as he had been prevented from gathering information firsthand and from verifying asylum-seekers' conditions of detention as reported by other sources. The Court found that that had constituted an interference with his freedom of expression.

The interference had been lawful, as it was based on section 2 of Decree no. 52/2007 (XII.11) of the Ministry of Justice, and its aim, protecting the private lives of asylum-seekers, had been legitimate. However, the Court found that the reasons given for such a restriction on the applicant's freedom of expression, although relevant, had not been sufficient.

First, as concerned the need to protect asylum-seekers' private lives, the immigration authorities had not apparently taken any notice of the applicant's argument that he would only take photographs with prior and, if need be, written consent. The Court also noted that reporting on the living conditions at the centre, although necessarily touching upon asylum-seekers' private lives, had not sought to sensationalise, but to report on a matter of public interest.

Secondly, neither the domestic authorities nor the Government had indicated how exactly asylumseekers' safety could be jeopardised in practice, especially if the research only took place with their consent.

Thirdly, the Court disagreed with the Government that the applicant could just as easily have taken pictures and conducted interviews outside the Reception Centre and used information published by international organisations and/or NGOs. Those alternatives could in no way replace face-to-face discussions and first-hand impressions on living conditions. Indeed, in the eyes of the public secondhand data might not have carried the same weight or seemed as reliable.

Lastly, the courts had not been able to carry out any balancing exercise of the various interests involved, given that the decision to refuse access was not subject to judicial review.

Moreover, bearing in mind the importance in a democratic society of reporting on a matter of considerable public interest, namely the refugee crisis in Hungary, the authorities' decision to refuse access had not taken into account at all the applicant's interest as a journalist in carrying out research or the public's interest in receiving such information.

It followed that there had been a violation of Article 10.

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

Just satisfaction (Article 41)

The Court held that the finding of a violation was in itself sufficient just satisfaction for the nonpecuniary damage sustained by the applicant.

34. **ECtHR, *Batiashvili v. Georgia*, No. 8284/07, Chamber judgement of 10 October 2019 (Article 5-3, Right to liberty and security / Entitlement to trial within a reasonable time or to release pending trial – No violation; Article 5-4, Right to have lawfulness of detention decided speedily by a court – No violation; Article 6-2, Presumption of innocence – Violation).** The case concerned the detention pending trial of a Georgian national, who alleged a violation of his right to be presumed innocent in connection with criminal proceedings over his allegedly helping an armed group in carrying out a rebellion. The Court considered that the applicant's allegations concerning the manipulation of evidence in his criminal trial were well founded.

ECHR 345 (2019)
10.10.2019

Press release issued by the Registrar

The applicant, Irakli Batiashvili, is a Georgian national who was born in 1961 and lives in Tbilisi.

The case concerned his detention pending trial and an alleged violation of his right to be presumed innocent in connection with criminal proceedings over his allegedly helping an armed group in carrying out a rebellion.

In July 2006 tensions arose in Georgia over the possibility that an armed group in the Kodori Gorge region, which had helped the Government in its 1992-1993 fight against separatist forces in Abkhazia, would begin a conflict with the State. The authorities eventually took control of the gorge in late July 2006 in a near bloodless police operation.

Mr Batiashvili was charged with failure to report to the authorities the potential involvement of the Abkhaz separatists in the conflict with the State and with aiding and abetting the leader of the Kodori Gorge armed force, E.K., after telephone calls between the two men were intercepted. In particular, a recording of one call played on television appeared to show the applicant and E.K. discussing, among other things, help for the armed group from the Abkhaz separatists. Mr Batiashvili later said E.K. had refused the Abkhaz offer but that that part of the conversation had been omitted from the broadcast.

Mr Batiashvili was eventually held in pre-trial detention for four months and found guilty of the charges in 2007. He received a presidential pardon on an unspecified date.

The applicant raised various complaints about the decisions on his pre-trial detention, the appeal proceedings and access to evidence on that question under, in particular, Article 5 § 3 (right to liberty and security / entitlement to trial within a reasonable time or to release pending trial) and Article 5 § 4 (right to have lawfulness of detention decided speedily by a court) of the European Convention on Human Rights.

He further alleged that statements by prominent members of parliament and the dissemination to the media of an edited recording of his telephone conversation had infringed his rights under Article 6 § 2 (presumption of innocence) of the European Convention.

No violation of Article 5 § 3
No violation of Article 5 § 4
Violation of Article 6 § 2

Just satisfaction: 3,600 euros (EUR) (non-pecuniary damage)

35. ECtHR, *M.D. v. France*, No. 50376/13, Chamber judgment of 10 October 2019 (Article 3, Prohibition of inhuman or degrading treatment – No violation). The case concerned a Guinean national migrant who identified himself as an unaccompanied minor and who complained of being left in a precarious material situation by the French authorities. The Court considered that, once the French courts had ruled that the applicant was a minor, the authorities had provided him with all the necessary assistance.

ECHR 348 (2019)
10.10.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of M.D. v. France (application no. 50376/13) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights

The case concerned M.D., a migrant who identified himself as an unaccompanied minor and who complained of being left in a precarious material situation by the French authorities.

The Court noted that, once the French courts had ruled that M.D. was a minor, the authorities had provided him with all the necessary assistance, appointing a legal representative, providing him with accommodation and enrolling him in a vocational school. Although the period of around 14 months after the Court of Appeal had found him to be an adult had been difficult, it had not amounted in the Court's view to treatment contrary to Article 3 of the Convention. M.D. had ultimately been placed in the care of the council for the *département* until he had reached majority on 15 October 2014.

Since 14 May 2018 he has been working in a company on a permanent contract.

Principal facts

The applicant, M. D., is a Guinean national from Conakry.

Having arrived in France on 23 September 2012, M.D. went immediately to the reception "platform" for asylum-seekers, stating that he had been born on 15 October 1996 and was therefore a minor.

He underwent bone tests which indicated that he was 19. On 28 September 2012, on the basis of the civil-status documents submitted by M.D., the guardianship judge held that he was a minor and issued a State guardianship order. On 4 June 2013 the Rennes Court of Appeal, on an appeal by the President of the council for the Loire-Atlantique *département*, set aside that order. It held that in the absence of a reliable document enabling the applicant's age to be determined, there was no evidence preventing it from accepting the results of the bone tests. The court therefore concluded that M.D. was an adult and the protection and assistance measures were lifted.

In November 2013 the Guinean authorities issued M.D. with a passport indicating his date of birth as 15 October 1996. On 31 July 2014, on the basis of this passport, the children's judge ruled that M.D. was a minor and made him the subject of an education assistance measure until he reached majority. M.D. was issued with an initial residence permit in November 2014 and then with a multi-year residence permit

authorising him to work. Since 14 May 2018 he has been employed by a company in Nantes on a permanent contract.

Complaints, procedure and composition of the Court

Relying in particular on Article 3 (prohibition of inhuman or degrading treatment), the applicant alleged that he had been left by the national authorities in a precarious material situation, although he was an unaccompanied foreign minor, and that no remedy had been available to him.

The application was lodged with the European Court of Human Rights on 6 August 2013.

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

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

and also Milan **Blaško**, *Deputy Section Registrar*.

Decision of the Court

Article 3

The Court reiterated that in cases concerning the reception of foreign minors, whether or not they were accompanied, the child's situation of extreme vulnerability was the decisive factor and took precedence over considerations relating to the status of illegal immigrant. The Court accepted that the national authorities were faced with a delicate task when having to assess the authenticity of civil-status documents, on account of the difficulties that arose in some cases from failings on the part of the civil-status authorities in certain countries from which migrants originated, and the associated risks of fraud.

Initially, on 28 September 2012, the guardianship judge had made an order placing M.D. under State guardianship with immediate effect on the sole basis of the Guinean birth certificate produced by the applicant, as there had been no evidence at the time to suggest that the document was forged.

On 4 June 2013 the Court of Appeal had quashed the order on the grounds that the public prosecutor's office and the council for the *département* had been justified in challenging the authenticity of the papers presented by the applicant as evidence that he was a minor. The documents presented by M.D., and later his passport, had been handed over to the police by the judges for authentication before they gave a final decision.

The Court therefore saw no reason to call into question the assessment made by the domestic courts or to reach a different conclusion.

Following the order of 28 September 2012, M.D., having been recognised as a minor, had been placed immediately under the guardianship of the President of the council for the *département*, until that decision was overturned by the Court of Appeal on 4 June 2013 when M.D. was found to be an adult.

The Court therefore observed that, once the French courts had ruled that M.D. was a minor, the authorities had provided him with all the necessary assistance, appointing a legal representative, providing him with accommodation and enrolling him in a vocational school. Accordingly, the Court noted that the authorities which had implemented the ruling of 28 September 2012 had done everything that could reasonably be expected of them to fulfil the State's obligation to assist and protect the applicant, who, as an unaccompanied foreign minor unlawfully present in the country, had fallen into the category of the most vulnerable members of society. The Court considered that M.D.'s situation during that period had not constituted treatment contrary to Article 3.

Subsequently, on 4 June 2013, the Court of Appeal had ruled that M.D. was an adult. As far as the authorities were concerned, that had continued to be the case until 31 July 2014. With regard to the period between 4 June 2013 and 31 July 2014, the Court considered that the French authorities could not be said to have remained indifferent to M.D.'s situation, although he had remained without accommodation for 40 nights while being regarded as an adult asylum-seeker. Furthermore, the applicant had not provided the Court with details of his actual living conditions. Although his situation during that period had been difficult, it had not amounted to treatment contrary to Article 3 of the Convention.

Lastly, on 31 July 2014, on the basis of the passport produced by M.D., the children's judge had made an order placing him in the care of the council for the *département* until he reached majority on 15 October 2014. M.D. did not submit any complaints in relation to this third period, and the Court held that his situation had not constituted treatment in breach of Article 3.

36. ECtHR, *Lewit v. Austria*, No. 4782/18, Chamber judgment of 10 October 2019 (Article 8, Right to respect for private and family life – Violation). The Court considered that the Austrian courts had failed to protect the applicant's rights, an Austrian national and one of the last Holocaust survivors still alive, because they had failed to conduct a comprehensive examination to consider whether an article had been defamatory to him.

ECHR 346 (2019)
10.10.2019

Press release issued by the Registrar

In today's **Chamber** judgment in the case of Lewit v. Austria (application no. 4782/18) the European Court of Human Rights held, unanimously, that there had been: **a violation of Article 8 (right to respect for private and family life)** of the European Convention on Human Rights.

The case concerned a now 96-year-old Holocaust survivor's complaint that he had been defamed by a right-wing periodical and that the courts had not protect his right to reputation. The Court found that the Austrian courts had failed to protect the applicant's rights because they had never dealt with the central issue of his claim: that he had been defamed by an article which had used terms like "mass murderers", "criminals" and "a plague" to describe people like him liberated from the Mauthausen concentration camp complex in 1945.

Instead, the courts had concluded that he had no standing to bring the case at all as the number of people liberated had been so large that he could not have been personally affected by statements in which he had not been named. However, the courts had not examined the fact that by the time of the article there were far fewer survivors still alive. The courts had also concluded that the article had simply repeated statements made in an earlier piece on the same theme and thus the words had had no separate defamatory meaning. The Court found that no explanation had been provided for that finding and concluded that in fact the context and purpose of the two articles was very different.

Overall, the lack of a proper examination by the courts of the applicant's defamation claim had led to a violation of his privacy rights.

Principal facts

The applicant, Aba Lewit, is an Austrian national who was born in 1923 and lives in Vienna (Austria).

He is one of the last Holocaust survivors still alive.

In summer 2015 the periodical *Aula* published an article where people liberated from the Mauthausen concentration camp were described as "mass murderers", "criminals" and "a plague".

The authorities opened criminal investigations against the author of the article but they were ultimately discontinued. In *Aula*'s February 2016 issue the same author reported on the discontinuation of the criminal investigations and repeated verbatim the earlier statements. Mr Lewit, together with nine other survivors, who had all been imprisoned in concentration camps and were liberated in 1945, brought an action under the Media Act (*Mediengesetz*) against *Aula* and the author.

The claimants argued that they had been defamed and insulted by the 2016 article, even if they had not been named personally. They reiterated that they had all been victims of the National Socialist regime, and had

been imprisoned in Mauthausen because of their origins, beliefs or faith and liberated after the war. They had never committed any criminally significant acts.

The Graz Regional Criminal Court dismissed their claim, finding that the number of people liberated from Mauthausen, about 20,000 in 1945, was so large as to mean the claimants could not be individually concerned by the article's statements. It held that the claimants therefore did not have standing to bring their claim. It also found that the article had not contained any separate defamatory statements when compared with the one published in 2015.

On appeal the claimants argued that they were indeed recognisable, firstly, because only a few former Mauthausen prisoners were still alive and, secondly, because they were known as activist survivors of the Holocaust. The Graz Court of Appeal dismissed the appeal, without going into the questions of the size of the group and the claimants' legal standing. It confirmed the first-instance finding that the statements in question did not have a separate meaning from those published in the 2015 article.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), Mr Lewit complained that the courts had failed in their duty to protect his reputation from the false and defamatory statements made in *Aula.*

The application was lodged with the European Court of Human Rights on 18 January 2018.

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

Angelika **Nußberger** (Germany), *President*,
Gabriele **Kucsko-Stadlmayer** (Austria),
Ganna **Yudkivska** (Ukraine),
André **Potocki** (France),
Síofra **O'Leary** (Ireland),
Mārtiņš **Mits** (Latvia),
Lado **Chanturia** (Georgia),
and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Admissibility

The Court first found that Mr Lewit and the other former Mauthausen prisoners, as survivors of the Holocaust, constituted a social group, reiterating its case-law that the private life of each member of a group could be affected by negative stereotyping or defamatory statements. It thus considered that although Mr Lewit had not been identified by name in the article, the case fell within the scope of his private life and that Article 8 of the Convention was applicable.

The Court took note of the Government's argument that he should have exhausted domestic remedies before bringing his case to Strasbourg, in particular by bringing an action under Article 1330 of the Civil Code over the original 2015 article or the 2016 follow-up.

The Court reiterated that in privacy cases involving the media a remedy at national level had to offer at least the possibility of compensation for any non-pecuniary damage caused. However, based on the Austrian Supreme Court's case-law, a claim under Article 1330 of the Civil Code did not provide such an option and so Mr Lewit, one of whose stated aims had been to obtain compensation for non-pecuniary

damage, had not been obliged to use that legal option. The Court also rejected other remedies suggested by the Government as ineffective for his purposes.

On the merits

The Court reiterated that under Article 8 a fair balance had to be achieved between competing interests, those of the individual and those of the community as a whole. However, the domestic courts had never got to the stage of carrying out such a balancing exercise in Mr Lewit's case.

The first-instance court, basing its conclusion on previous domestic case-law, had found that the size of the group of liberated prisoners had been too large to allow for Mr Lewit's identification which meant he had no legal standing to bring a claim. That had been despite the fact that the courts had never before dealt with the very particular question of the impact of a statement on a group of people whose size had diminished considerably over time, as in the present case.

The Court of Appeal had not taken up the question of legal standing at all, despite Mr Lewit making very detailed arguments. That meant that the courts had never examined the core of his claim: that he had been personally affected and defamed by the statements because only very few members of the group were still alive. Not had the courts provided relevant and sufficient arguments to support their view.

The first-instance court had also found that the 2016 article was simply a description of the preliminary investigation into the 2015 article and that the statements in the second piece had had no separate defamatory meaning. It did not provide any answer as to how it had reached that conclusion, although it was a point that should have been examined in detail.

The appeal court had in turn explicitlity noted the lack of an explanation by the first-instance body, but had gone on anyway to agree with its conclusion.

For its part, the Court was not persuaded by the findings that Mr Lewit and the other claimants could not have been personally affected by the second article given that the context of the two pieces had been very different. The first had focussed on the historical event of the Mauthausen liberation, while the second had concerned the criminal investigation into the author. The domestic courts would thus have been required to provide a comprehensive explanation of the reasons for their interpretation.

The Court concluded that the domestic courts had never actually examined the core of Mr Lewit's claim of defamation as they had failed to carry out a comprehensive examination of the questions of legal standing and of whether the statements in question had had the same or a separate meaning in the context of the 2016 article. The courts had therefore failed to conduct a comprehensive assessment of a matter that had affected Mr Lewit's privacy rights, leading to a procedural violation of Article 8.

Just satisfaction (Article 41)

The Court held that Austria was to pay the applicant 648.48 euros (EUR) in respect of pecuniary damage, EUR 5,000 in respect of non-pecuniary damage, and EUR 6,832.85 in respect of costs and expenses.

37. ECtHR, *O.D. v. Bulgaria*, No. 34016/18, Chamber judgment of 10 October 2019 (Articles 2, Right to life and 3, Prohibition of torture and inhuman or degrading treatment – Violation; Article 13, Right to an effective remedy, read in conjunction with Articles 2 and 3 – Violation). The applicant, a Syrian national, successfully complained that, were he to be expelled to Syria, he would be subjected to ill-treatment on account of his desertion from the Syrian army. The Court considered that the Bulgarian authorities had not carried out an evaluation of the general situation in Syria and that the applicant had not had access to an effective remedy.

ECHR 347 (2019)
10.10.2019

Press release issued by the Registrar

This case concerned an order made by the Bulgarian authorities for the expulsion to Syria of a former Syrian serviceman on the grounds that he posed a threat to national security.

In today's **Chamber** judgment1 in the case of O.D. v. Bulgaria (application no. 34016/18) the European Court of Human Rights held unanimously:

- that O.D.'s removal to Syria would amount to a **violation of Article 2 (right to life) and Article 3 (prohibition of torture and inhuman or degrading treatment)** of the European Convention on Human Rights

- that there had been a **violation of Article 13 (right to an effective remedy), read in conjunction with Articles 2 and 3.**

The Court found, in particular, that in view of the overall situation in Syria and the individual risk faced by the applicant it could not be established that he could safely return to Syria.

The Court also found that the applicant had not had access to an effective remedy, noting that his request for a stay of execution of the expulsion order had been rejected on the grounds that he posed a threat to national security, and that the proceedings relating to the application for refugee status or humanitarian status had not been aimed at reviewing the lawfulness of the expulsion order or its effects in relation to the complaints concerning the right to life and the right not to be subjected to ill-treatment.

The Court decided to indicate to the Government, under Rule 39 of the Rules of Court, that O.D. should not be expelled.

Principal facts

The applicant is a Syrian national who was born in 1991 and lives in Sofia.

In 2011 the applicant joined the Syrian army and apparently reached the grade of sergeant. He was a sniper and had the ability to handle missiles. He stated that he had deserted in 2012, joining the Free Syrian Army for nine months.

In 2013 he left Syria for Turkey, where he stayed for three months. He then travelled to Bulgaria, where he made two asylum claims, both of which were rejected. The Bulgarian authorities ordered his expulsion in

the same year, considering that he represented a threat to national security. The applicant's appeals against that decision were unsuccessful.

In 2018 the European Court of Human Rights decided to indicate to the Bulgarian Government that the applicant should not be expelled for the duration of the proceedings before the Court, under Rule 39 of the Rules of Court (interim measures).

In the same year the Syrian Embassy in Bulgaria issued the applicant with a passport that was valid for two years. It is currently held by the "Migration" service in the Ministry of the Interior and the applicant is considered to be unlawfully resident in Bulgaria.

Complaints, procedure and composition of the Court

The applicant alleged that, were he to be expelled to Syria, he would be at risk of breaches of his rights as guaranteed by Article 2 (right to life) and Article 3 (prohibition of torture and inhuman or degrading treatment). He also submitted that he had not had an effective remedy (Article 13) in respect of his complaints.

The application was lodged with the European Court of Human Rights on 13 July 2018.

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

Angelika **Nußberger** (Germany), *President*,
Ganna **Yudkivska** (Ukraine),
Yonko **Grozev** (Bulgaria),
Síofra **O'Leary** (Ireland),
Mārtiņš **Mits** (Latvia),
Lətif **Hüseynov** (Azerbaijan),
Lado **Chanturia** (Georgia),

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

Decision of the Court

Articles 2 (right to life) and 3 (prohibition of torture and inhuman or degrading treatment)

The Court noted that the decisions of the Refugees Agency and the Supreme Administrative Court, and the Government's observations, acknowledged that the overall situation in Syria warranted protection of the rights guaranteed by Articles 2 and 3 of the Convention.

For its part, the Court observed that the security and humanitarian situation, and the nature and extent of the hostilities in Syria, had deteriorated dramatically between the applicant's arrival in Bulgaria in June 2013 and the final judgment upholding the order for his expulsion in August 2014, and also between the latter date and the decision refusing him protection. Furthermore, the situation appeared unchanged to date.

Despite an overall easing of hostilities, the parties to the conflict were engaged in intense fighting and were carrying out indiscriminate attacks, including against the civilian population and civilian infrastructure, and were engaging in looting and persecution. Moreover, large-scale arbitrary arrests and detentions had been carried out as recently as the beginning of 2019 in the vicinity of Homs, the applicant's city of origin.

With regard to the individual risk faced by the applicant, the Court noted that he feared ill-treatment because he had allegedly deserted from the Syrian army. It also observed that there was nothing in the domestic decisions or in the Government's observations to suggest that the Bulgarian authorities considered the applicant's version not to be credible. The Court also took particular note of the existence of practices of execution, arbitrary detention and ill-treatment of individuals who had deserted from the army or had refused to carry out orders to shoot. Moreover, the same assessment of the individual risk faced by the applicant in Syria had been made by the Supreme Administrative Court and in the Government's observations.

Consequently, the Court considered that it could not be established, in view of the applicant's allegations that he would be subjected to ill-treatment on account of his desertion from the army, that he could safely return to Syria, either to the city of Homs or elsewhere in the country. Thus, the applicant's removal from Bulgaria to Syria would amount to a violation of Articles 2 and 3 of the Convention.

Article 13 (right to an effective remedy), read in conjunction with Articles 2 and 3

The Court observed that the Supreme Administrative Court had not addressed the risk referred to by the applicant, simply stating that the threats he faced and the rights he sought to protect had not been clear. Hence, it had not conducted an assessment of the overall situation in Syria. Moreover, the applicant's request for a stay of execution of the expulsion order had been rejected on the ground, among others, that he posed a threat to national security.

As to the proceedings concerning the application for refugee status or humanitarian status, the applicant would have been protected against possible expulsion had the outcome been in his favour.

However, those proceedings had not been aimed at reviewing the lawfulness of the expulsion order or its effects in relation to the complaints under Articles 2 and 3 of the Convention. In any event, in refusing to grant the status requested the Supreme Administrative Court, while noting the existence of a serious and widespread situation in Syria, had applied the domestic legislation according to which considerations relating to a threat to national security took precedence over a situation of risk in the destination country. The remedy in question had therefore not enabled the issue of risk to be determined.

Furthermore, the Government had not referred to any other remedies available in Bulgarian law for that purpose. Hence, under the legislation as it currently stood, the applicant would have had no other means of obtaining effective scrutiny of his complaints under Articles 2 and 3 of the Convention. There had therefore been a violation of Article 13 of the Convention.

Just satisfaction (Article 41)

The Court held that Bulgaria was to pay the applicant 2,500 euros (EUR) in respect of costs and expenses and that the finding of a violation constituted in itself sufficient just satisfaction in respect of non-pecuniary damage.

38. ECtHR, *Mehmet Ali Eser v. Turkey*, No. 1399/07, Chamber judgment of 15 October 2019 (Article 6-1-3c, Right to a fair trial and right to legal assistance of own choosing – No violation). The case concerned restrictions on the applicant's right of access to a lawyer during the preliminary investigation stage of proceedings against him for being a member of an illegal armed organisation. The Court found that the Turkish court had not violated the applicant's rights.

ECHR 353 (2019)
15.10.2019

Press release issued by the Registrar

The applicant, Mehmet Ali Eser, is a Turkish national who was born in 1958 and lives in Istanbul (Turkey).

The case essentially concerned restrictions on his right of access to a lawyer during the preliminary investigation stage of proceedings against him for being a member of an illegal armed organisation.

On 5 August 1997, Mr Eser was arrested on suspicion of being a member of TKP-ML/TIKKO (Communist Party of Turkey/Marxist-Leninist/Turkish Workers and Peasants' Liberation Army), while also in possession of a fake identity card. He was taken to a police station for questioning but remained silent. Over the next seven days, he was initially refused access to legal assistance and alleges that he was tortured by the police. He had three separate medical examinations which were inconclusive. A few days later, a co accused, Z.Ş., gave a statement which confirmed the applicant's involvement in the criminal organisation.

Mr Eser was ultimately found guilty in 2009 and sentenced to six years and three months' imprisonment.

The trial court relied on the arrest report, the fake identity card and Z.Ş.'s statements, noting that Mr Eser had denied the accusations against him throughout the proceedings.

He raised allegations of ill-treatment before the public prosecutor and the investigating judge at the pre-trial stage, and before the trial court during the criminal proceedings, but no action was taken. Relying in particular on Article 6 §§ 1 and 3 (c) (right to a fair trial and right to legal assistance of own choosing) Mr Eser alleged that his statements taken in the absence of a lawyer and under coercion had been used by the trial court to convict him.

No violation of Article 6 §§ 1 and 3 (c)

39. **ECtHR, *G.B. and Others v. Turkey*, No. 4633/15, Chamber judgment of 17 October 2019 (Article 3, Prohibition of inhuman or degrading treatment – Violations; Article 13, Right to an effective remedy – Violation; Article 5-1-4, Right to liberty and security / right to have lawfulness of detention decided speedily by a court – Violations).** The applicants, a mother and her three young children, Russian nationals, successfully complained about their conditions of detention in the retention centre, especially on account of overcrowding and poor hygiene.

ECHR 358 (2019)
17.10.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of **G.B. and Others v. Turkey** (application no. 4633/15) the European Court of Human Rights held, unanimously, that there had been:

two violations of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights concerning the applicants' conditions of detention pending deportation at two different removal centres;

a violation of Article 13 (right to an effective remedy) in conjunction with Article 3 because of the lack of effective remedies for the applicants to complain about the conditions of detention at one of the removal centres; and,

violations of Article 5 §§ 1 and 4 (right to liberty and security / right to have lawfulness of detention decided speedily by a court).

The case concerned the immigration detention of a mother and her three young children pending their deportation from Turkey. They had been released after nearly four months following a series of challenges about the lawfulness of their detention before the domestic courts.

The Court found that the Government had failed to disprove the applicants' allegations that they had been detained in overcrowded dormitories, had rarely been allowed to go outside for fresh air, had constantly been exposed to cigarette smoke from other detainees and had not been given suitable food for children. Such conditions were manifestly adverse even for adults, and had therefore been all the more so for the three applicants who were vulnerable children.

It also held that even though a new law had come into force in 2014 which had completely overhauled the legal framework on migration and asylum in Turkey, it had had been wholly ineffective in the applicants' case for them to complain about either the conditions or lawfulness of their detention.

Principal facts

The applicants, G.B. and her three children, are Russian nationals who were born in 1986, 2008, 2012, and 2013 respectively. According to the latest information in the case file, they live in Baku (Azerbaijan).

They entered Turkey on 17 October 2014. According to the official records, they were arrested the next day attempting to illegally cross the border into Syria. The local governor's office ordered G.B.'s detention pending deportation and the whole family were transferred to Kumkapı Foreigners' Removal Centre in Istanbul.

On 23 October 2014 the Istanbul governor's office further ordered the deportation and detention of G.B. The whole family was held at the Kumkapı Foreigners' Removal Centre for the next three months, before being transferred on 23 January 2015 to the Gaziantep Foreigners' Removal Centre.

Following their transfer, the Gaziantep governor's office issued a deportation and detention order against all four applicants.

The applicants challenged the lawfulness of their detention at both removal centres, and requested their release. They stressed that the conditions at the centres were particularly unsuitable for young children and that the authorities had not considered any alternatives to detention, despite their vulnerable situation.

The Istanbul Magistrate's Court examined their requests with regard to their detention at Kumkapı. In an initial decision of November 2014 it decided that it could not rule on the lawfulness of the minor applicants' detention at this centre because it found that there was no decision actually ordering their placement there. It further found that their mother's detention was lawful as she posed a danger to public safety and had attempted to leave Turkey illegally. In four subsequent decisions, the court similarly declared G.B.'s detention lawful, referring to the relevant legal provisions under domestic law.

The Gaziantep Magistrates' Court, on the other hand, in a decision of 5 February 2015 concluded that the applicants' detention at Gaziantep did not comply with law, and ordered their release. The court found in particular that no explanation had been given as to why their detention was called for and that an asylum request was still ongoing before the administrative courts. They were released five days later.

On 15 December 2014, while still being held at Kumkapı, the applicants had also lodged an individual application with the Constitutional Court about the conditions and unlawfulness of their detention and the fact that it was impossible for them to raise those complaints under domestic law.

On 9 January 2015 the Constitutional Court dismissed their request for urgent measures, holding that the conditions of their detention did not amount to an immediate and serious risk to their lives or to their physical or mental integrity. That court then declared the case inadmissible in May 2018, finding that the applicants had in the meantime been released following the decision by Gaziantep Magistrates' Court and that they could bring compensation proceedings in respect of complaints concerning both the conditions and the unlawfulness of their detention before the administrative courts.

Complaints, procedure and composition of the Court

Relying on Articles 3 (prohibition of inhuman or degrading treatment), 8 (right to respect for private and family life) and 13 (right to an effective remedy), the applicants complained about the conditions of their detention at Kumkapı, especially on account of overcrowding, poor hygiene and lack of outdoor exercise, and alleged that conditions at Gaziantep had been even worse.

They also brought a number of complaints under Article 5 §§ 1, 2, 4, and 5 (right to liberty and security / right to be informed of the reasons for arrest / right to have lawfulness of detention decided speedily by a court / right to compensation), alleging that their detention had been unlawful, that the authorities had failed to inform them of the reasons for their detention, that the judicial review mechanism to challenge the lawfulness of detention had been ineffective and that they had not been able to claim compensation under domestic law.

The application was lodged with the European Court of Human Rights on 22 January 2015.

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

Robert **Spano** (Iceland), *President*,
Marko **Bošnjak** (Slovenia),
Valeriu **Grițco** (the Republic of Moldova),
Egidijus **Kūris** (Lithuania),
Arnfinn **Bårdsen** (Norway),
Darian **Pavli** (Albania),
Saadet **Yüksel** (Turkey),

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

Decision of the Court

Article 3 (conditions of detention)

The Court observed that reports by the CPT (the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) and the National Human Rights Institution of Turkey had corroborated the applicants' allegations about their conditions of detention at the Kumkapı Foreigners' Removal Centre.

In contrast, the Government had failed to give evidence to refute the applicants' allegations. It had failed to prove its submission that the applicants had been accommodated in a separate living area for families with access to a playground, while they had not disproved the allegations that the family had rarely been allowed to go outside for fresh air, had constantly been exposed to cigarette smoke from other detainees and had not been given food suitable for children. Indeed, the little information it had provided, such as the size of the dormitories and the number of bunk beds in each dormitory, could on its own lead the Court to draw alarming conclusions as to the severe lack of personal space at Kumkapı.

The Court considered that the conditions of the applicants' detention at Kumkapı, for three months without knowing when exactly they would be released, had caused them distress which had exceeded the unavoidable level of suffering inherent in detention and had reached the threshold of severity for bringing the case within the scope of Article 3.

It stressed that it had already found that such conditions were manifestly adverse even for adults. Such a situation had therefore been particularly unsuitable for the extremely vulnerable applicant children and had been totally at odds with the widely recognised international principles on the protection of children.

The Government had likewise failed to submit sufficient evidence to refute the applicants' allegations with regard to the Gaziantep removal centre. It was not clear from the evidence it had submitted, namely photographs of some of the rooms there, whether the applicants had actually stayed in those rooms and, if so, with how many people. The photographs had even suggested that the applicant children had been made to sleep on iron-frame bunk-beds with sharp edges, which could be dangerous for children their age, and that they had not been provided with any indoor or outdoor play areas.

The Court therefore concluded that there had been a violation of Article 3 as concerned the conditions of detention at both the Kumkapı and Gaziantep removal centres.

Article 13 in conjunction with Article 3 (remedies to complain about conditions of detention)

The Court noted in particular that the Constitutional Court had not examined the admissibility and merits of the applicants' complaint while they were still being detained. A purely compensatory remedy available after release, whether before the Constitutional Court or elsewhere, could not therefore have been effective in respect of the applicants' complaints. Moreover, a legal mechanism with the capacity to provide a more urgent reaction had been called for in circumstances where children were being detained in adverse conditions.

The Court therefore found that although the individual-application procedure before the Constitutional Court had in principle offered the possibility of redress, it had not functioned effectively in the applicants' case.

Nor had the Government suggested any other remedies available at the time that could have rapidly put an end to the ongoing violation of the applicants' rights under Article 3.

The Court also pointed out that even though a new law (Law no. 6548) had come into force in 2014 which had completely overhauled the legal framework on migration and asylum in Turkey, neither that law nor the regulations to implement it had designated any specific remedies for complaints about conditions of detention.

There had accordingly been a violation of Article 13 in conjunction with Article 3 as concerned the lack of effective remedies for the applicants to complain about the conditions of detention at the Kumkapı removal centre.

Given that finding, the Court held that there was no need to examine the applicants' complaints under Article 13 in conjunction with Article 3 about the conditions of their detention at the Gaziantep removal centre.

Article 5 §§ 1 and 4 (lawfulness of detention and judicial review mechanism)

It was not in dispute that the applicant children had been deprived of their liberty from 18 October 2014 to 10 February 2015. However, the only detention order issued against them had been on 23 January 2015 following their transfer from Istanbul to Gaziantep. The other detention orders had only concerned their mother, without mentioning them in any way.

The Court therefore concluded that the applicant children had not been detained in accordance with the procedure prescribed by Law no. 6458, at least not between 18 October 2014 and 23 January 2015, in violation of Article 5 § 1 of the Convention.

It also held that the applicants' detention between 5 and 10 February 2015, despite an order for their release and without any satisfactory explanation from the Government for such a delay, had been arbitrary, in further violation of Article 5 § 1.

The Court then went on to examine the judicial mechanism available to the applicants to have the lawfulness of their detention reviewed. It reiterated that such judicial-review proceedings were particularly urgent in the case of the applicants, a mother with her three very young children.

The applicants had been able to challenge their detention on six occasions before magistrates' courts and to lodge an individual application with the Constitutional Court, ultimately obtaining their release. However, the applicant children had been left in legal limbo for three months as the Istanbul Magistrates

Court had not actually ruled on the lawfulness of their detention and had only examined the lawfulness of their mother's detention in its subsequent decisions. The decisions concerning the mother had moreover not engaged in any way in a review, simply repeatedly declaring her detention lawful using the same brief formula, without taking into consideration her arguments at all.

In those circumstances, namely where a review had not been undertaken at all or had been devoid of any effect, it had been up to the Constitutional Court to carry out a very prompt review. The Court noted, however, that the applicants had remained in administrative detention for some 50 days after lodging their application with the Constitutional Court, during which period that court had taken no action as regards their complaints.

Having regard to the particular vigilance required by the special circumstances of the applicants, the Court concluded that both the Istanbul Magistrates' Court and the Constitutional Court had failed to conduct a speedy and effective review of the lawfulness of the applicants' detention, in violation of Article 5 § 4.

Although the review mechanism under Law no. 6458 had been ineffective in the applicants' case, the Court noted that that should not cast doubt on the general effectiveness of the judicial review mechanism under that law or that of the individual application procedure before the Constitutional Court.

Other complaints

Given the findings above, the Court held that there was no need to examine the applicants' remaining complaints under Article 5 §§ 2 and 5 or Article 8, alone or in conjunction with Article 13.

Article 41 (just satisfaction)

The Court held that Turkey was to pay G.B. 2,250 euros (EUR) and EUR 20,000 to each of her children in respect of non-pecuniary damage, and EUR 5,500 in respect of costs and expenses.

40. ECtHR, *Polyakh and Others v. Ukraine*, Nos. 58812/15, 53217/16, 59099/16, 23231/18 et 47749/18, Chamber judgment of 17 October 2019 (Article 6-1, Right to a fair trial – Violation; Article 8, Right to respect for private and family life – Violation). The applicants, five Ukrainian nationals, successfully complained that their dismissal and the measures of lustration concerning the civil servants had been in violation of their rights. The Court found that the interference with the rights of the five applicants' rights had not been necessary in a democratic society.

ECHR 356 (2019)
17.10.2019

Press release issued by the Registrar

The case **Polyakh and Others v. Ukraine** (applications nos. 58812/15, 53217/16, 59099/16, 23231/18, and 47749/18) concerned the dismissal of five civil servants under the Government Cleansing (Lustration) Act of 2014 ("the GCA").

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

a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights owing to the length of the proceedings in the first three applicants' domestic cases, and

a violation of Article 8 (right to respect for private and family life) of the Convention in respect of all five applicants.

The Court first held that the first three applicants' right to a fair trial had been violated because proceedings on their dismissal had lasted more than four and a half years and were still ongoing.

As for the Article 8 issue, the Court did not doubt that in the period when former President Viktor Yanukovych was in power the Ukrainian civil service and democratic governance had indeed faced considerable challenges which justified a need for reform. However, the Court found in particular that the GCA was of very broad application and had led to the dismissal of the applicants simply for having worked in the civil service for more than a year while Mr Yanukovych was in power or for having been a Communist Party official before 1991.

The law therefore had no regard to the applicants' individual roles or whether they had been associated with any of the undemocratic acts which had taken place under the former president. In that context, Ukraine's Government Cleansing Act differed from more narrowly targeted lustration programs put in place in other Central and Eastern European States.

Principal facts

The applicants, Vyacheslav Polyakh, Dmytro Basalayev, Oleksandr Yas, Roman Yakubovskyy, and Sergiy Bondarenko, are Ukrainian nationals who were born in 1970, 1976, 1954, 1977, and 1957 respectively and live in Kyiv, Mykolayiv, Chernigiv, Yaremche (Ivano-Frankivsk Region), and Oleksandrivka (Donetsk Region) (all in Ukraine).

After the departure from office of former President Viktor Yanukovych as a result of the "EuroMaidan" protests in February 2014, the new government and parliament passed a law, the Government Cleansing (Lustration) Act of 2014, which provided for the dismissal of various categories of officials.

The people concerned were those who had occupied certain positions in the civil service for at least one year from the time Mr Yanukovych had become president in February 2010 to his departure in February 2014, or had held certain positions in the Communist Party of the former Ukrainian Soviet Socialist Republic before 1991. Civil servants also had to fill in "lustration declarations" if they were covered by the law.

The first three applicants were dismissed under the GCA in October 2014, based on the fact that they had worked in the civil service in the 2010-2014 period. The fourth applicant was dismissed after failing to file a lustration declaration in time, while the fifth applicant lost his job because he was a second secretary of the Communist Party at the district level before 1991.

In court proceedings brought by the applicants to be reinstated, the first three applicants' cases were suspended in 2014 or 2015 pending a ruling by the Constitutional Court on the constitutionality of the GCA. The other two applicants' dismissals were upheld by the courts in 2018 on the grounds that, among other things, the Constitutional Court had not ruled the law unconstitutional.

According to information available at the time of the Court's examination of the case, the Constitutional Court was still considering the matter of the GCA's constitutionality.

Complaints, procedure and composition of the Court

Relying on the various fair trial guarantees set down in Article 6 (right to a fair trial), the first three applicants complained about the ongoing failure of the domestic courts to examine their claims.

All the applicants complained under Article 8 (right to respect for private life) about their dismissal and the effect it has had on them. The second applicant also raised a complaint of a breach of

Article 13 (right to an effective remedy).

The applications were lodged with the European Court of Human Rights on various dates between 21 November 2015 and 3 October 2018.

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

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

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

Decision of the Court

Article 6

The Court decided to examine the first three applicants' case as a complaint about the length of the domestic proceedings, which had lasted more than four and a half years at one level of jurisdiction, including the proceedings before the Constitutional Court on the constitutionality of the GCA.
It noted that the Government had objected that the applications were inadmissible for non-exhaustion of domestic remedies because the applicants' cases were still being dealt with by the courts. Furthermore, the applicants had themselves contributed to the situation by not insisting that the domestic courts resume proceedings and deliver judgments in their cases in the absence of the Constitutional Court's decision on the GCA's constitutionality.

However, the Court held that it was not reasonable to expect the applicants to do so given that the courts had considered that a constitutional ruling was necessary to resolve the applicants' cases, a position endorsed by the Plenary of the Supreme Court.

The applicants could also have undermined their own positions by not waiting for a decision from the Constitutional Court decision against the GCA and they could not have known that the Constitutional Court would exceed the legal time-limits to carry out a review of the bill. Overall, the applicants could not be blamed for either not opposing the referral of a question to the Constitutional Court or for not asking for the resumption of suspended proceedings.

The Court noted that the specific nature of Constitutional Court proceedings had to be taken into account when considering the length of proceedings, however, that factor could not provide a full explanation for the delay in the applicants' cases.

Firstly, the Supreme Court had asked for an urgent examination of the issue and the Government had not shown that other urgent Constitutional Court cases had had precedence. There had not been any major developments at Constitutional Court level since July 2017, beyond deliberations, nor any convincing explanation of why the statutory time-limits for consideration of the referred question had been exceeded.

The Court concluded that the length of the proceedings in the first three applicants' cases could not be considered as reasonable and rejected the Government's objection of non-exhaustion of remedies. It also held that there had been a violation of the three applicants' right to a trial within reasonable time.

Article 8

The Court first noted that this case differed from other previously decided cases against Central and Eastern European States which related to measures against former alleged collaborators of totalitarian secret services and the specificity of the applicants' situation and the GCA measures had to be taken into account.

The Court found that the measures against the applicants had interfered with their right to respect for their private life. In particular, they had been dismissed, banned from civil service positions for 10 years, and had had their names published in a publicly accessible online Lustration Register.

Those measures had been set out in the GCA, which had been accessible as it had been published and foreseeable in its implications for the applicants.

However, the Court had doubts as to whether the interference had pursued a legitimate aim. Among other issues, it noted that previous lustration laws had dealt with alleged security service personnel of totalitarian

States, whereas the first four applicants had worked for what was in principle a State based on democratic constitutional foundations. The measures had also been based on what appeared to be a sort of collective liability for working under Mr Yanukovych, taking no account of any individual role or link to any antidemocratic developments.

There was a possibility that the law had been passed for reasons of vindictiveness against those who had worked for former Governments, which implied the politicisation of the civil service, which by itself was against the proclaimed purpose of the legislation. It was a well-established Court case-law principle that lustration could not serve for punishment, retribution or revenge and that applied also to the GCA.

Nevertheless, the Court had more concerns about the proportionality of the GCA measures as applied to the applicants. This was part of its consideration of whether they were "necessary in a democratic society".

The first three applicants

The Court noted that the first three applicants had been dismissed owing to having served under the former president, whose time in office had been marked by negative developments in terms of respect for democracy, the rule of law and human rights.

The Court accepted that some changes in the civil service could have been necessary after that period, including steps against individuals who were personally associated with such developments. States in principle had wide discretion ("margin of appreciation") in dealing with the legacy of communism via lustration.

In the case of the applicants, the measures had been very restrictive and of broad scope. Very convincing reasons had thus been required to show that they could be applied without any individual assessment of their actions.

However, the Government had not pointed to any discussion of such reasons in the parliamentary debates on the GCA, which furthermore appeared to lack cohesion between its guiding principles – presumption of innocence and individual liability – and its actual operation.

Other issues were that the GCA was broader than similar measures in other countries, which had only targeted people who had actively worked for the former communist authorities. By contrast, that broad scope had led to the second and third applicants being dismissed, even though they had taken up their civil service posts long before Mr Yanukovych had become president and had simply failed to resign within one year of him taking office.

There was also lack of clarity as to the applicable time-frame: the Government had argued that the law aimed at dealing with the ills caused by all post-communist elites, however, the period from 1991-2010 was excluded from the law's operation. There was also no explanation for why the oneyear period was chosen as the criterion for the law's application.

The Government had raised various arguments to support the law, such as the practice of placement of corrupt officials in the civil service under Mr Yanukovych, a 2010 Constitutional Court decision which had increased his powers and the alleged politically motivated persecution of EuroMaidan protesters. However, those issues were of no relevance in the decision to apply the GCA to the applicants. No connection was shown between them and those negative developments.

The Government had argued that it had not been possible to apply the GCA in a more individualized way because of the emergency in eastern Ukraine. However, the GCA was not mentioned in the declaration

made by Ukraine under the Convention provision (Article 15) allowing derogation from certain Convention obligations in time of emergency.

While the Court was aware of the situation in Ukraine at the time, it noted that the alleged urgency of the need for the GCA contrasted with the fact that the applicants were to be barred from office for 10 years. Personnel changes might well have been necessary in Ukraine after those events, but there was no sign that the situation would have remained unstable for so long so as to prevent a review of each individual's role and the possible phasing out of restrictive measures over time.

Lastly, the Court noted that the applicants had been removed from office and information about that decision had been made publicly available even before any review of those decisions by courts.

The review that had subsequently begun was still going on and had already lasted almost half of the 10-year exclusion period envisaged by the GCA.

The fourth and fifth applicants

The fourth applicant had been removed from office for filing his lustration declaration four days late.

If he had been dismissed because of his association with the rule of former President Yanukovych then the considerations set out for the first three applicants applied. If he had been dismissed for the late filing, then that was a disproportionate measure, given the minor technical nature of the applicant's omission.

The fifth applicant had been dismissed because of his former role as a second secretary of a district in the Communist Party.

The Court noted that it had found violations of the Convention in cases against other States where there was a big time gap between a person's alleged involvement in totalitarian structures and lustration measures against them.

It noted that the time gap in the fifth applicant's case was 23 years and that there had been no suggestion of wrongdoing on his part in the past. It concluded that the Ukrainian authorities had failed to provide reasons to justify lustration against people who had merely occupied certain positions in the Communist Party prior to 1991, where there was no allegation of specific antidemocratic activities on their part.

Furthermore, the measure against the fifth applicant had been particularly disproportionate. No serious argument had been made that as a local official working in agriculture he had posed any threat to the newly established democratic regime and the authorities had demonstrated a total disregard for his rights.

In conclusion, the interference with all five applicants' rights had not been necessary in a democratic society and there had been a violation of their rights under Article 8.

Just satisfaction (Article 41)

The Court held that Ukraine was to pay each applicant 5,000 euros (EUR) in respect of non-pecuniary damage. In respect of costs and expenses it awarded EUR 1,500 to the first applicant and EUR 300 each to the second to fifth applicants.

41. ECtHR, *Hatice Çoban v. Turkey*, No. 36226/11, Chamber judgment of 29 October (Article 10, freedom of expression – Violation). The applicant, a Turkish national, had been charged with disseminating propaganda in favour of a terrorist organisation on account of a speech she had given during a demonstration held by a political party, to which she was a member of the board. The Court considered that the national courts could not have been said to have applied standards conforming to the principles of the Convention, or to have had based their decisions on an acceptable assessment of the relevant facts.

ECHR 371 (2019)
29.10.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of **Hatice Çoban v. Turkey** (application no. 36226/11) 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 Ms Çoban's criminal conviction for disseminating propaganda in favour of a terrorist organisation on account of a speech she had given.

The Court reiterated that the fairness of proceedings and the procedural guarantees afforded were factors to be taken into account when assessing the proportionality of an interference with freedom of expression.

The Court went on to find that the national courts had not addressed the relevant arguments raised by Ms Çoban, who had challenged the reliability and accuracy of the main item of evidence used in support of her conviction. The Court of Cassation had endorsed the Assize Court's findings in a summary fashion, without giving any further consideration to the arguments submitted by Ms Çoban in her appeal on points of law.

The domestic courts had therefore not performed their task of weighing up the various interests at stake for the purposes of Article 10 of the Convention.

Principal facts

The applicant, Hatice Çoban, is a Turkish national who was born in 1965 and lives in Ankara. At the material time, she was a member of the board of the Party for a Democratic Society (DTP, *Demokratik Toplum Partisi*).

In 2007 Ms Çoban was charged with disseminating propaganda in favour of a terrorist organization on account of a speech she had given during a "World Peace Day" demonstration held by the DTP.

In 2008 the Assize Court sentenced Ms Çoban to a prison term of two years and one month. It found, in particular, that she had supported a statement by the PKK (Kurdistan Workers' Party, an illegal armed organisation); that she had called for the Republic of Turkey to enter into talks with the PKK; and that she had stated that the PKK was engaged in an honourable campaign for identity and freedom in the name of the Kurds, that this terrorist organisation's existence was necessary and that its members should never surrender to the security forces.

Ms Çoban appealed on points of law. She alleged, among other points, that the police officers who had monitored the demonstration had not related the full contents of her speech in their report dated 2 September 2006; that, not having made a recording of her speech, they had distorted her words; and that in any event they could not have lawfully monitored the demonstration and taken notes in the absence of a decision by a judge. Moreover, Ms Çoban argued that the version of her speech reported in the press differed from that recounted by the police, and that the Assize Court had not sought to elucidate this discrepancy or to obtain recordings of her speech. Lastly, she explained that the speech had concerned the need to resolve the Kurdish problem by democratic and peaceful means. Her appeal was rejected.

In 2014 the Assize Court, pursuant to a new law, decided to stay the execution of her sentence, which had not yet begun.

Complaints, procedure and composition of the Court

Relying in particular on Article 10 (freedom of expression), Ms Çoban complained about her conviction, arguing that the criminal proceedings had been unfair and had breached her right to freedom of expression.

The application was lodged with the European Court of Human Rights on 18 April 2011.

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

Robert **Spano** (Iceland), *President*,
Julia **Laffranque** (Estonia),
Valeriu **Griţco** (Republic of Moldova),
Egidijus **Kūris** (Lithuania),
Ivana **Jelić** (Montenegro),
Darian **Pavli** (Albania),
Saadet **Yüksel** (Turkey),

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

Decision of the Court

Article 10 (freedom of expression)

The question arising was whether the criminal proceedings against Ms Çoban had been fair as a whole, including the way in which evidence had been taken for the establishment of the facts. The Court reiterated in that connection that the fairness of proceedings and the procedural guarantees afforded were factors to be taken into account when assessing the proportionality of an interference with freedom of expression.

In the present case, it noted that the Assize Court had not sought to ascertain whether the only incriminating evidence it had against Ms Çoban, namely the report dated 2 September 2006 as presented by the prosecution and subsequently confirmed by the police officers who had drawn it up, was corroborated by other evidence, such as statements by independent witnesses or any recordings that might have been made by media outlets. Nor had the Assize Court explained why it had found the defence statement by Ms Çoban, who had denied making the offending comments, to be "evasive".

In her appeal on points of law Ms Çoban had pointed out the divergence between the contents of her speech as reported in press articles and as recounted in the police report. She had also submitted that the precise contents of her speech could have been established by calling as witnesses the individuals whom she had named as having been present at the demonstration.

In the Court's view, since Ms Çoban had put forward arguments in her appeal on points of law that could have cast doubt on the accuracy of the main item of evidence used in support of her conviction, had contended that the Assize Court's reasoning had been devoid of any factual basis, and had asked for new evidence to be produced, the Court of Cassation should not simply have relied on the single item of evidence in question (the police report of 2 September 2006) without examining the grounds of appeal submitted by Ms Çoban in that regard. It had therefore been required to provide reasons in addressing her arguments. However, Ms Çoban's argument that there were discrepancies between the contents of the respective documents reporting her speech – namely the police report and the press articles published on the subject – had been dismissed by the Court of Cassation as irrelevant, as had her request for defence witnesses to be called in order to establish the precise contents of the speech.

However, the Court found that the articles reporting on Ms Çoban's speech or recordings of the speech by the media and statements by witnesses other than the police officers who had drawn up the report could arguably have strengthened the position of the defence or even led to Ms Çoban's acquittal. Yet the Court of Cassation had endorsed the Assize Court's findings in a summary fashion, without giving any further consideration to the arguments submitted by Ms Çoban in her appeal on points of law. While such an approach was in principle acceptable for an appellate court, in the circumstances of the present case, where the factual basis for the Assize Court's reasoning had been called into question by sound arguments, it had failed to satisfy the requirements of a fair trial.

Consequently, the domestic courts had not addressed the relevant arguments put forward by Ms Çoban regarding the reliability and accuracy of the main item of evidence on which they had relied in support of her conviction, and had not performed their task of weighing up the various interests at stake for the purposes of Article 10 of the Convention. The national courts could therefore not be said to have applied standards conforming to the principles embodied in Article 10 of the Convention, or to have based their decisions on an acceptable assessment of the relevant facts.

There had been a violation of Article 10 of the Convention.

Just satisfaction (Article 41)

The Court held that Turkey was to pay Ms Çoban 2,500 euros in respect of non-pecuniary damage.

42. ECtHR, *A.A. v. Switzerland*, No. 32218/17, Chamber judgment of 5 November 2019 (Article 3, Prohibition of inhuman or degrading treatment – Violation). The case concerned the removal from Switzerland of an Afghan national converted to Christianity to Afghanistan. The Court considered that the Federal Administrative Court had not engaged in a sufficiently serious examination of the consequences of the applicant's conversion, neither had carried out a sufficient assessment of the risks that could be personally faced by the applicant if he were returned to Afghanistan.

ECHR 379 (2019)
05.11.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of **A.A. v. Switzerland** (application no. 32218/17) the European Court of Human Rights held, unanimously, that there would be:

a violation of Article 3 of the European Convention on Human Rights in the event of the applicant's return to Afghanistan.

The case concerned the removal from Switzerland to Afghanistan of an Afghan national of Hazara ethnicity who was a Muslim convert to Christianity.

The Court noted that according to many international documents on the situation in Afghanistan, Afghans who had become Christians or who were suspected of conversion would be exposed to a risk of persecution by various groups. It could take the form of State persecution and result in the death penalty.

The Court noted that, while the authenticity of the applicant's conversion in Switzerland had been accepted by the Federal Administrative Court, it had not carried out a sufficient assessment of the risks that could be personally faced by the applicant if he were returned to Afghanistan. The Court found in particular that the file did not contain any evidence that the applicant had been questioned about the everyday practice of his Christian faith since his baptism in Switzerland and how he could, if returned, continue to practise it in Afghanistan, in particular in Kabul, where he had never lived and where he said that he would be unable to rebuild his future life.

Principal facts

The applicant is an Afghan national who claims to have been born in 1996 and lives in the Canton of Ticino.

In March 2014 A.A. arrived in Switzerland. He applied for asylum and stated that he had left Afghanistan because of the lack of security in that country and his conversion from Islam to Christianity.

In February 2015 the State Secretariat for Migration (SEM) rejected his application, noting that the grounds for asylum were not credible.

In October 2016 the Federal Administrative Court confirmed the SEM's decision on the credibility of the asylum grounds, but found that the applicant's conversion in Switzerland was genuine. It was of the view that the applicant would not be exposed to serious harm in Afghanistan as a result of his conversion and ordered his removal to that country. It further held that, while the complainant could not be returned to his region of origin (Ghazni province), he would have an internal protection alternative in Kabul, where his uncles and cousins lived. His conversion to Christianity, which had occurred in Switzerland, was not a decisive factor, as it was not known to his relatives in Kabul.

In May 2017 the duty judge decided to apply Rule 39 of the Court's Rules of Court and asked the Swiss government not to deport A.A. to Afghanistan during the proceedings before the European Court of Human Rights.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment), A.A. alleged that he would be subjected to ill-treatment if returned to Afghanistan.

The application was lodged with the European Court of Human Rights on 27 April 2017.

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

Paul **Lemmens** (Belgium), *President*,
Georgios A. **Serghides** (Cyprus),
Paulo **Pinto de Albuquerque** (Portugal),
Helen **Keller** (Switzerland),
Alena **Poláčková** (Slovakia),
María **Elósegui** (Spain),
Erik **Wennerström** (Sweden),

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

Decision of the Court

Article 3

The Court noted that according to many international documents on the situation in Afghanistan, Afghans who had become Christians or who were suspected of conversion would be exposed to a risk of persecution by various groups. It could take the form of State persecution and result in the death penalty.

The Court found that in its judgment of 21 October 2016 the Federal Administrative Court, the only judicial body to have examined the case, had not looked at the applicant's practice of his Christian faith since his baptism in Switzerland or how he could, if returned, continue to practise it in Afghanistan. The court had merely presumed that he would have an internal protection alternative by going to live in Kabul with his uncles and cousins, on the basis that his conversion to Christianity was not known to his relatives there.

In the Court's view this argument did not stand up to serious scrutiny of the specific circumstances of the case. The Federal Administrative Court should have carried out its examination by looking at how the applicant practised his Christian faith in Switzerland and could continue to practise it in Afghanistan, for example by referring that assessment back to the first-instance authority or by submitting a list of relevant questions to the applicant; but it had not done so.

In the Court's view, the Federal Administrative Court's explanation that the applicant's return to Kabul would not be problematic because he had not spoken of his conversion to Christianity to his relatives in Afghanistan, but that he had only shared his beliefs with those closest to him, implied that the applicant would nevertheless be obliged, in the event of his return, to change his social conduct by confining it to a strictly private level. He would have to live a life of deceit and could be forced to renounce contact with other Christians. The Court further noted that, in a leading judgment published shortly after the judgment in the present case, the Federal Administrative Court had itself conceded that the daily dissimulation and

negation of one's inner beliefs in the context of Afghan society could, in certain cases, be characterised as a form of unbearable mental pressure.

Lastly, the Court observed that the applicant belonged to the Hazara community, which continued to face a degree of discrimination in Afghanistan. Even though the applicant had not specifically relied on his ethnic origin in support of his asylum application and this factor was not decisive for the outcome of the case, the Court could not completely overlook this aspect, which had not been referred to at all by the domestic courts. The Court noted that the Federal Administrative Court's comparison of the situation in Afghanistan to that in central Iraq appeared particularly problematic as it was not substantiated by international reports on the experience of converts to Christianity in Afghanistan.

The Court found that the Federal Administrative Court, while accepting that the applicant, of Hazara ethnicity, had undergone a conversion from Islam to Christianity while in Switzerland and that he could therefore be regarded as belonging to a group that was exposed to a risk of ill-treatment if returned to Afghanistan, had not engaged in a sufficiently serious examination of the consequences of the applicant's conversion. Consequently, there would be a violation of Article 3 if the applicant was returned to Afghanistan.

Just satisfaction (Article 41)

As the applicant had not claimed just satisfaction, the Court took the view that there was no need to make any award on this basis.

43. ECtHR, *N.A. v. Finland*, No. 25244/18, Chamber judgment of 14 November 2019 (Article 2, Right to life – Violation; Article 3, Prohibition of inhuman or degrading treatment – Violation). The case concerned the decision to deport the applicant's father to his country of origin, Iraq, where he had been subsequently killed. The Court was not convinced that the Finnish authorities' assessment of the risks faced by the applicant's father if he was returned to Iraq had been sufficient, those authorities being aware of the risks he faced. The Court concluded that the Finnish authorities had failed to comply with their obligations under the Convention when dealing with the applicant's father's asylum application.

ECHR 388 (2019)
14.11.2019

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of N.A. v. Finland (application no. 25244/18) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 2 (right to life) and Article 3 (prohibition of torture and inhuman and degrading treatment) of the European Convention on Human Rights owing to decisions to deport the applicant's father to his country of origin, Iraq, where he was subsequently killed.

The Court found in particular that the Finnish authorities had not carried out a thorough enough assessment of the individual risks faced by the applicant's father in Iraq although they had accepted his account of having faced two near deadly attacks in a context of tensions between Shia and Sunni Muslim groups, the father belonging to the latter.

The Finnish authorities' decision to expel the father, who had had a conflict with a Shia colleague in his place of work as an investigator for the Interior Ministry, had ultimately forced him to agree to return voluntarily to Iraq, where he had been shot and killed soon after arrival.

Principal facts

The applicant, Ms N.A., is an Iraqi national who was born in 1996 and lives in Finland.

The applicant's father was a Sunni Muslim Arab from Baghdad. He served as a major in the army under former Iraqi leader Saddam Hussein and then for an American logistics company after the fall of that regime. Between 2007 and 2015 he worked in the Iraqi Office of the Inspector General, part of the Interior Ministry, where he was an investigator and then a leading officer on human rights crimes and corruption cases. He often had to investigate intelligence service officers or officers in militia groups. His work became more dangerous when Shia militia gained prominence.

He was investigating a case in 2015 when he had a disagreement with a colleague, who allegedly belonged to a leading Shia militia group, the Badr Organisation. The colleague assaulted the applicant's father and insulted him but was then transferred to the intelligence service and promoted. In February 2015 there was an attempt on the applicant's father's life when someone tried to shoot him. He reported the attack but later concluded that it was not being investigated.

Feeling that he would not be protected in Iraq or receive any justice, he resigned in March 2015. In April 2015 a bomb exploded in the family car just after the applicant's father and mother had got out of it and in May of that year the applicant herself was the victim of an attempted kidnapping.

The family arrived in Finland in September 2015 and the father sought international protection.

The authorities rejected his asylum application in December 2016, the Immigration Service accepting his account of the facts but deciding that Sunni Arabs did not *per se* face persecution in Iraq. An appeal by the applicant's father was dismissed by the Helsinki Administrative Court in September 2017. It held that he faced no danger owing to his past work for the regime of Saddam Hussein or the American logistics company. There was no proof that the attacks on him had been due to his conflict with his former colleague at the Interior Ministry, rather the general security situation in Iraq was to blame. There was also no real risk of persecution owing to his Sunni background. He was refused leave to appeal to the Supreme Administrative Court at the end of November 2017.

The applicant's father returned to Iraq in November 2017 under assisted voluntary return. In December 2017 the applicant learned that her aunt's apartment, used previously by the family as a hiding place, had been attacked. Later that month she was informed that her father had been killed by unidentified gunmen. According to documents submitted by the applicant her father was shot three times in a street in Baghdad.

Complaints, procedure and composition of the Court

The applicant complained that her father's expulsion to Iraq had violated Article 2 (right to life) and Article 3 (prohibition of torture and of inhuman or degrading treatment).

The application was lodged with the European Court of Human Rights on 23 May 2018.

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

Ksenija **Turković** (Croatia), *President*,
Krzysztof **Wojtyczek** (Poland),
Aleš **Pejchal** (the Czech Republic),
Pauliine **Koskelo** (Finland),
Tim **Eicke** (the United Kingdom),
Jovan **Ilievski** (North Macedonia),
Raffaele **Sabato** (Italy),

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

Decision of the Court

Article 2 and Article 3

The Court took note of the Government's argument that Finland did not have jurisdiction as the applicant's father had returned voluntarily to his land of origin. However, the applicant had argued that the return had not been voluntary, but had rather been forced on him by the Finnish domestic authorities' decisions. Her father had not wanted to attract the attention of the Iraqi authorities by being forcibly returned and had not wanted to have a two-year Schengen area visa ban.

The Court found that the applicant's father would not have returned to Iraq if an enforceable expulsion decision had not been issued against him and so his decision had not been voluntary in the sense of being a free choice. The respondent State's jurisdiction could therefore be engaged under

Article 1 of the Convention

The Court also cited the lack of a genuinely free choice as a reason to reject a further implicit argument by the Government that the applicant's father had waived his right to Convention protection because he had signed a declaration that no agency or authority taking part in his return could be held liable or responsible.

The Court noted that the Finnish authorities had found the applicant's father's account of events in his asylum application to be both credible and coherent, including the possibility that he could be of interest to the Iraqi authorities or non-State actors.

The domestic authorities had also referred extensively to relevant country information on Iraq, which showed among other things that there were tensions between Shia militia groups and Sunni Arab Muslims, that there had been incidents where Iraqis who had worked for American companies had been killed, and that the security situation in Baghdad required decision makers to look at the risks faced by particular individuals facing deportation.

When taken cumulatively, and considered in the light of the general security situation and violence, it was possible that such factors could give rise to a real risk. However, the domestic authorities had not made such a cumulative assessment.

Even more importantly, the courts had not given enough consideration to the violent attempts on the applicant's father's life before he had left Iraq, although the Finnish authorities had acknowledged the shooting and car bomb as facts. Instead, they had seen those incidents as part of the general security situation, rather than being focussed on the applicant's father in particular.

The Court could not see a plausible explanation for why the Finnish authorities had not taken those two incidents more seriously or looked at them in terms of a risk that the father had been personally targeted. Furthermore, the dispute between the father and his colleague had been dismissed as a personal conflict rather than being examined for possible links with their religious affiliations and tensions between Shia and Sunni groups or the attempts on the father's life.

The Court was thus not convinced that the Finnish authorities' assessment of the risks faced by the father if he was returned to Iraq had met the requirements of Article 2 or Article 3. Indeed, those authorities were or should have been aware of the risks he faced.

The Court concluded that the Finnish authorities had failed to comply with their obligations under Article 2 or Article 3 when dealing with the applicant's father's asylum application and there had been a violation of both of those provisions. It rejected a complaint by the applicant about her own rights under Article 3 having been violated.

Just satisfaction (Article 41)

The Court held that Finland was to pay the applicant 20,000 euros (EUR) in respect of non-pecuniary damage and EUR 4,500 in respect of costs and expenses.

44. ECtHR, *Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia*, No. 75734/12 and two others, Chamber judgment of 19 November 2019 (Article 3, Prohibition of torture and inhuman or degrading treatment – Violation; Article 5, Right to liberty and security – Violation; Article 11, Freedom of assembly – Violation; Articles 5 et 6, Right to a fair trial – Violation; Article 8, Right to respect for private life – Violation; Article 1 of Protocol No. 1, Protection of property – Violation). The case concerned the conviction of two Russian nationals for organising "mass disorder" following their participation to opposition protests and the resultant disturbances in central Moscow in May 2012. The Court considered that Russia and Ukraine had failed to carry out an effective investigation. The Court noted that the domestic courts had blamed for the violence, however, they had not assessed the authorities' responsibility for the rally deteriorating from its peaceful initial phase.

ECHR 394 (2019)
19.11.2019

Press release issued by the Registrar

The case of **Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia** (application no. 75734/12 and two others) concerned the conviction of two men for organising "mass disorder" for their part in May 2012 opposition protests and resultant disturbances in central Moscow, an incident which has been at the centre of several earlier cases dealt with by the European Court of Human Rights.

In today's **Chamber** judgment1 the Court held, unanimously, that there had been several violations of the two applicants' rights under the European Convention on Human Rights.

They included **a violation of the first applicant's rights under Article 3 (prohibition of torture and inhuman and degrading treatment)** and **Article 5 (right to liberty and security)** over a failure by both Russia and Ukraine to carry out an effective investigation of arguable allegations that he had been abducted by State agents of Russia while in Ukraine and returned to Russia, and,

a violation of the second applicant's rights protected by Article 11 (freedom of assembly) owing to his conviction for organising mass disorder. The Court rejected the complaint by the first applicant under this provision, finding that his actions did not fall within the notion of "peaceful assembly".

The Court noted that the domestic courts had blamed the protesters for the violence and the second applicant personally as an organiser, however, they had not assessed the authorities' responsibility for the rally deteriorating from its peaceful initial phase. In contrast, the Court had held in an earlier case that tensions had arisen because the authorities had unexpectedly changed the venue for the rally and had not communicated properly with the protesters. Furthermore, the second applicant had never shown any violent intent and had instead called for calm.

The Court also found various other violations of the rights protected by **Article 5, Article 6 (right to a fair trial), Article 8 (right to respect for private life) and Article 1 of Protocol No. 1 (protection of property)**.

Principal facts

The applicants, Leonid Razvozzhayev and Sergey Udaltsov, are Russian nationals who were born in 1973 and 1977 respectively and live in Moscow. Mr Udaltsov was one of the organisers of a rally planned for 6 May 2012 against allegedly rigged parliament and presidential elections. The rally was to proceed down

several streets in Moscow and end with a meeting at an area including the park at Bolotnaya Square and Bolotnaya embankment.

On the day of the march, which included thousands of people, the protesters found that the police had blocked off the square, leaving access only to the embankment. Leaders of the rally, including the second applicant, held a brief sit-down protest, while other participants tried to break through the cordon around the square. The police eventually declared the meeting closed, with riot police being employed. There were also various confrontations between demonstrators and the police. The second applicant and other leaders of the protest were arrested.

The authorities began an investigation into mass disorder. The second applicant was placed under house arrest from February 2013 until his conviction at first instance in July 2014.

The first applicant, a political activist who was an assistant at the time to a State Duma deputy, went to Kyiv in October 2012 where he planned to apply for asylum. He alleged that he was abducted by unidentified people, forced into a minibus and driven back to Russia against his will where he was coerced into a making a confession that he had plotted political unrest and violence.

In July 2014 the applicants were found guilty of organising mass disorder on 6 May 2012 and each sentenced to an aggregate of four and half years in prison. Their appeals were rejected, ending with the Supreme Court declining in January 2016 to hold supervisory review proceedings of their cases.

Complaints, procedure and composition of the Court

The first applicant raised complaints about his alleged abduction and alleged lack of a proper investigation by either Russia or Ukraine under Article 3 (prohibition of torture and of inhuman or degrading treatment) and Article 5 (right to liberty and security) of the European Convention on Human Rights. He also relied on Article 3 to complain of a lack of medical treatment in pre-trial detention and of the effects on his health of the intensive schedule of his trial hearings.

Both applicants complained under Article 5 about their pre-trial detention, with the second applicant referring to his lengthy period of house arrest, and under various provisions of Article 6 (right to a fair trial) about their trial on charges of mass disorder.

Under Article 8 (right to respect for private and family life), the first applicant complained about not being granted leave from pre-trial detention to visit his dying mother or to attend her funeral and that he had been sent to serve his prison sentence in Krasnoyarsk, far from his home city Moscow.

The applicants relied on Article 10 (freedom of expression) and Article 11 (freedom of assembly and association) to complain of being found liable for the disorder at the site of the protest. The second applicant also raised a complaint under Article 18 (limitation on use of restrictions on rights) in relation to his arrest and prosecution. The second applicant relied on Article 1 of Protocol No. 1 (protection of property) in relation to a court attachment order on his assets.

The applications were lodged with the European Court of Human Rights on 28 November 2012, 13 January 2015 and 10 September 2015.

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

Paul **Lemmens** (Belgium), *President*,
Georgios A. **Serghides** (Cyprus),

Ganna **Yudkivska** (Ukraine),
Paulo **Pinto de Albuquerque** (Portugal),
Helen **Keller** (Switzerland),
Dmitry **Dedov** (Russia),
Alena **Poláčková** (Slovakia),

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

Decision of the Court

Article 3 and Article 5

Mr Razvozzhayev stated that he had been abducted in October 2012 by unidentified men acting on behalf of the Russian State and had been transferred illegally across the Ukraine-Russia border. He had not voluntarily left Ukraine, where he had planned to apply for asylum. Neither Ukraine nor Russia had carried out an effective investigation into his allegations.

The Ukrainian Government at first contended that the authorities had investigated the incident but made no further comment after the investigation was subsequently re-opened. The Russian Government contested his allegations, stating that he had returned voluntarily.

The Court found that there was no evidence that the abductors had acted on behalf of the Russian Government or that the Ukrainian authorities had been involved in his transfer back to Russia.

However, Mr Razvozzhayev had had an arguable claim of abduction and ill-treatment and neither country had taken the necessary steps to look into his case, leading to a violation of the procedural guarantees of Article 3 and Article 5 by both countries.

The Court further rejected as manifestly ill-founded his complaint of a violation of Article 3 owing to an alleged lack of medical care during his long period of pre-trial detention, to a decline in his health caused by an overly intensive schedule of court hearings and to conditions in the court.

Article 5

First applicant

The Court rejected as manifestly ill-founded a complaint by Mr Razvozzhayev under Article 5 § 1 that the authorities had not taken account of the period of his abduction or another period related to an incident in 1997 in calculating the term of his pre-trial detention.

However, it noted that he had been held in custody for one year and nine months. While the charges of carrying out acts of mass disorder could have justified the initial period of his detention, the Court had no grounds to accept that risks, such as his reoffending or influencing witnesses, could not have been dealt with by other preventive measures. There had thus been insufficient grounds to keep him detained for such a long period and there had been a breach of Article 5 § 3.

Second applicant

Mr Udaltsov complained of unlawful and lengthy house arrest before his trial. The Government argued that the measure had been necessary as he had breached a previous undertaking not to leave Moscow and to behave properly, in particular as he had taken part in other protests.

The Court noted that he had been held under house arrest for one year and five months and found that the imposition of the measure had been justified under Article 5 § 1 (c) as a way to prevent him offending, given his conduct at public assemblies during the period of the previous undertaking.

There had therefore been no violation of that provision.

However, that reason had only been sufficient for the first two months of house arrest and the five subsequent extension decisions had not been properly justified. The courts had relied on reasons given in the first decision without reviewing them and had moreover rejected his offer of bail with only a formulaic response. There had therefore been a violation of Article 5 § 3 of the Convention.

Article 6

The Court examined three admissible complaints under this provision: about testimony by a witness originally due to be tried with the applicants but whose proceedings had been disjoined and who had been convicted separately under a plea-bargaining agreement; of restrictions on Mr Razvozzhayev because he had been held in a glass cabin during his trial; and that the schedule of the hearings had left him too tired to take part in the trial effectively.

The Court found that the decision to disjoin the proceedings against a man who had later become a witness against them had not involved an assessment of the countervailing interests or any consultation with the two applicants to allow them to object. The witness's credibility in the case against the applicants had also been undermined because he had been forced to maintain the statements he had made to negotiate the reduction of his sentence while not being under oath.

Furthermore, the court in the applicants' case had had an incentive to uphold the findings made against the witness although those findings had not been scrutinised in an adversarial manner. Both applicants had thus suffered a violation of their rights under Article 6 § 1.

The Court applied earlier case-law to Mr Razvozzhayev's being confined in a glass cabin during the five months of the trial, finding that he had suffered unnecessary restrictions. That had led to a breach of his rights under Article 6 § 1 in conjunction with Article 6 § 3 (b) and (c).

As to the intensity of the schedule of the hearings, the Court found that the domestic court had not given proper consideration to the first applicant's complaints, looking only at the period spent in court and not including the time taken to transfer him to and from his place of detention. The whole process had cumulatively been exhausting and had seriously affected his ability to take part in the proceedings. He had consequently not had adequate facilities to prepare his defence, undermining the requirements of a fair trial and equality of arms and breaching Article 6 §§ 1 and 3 (b).

Article 8

The Government had given no reason why Mr Razvozzhayev had not been allowed to visit his sick mother. He had also not been permitted to attend her funeral, although it was in Moscow where he was being held, with the Government citing a lack of time for the necessary arrangements.

The Court noted that people being held in detention or prison were entitled to maintain their family lives, although there was no unconditional right to be able to attend a funeral. However, domestic authorities could only refuse an individual the right to attend a parent's funeral if there were compelling reasons for such a refusal and no alternative solution could be found.

In Mr Razvozzhayev's case, the refusal had not been based on an assessment of his individual situation, in particular the fact that he had not been able to see his mother before her death. The issue of time constraints was not a sufficient reason for the refusal. Mr Razvozzhayev had therefore suffered a violation of his rights under Article 8.

As to his placement in a prison far from his place of residence, the Court noted that it had examined such questions before and had found violations of the Convention owing to a lack of adequate legal protection against possible abuse and because the applicable legislation did not satisfy the "quality of law" requirement. It saw no reason to find differently in this case and held that there had been another violation of Article 8 owing to Mr Razvozzhayev having to serve his sentence in Krasnoyarsk.

Article 10 and Article 11

The Court considered these complaints mainly under Article 11 as reflecting restrictions of the right to freedom of peaceful assembly. This case was also different from others about Bolotnaya Square as it concerned allegations of the organisation of mass disorder rather than participation in it.

The Court adhered to its finding in previous Bolotnaya cases, such as *Frumkin and Others v. Russia*, that the protesters' sit-in had begun because of the unexpected change of the venue layout, that the authorities had not made enough of an effort to communicate with the organisers, and that breaking through the police cordon had not been confirmed as the organisers' desired outcome.

At the same time, Article 11 protected peaceful assembly and it had accepted that some of the protesters had contributed to the onset of clashes with the police and the deterioration of the assembly's peaceful character.

As for Mr Razvozzhayev, he had been found guilty of leading a number of individuals to break through the police cordon, as confirmed by witnesses, which had led to an escalation of violence at a crucial moment, triggering the onset of clashes. The Court therefore found that his actions fell outside the notion of "peaceful assembly" and it rejected his complaint under Article 11.

In contrast, that provision was applicable to Mr Udaltsov, who had not shown any violent intentions with his call for a sit-down protest and to set up an illegal campsite.

The Court noted that he had been sentenced to four years and four months prison for organizing mass disorder, to be served concurrently with a sentence of four years for organising similar acts elsewhere. The courts had found that he had been responsible for the stand-off between protesters and the police at Bolotnaya Square as part of a plan to spread the protest outside the permitted area and to set up a long-term protest camp in the park.

However, the Court reiterated its findings that the authorities themselves had had some responsibility for the situation, while the domestic judgments on Mr Udaltsov had not made any attempt to examine the extent of that responsibility for the events at the square.

Furthermore, none of his actions or statements had incited violence as he had repeatedly called for calm. Nor could violent intent be found in the charges against him over other protests. The measures against him had also had a chilling effect on others' readiness to attend demonstrations and take part in open political debate.

The Court concluded by finding that the severity of the penalty imposed on Mr Udaltsov, combined with the courts' lack of an assessment of the authorities' responsibility, meant that his conviction had not been

proportionate to the legitimate aim of preventing disorder and crime and protecting others' rights. There had therefore been a violation of Article 11.

Article 18

The Court reiterated that this provision came into play where it found that a restriction on an applicant which was not in line with the Convention was a fundamental aspect of a case. However, it found that that was the not case in this instance, based on the parties' submissions being essentially the same as those made under Article 10 and Article 11. There was no separate issue under this provision and it was not necessary to carry out a separate examination.

Article 1 of Protocol No. 1

The Court noted that an attachment order on Mr Udaltsov's assets had remained in place after the end of the criminal proceedings as the trial court had found that his offence gave rise to a civil claim for damages. However, the court had not identified which legal provision governed the extended attachment order; nor had the Government provided any information about any civil proceedings or how Mr Udaltsov, as someone who had been convicted in the criminal proceedings, could have recovered his possessions.

It concluded that there had been violation of Article 1 of Protocol No. 1 to the Convention as the attachment had not been based on clear and foreseeable legal provisions and had been unlawful.

Just satisfaction (Article 41)

The Court held that Russia was to pay the first applicant 11,000 euros in respect of non-pecuniary damage and that Ukraine was to pay him EUR 4,000. It held that Russia was to pay the second applicant EUR 9,000 in respect of non-pecuniary damage.

45. ECtHR, *Nejdet Atalay v. Turkey*, No. 76224/12, Chamber judgment of 19 November 2019 (Article 10, Freedom of expression – Violation). The applicant, a Turkish national, had been sentenced to prison for ten months for propaganda in favour of the PKK (Kurdistan Workers' Party, an illegal armed organisation). He successfully complained that this conviction had been contrary to his freedom of expression.

ECHR 392 (2019)
19.11.2019

Press release issued by the Registrar

The applicant, Nejdet Atalay, is a Turkish national who was born in 1978 and lives in Batman (Turkey).

The case concerned his criminal conviction for propaganda in favour of the PKK (Kurdistan Workers' Party, an illegal armed organisation).

On 23 May 2006 the public prosecutor of Diyarbakır brought proceedings against Mr Atalay for acts he was alleged to have committed during a demonstration on 28 March 2006 in Diyarbakır at the time of the funeral of four members of the PKK who had been killed during clashes with the police.

On 11 March 2008 the Assize Court found Mr Atalay guilty of the offence of pro-PKK propaganda and gave him a 10-month prison sentence. It took the view that he had espoused the demands of the demonstrators and had participated in their illegal actions. The Court of Cassation upheld the judgment.

The applicant complained, in particular, that his conviction had breached his right under Article 10 (freedom of expression) of the European Convention on Human Rights.

Violation of Article 10

Just satisfaction: 5,000 euros (EUR) for non-pecuniary damage and EUR 2,000 for costs and expenses

46. ECtHR, *Ilias et Ahmed v. Hungary*, No. 47287/15, Grand Chamber judgment of 21 November 2019 (Article 3, Prohibition of torture or inhuman or degrading treatment – Violation owing to the applicants' removal to Serbia and No violation as regards the conditions in the transit zone).
The case concerned two asylum-seekers, Bangladeshi nationals, who had spent 23 days in a Hungarian border transit zone before being removed to Serbia after their asylum applications had been rejected. The Court found that the Hungarian authorities had failed in their duty to assess the risks of the applicants not having proper access to asylum proceedings in Serbia or being subjected to chain-*refoulement*, and being sent back to Greece, where conditions in refugee camps had already been found to be in violation of Article 3.

ECHR 400 (2019)
21.11.2019

Press release issued by the Registrar

The case of Ilias and Ahmed v. Hungary (application no. 47287/15) concerned two asylum-seekers from Bangladesh who spent 23 days in a Hungarian border transit zone before being removed to Serbia after their asylum applications were rejected.

In today's **Grand Chamber** judgment1 the European Court of Human Rights held, **unanimously**, that there had been **a violation of Article 3 (prohibition of torture or inhuman or degrading treatment)** of the European Convention on Human Rights owing to the applicants' removal to Serbia**,** and,

no violation of Article 3 as regards the conditions in the transit zone, and,

by a majority, that the applicants' complaints under **Article 5 §§ 1 and 4 (right to liberty and security)** had to be rejected as inadmissible.

The Court found in particular that the Hungarian authorities had failed in their duty under Article 3 to assess the risks of the applicants not having proper access to asylum proceedings in Serbia or being subjected to chain-*refoulement*, which could have seen them being sent to Greece, where conditions in refugee camps had already been found to be in violation of Article 3.

In a development of its case-law, it held that Article 5 was not applicable to the applicants' case as there had been no *de facto* deprivation of liberty in the transit zone. Among other things, the Court found that the applicants had entered the transit zone of their own initiative and it had been possible in practice for them to return to Serbia, where they had not faced any danger to their life or health.

Their fears of a lack of access to Serbia's asylum system or of refoulement to Greece, as expressed under Article 3, had not been enough to make their stay in the transit zone involuntary.

Principal facts

The applicants, Ilias Ilias and Ali Ahmed, are Bangladeshi nationals who were born in 1983 and 1980.

The applicants arrived in Hungary on 15 September 2015 after transiting through various countries, including Serbia. They immediately applied for asylum in Hungary and for the next 23 days stayed in the Röszke transit zone, which is on Hungarian territory next to Serbia; they could not leave for Hungary as the zone had a fence and was guarded.

Their applications for asylum were rejected and in October 2015 their expulsion was ordered. The removal decision referred to a Government Decree introduced in 2015 listing Serbia – the last country through which the applicants had transited – as a safe third country.

The asylum authorities found in particular that the applicants had not referred to any pressing individual circumstances to substantiate their assertion that Serbia was not a safe country for them.

The domestic court upheld this decision, which was served on the applicants on 8 October 2015.

They were immediately escorted to the Serbian border, leaving the transit zone without physical coercion.

Complaints, procedure and composition of the Court

The applicants complained in particular that, contrary to Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights, the Hungarian authorities had failed to adequately examine their allegation that they faced a real risk of ill-treatment by being expelled to Serbia. Under the same provision they complained about the conditions of detention in the transit zone. In the same context, the applicants also relied on Article 13 (right to an effective remedy) in conjunction with Article 3.

The applicants alleged that they had been confined to the transit zone in violation of Article 5 § 1 (right to liberty and security) and Article 5 § 4 (right to have lawfulness of detention decided speedily by a court).

The application was lodged with the European Court of Human Rights on 25 September 2015.

In a Chamber judgment of 14 March 2017, the European Court of Human Rights held, unanimously, that there had been a violation of Article 5 §§ 1 and 4, finding that the applicants' confinement in the Röszke border zone had amounted to detention, meaning they had effectively been deprived of their liberty without any formal, reasoned decision and without appropriate judicial review.

The Chamber further held, unanimously, that there had been no violation of Article 3 as concerned the conditions of the applicants' detention in the transit zone, but that there had been a violation of Article 13 owing to the lack of an effective remedy to complain about those conditions.

Lastly, the Chamber held, unanimously, that there had been a violation of Article 3 on account of the applicants' expulsion to Serbia as they had not had the benefit of effective guarantees to protect them from exposure to a real risk of being subjected to inhuman or degrading treatment.

The Chamber found in particular that, in the applicants' asylum proceedings, the Hungarian authorities had failed to carry out an individual assessment of each applicant's case; had schematically referred to the Government's list of safe third countries; had disregarded the country reports and other evidence submitted by the applicants; and had imposed an unfair and excessive burden on them to prove that they were at real risk of a chain-*refoulement* situation, whereby they could eventually be driven to Greece to face inhuman and degrading reception conditions.

On 18 September 2017 the Grand Chamber Panel accepted a request from the Hungarian Government that the case be referred to the Grand Chamber. A hearing was held on 18 April 2018.

The following persons and organisations were granted leave to intervene in the written proceedings as third parties: the Governments of Bulgaria, Poland and Russia, the UN Refugee Agency (UNCHR), the Dutch

Council for Refugees (DRC), the International Commission of Jurists (ICJ), the European Council on Refugees and Exiles (ECRE), and five Italian scholars.

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

Linos-Alexandre **Sicilianos** (Greece), *President*,
Angelika **Nußberger** (Germany),
Robert **Spano** (Iceland),
Jon Fridrik **Kjølbro** (Denmark),
Ksenija **Turković** (Croatia),
Paul **Lemmens** (Belgium),
Ledi **Bianku** (Albania),
Işıl **Karakaş** (Turkey),
Nebojša **Vučinić** (Montenegro),
André **Potocki** (France),
Aleš **Pejchal** (the Czech Republic),
Dmitry **Dedov** (Russia),
Yonko **Grozev** (Bulgaria),
Mārtiņš **Mits** (Latvia),
Georges **Ravarani** (Luxembourg),
Jolien **Schukking** (the Netherlands),
Péter **Paczolay** (Hungary),
and also Johan **Callewaert**, *Deputy Grand Chamber Registrar.*

Decision of the Court

The Court first held that the applicants' complaint under Article 13 in conjunction with Article 3 about an alleged lack of remedies for the issue of the living conditions in the border zone had to be declared as inadmissible after being submitted outside the six-month time-limit.

Article 3

Expulsion to Serbia

The Court found that it was not called on to examine the substance of the applicants' asylum application in Hungary – that they faced ill-treatment in Bangladesh – as it was not its job to act as a first-instance court where a defendant State had opted not to deal with an asylum request itself but had relied on the safe country principle to expel someone to another country.

The Court thus had to look at whether the Hungarian authorities had fulfilled their procedural duty under Article 3 to assess properly the conditions for asylum-seekers in Serbia. That included access to effective asylum procedures and the risk of chain-*refoulement* to Greece, where the conditions in refugee camps had already been found to be in violation of Article 3.

It noted that Hungary had begun to classify Serbia as a safe third country from July 2015. The Hungarian Government had appeared to confirm in its submissions to the Grand Chamber that the change in classification had been due to the fact that Serbia was bound by international conventions; that as a European Union entry candidate it had been aided to improve its asylum system; and that there had been an unprecedented wave of migration at the time and measures had had to be taken. However, the Government had not provided any evidence that its authorities had examined the risk of a lack of effective access to asylum proceedings or the risk of *refoulement.*

As to the applicants' individual circumstances, the Court noted that the authorities had had access to reports on conditions in Serbia, particularly those produced by the UNHCR. However, the authorities had not given sufficient weight to concerns in such reports, such as people being denied access to asylum procedures in Serbia, being summarily removed and eventually arriving in Greece.

The Hungarian authorities had contributed to the risks faced by the applicants by inducing them to return to Serbia in an illegal manner without obtaining any guarantees from the Serbian authorities.

The Court thus found that Hungary had failed to comply with its procedural obligation to assess the risk of the applicants facing treatment contrary to Article 3 before removing them to Serbia and there had been a violation of that provision of the Convention.

Given its conclusion of a violation of Article 3 in relation to the procedures for the applicants' expulsion, the Court did not consider it necessary to carry out a separate examination of their related complaint on domestic remedies under Article 13 in conjunction with Article 3.

Conditions in the transit zone

The Grand Chamber, endorsing the Chamber's findings, held that the living conditions in the zone, the length of the applicants' stay there, and the possibilities for human contact with other asylum-seekers, UNHCR representatives, NGOs and a lawyer, meant that their situation had not reached the minimum level of severity necessary to be considered as inhuman treatment within the meaning of Article 3. There had therefore been no violation of that provision.

Article 5 §§ 1 and 4

The key issue was whether there had been *de facto* deprivation of liberty, even if the Hungarian authorities did not consider that the applicants had been detained in the transit zone.

The Court also observed that this was apparently the first time that it had had to deal with a case of a land border transit zone between two States who were members of the Council of Europe and where asylum-seekers had to stay during the examination of their asylum claims.

The Court took account of the following factors: the applicants' individual situation and choices; the applicable legal regime and its purpose; the duration of the measure and procedural protection; and the nature and degree of the actual restrictions involved.

On the first point, the Court noted that the applicants had entered the transit zone on their own initiative in order to seek asylum in Hungary and had not faced an immediate threat to their life or health in Serbia which had forced them to leave that country.

Considering the legal regime, the Court observed that the transit zone's express purpose was to serve as a waiting area while asylum applications were processed and that the applicants had had to wait there pending the completion of their appeal. Having to wait for a short time during such a process could not be considered deprivation of liberty.

The domestic law also had procedural guarantees on waiting times, which had been applied in the applicants' case. It had taken 23 days to examine their claims, at a time of a mass influx of asylum-seekers and migrants, and the Court found that the applicants' situation had not been influenced by any official inaction or by actions that had not been linked to their asylum claims.

As to the actual restrictions which the applicants had faced in the transit zone, the Court concluded that their freedom of movement had been restricted to a very significant degree given the small area of the zone and the fact that it was heavily guarded. However, it had not been restricted unnecessarily or for reasons unconnected with their asylum applications.

The remaining question was whether the applicants had been able to leave the zone for any other country than Hungary.

The Court first noted that other people in similar situations had returned to Serbia from the transit zone. A further significant consideration was that, in contrast to people confined to an airport transit zone, people in a land border zone, like the applicants, did not have to board an aeroplane to return to the country whence they had come. Serbia was adjacent to the Röszke zone and the possibility for the applicants to leave for that country had thus not only been theoretical but realistic.

The Court reiterated its findings in *Amuur v. France* that asylum-seekers being able voluntarily to leave a country where they had wished to take refuge did not exclude a restriction on liberty. However, it distinguished that case from Mr Ilias's and Mr Ahmed's as the applicants in *Amuur* had been confined to an airport transit zone which they had not been able to leave of their own volition and would have had to return to Syria, which was not bound by the Geneva Convention Relating to the Status of Refugees. Serbia was bound by that Convention and Mr Ilias and Mr Ahmed had had the real possibility of being able to return there of their own will.

The Court noted the applicants' fears, as set down under Article 3, of a lack of access to asylum procedures in Serbia and of further removal to other countries. However, it found that such fears could not make Article 5 applicable to their case, where all the other circumstances pointed to it not being applicable and with the circumstances being different from airport transit zone cases. Such an interpretation of the applicability of Article 5 would stretch the concept of deprivation of liberty beyond its meaning intended by the Convention.

The Court found that where all other relevant factors did not point to *de facto* deprivation of liberty, and where asylum-seekers could return to a third country without danger to their life or health, then a lack of compliance with a State's duties under Article 3 could not be called on to make Article 5 applicable to a situation in a land border zone where people were waiting for an asylum decision.

The Convention could not be read as linking in such a manner the applicability of Article 5 to a separate issue concerning the authorities' compliance with Article 3. That was the case even if the applicants had risked losing the right to have their asylum claims considered in Hungary if they returned to Serbia. That factor, along with their other fears, had not made the possibility of leaving the transit zone in the direction of Serbia merely theoretical. It therefore had not had the effect of making their stay in the transit zone involuntary from the standpoint of Article 5 and could not by itself trigger the applicability of that provision.

The Court concluded that the applicants had not been deprived of their liberty within the meaning of Article 5, which therefore did not apply to their case and their complaint under this provision had to be rejected as inadmissible.

Just satisfaction (Article 41) - The Court held by 16 votes to one that Hungary was to pay the applicants 5,000 euros (EUR) each in respect of non-pecuniary damage. It held unanimously that Hungary was to pay the applicants EUR 18,000 jointly in respect of all costs and expenses.

Separate opinion - Judge Bianku, joined by Judge Vučinić, expressed a partly dissenting opinion which is annexed to the judgment.

47. **ECtHR, *Z.A. and Others v. Russia*, No. 61411/15, Grand Chamber judgment of 21 November 2019 (Article 5-1, Right to liberty and security – Violation; Article 3, Prohibition of torture and inhuman or degrading treatment – Violation).** The applicants, an Iraqi, a Palestinian, a Somalian and a Syrian nationals, successfully complained that their confinement in the transit zone of Moscow's Sheremetyevo airport while the authorities had been dealing with their asylum applications, had amounted to unlawful deprivation of liberty, and that their conditions of detention in this zone had been contrary to the Convention.

ECHR 401 (2019)
21.11.2019

Press release issued by the Registrar

The case of Z.A. and Others v. Russia (application no. 61411/15) concerned four men who were held for long periods of time in the transit zone of Moscow's Sheremetyevo airport while the authorities dealt with their asylum applications. They all eventually left Russia after living in the transit zone.

In today's **Grand Chamber** judgment1 the European Court of Human Rights held, unanimously, that there had been,

a violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights, and,

a violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the European Convention.

The Court found in particular that Article 5 was applicable to the applicants' case as their presence in the transit zone had not been voluntary; they had been left to their own devices for the entire period of their stay, which had lasted between five months and almost two years depending on the applicant; there had been no realistic prospect of them being able to leave the zone; and the authorities had not adhered to the domestic legislation on the reception of asylum-seekers.

Given the absence of a legal basis for their being confined to the transit zone, a situation made worse by them being impeded in accessing the asylum system, the Court concluded that there had been a violation of the applicants' rights protected by Article 5 § 1.

The conditions the applicants had lived in had also been appalling: they had had to sleep in the transit zone, a busy and constantly lit area, with no access to washing or cooking facilities. There had thus also been a breach of Article 3 as their treatment had been degrading.

Principal facts

The applicants are four individuals, Z.A., an Iraqi national; M.B., who holds a passport issued by the Palestinian Authority; A.M., a Somalian national; and Hasan Yasien, a Syrian national. They were born in 1987, 1988, 1981 and 1975 respectively.

Travelling independently from each other in different circumstances, the applicants eventually arrived at Moscow's Sheremetyevo Airport, where they were denied entry into Russia by the border authority. They applied for refugee status in Russia, without success. Three of them spent between five and seven months in 2015/2016 in the transit zone of the airport while A.M. was there for almost two years.

Z.A. and Mr Yasien were eventually resettled by the office of the United Nations High Commissioner for Refugees ("UNHCR"), in Denmark and Sweden. They left the airport in March and May 2016. M.B. left the transit zone to take a flight to Egypt in February 2016 while A.M. left for Mogadishu in March 2017 after losing hope of obtaining refugee status in Russia.

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights, the applicants alleged that their confinement in the transit zone had amounted to unlawful deprivation of liberty. They also complained under Article 3 (prohibition of inhuman or degrading treatment) of the Convention of poor conditions of detention in the transit zone, where they had had to sleep on mattresses in the constantly lit, noisy boarding area of the airport, with no possibility to shower, and to live on emergency rations provided by UNHCR.

The first three applications were lodged with the European Court of Human Rights on 12 December 2015 and the fourth on 14 January 2016.

In a Chamber judgment of 28 March 2017, the European Court of Human Rights held, by six votes to one, that there had been a violation of Article 5 § 1 of the Convention, finding that the applicants' confinement in the transit zone, which had not been of their own choosing, had amounted to deprivation of liberty and that there had been no domestic legal basis for it.

The Chamber also held, by six votes to one, that there had been a violation of Article 3 as the applicants had been detained for extended periods of time in unacceptable conditions, which had undermined their dignity, made them feel humiliated and debased, and had therefore amounted to inhuman and degrading treatment.

On 18 September 2017 the Grand Chamber Panel accepted a request from the Russian Government that the case be referred to the Grand Chamber. A hearing was held on 18 April 2018.

The Government of Hungary and the Memorial Human Rights Centre organisation were granted leave to intervene in the written proceedings before the Grand Chamber as third parties but only the Government of Hungary submitted observations. UNHCR's submissions in the Chamber case related to the fourth application were also included in the Grand Chamber case file.

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

Linos-Alexandre **Sicilianos** (Greece), *President*,
Angelika **Nußberger** (Germany),
Robert **Spano** (Iceland),
Jon Fridrik **Kjølbro** (Denmark),
Ksenija **Turković** (Croatia),
Paul **Lemmens** (Belgium),
Ledi **Bianku** (Albania),
Işıl **Karakaş** (Turkey),
Nebojša **Vučinić** (Montenegro),
André **Potocki** (France),
Aleš **Pejchal** (the Czech Republic),
Dmitry **Dedov** (Russia),
Yonko **Grozev** (Bulgaria),

Mārtiņš **Mits** (Latvia),
Georges **Ravarani** (Luxembourg),
Jolien **Schukking** (the Netherlands),
Péter **Paczolay** (Hungary),

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

Decision of the Court

Article 5 § 1

The Court took note of concerns expressed by the Governments of Russia and Hungary, as a third party, and agreed that the case had to be seen in the context of the challenges facing States owing to the influx of large numbers of refugees and migrants.

However, the Court held that the case had little to do with whether the right to asylum or asylum-shopping existed under international law but that it was about the legal basis for the applicants being held in the airport and the conditions of their confinement there.

Applicability of Article 5

The Court reiterated previous case-law that four factors had to be taken into consideration when distinguishing between a restriction on liberty of movement and deprivation of liberty when it came to foreigners being confined in airport transit zones and reception centres. Those factors were: the applicants' individual situation and choices; the applicable legal regime and its purpose; the duration of the measure and procedural protection; and the nature and degree of the actual restrictions.

The Court found among other things that the applicants' presence at the airport had not been voluntary, as it had been due to their travel routes, while the Russian authorities had been entitled to perform checks of their claims before deciding to admit them. The purpose of a transit zone was to hold people pending a decision and the authorities had not sought to deprive them of their liberty. States also had a right to carry out such procedures and being made to wait for a short time pending their completion was not deprivation of liberty.

However, the Government had not been able to point to any legal guarantees about the time required to process the applicants' asylum applications and on the maximum length of their stay in the transit zone. Requirements that were laid down by law were not adhered to: for instance the applicants had not been given certificates to show their asylum claims had been examined by the migration authority and they had been left to their own devices in the zone rather than being offered asylum accommodation.

The duration of a restriction was also an important point to consider. In this case, the processing and subsequent judicial decisions on their asylum claims had been anything but speedy as the applicants had spent between five and 21 months in the transit zone depending on their circumstances.

As to restrictions, the Court noted that the zone was continuously monitored by the Border Guard Service, a branch of the Federal Security Service. The applicants' freedom of movement had been very restricted, in a way that was similar to certain types of light regime detention facilities. Unlike a land transit border zone, leaving the airport would have required much planning and organisation and the Court found that the Government had not substantiated its assertion that the applicants had been free to leave at any time. The Court concluded that Article 5 was applicable to the applicants' case.

Compatibility of the applicants' deprivation of liberty with Article 5

The Court noted the arguments by the applicants and UNHCR that there had been no legal basis for the men's confinement in the transit area, something the Government had essentially not disputed.

After examining the relevant law, the Court could find no trace of any provision which could serve as grounds for justifying the applicants having been deprived of their liberty. For that reason alone there had been a violation of Article 5 of the Convention.

However, their situation had been worsened by the fact that their access to the asylum system had been impeded as there had been no information available in the transit zone on asylum procedures and their access to legal assistance had been severely restricted.

Furthermore, they had experienced serious delays when attempting to submit and register their asylum applications, they had not been given the necessary examination certificates, and there had been delays in communicating some of the official decisions to them. They had also been held in an area which had clearly not been suitable and the length of their stay had been excessive. The Court concluded that each applicant had suffered a violation of their rights under Article 5 § 1.

Article 3

Many States faced an influx of asylum-seekers and migrants and the Court did not underestimate the burden and pressure this placed on Governments. It was particularly aware of the difficulties involved in the reception of asylum-seekers at major international airports.

However, the prohibition of inhuman or degrading treatment in the Convention was a fundamental value in democratic societies and was a value of civilisation closely bound up with respect for human dignity, which was part of the very essence of the Convention.

It was clear in the applicants' case that the conditions in which they had lived in the airport transit zone had been unsuitable for an enforced and lengthy stay.

Their having had to sleep on the floor in a constantly lit, crowded and noisy airport transit zone, without unimpeded access to cooking or shower facilities and without outdoor activities or medical or social assistance, had fallen short of the minimum standards of respect for human dignity.

The situation had been aggravated by the applicants being left to their own devices, in disregard of Russia's domestic rules on asylum procedures. Three of the applicants had eventually been recognised by UNHCR as needing international protection, suggesting that their distress had been accentuated by the events they had been through during their migration.

Taken together, the appalling conditions of their detention, which they had had to endure for a long time, and the complete failure of the authorities to take care of them, had constituted degrading treatment, in violation of each applicant's right under Article 3 of the Convention.

Just satisfaction (Article 41)

The Court held that Russia was to pay 20,000 euros (EUR) each to Z.A. and Mr Yasien in respect of non-pecuniary damage; EUR 15,000 in respect of non-pecuniary damage to M.B.; and EUR 26,000 in respect of non-pecuniary damage to A.M. The Court also awarded EUR 19,000 jointly to the applicants in respect of costs and expenses.

48. ECtHR, *Parmak and Bakir v. Turkey*, Nos. 22429/07 and 25195/07, Chamber judgment of 3 December 2019 (Article 7, No punishment without law – Violation; Article 8, Right to respect for private life – Violation). The applicants are Turkish nationals who had been sentenced to imprisonment on account of their membership of an illegal organisation (the Bolshevik Party of North Kurdistan/Turkey). They successfully complained that the domestic legislation on terrorism and its interpretation by the domestic courts had been too broad and had led to a violation of their rights.

ECHR 411 (2019) - 03.12.2019

Press release issued by the Registrar

The applicants, Şerafettin Parmak and Mehmet Bakır, are Turkish nationals who were born in 1955 and 1963 respectively and live in Denizli (Turkey) and Berlin (Germany). The case essentially concerned domestic legislation on terrorism and its interpretation by the domestic courts. The applicants were taken into police custody in 2002 following an investigation into flyers distributed in Izmir by the Bolshevik Party of North Kurdistan/Turkey ("the BPKK/T"), a pro-Kurdish organisation which was subsequently designated as a terrorist organisation in proceedings against the applicants.

During the proceedings the applicants denied any involvement in the BPKK/T, and stated that in any event there was nothing in the case file to suggest that the organisation was involved in violence and was therefore terrorist. They submitted that the flyers had not made any incriminating statements, and had been nothing more than the legitimate exercise of freedom of thought and expression.

The domestic courts ultimately convicted the applicants of membership of an illegal organisation in 2006 and sentenced them to two years and six months' imprisonment. They based their findings on a note by the General Security Directorate which classified the BPKK/T as a terrorist organization whose ultimate aim was to bring about an armed revolution in Turkey. They also relied on an identification parade, BPKK/T flyers and periodicals seized during a search of Mr Parmak's apartment and the organisation's manifesto discovered in a co-accused's apartment.

In convicting the applicants, the courts relied on the relevant domestic legislation as amended in 2003 to define terrorism as acts that were "committed using violence and coercion". In this case, the court found that even though the members of the organisation had not resorted to physical violence, they had used "moral coercion" or intimidation in their confiscated documents which constituted a form of violence.

The applicants had in the meantime – in January 2003 – been released and had had a travel ban imposed on them. Mr Bakır made seven applications to the courts for the ban to be lifted, explaining each time that he resided in Germany and that the ban had a profound impact on both his professional and private life. The courts either rejected his requests, referring to the ongoing proceedings, or did not reply at all. The ban was eventually lifted in June 2009 when he had served his sentence.

Relying in particular on Article 7 (no punishment without law), the applicants complained that their conviction had been based on too broad an interpretation of the definition of terrorism, notably that violence, which is a component of a terrorist offence, could be taken to include moral coercion. Mr Bakır also complained that the ban on him travelling while the criminal proceedings had been ongoing had not been justified, in breach of Article 8 (right to respect for private life).

Violation of Article 7 – as concerns Mr Parmak and Mr Bakir; **Violation of Article 8** – as concerns Bakir
Just satisfaction: 760 euros (EUR) to Mr Bakır for pecuniary damage, EUR 7,500 to Mr Parmak and EUR 9,750 to Mr Bakır for non-pecuniary damage, and EUR 831 to Mr Parmak for costs and expenses

49. ECtHR, *A.S. v. Norway*, No. 60371/15 and *Abdi Ibrahim v. Norway*, No. 15379/16, Chamber judgments of 17 December 2019 (Article 8, Right to respect for private and family life – Violation). The applicants are a Polish national in the first case, and a Somali national in the second, whose children had been taken into care and placed with a foster family. The first applicant complained that the Norwegian authorities had rejected her request to end her son's placement in a foster family, denied her any contact rights and withheld the foster family's address. The applicant in the second case complained about the decision by the Norwegian authorities to withdraw her parental rights and to authorise her child's adoption. The Court considered that it had to apply the "strict scrutiny" when limitations had been placed on parental access after a child had been taken into care. The Court found that the decision-making process on the children in these two cases had failed to give due account to the applicants' views and interests, leading to violations of their human rights.

ECHR 436 (2019)
17.12.2019

Press release issued by the Registrar

In today's **Chamber** judgments1 in the cases of **A.S. v. Norway** (application no. 60371/15) and **Abdi Ibrahim v. Norway** (application no. 15379/16), the European Court of Human Rights held, unanimously, that there had been in both cases:

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

The cases concerned decisions by the Norwegian authorities and courts to take the applicants' children into care at a young age and then in the first case to refuse to terminate long-term foster care for the child and in the second to allow adoption by the foster family, both against the applicants' wishes. The applicants were refused any contact rights with their children.

The Court referred to the recent case of *Strand Lobben v. Norway*, noting the "strict scrutiny" it had to apply when limitations had been placed on parental access after a child had been taken into care.

The Court found that the decision-making process on the children in these two cases had failed to give due account to the applicants' views and interests, leading to violations of their human rights.

Principal facts

The two applicants in these cases were women whose children were taken into care and placed with a foster family. In the first case the authorities refused to terminate foster care for the child and in the second the child was adopted by the foster carers, in both instances against the applicants' wishes.

The applicant in the first case was A.S., a Polish national who was born in 1968, while the applicant in the second case was Mariya Abdi Ibrahim, a Somali national born in 1993.

The first applicant's son, born in 2009, was first placed in emergency care and then in foster care in 2012. She applied in 2014 to terminate the placement, but the City Court in March 2015 rejected her request, denied her any contact rights and withheld the foster family's address.

The City Court found, among other things, that the son had had developmental issues which had improved after his foster placement. The applicant had acknowledged that the 2012 care order had been justified but had argued that her parenting skills had improved after special courses.

The City Court questioned whether she had acknowledged her neglect of the child and could not see that the measures she had taken had had much effect on her parenting skills. It further observed that contact sessions with her son had shown that she could not see his perspectives and needs.

The City Court also found that he had become so attached to his foster family that he would be harmed if he was moved. The applicant was denied leave to appeal by both the High Court and the Supreme Court, whose decision was delivered in July 2015.

The second applicant's child, a son born in 2009 in Kenya before she moved to Norway, where she was granted refugee status, was taken into emergency foster care in December 2010. He was subsequently placed with a Christian family, while the applicant had argued he should go to either her cousins or to a Somali or Muslim family.

The authorities applied to allow the foster family to adopt the child, which would lead to the applicant having no contact, and for the applicant's parental rights to be removed. She appealed: she did not ask for the child's return as he had spent a long time with foster parents to whom he had become attached, but she sought contact so he could maintain his cultural and religious roots.

The High Court ruled by a majority in May 2015 to dismiss the applicant's appeal and allow the adoption. Among other things, it examined issues arising from his being adopted by a Christian family, such as ethnicity, culture and religion. She was refused leave to appeal to the Supreme Court in September 2015.

Complaints, procedure and composition of the Court

The applicant in the first case complained that the decisions refusing to terminate her child's foster placement, the refusal of contact, and the withholding of his address had constituted a violation of Article 8 (right to respect for private and family life). The application was lodged with the European Court of Human Rights on 25 November 2015.

The applicant in the second case complained about the withdrawal of her parental rights and the authorisation for adoption, relying on Article 8 and Article 9 (freedom of thought, conscience and religion). The application was lodged on 17 March 2016.

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

Robert **Spano** (Iceland), *President*,
Marko **Bošnjak** (Slovenia),
Valeriu **Grițco** (the Republic of Moldova),
Egidijus **Kūris** (Lithuania),
Ivana **Jelić** (Montenegro),
Arnfinn **Bårdsen** (Norway),
Darian **Pavli** (Albania),

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

Decision of the Court

Considerations common to both cases

The Court reiterated the principles related to child welfare as set out in *Strand Lobben*. Where public care had been imposed, the authorities had a duty to take measures to facilitate family reunification as soon as reasonably feasible.

Where there was a conflict of interests between a child and the parents, the authorities had to strike a fair balance, although a child's best interests could override those of a parent. Family ties could only be severed in very exceptional circumstances. States had wide discretion ("a wide margin of appreciation") when deciding on taking a child into care, but the Court had to apply a "stricter scrutiny" of further limitations, such as restricting parental access, as they could lead to a parent and young child's family relations being curtailed.

Case of A.S. v. Norway

The Court noted that the March 2015 City Court judgment refusing the applicant's request to end her son's foster placement had stated that such care was expected to be "long term". Furthermore, the proceedings before that point had also carried the assumption of an extended placement. The situation had thus been cemented from the outset, in particular through a strict regime of visits.

The Court found no grounds to second-guess the City Court's assessment of aspects of the case.

However, it observed that a finding that the applicant had shortcomings in her basic and intuitive parental skills was particularly challenging as it had to rest on vague and subjective criteria.

The Court also emphasised that the City Court's decision, which had effectively represented the end-point for the applicant's family life with her son, had to be based on a sufficiently broad and updated factual basis, particularly where she had argued that her parenting skills had improved.

The City Court had assessed a number of relevant issues, but it was striking that it had nevertheless rejected all the evidence in the applicant's favour with limited or no reasoning. Furthermore, the March 2015 judgment had been based on old reports: her parenting skills had last been assessed independently in 2012, while the foster parents had been the ones who had reported on the child's development from 2013 to 2015, without further independent corroboration.

The decision to refuse to terminate foster care had been based to a large extent on the child's negative reactions to contact sessions with the applicant. However, those reactions had also been reported on by the foster parents as they had been with him between the sessions. Psychologists had disagreed as to why the child had reacted negatively to his mother. In short, the City Court had provided limited grounds for its finding about the nature and cause of the child's negative reactions.

The Court, emphasising the gravity of the interference in question and the seriousness of the interests at stake, did not consider that the decision-making process leading to the orders against the applicant had been conducted to ensure that all her views and interests had been duly taken into account. It concluded that there had been a violation of Article 8.

Case of Abdi Ibrahim v. Norway

The Court decided to consider the applicant's complaints under Article 8 alone.

It noted that Ms Abdi Ibrahim had not sought her child's return but had asked the courts to refuse his adoption and the removal of her parental rights, maintaining her contact rights. Nevertheless, the authorities had still been under an obligation to facilitate their family life, at the minimum by maintaining a relationship via regular contact in a way that was in the child's best interests.

The Court noted that from the outset her contact with her child had been severely limited by the authorities, thus already leading to a danger of their family ties being completely broken.

It was thus difficult to see how the authorities had fulfilled their duty to facilitate family reunification, especially when an initial care order was to be seen as a temporary measure and that adoption, the most far-reaching outcome, was only to be foreseen after careful consideration by the courts had led to a conclusion that reunification was not possible.

Furthermore, domestic authorities could not use a breakdown in family relations as a reason to authorize adoption when they had themselves created that situation by failing in their obligation to take measures to reunite a family.

A key issue in the High Court judgment had been that the child had reacted negatively to the few contact sessions that had taken place with the applicant.

However, it was not possible to draw clear conclusions about future contact from so few meetings.

The High Court had also provided limited grounds for its findings on the nature and cause of the child's reactions during the meetings, which had nevertheless been crucial for its finding that adoption should go ahead. There had been little to suggest that contact would always be negative so as to conclude that breaking off all contact with the applicant would be in the child's best interests.

Lastly, the High Court had focussed on the potential harm from the child being removed from his foster parents, rather than on the grounds for terminating all contact with his mother. The High Court had thus apparently given more importance to the foster parents' opposition to an "open adoption", which would have allowed for contact, than to Ms Abdi Ibrahim's interest in continuing to have a family life with her child.

The Court concluded that the authorities had not given enough weight to the applicant and her child enjoying a family life, a finding it based on the case as a whole and on reasons which had spoken for maintaining contact, notably relating to their cultural and religious background.

The Court, emphasising the gravity of the interference and the seriousness of the interests at stake, did not consider that the decision-making process leading to the withdrawal of the applicant's parental responsibilities for her child and to his adoption had been conducted so as to ensure that all the applicant's views and interests had been duly taken into account.

There had therefore been a violation of Article 8.

Just satisfaction (Article 41)

The Court held that Norway was to pay the applicant in the first case 25,000 euros (EUR) in respect of non-pecuniary damage. The applicant in the second case did not claim compensation for damage.