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Appendix III

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

prepared by the
Public International Law Division
Directorate of Legal Advice and Public International Law (DLAPIL)

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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. **ECHR, *Jeddi v. Italy*, no. 42186/14, Chamber judgment of 9 January 2020 (Article 5-1, right to liberty and security – No violation).** The applicant, a Tunisian national, appealed against his placement in the Milan Identification and Expulsion Centre with a view to his removal, despite a court ruling requiring the authorities to grant him a residence permit on humanitarian grounds.

ECHR 006 (2020)
09.01.2020

Press release issued by the Registrar

The applicant, Sami Jeddi, is a Tunisian national, who was born in 1983 and lives in Castel Volturno (Italy).

The case concerned the applicant's appeal against his placement in the Milan Identification and Expulsion Centre with a view to his removal, despite a court ruling requiring the authorities to grant him a residence permit on humanitarian grounds.

In April 2011 Mr Jeddi was arrested by Italian police on the island of Lampedusa where he had come ashore illegally and without identity documents.

On 21 April 2011 the police authorities issued him with a removal order and, pending its execution, he was placed in the Identification and Expulsion Centre in Santa Maria Capua Vetere; he submitted an application for international protection while he was there. On 31 May 2011 the Territorial Commission for the Recognition of International Protection rejected his request. Mr Jeddi challenged this decision before the Naples District Court. In a judgment of 16 November 2011 the court held that the grounds for seeking asylum or subsidiary protection were not sufficient. However, the court took the view – on the basis of a decree of the President of the Council of Ministers of 6 October 2011 – that the applicant was entitled to a residence permit on humanitarian grounds until 31 December 2012.

On 24 December 2011 Mr Jeddi arrived in Switzerland where he submitted an asylum application. On 19 October 2012 the Swiss authorities sent him back to Italy in accordance with the "Dublin Regulation". Upon his arrival at Milan airport, he was taken to the border police and on the same day the Prefect of Varese notified him of a removal order against him. Pursuant to this order, he was taken to the Identification and Expulsion Centre in Milan pending his removal.

On 22 October 2012 the Milan Justice of the Peace, after hearing the applicant, who was assisted by an interpreter and a court-appointed lawyer, endorsed the detention measure.

On 2 November 2012, after his lawyer had transmitted the judgment of the Naples District Court of 21 November 2011 to the Milan police authorities, the applicant was released. Upon an appeal by the applicant, the Justice of the Peace of Varese annulled the removal order and found that Mr Jeddi was allowed to remain in Italy until 31 December 2012, the expiry date of his humanitarian residence permit.

The applicant then lodged an appeal before the Court of Cassation against the decision of the Justice of the Peace of Milan who had endorsed his placement in the detention centre. The appeal was dismissed.

Relying in particular on Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights, the applicant claimed that his placement in the Identification and Expulsion Centre in Milan for 14 days in spite of the judgment of the Naples District Court which had required the Italian authorities to grant him a humanitarian residence permit had not met the requirements of the Convention.

No violation of Article 5 § 1

2. **ECHR, *Rinau v. Lithuania*, no. 10926/09, Chamber judgment of 14 January 2020 (Article 8, right to respect for private and family life – Violation).** The applicant, a German national and his Lithuanian daughter, successfully claimed that the Lithuanian authorities' handling of his complaint for the return of his daughter to his care in Germany infringed on their right to respect for private and family life.

ECHR 012 (2020)
14.01.2020

Press release issued by the Registrar

In today's **Chamber** judgment in the case of **Rinau v. Lithuania** (application no. 10926/09) 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 German father's efforts to return his daughter from his former Lithuanian wife after court orders in his favour.

The Court found in particular that it was clear that the legislature and executive had attempted to influence the decision-making process in favour of the mother, despite the court orders in favour of the father, which should have been rapidly enforced in Lithuania.

Among other factors, actions by the Supreme Court and the Supreme Court's President had led to "procedural vagaries" which had contradicted the aims of international and European Union rules on child custody.

Principal facts

The applicants, Michael Rinau, a German national, and his daughter Luisa, a Lithuanian and German national, were born in 1969 and 2005 respectively and live in Bergfelde (Germany).

The case concerns their complaint about the Lithuanian authorities' handling of Mr Rinau's case for the return of his daughter to his care in Germany.

In 2006 Mr Rinau's former wife, I.R., a Lithuanian national, took their daughter to her homeland for a holiday, but did not return after two weeks as promised. Mr Rinau applied for and obtained German court orders to give him provisional sole responsibility and to return the child to him. In 2007 the German courts also granted the couple a divorce and gave Mr Rinau permanent custody.

In October 2006 he applied to the Lithuanian courts to have the child returned, relying on the Hague Convention on the Civil Aspects of International Child Abduction and the European Union's Brussels II *bis* Regulation on the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. After being refused at first instance, he won such an order on appeal in March 2007 in a decision which was not amenable to further appeal.

The case attracted much comment by the Lithuanian media and politicians, who were critical of the idea of returning the child to Germany and who alleged that the authorities were failing to protect the rights of a Lithuanian citizen, the mother.

The case involved several sets of proceedings in Lithuania whereby the mother and the Prosecutor General aimed in particular to reopen the proceedings on the order to return the child.

In October 2007 the President of the Supreme Court adopted a ruling suspending the execution of the Court of Appeal decision of March 2007.

In April 2008 the Supreme Court also made a request for a preliminary ruling to the Court of Justice of the European Union (ECJ) on various aspects of the Brussels II *bis* Regulation. That Court essentially subsequently found that if the German courts had issued a valid certificate for the child's return, as they had done in 2007, then under the Regulation the Lithuanian courts had to fulfil it.

In August 2008 the Supreme Court rejected requests by the Prosecutor General and I.R. for a reopening of the civil proceedings and dismissed an appeal on points of law by I.R., referring to the ECJ preliminary ruling in both decisions.

Amid further delays in a handover, Mr Rinau in October 2008 took his daughter from a child-care centre in Lithuania and travelled to Latvia, being briefly detained at Riga airport before being allowed to proceed back to Germany. He initially faced criminal prosecution for abduction in Lithuania but prosecutors terminated the case in November 2009.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for family life), the applicants complained about the Lithuanian authorities' handling of the proceedings for the second applicant's return to Germany. Referring to Article 6 § 1 (right to a fair trial), they also complained that the case had been politicised.

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

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

Robert **Spano** (Iceland), *President*,
Marko **Bošnjak** (Slovenia),
Valeriu **Griţco** (the Republic of Moldova),
Egidijus **Kūris** (Lithuania),
Ivana **Jelić** (Montenegro),
Arnfinn **Bårdsen** (Norway),
Saadet **Yüksel** (Turkey),

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

Decision of the Court

The Court decided to deal with the applicants' complaints under Article 8 alone.

It observed that the key court of appeal decision in Lithuania, upholding Mr Rinau's right to the return of his daughter after German courts had already ruled in his favour, had been delivered in March 2007, five months after he had made his request.

While that length of time had exceeded the six-week limit set under the Hague Convention, the Court accepted that the courts had faced difficult, competing demands: they had had to act quickly as the child was being held unlawfully by the mother in Lithuania and they had also had to examine her allegations of harm to the child if returned to Mr Rinau.

The Court found that up to June 2007 the courts' decision-making, although lengthy compared with the provisions of the Hague Convention, had met the requirements of Article 8.

The Court then examined subsequent developments, including the applicants' allegations that politicians, both in the legislature and executive, had tried to influence the decision-making process.

It observed that there had been an upsurge of public, political and institutional pressure after the bailiff had begun to enforce the return order. That had involved a public petition, verbal assaults on Mr Rinau as a "German pig" or "Nazi" and threats to him, his lawyer and the bailiff.

The Court was disquieted by what it saw as concerted official efforts to keep the child in Lithuania, with members of Parliament openly questioning the lawfulness of court judgments and the Minister of Justice keeping the mother's hopes of reopening the case alive. There had in addition been pressure on the bailiff, an independent official, over the enforcement, and on the child-care services to change their opinion that it was in the child's best interests to return to Germany.

Furthermore, Lithuanian law had been changed in order to allow the couple's daughter to obtain citizenship despite Mr Rinau's argument that under the German court orders he alone had the authority to take decisions on his daughter's nationality. The Lithuanian Government had also made a financial contribution to assist the mother in the ECJ case.

The Court concluded that it was beyond doubt that the Lithuanian authorities had not ensured a fair decision-making process in the enforcement of the judgment for the child's return.

The Court also took note of the personal intervention of the President of the Supreme Court in the case and then the subsequent Supreme Court proceedings, which had in turn been suspended pending a preliminary ruling by the ECJ. That was despite the fact that it was not possible under Lithuanian law to reopen proceedings for the return of a child under the Hague Convention.

Those and other "procedural vagaries" had completely disregarded the fundamental aims of the Hague Convention, the EU Regulation and Article 8 of the Convention. While Mr Rinau had taken his daughter back to Germany in "extemporaneous" fashion, he had already been faced with a long wait and had feared more delays owing to the mother's opposition.

The Court concluded that the time taken by the Lithuanian authorities to reach a final decision in the applicants' case had failed to respond to the urgency of the situation.

Overall, such conduct by the Lithuanian authorities had fallen short of what was required of the State under Article 8 and there had been a violation of that provision in respect of both applicants.

Just satisfaction (Article 41)

The Court held that Lithuania was to pay the applicants 30,000 euros (EUR) jointly in respect of non-pecuniary damage and EUR 93,230 in respect of costs and expenses.

The judgment is available only in English.

3. **ECHR, *D and Others v. Romania*, no. 75953/16, Chamber judgment of 14 January 2020 (Article 2, right to life and Article 3, prohibition of torture and inhuman or degrading treatment – No violation; Article 13, right to an effective remedy, taken together with Articles 2 and 3 – Violation).** The case concerned an order for the expulsion to Iraq of an Iraqi national following his conviction in Romania for having facilitated the entry to Romania of persons involved in terrorist activities (a migrant smuggling offence).

ECHR 016 (2020)
14.01.2020

Press release issued by the Registrar

The case concerned an order for the expulsion to Iraq of an Iraqi national following his conviction in Romania for having facilitated the entry to Romania of persons involved in terrorist activities (a migrant smuggling offence).

In today's **Chamber** judgment1 in the case of **D and Others v. Romania** (application no. 75953/16) the European Court of Human Rights held, unanimously:

- that there would **not be a violation of Article 2 (right to life) and 3 (prohibition of torture and inhuman or degrading treatment)** of the European Convention on Human Rights if the order to expel the applicant to Iraq were implemented;

- that there had been a **violation of Article 13 (right to an effective remedy)** of the Convention, **taken together with Articles 2 and 3**.

The Court held that the general evidence submitted by D was accompanied by very little information about his individual circumstances and failed to demonstrate in practical terms that there was a direct link between his conviction in Romania and the likelihood of his being subjected in Iraq to treatment contrary to Articles 2 and 3 of the Convention. The actions for which D had been convicted in Romania had not taken place in Iraqi territory and had no direct link with terrorism. There were therefore no serious or proven grounds to believe that if he were returned to Iraq, D would run a real risk of being subjected to treatment in breach of Articles 2 and 3 of the Convention.

The Court noted that the remedies available to the applicant to challenge the expulsion order did not have suspensive effect, which was incompatible the Court's case-law in respect of Article 13.

The Court considered that the complaints under Articles 6 (right to a fair hearing) and 8 (right to respect for private and family life) of the Convention were manifestly ill-founded.

The Court decided to continue to indicate to the Government (Rule 39 of the Rules of Court) not to send D back to Iraq until such time as the judgment became final or the Court gave another ruling on the subject.

Principal facts

The applicants are D, an Iraqi national who was born in 1975, and his former wife and their three children, Romanian nationals. They live in Bucharest.

D arrived in Romania in 1994 and was legally resident there until 1997. That same year he obtained refugee status in Germany and returned to Romania, where he married. The couple, who had three children, divorced in 2009. Custody of the children was granted to the mother.

Until 2003 D was legally resident in Romania, then illegally after that date. In 2006 the prosecutor's office declared that his presence on Romanian territory was undesirable for a period of 15 years, on the ground that he constituted a serious threat to national security. In the same year D was expelled to Syria, but he returned to Romania illegally in 2007, under a false identity and with false identity papers.

In 2007 D was granted "tolerated status" on Romanian territory. That same year the prosecutor's office opened a criminal investigation against him on charges of migrant smuggling, membership of a criminal organisation and forgery. Three criminal case files were compiled against him. D was sentenced to prison terms in respect of the first two sets of charges. In this application, his complaints concerned the third criminal case, in which he was accused of having facilitated the entry into Romanian territory of five Iraqi nationals with links to terrorist activities.

In 2014 the first-instance court sentenced D to seven years' imprisonment, together with a five-year prohibition on residing in the country. On appeal, his sentence was reduced to three years and six months' imprisonment and the High Court upheld the order for his exclusion from the national territory for five years.

In 2017, after having served his sentence, D was released then placed in administrative detention with a view to his detention from Romania. The applicant challenged his expulsion, alleging that he would be exposed to the death penalty, torture or ill-treatment. He specified that his expulsion would also have irreversible consequences for his private and family life. He also made an asylum claim. All his appeals were rejected.

In the meantime, D contacted the European Court of Human Rights, requesting the application of an interim measure (Rule 39 of the Rules of Court). In October 2017 the Court decided to ask the Romanian Government to stay D's expulsion until further notice.

In 2019 was granted "tolerated status" until 11 May 2019. He lives with his ex-wife.

Complaints, procedure and composition of the Court

Relying on Articles 2 (right to life) and 3 (prohibition of torture and inhuman or degrading treatment), D alleged that he would be exposed to the death penalty or that he would be subjected to torture and inhuman treatment were he to be deported to Iraq.

Relying on Article 13 (right to an effective remedy), D complained that he had not had access to a remedy with suspensive effect before the domestic courts, which would have enabled those courts to examine his allegations under Articles 2 and 3 of the Convention in the event of his expulsion to Iraq.

Relying on Article 6 (right to a fair trial), D complained about the length of the criminal proceedings the fact that he had been convicted on the basis of statements from witnesses who had not been heard directly by the courts and the use of secret documents to which he had not had access.

The five applicants complained about a breach of their rights as guaranteed by Article 8 (right to respect for private and family life).

The application was lodged with the European Court of Human Rights on 30 November 2016.

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

Jon Fridrik **Kjølbro** (Denmark), *President*,
Faris **Vehabović** (Bosnia and Herzegovina),
Iulia Antoanella **Motoc** (Romania),
Branko **Lubarda** (Serbia),
Carlo **Ranzoni** (Liechtenstein),
Georges **Ravarani** (Luxembourg),
Jolien **Schukking** (the Netherlands),

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

Decision of the Court

Articles 2 (right to life) and 3 (prohibition of torture and inhuman or degrading treatment)

D alleged that his conviction in Romania for acts linked to terrorism would expose him to ill-treatment, torture or the death penalty if he returned to Iraq. In support of his argument, he referred to the general situation in Iraq.

The Court noted that the general evidence submitted by D was accompanied by very little information about his individual circumstances and failed to demonstrate in practical terms that there was a direct link between his conviction in Romania and the likelihood of his being subjected to treatment in breach of Articles 2 and 3 of the Convention in Iraq. Indeed, although this evidence drew attention to failings in the Iraqi system for suppressing terrorism, it indicated that the shortcomings in question had been observed in the context of criminal proceedings conducted against persons suspected of terrorist acts carried out on Iraqi soil. However, the actions for which D had been convicted in Romania had not occurred on Iraqi territory and had no direct link with terrorism, as D had been convicted of facilitating the entry into Romanian territory of individuals involved in terrorist activities (a migrant-smuggling offence). In addition, D had never been accused, in Romania or Iraq, of having been personally involved in acts of a terrorist nature. For these reasons, the Court concluded that there was no conclusive evidence to suggest that D was exposed to a real threat of being re- tried in Iraq or of being re-sentenced.

The Court also noted that Iraq applied the *non bis in idem* principle, which made it possible from the outset to rule out the possibility of a new trial for the same offences. Furthermore, D had not submitted any evidence showing that this principle had not been respected in practice by the Iraqi authorities. Lastly, D had a normal relationship with the authorities in his country, given that they had issued him, at his request, with a document stating that he was not being searched for or under prosecution in Iraq and that he was not linked to military or terrorist groups. The same Iraqi authorities had also issued him with at least two *laissez-passer*.

For these reasons the Court considered that, in holding that D had not demonstrated that he ran a real risk on account of his individual situation were he to be returned to Iraq, the national courts had not imposed on him an excessive evidentiary burden. In addition, the analysis performed by the national courts had been reasoned and free from arbitrariness.

It followed that there were no serious or proven grounds to believe that if he were returned to Iraq, D would run a real risk of being subjected to treatment in breach of Articles 2 and 3 of the Convention. There would not therefore be a violation of Articles 2 and 3 if the order to expel the applicant to Iraq were implemented.

Article 13 (right to an effective remedy)

The Court noted that D had been able to challenge the execution of the additional penalty imposed on him (a five-year ban on entering the national territory) and that he had also applied for asylum. However, those remedies did not have suspensive effect under Romanian law in so far as D's situation was concerned, which was incompatible with the Court's case-law. It followed that there had been a violation of Article 13 taken together with Articles 2 and 3 of the Convention.

Other articles

The Court concluded that the complaints under Articles 6 and 8 of the Convention were manifestly unfounded, for the reasons set out below.

Under Article 6 (right to a fair trial), the Court noted, in particular, that the proceedings had lasted four years, one month and four days for two levels of jurisdiction, in a case involving cross-border

elements and foreign witnesses who had had to be identified and located by the national authorities. Those authorities had thus pursued the requirements of a fair trial with due diligence. The Court also noted that there had been serious grounds for the failure of one witness to appear and that secret evidence had not been used to justify D's conviction.

Under Article 8 (right to respect for private and family life), the Court held that the implementation of D's expulsion to Iraq did not appear to give rise to any violation of the five applicants' right to respect for their private and family life. In its reasoning, the Court gave specific consideration to the couple's divorce, which indicated a change in the applicants' family life, the particular seriousness of the terrorism-related offence and other offences of which D had been convicted, and the duration of the measure banning him from the national territory, which was limited to five years.

Just satisfaction (Article 41)

The Court held that its findings under Article 13 of the Convention taken together with Articles 2 and 3 constituted sufficient just satisfaction for any non-pecuniary damage sustained by D.

The judgment is available only in French.

4. **ECHR, *Kušić and Others v. Croatia*, no. 71667/17, decision of 16 January 2020 (Inadmissible).** The applicants, Serbian nationals, unsuccessfully claimed that the investigation into the death of their family members, who had been found shot dead by the side of a road in Petrovo Polje (Croatia) on 6 February 1992, had been ineffective and that the domestic remedy suggested by the Croatian Government for their grievance, a constitutional complaint, was not effective as the Constitutional Court usually dismissed such complaints as unfounded.

ECHR 021 (2019)
16.01.2019

Press release issued by the Registrar

In its decision in the case of Kušić and Others v. Croatia (application no. 71667/17) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

In their application to the European Court, the Kušić family alleged that the investigation into the death of their family members had been ineffective and that the domestic remedy suggested by the Government for their grievance, a constitutional complaint, was not effective as the Constitutional Court usually dismissed such complaints as unfounded.

The Court considered, however, that the Constitutional Court, after many years of not examining such grievances, had revised and consolidated its practice and in its most recent decisions of 2019 had exercised a review of the effectiveness of investigations, taking European Convention case-law as a basis for its assessment. The Constitutional Court was therefore now an effective remedy for complaints about ineffective investigations under Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment) of the Convention.

The applicants were therefore required to bring a constitutional complaint in Croatia before bringing an application before the European Court.

Principal facts

The applicants, Zdravka Kušić, Bojan Kušić, and Martina Kušić, are Serbian nationals who were born in 1958, 1987, and 1990 respectively and live in Kragujevac (Serbia).

The applicants' relatives, N.K. and P.K, were found shot dead by the side of a road in Petrovo Polje (Croatia) on 6 February 1992.

The police called an investigating judge as well as a deputy prosecutor and an inspection of the crime scene was carried out. After an autopsy established that N.K. and P.K. had died from gunshot wounds to the head and torso, the police filed a criminal complaint with the Sisak County State Attorney's Office against unknown persons for murder.

An investigation ensued and the police initially carried out numerous interviews, notably with two men who had been living with the Kušić family and neighbours who stated that N.K. and P.K. had been abducted by men in camouflage uniforms. The murders were classified as a war crime in 2006 and further interviews were carried out in late 2008 and the beginning of 2009 and then from 2016 to 2018.

The investigation was transferred to the Osijek authorities in 2010 and most recently, in March 2019, to the Zagreb authorities, but is to date still ongoing.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 29 September 2017.

Relying in particular on Article 2 (right to life), the applicants complained that the investigation into the killing of their relatives had been ineffective, and also argued that they had no effective domestic remedy for their complaint.

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

Krzysztof **Wojtyczek** (Poland), *President*,
Ksenija **Turković** (Croatia),
Armen **Harutyunyan** (Armenia),
Pere **Pastor Vilanova** (Andorra),
Pauliine **Koskelo** (Finland),
Jovan **Ilievski** (North Macedonia),
Raffaele **Sabato** (Italy),

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

Decision of the Court

First, the Court reiterated that as soon as the State authorities had been informed of the death of a person in suspicious circumstances, they were required to conduct an effective official investigation of their own motion. It was not up to the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.

In the applicants' case, the police had filed a criminal complaint shortly after they had learned of the killings and an investigation had ensued. However, the applicants had considered that that investigation had been ineffective.

The main question which the Court had to examine was whether, as argued by the Government, a constitutional complaint was an effective domestic remedy for complaints concerning ineffective investigations and whether the applicants should have lodged such a complaint before bringing their application before it.

The applicants alleged that the Constitutional Court usually dismissed such complaints as unfounded, relying on five decisions between 2012 and 2016 concerning constitutional complaints about civil court judgments dismissing claims against the State for compensation for violent deaths.

The Court noted, however, that the dates of those decisions corresponded to a transitional period when the Constitutional Court was consolidating its case-law on the admissibility of complaints concerning ineffective investigations under Articles 2 and 3 of the European Convention. Indeed, its case-law had first developed after a decision of November 2014 concerning an allegation of ill-treatment. That decision, referring to the standards for an effective investigation in the Strasbourg Court's case-law, had found a violation of the procedural aspect of Article 3 of the Convention, awarded damages to the complainant and ordered the prosecuting authorities to conduct an effective investigation. The Constitutional Court's most recent decisions in 2019 had extensively implemented the criteria established by the Court as concerned the effectiveness of investigations.

Thus, after many years of Croatia not examining grievances concerning the lack of an effective investigation and dozens of applications being lodged against that country before the Court, the Constitutional Court now provided parties with the possibility to have the effectiveness of investigations under Articles 2 and 3 of the Convention reviewed, taking the Court's case-law as the basis for its assessment.

Under those circumstances and emphasising the subsidiary character of its role, the Court considered that the applicants should be required to bring a constitutional complaint, a possibility which was still open to them given that the investigation into the death of their relatives was still ongoing, it being

understood that the period during which the proceedings were pending before the Court should not be held against them.

Following the termination of the proceedings before the Constitutional Court, or if those proceedings became unreasonably protracted, it remained open for the applicants to bring their complaints before the Court if they still considered themselves to be victims of a violation of the Convention.

The Court concluded that the applicants had not exhausted domestic remedies, meaning that they had not given the State the opportunity to put matters right through its own legal system first. It therefore rejected the application as inadmissible.

The decision is available only in English.

5. **ECHR, *Ahmadov v. Azerbaijan*, no. 32538/10, Chamber judgment of 30 January 2020 (Article 8, Right to protection of private and family life, the home and the correspondence – Violation).** The applicant, who was born in Georgia and now lives in Azerbaijan, successfully claimed that the Azerbaijani authorities' refusal to issue him an identity card violated his right to respect for private and family life, the home and correspondence.

ECHR 036 (2020)
30.01.2020

Press release issued by the Registrar

The applicant, Eldar Ziyadkhan oglu Ahmadov was born in 1973 in Georgia and lives in Baku. He is of Azerbaijani ethnicity.

The case concerned the authorities' refusal to issue him an identity card.

Mr Ahmadov was born in Georgia but moved to Baku in 1991 to begin studies at the Azerbaijan Oil and Chemistry Institute. In 1998 the Azerbaijan police put a stamp in his Soviet-issue passport that he was a "citizen of the Republic of Azerbaijan".

In 2008 he applied for an identity card, but was refused pursuant to Article 5 of the 1998 Law on Citizenship, which stated that only people who had permanent registration in Azerbaijan before the Law entered into force were considered citizens. However, the applicant had only had temporary registration as a student and thus did not qualify.

The applicant appealed against the administrative decision and won at first instance. However, on appeal by the authorities the refusal to issue the identity card was confirmed, a ruling upheld in December 2009 by the Supreme Court. The courts rejected his argument that his participation in elections, being designated as an Azerbaijani citizen on his son's birth certificate, issued in Georgia, and his registration as a reserve military officer in Azerbaijan were proof of citizenship, although they failed to address his argument about the stamp in his passport.

The applicant complained under Article 8 (right to respect for private and family life, the home, and the correspondence) of the European Convention on Human Rights about the refusal to issue him an ID card.

Violation of Article 8

Just satisfaction: 6,000 euros (EUR) for non-pecuniary damage and EUR 1,500 for costs and expenses

6. **ECHR, *Saribekyan and Balyan v. Azerbaijan*, no. 35746/11, Chamber judgment of 30 January 2020 (Article 2, right to life – Violation; Article 3, prohibition of torture and inhuman or degrading treatment - No violation).** The applicants are Armenian nationals whose son was arrested in Azerbaijan and placed in a cell, where he was found dead a month later. The applicants successfully claimed that their son had been tortured and killed in detention.

ECHR 039 (2020)
30.01.2020

Press release issued by the Registrar

The case of Saribekyan and Balyan v. Azerbaijan (application no. 35746/11) concerned the death of the applicants' son, an Armenian citizen, while in military police detention in Azerbaijan.

In today's **Chamber** judgment the European Court of Human Rights held that there had been,

by five votes to two, a violation of Article 2 (right to life) of the European Convention on Human Rights owing to the applicants' son's death in detention in Azerbaijan, and,

by six votes to one, a violation of Article 2 owing to the lack of an effective investigation into the son's death, and,

by six votes to one, **a violation of Article 3 (prohibition of torture and ill-treatment)** because the applicant's son had been tortured before his death, and,

unanimously, no violation of the rights of the applicants under Article 3.

The Court found in particular that the applicants had made a prima facie case that their son, Manvel Saribekyan, had died as a result of the violent actions of others, notably personnel at the Military Police Department in Baku, where he was being held. It could not accept the Azerbaijani authorities' version of events that he had hanged himself.

Furthermore, Azerbaijan had not provided any evidence to question Armenian forensic findings on injuries suffered by Mr Saribekyan before his death, including signs of beating and a head trauma, ill-treatment which had to be classified as torture.

Principal facts

The applicants, Mamikon Saribekyan and Siranush Balyan, are Armenian nationals.

Their son, Manvel Saribekyan, born in 1990, was arrested in Azerbaijan in September 2010. His family state that he inadvertently crossed the border in the fog in a forest while looking for wood and stray cattle, however, the Azerbaijani authorities accused him of being part of a plan to blow up a school in a nearby Azerbaijani village.

He was taken to the Military Police Department of the Ministry of Defence in Baku and placed in a cell, where he was found dead in October 2010, with the Azerbaijani authorities subsequently finding that he had hanged himself. A forensic report was issued.

The body was returned to Armenia in November 2010 and the authorities there opened a criminal investigation. A forensic report found injuries on his neck, head and body.

The Armenian Prosecutor General asked for legal assistance from Azerbaijan but as no reply was received the Armenian pre-trial investigation was suspended in December 2011. An investigation in Azerbaijan found in January 2011 that Mr Saribekyan had committed suicide, that he had been held in proper conditions and that he had not been assaulted while in custody.

Complaints, procedure and composition of the Court

The applicants complained under Article 2 (right to life), Article 3 (prohibition of torture and of inhuman or degrading treatment), Article 13 (right to an effective remedy), and Article 14 (prohibition of discrimination) in conjunction with Articles 2 and 3 that their son had been tortured and killed in detention; that the Azerbaijani authorities had not carried out an effective investigation; that they had had no effective legal remedy; and that the alleged violations had occurred because of discrimination based on ethnic origin.

The application was lodged with the European Court of Human Rights on 10 June 2011.

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

Angelika **Nußberger** (Germany), *President*,
Yonko **Grozev** (Bulgaria),
Ganna **Yudkivska** (Ukraine),
Síofra **O'Leary** (Ireland),
Mārtiņš **Mits** (Latvia),
Lətif **Hüseynov** (Azerbaijan),
Lado **Chanturia** (Georgia),

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

Decision of the Court

The Court first rejected two objections by the Government of Azerbaijan. It argued that Mr Saribekyan had been captured as a member of the Armenian armed forces and so his case had to be dealt with under international humanitarian law not by the Court. In addition, it argued that the applicants had not met the requirement of exhausting domestic remedies.

On the first point, the Court noted that international humanitarian law and international human rights laws were not mutually exclusive. Furthermore, international humanitarian law usually applied in a situation of armed conflict, which was not the case here.

Rejecting the second objection, the Court noted that there were no diplomatic relations between the two countries and that the Azerbaijani Government had not provided any examples of people in the applicants' situation being able to obtain redress in its jurisdiction.

Article 2

Mr Saribekyan's death

The Court emphasised that this provision was one of the most fundamental of the Convention and that it applied careful scrutiny to cases involving someone being deprived of their life.

It noted that the Azerbaijan and Armenian authorities had come to different conclusions about how Mr Saribekyan had died, with the former finding that he had hanged himself with a bed sheet in his cell and the latter that he had had other injuries, including signs of beating.

The Court observed that the Armenian investigation had been accompanied by photographs and drawings, whereas the Azerbaijan Government had not submitted any supporting evidence for its

authorities' findings. Furthermore, the photographs in the Armenian forensic report had shown head injuries that should have been examined in the corresponding procedure in Azerbaijan.

While the Court adopted a standard of proof of "beyond reasonable doubt" in cases of death or injury at the hands of the State, strong presumptions of fact could arise where injuries or death occurred during detention as the authorities were the only one who could know what had happened. A Government then had to provide a convincing and satisfactory explanation.

However, the limited Azerbaijani investigation into Mr Saribekyan's case and the lack of documentation to support the findings gave cause for concern.

The applicants had made a prima facie case that their son had been taken into custody in good health and had died as the result of actions by personnel at the Military Police Department in Baku. Given the evidence made available to the Court, including the Armenian investigation's descriptions and photographs of Mr Saribekyan's injuries, and the information on the arrangement of the cell, the account according to which he had hung himself could not be accepted.

The Government of Azerbaijan had not convincingly accounted for how Mr Saribekyan had died and the respondent's State's responsibility was engaged. There had thus been a violation of Article 2.

The Azerbaijani investigation

The Azerbaijan authorities had assumed from the outset that Mr Saribekyan had committed suicide, limiting the scope of the investigation and hampering its efficacy.

Moreover, there should have been a careful investigation into whether ethnic hatred had contributed to his death: he had been arrested as an Armenian citizen allegedly engaged in spying and plotting a terrorist act, something the personnel at the Military Police Department must have been aware of. The events had also occurred amid a general context of inter-State tensions.

Nor had the Azerbaijani authorities contacted the family or any Armenian authority during the domestic proceedings, the Court noting that a lack of diplomatic relations did not mean countries had no duty to cooperate in a criminal investigation in the context of Article 2. Furthermore, the applicants and the Armenian authorities had only become aware of the Azerbaijani documents on the domestic investigation in submissions to the Court.

The Court concluded that there had been a further violation of the Convention owing to the investigation in Azerbaijan.

Article 3

The Court took account of the Armenian forensic examination, which apart from strangulation injuries, had recorded kidney, chest, lumbar, thigh and rectal haemorrhages as well as a head injury, all caused by a blunt object. Neither the Azerbaijani Government's submissions nor the documents in the case file gave reason to question those findings.

The Court thus found that Mr Saribekyan had been subjected to ill-treatment in the form of severe physical violence during the final days of his life while being detained in the Military Police Department in Baku.

The Court found that the suffering he had endured had amounted to torture and that he had suffered a violation of his rights under Article 3.

It found no violation of the two applicants' rights under this provision, although it had no doubt that the arrest, detention and death of their son, as well as the uncertainty about his fate, had caused them profound suffering.

Other Articles

The Court saw no need for separate examinations of the applicants' complaints under Article 13 and Article 14.

Just satisfaction (Article 41)

The Court held by six votes to one that Azerbaijan was to pay the applicants 60,000 euros (EUR) jointly in respect of non-pecuniary damage and EUR 2,200 in respect of costs and expenses.

Separate opinion

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

The judgment is available only in English.

7. **ECHR, *Batsys v. Lithuania*, no. 80749/17, Chamber judgment of 4 February 2020 (Article 13, right to an effective remedy, in conjunction with Article 8, right to respect for private and family life – No violation).** The applicant, a Lithuanian national who was appointed as Deputy Speaker of the Lithuanian parliament, complained about the impossibility to challenge a State Security Department note opposing him getting a security clearance. The applicant apparently maintained relationships with several individuals who had links to Russia and whose activities were considered contrary to national security interests.

ECHR 045 (2020)
04.02.2020

Press release issued by the Registrar

The case concerned the authorities' refusal to issue a member of parliament with security clearance.

The applicant, Mindaugas Bastys, is a Lithuanian national who was born in 1965 and lives in Vilnius.

In October 2016, Mr Bastys was re-elected as a member of the Seimas (the Lithuanian parliament) and appointed as Deputy Speaker a month later. As part of the standard procedure, the Speaker asked the State Security Department (SSD) to assess whether or not he could be granted security clearance, which would allow him access to top secret information. Following a questionnaire and two interviews to which he had agreed, the SSD issued a note opposing his security clearance as it had reasons to doubt his trustworthiness. In particular, he apparently maintained relationships with several individuals who had links to Russia and whose activities were considered contrary to national security interests.

On 9 March 2017, the Speaker informed Mr Bastys orally that he would not be issued with security clearance and asked him to resign as Deputy Speaker, which he did. A few days later, he asked the SSD to provide him with the information used to justify its note in order to be able to contest the note in court. The SSD refused, stating that part of the information in the note was classified. It also stated that the note, as an interim document, could not be contested before a court. The Speaker also refused to provide a copy of his decision not to issue the applicant with security clearance.

Mr Bastys subsequently lodged complaints against the Seimas and the SSD before the Vilnius Regional Administrative Court and the Supreme Administrative Court. He primarily alleged that the conclusions in the SSD note were unfounded and that the Speaker had not adopted a written decision on the refusal for security clearance. Both jurisdictions ruled that the SSD note was an interim document without any legal consequences and could not therefore be contested in court. The Supreme Administrative Court also found that the Speaker's decision did not fall within the scope of public administration and could not be examined by the administrative courts.

In March 2018 Mr Bastys resigned as a member of the Seimas.

Relying on Article 13 (right to an effective remedy) taken in conjunction with Article 8 (right to respect for private and family life) of the European Convention on Human Rights, Mr Bastys complained that he had not been able to defend himself against the allegations in the SSD note.

No violation of Article 13 taken in conjunction with Article 8

8. **ECHR, *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15, Grand Chamber judgment of 13 February 2020 (Article 4 of Protocol No. 4, prohibition of collective expulsion – No violation; Article 13, right to an effective remedy – No violation).** The applicants, nationals of Mali and Côte d'Ivoire, unsuccessfully claimed that they had been subjected to a collective expulsion following an attempt to illegally enter Spanish territory by climbing the fences surrounding the Spanish enclave of Melilla, on the North African coast.

ECHR 063 (2020)
13.02.2020

Press release issued by the Registrar

In today's **Grand Chamber** judgment in the case of N.D. and N.T. v. Spain (applications nos. 8675/15 and 8697/15) the European Court of Human Rights held:

unanimously, that there had been **no violation of Article 4 of Protocol No. 4 (prohibition of collective expulsion)** to the European Convention on Human Rights**,** and

unanimously, that there had been **no violation of Article 13 (right to an effective remedy) of the Convention taken in conjunction with Article 4 of Protocol No. 4.**

The case concerned the immediate return to Morocco of two nationals of Mali and Côte d'Ivoire who on 13 August 2014 attempted to enter Spanish territory in an unauthorised manner by climbing the fences surrounding the Spanish enclave of Melilla on the North African coast.

The Court considered that the applicants had in fact placed themselves in an unlawful situation when they had deliberately attempted to enter Spain on 13 August 2014 by crossing the Melilla border protection structures as part of a large group and at an unauthorised location, taking advantage of the group's large numbers and using force. They had thus chosen not to use the legal procedures which existed in order to enter Spanish territory lawfully. Consequently, the Court considered that the lack of individual removal decisions could be attributed to the fact that the applicants – assuming that they had wished to assert rights under the Convention – had not made use of the official entry procedures existing for that purpose, and that it had thus been a consequence of their own conduct.

In so far as it had found that the lack of an individualised procedure for their removal had been the consequence of the applicants' own conduct, the Court could not hold the respondent State responsible for the lack of a legal remedy in Melilla enabling them to challenge that removal.

Principal facts

The applicants, N.D. and N.T., are nationals of Mali and Côte d'Ivoire who were born in 1986 and 1985 respectively. The first applicant stated that he had left Mali on account of the armed conflict there in 2012. After travelling through Mauritania and Algeria he arrived in Morocco in March 2013 and apparently stayed in the migrants' camp on Mount Gurugu, close to the border with Melilla. The second applicant arrived in Morocco at the end of 2012 and also stayed in the migrants' camp.

The autonomous city of Melilla is a Spanish enclave of 12 sq. km on the North African coast which is surrounded by Moroccan territory. The Spanish authorities have built a barrier along the 13 km border which since 2014 has comprised three parallel fences. Four border crossing points are located along the triple fence. Between these points *Guardia Civil* officials patrol the land border and the coast in order to prevent illegal entry. Groups of foreign nationals from, among other places, sub-Saharan Africa make frequent attempts to breach the fences.

In the early morning of 13 August 2014 an initial attempt at entry took place. According to the Government, the Moroccan police prevented around 500 migrants from scaling the outer fence, but around a hundred migrants nevertheless succeeded. Some 75 migrants managed to reach the top of the inner fence but only a few came down the other side and landed on Spanish soil, where they were met by members of the *Guardia Civil*. The others remained sitting on top of the inner fence. *Guardia Civil* officials helped them to climb down, before escorting them back to Moroccan territory on the other side of the border through the gates between the fences.

N.D. and N.T. reportedly managed to reach the top of the inner fence and remained there for several hours. At around 3 p.m. and 2 p.m. respectively they climbed down from the fence with the help of Spanish law-enforcement officials who provided them with ladders. As soon as they reached the ground they were apprehended by *Guardia Civil* officials who reportedly handcuffed them, took them back to Morocco and handed them over to the Moroccan authorities. The applicants allegedly did not undergo any identification procedure and had no opportunity to explain their personal circumstances to the officials or to be assisted by lawyers or interpreters. They were reportedly transferred to Nador police station, a few kilometres south of Melilla. There they allegedly requested, and were refused, medical assistance before being taken to Fez, some 300 km away, and being left to fend for themselves.

Complaints, procedure and composition of the Court

Relying on Article 4 of Protocol No. 4 (prohibition of collective expulsion) to the European Convention on Human Rights, the applicants maintained that they had been subjected to a collective expulsion without an individual assessment of their circumstances and in the absence of any procedure or legal assistance. They complained of a systematic policy of removing migrants without prior identification, which, in their view, had been devoid of legal basis at the relevant time. Relying on Article 13 (right to an effective remedy) taken in conjunction with Article 4 of Protocol No. 4, they complained of the lack of an effective remedy with suspensive effect by which to challenge their immediate return to Morocco.

The applications were lodged with the European Court of Human Rights on 12 February 2015. In its Chamber judgment of 3 October 2017 the Court held, unanimously, that there had been a violation of Article 4 of Protocol No. 4 and a violation of Article 13 (right to an effective remedy) taken in conjunction with Article 4 of Protocol No. 4.

On 14 December 2017 the Government requested that the case be referred to the Grand Chamber under Article 43 of the Convention, and on 29 January 2018 the panel of the Grand Chamber accepted that request. A hearing was held on 26 September 2018.

The Belgian, French and Italian Governments, which had been given leave to intervene in the written procedure, submitted third-party observations. Observations were also received from the Commissioner for Human Rights of the Council of Europe, the Office of the United Nations High Commissioner for Refugees (UNHCR), the Spanish Commission for Assistance to Refugees and, acting collectively, the Centre for Advice on Individual Rights in Europe, Amnesty International, the European Council on Refugees and Exiles and the International Commission of Jurists, joined by the Dutch Council for Refugees. The written observations submitted by the United Nations High Commissioner for Human Rights in the Chamber proceedings were also included in the file. Ms Dunja Mijatović, Commissioner for Human Rights of the Council of Europe since 1 April 2018, spoke at the hearing, in accordance with Article 36 § 3 of the Convention. UNHCR also took part in the hearing.

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

Linos-Alexandre **Sicilianos** (Greece), *President*,
Angelika **Nußberger** (Germany),
Robert **Spano** (Iceland),
Vincent A. **De Gaetano** (Malta),
Ganna **Yudkivska** (Ukraine),
André **Potocki** (France),
Aleš **Pejchal** (the Czech Republic),

Faris **Vehabović** (Bosnia and Herzegovina),
Mārtiņš **Mits** (Latvia),
Armen **Harutyunyan** (Armenia),
Gabriele **Kucsko-Stadlmayer** (Austria),
Pauliine **Koskelo** (Finland),
Marko **Bošnjak** (Slovenia),
Tim **Eicke** (the United Kingdom),
Lətif **Hüseynov** (Azerbaijan),
Lado **Chanturia** (Georgia),
María **Elósegui** (Spain),

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

Decision of the Court

Article 4 of Protocol No. 4

The Court noted that the applicants had been members of a group comprising numerous individuals who had attempted to enter Spanish territory by crossing a land border in an unauthorised manner, taking advantage of their large numbers and in the context of an operation that had been planned in advance. The applicants' complaints under Article 3 had been declared inadmissible by the Chamber. The applicants had not been identified and no written procedure had been undertaken to examine their individual circumstances. Their return to Morocco had therefore been a *de facto* individual but immediate handover, carried out by Spanish border guards.

With regard to Contracting States like Spain whose borders coincided with external borders of the Schengen area, the effectiveness of Convention rights required that those States make available genuine and effective access to means of legal entry, in particular border procedures for those who arrived at the border. Those means should allow all persons who faced persecution to submit an application for protection, based in particular on Article 3 of the Convention (prohibition of torture and inhuman or degrading treatment), under conditions which ensured that the application was processed in a manner consistent with the international norms, including those of the Court. Where arrangements existed securing the right to request protection under the Convention, and in particular Article 3, in a genuine and effective manner, the Convention did not prevent States, in the fulfilment of their obligation to control borders, from requiring applications for such protection to be submitted at the existing border crossing points. Consequently, States could refuse entry to their territory to aliens, including potential asylum-seekers, who had failed without cogent reasons to comply with those requirements and had sought to cross the border at a different location, especially, as happened in this case, by taking advantage of their large numbers and using force.

The Court noted that Spanish law had afforded the applicants several possible means of seeking admission to the national territory. They could have applied for a visa or for international protection, in particular at the border crossing point, but also at Spain's diplomatic and consular representations in their respective countries of origin or transit or else in Morocco.

On 1 September 2014 the Spanish authorities had set up an office for registering asylum claims, open around the clock, at the Beni Enzar international border crossing point. Even prior to that date a legal avenue to that effect had been established under section 21 of Law 12/2009. The Government stated that twenty-one asylum applications had been lodged between 1 January and 31 August 2014 in Melilla, including six applications lodged at the Beni Enzar border crossing point, with the asylum-seekers then being escorted to the Melilla police station in order to make a formal application. The individuals in question had come from Algeria, Burkina Faso, Cameroon, Congo, Côte d'Ivoire and Somalia.

The Court therefore saw no reason to doubt that even prior to the setting-up of the special international protection office at Beni Enzar on 1 September 2014 there had been a legal obligation to accept asylum applications at that border crossing point, and also an actual possibility to submit such applications. The mere fact – not disputed by the Government – that only very few asylum requests had been submitted

at Beni Enzar prior to 1 September 2014 did not allow the conclusion that the respondent State had not provided genuine and effective access to that border crossing point.

In the written procedure before the Grand Chamber the applicants did not allege that they had ever tried to enter Spanish territory by legal means. Only at the Grand Chamber hearing did they state that they had attempted to approach Beni Enzar but had been "chased by Moroccan officers". Quite apart from the doubts surrounding this allegation owing to the fact that it had been made at a very late stage of the procedure, the Court noted that at no point had the applicants claimed that the obstacles encountered were the responsibility of the Spanish authorities.

Hence, the Court was not persuaded that, at the material time, the applicants had had the required cogent reasons for not using the Beni Enzar border crossing point with a view to submitting reasons against their expulsion in a proper and lawful manner.

Article 4 of Protocol No. 4 did not entail a general duty for a Contracting State to bring persons who were under the jurisdiction of another State within its own jurisdiction. Even assuming that difficulties had existed in physically approaching the Beni Enzar border crossing point on the Moroccan side, no responsibility of the respondent Government for this situation had been established. That finding sufficed for the Court to conclude that there had been no violation of Article 4 of Protocol No. 4 in the present case.

Examining the possibilities referred to by the Spanish Government for accessing Spanish embassies and consulates where an application for international protection could be submitted, the Court observed that the Spanish consulate in Nador was only 13.5 km from Beni Enzar and hence from the location of the storming of the fences on 13 August 2014. The applicants, who stated that they had stayed in the Gurugu camp for two years (in N.D.'s case) and for one year and nine months (in N.T.'s case), could easily have travelled there had they wished to apply for international protection. They did not give any explanation to the Court as to why they had not done so, nor did they allege that they had been prevented from making use of that possibility. Lastly, the applicants did not dispute the genuine and effective possibility of applying for a visa at other Spanish embassies, either in their countries of origin or in one of the countries they had travelled through since 2012. In N.D.'s case, a special treaty between Spain and Mali had even afforded a possibility of obtaining a special working visa.

The Court considered that the applicants had in fact placed themselves in jeopardy by participating in the storming of the Melilla border fences on 13 August 2014, taking advantage of the group's large numbers and using force. They had not made use of the existing legal procedures for gaining lawful entry to Spanish territory in accordance with the provisions of the Schengen Borders Code concerning the crossing of the Schengen area's external borders. Consequently, the Court considered that the lack of individual removal decisions could be attributed to the fact that the applicants had not made use of the official entry procedures existing for that purpose, and that it had thus been a consequence of their own conduct.

Accordingly, there had been no violation of Article 4 of Protocol No. 4.

Article 13 taken in conjunction with Article 4 of Protocol No. 4

The Court noted that Spanish law had provided a possibility of appeal against removal orders at the border, but that the applicants themselves had also been required to abide by the rules for submitting such an appeal against their removal.

In so far as the Court had found that the lack of an individualised procedure for their removal had been the consequence of the applicants' own conduct in placing themselves in an unlawful situation by crossing the Melilla border protection structures on 13 August 2014 as part of a large group and at an unauthorised location, it could not hold the respondent State responsible for the absence of a legal remedy in Melilla enabling them to challenge that removal.

In so far as the applicants' complaint regarding the risks they were liable to face in the destination country, Morocco, had been dismissed at the outset of the procedure when the Article 3 complaint had been declared inadmissible, the lack of such a remedy did not in itself constitute a violation of Article 13.

Accordingly, there had been no violation of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4.

Separate opinions

Judge Pejchal expressed a concurring opinion. Judge Koskelo expressed a partly dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

9. **ECHR, *Makdoudi v. Belgium*, no. 12848/15, Chamber judgment of 18 February 2020 (Article 5-4, right to a speedy decision on the lawfulness of detention – Violation; Article 8, right to respect for private and family life – Violation).** The applicant, a Tunisian national, successfully complained about a removal measure issued against him by the Belgian authorities together with a 10-year ban on residence on account of his conviction for various offences committed in Belgium, and the national authorities' refusal to take into account the fact that he is the father of a child with Belgian nationality.

ECHR 066 (2020)
18.02.2020

Press release issued by the Registrar

Makdoudi v. Belgium (application no. 12848/15)

The applicant, Montassar Makdoudi, is a Tunisian national who was born in 1989 and lives in Monastir (Tunisia).

Mr Makdoudi complained about a removal measure issued against him by the Belgian authorities together with a 10-year ban on residence on account of his conviction for various offences committed in Belgium, and the national authorities' refusal to take into account the fact that he is the father of a child with Belgian nationality.

Mr Makdoudi allegedly arrived in Belgium in 2008. He was arrested in 2009, and then sentenced in 2010 to 42 months' imprisonment. He served his sentence until December 2012. In the meantime, in 2011 he officially acknowledged paternity of a girl with Belgian nationality, born on 15 March 2010. A ministerial deportation order was issued against him in 2011, followed by several orders to leave the country, the last of which was issued in June 2016; Mr Makdoudi returned to Tunisia on 27 July 2016.

Relying on Article 5 § 4 (right to a speedy decision on the lawfulness of detention) of the European Convention on Human Rights, Mr Makdoudi complained that the remedies he had used to challenge the lawfulness of his detention in a closed centre for aliens pending removal (from 15 May to 11 September 2014) had not enabled the domestic courts to take a final decision on this matter.

Relying in particular on Article 8 (right to respect for private and family life) of the European Convention, he complained about his removal to Tunisia coupled with the ban on residence, and the national authorities' refusal to take his paternity into account.

Violation of Article 5 § 4
Violation of Article 13

Just satisfaction: 10,000 euros (EUR) for non-pecuniary damage and EUR 3,000 for costs and expenses

10. **ECHR, *M.A. and Others v. Bulgaria*, no. 5115/18, Chamber judgment of 20 February 2020 (Article 2, right to life – Potential violation; Article 3, prohibition of torture and inhuman or degrading treatment – Potential violation).** The applicants, Chinese nationals of Uighur origins, complained against their intended expulsion on national security grounds to China by the Bulgarian authorities, where they would allegedly be at risk of death or ill-treatment.

ECHR 069 (2020)
20.02.2020

Press release issued by the Registrar

The applicants, Mr M.A., Mr. A.N., Mr Y.M., Mr S.H., and Mr A.A., are Chinese nationals who were born in 1983, 1994, 1991, 1994, and 1989 respectively. They are Uighur Muslims from the Xinjiang Uighur Autonomous Region in China.

The case concerned their intended expulsion on national security grounds to China, where they would allegedly be at risk of death or ill-treatment.

All the applicants arrived in Bulgaria in July 2017 from Turkey, where they had been living since leaving China on various dates between 2013 and 2015. The applicants subsequently applied for asylum but the State Refugees Agency rejected their applications in December 2017, decisions which the Haskovo Administrative Court upheld in January 2018.

The court found that the applicants had not shown that they had been persecuted in their country of origin, within the meaning of the Asylum and Refugees Act, or that they were at risk of any such persecution. The applicants had also made assumptions on the risk they faced, based on widely-known facts about the situation in the region they were from. It had not been shown that any problems the applicants had had with the authorities before leaving China had been due to their ethnicity or religion.

In parallel, the head of the State Agency for National Security in January 2018 ordered the applicants' expulsion on national security grounds. Applications by them for judicial review of that decision were dismissed by the Supreme Administrative Court in May 2019. In decisions made available by the Government on the second, third and fourth applicants, the Supreme Administrative Court concluded that the State Agency for National Security had convincingly shown that they could pose a threat to Bulgaria's national security owing to, among other things, links with the East Turkistan Islamic Movement (ETIM), which was considered to be a terrorist group.

The World Uighur Congress, the International Uighur Human Rights and Democracy Foundation, Amnesty International and several members of the European Parliament have asked Bulgaria not to remove the applicants. In January 2018 the Court indicated to the Bulgarian Government that the applicants should not be removed while the proceedings before the Court were ongoing.

Relying in particular on Article 2 (right to life) and Article 3 (prohibition of torture and of inhuman or degrading treatment) the applicants complained that if returned to China they would face persecution, ill-treatment and arbitrary detention and could even be executed.

Violation of Article 2 - should the second, third and fourth applicants be removed to China

Violation of Article 3 - should the second, third and fourth applicants be removed to China

Interim measure (Rule 39 of the Rules of Court) - not to remove the applicants - still in force until such time as the present judgment becomes final or until further notice.

11. **ECHR, *A.S.N. and Others v. the Netherlands*, nos. 68377/17 and 530/18, Chamber judgment of 25 February 2020 (Article 3, prohibition of torture and inhuman or degrading treatment – No violation).** The applicants, Sikh Afghan nationals who used to live in Afghanistan, unsuccessfully argued that they would face ill-treatment if removed back to that country.

ECHR 071 (2020)
25.02.2020

Press release issued by the Registrar

The applicants in application no. 68377/17 are Mr A.S.N. and Mrs T.K.M., while the applicants in application no. 530/18 are Mr S.S.G., Mrs M.K.G., and Mrs D.K.G. The applicants are Afghan nationals who were born in 1977, 1982, 1974, 1982, and 1947 respectively and live in the Netherlands in Capelle aan den IJssel (A.S.N. and T.K.M.) and Emmen (S.S.G., M.K.G. and D.K.G.).

All the applicants are Sikhs who used to live in Afghanistan. The case concerned their complaint that they would face ill-treatment if removed back to that country.

A.S.N. and T.K.M. are a husband and wife who have also lodged their application on behalf of their two children, who are minors.

The family applied for asylum in the Netherlands in October 2015, telling the Dutch authorities that they had left Afghanistan after T.K.M.'s sister had been kidnapped while on the way to the *Gurdwara* (Sikh temple) and that her brother had received a ransom demand signed by the Taliban and had then himself disappeared. The applicants had started receiving letters demanding to know where the brother was and threatening kidnap and murder if they did not reveal his location.

The applicants came into contact with a man who arranged for them to travel abroad: before leaving T.K.M. and the children had stayed in their house all the time, which they had eventually sold to pay for their journey. They also alleged that they had been the target of general abuse and threats in Afghanistan because of their religion.

The Dutch authorities rejected both an initial and a renewed asylum application by the applicants, decisions that were upheld in court. The decisions found in particular that the applicants' account of events lacked credibility, that they had failed to show that they had left Afghanistan only recently and that they had not made a plausible case for believing that they feared persecution.

The applicants in application no. 530/18 are a father, mother, two children and the children's maternal grandmother. They applied for asylum in June 2014, telling the authorities that about eight months before leaving Kabul three people had forced their way into their home and that the grandmother's husband had died as a result of being beaten. They had also suffered constant harassment because they were Sikhs. They had decided to leave Afghanistan and had made arrangements with an intermediary.

The Dutch authorities rejected their initial and a renewed asylum application, expressing doubts in particular about whether they had only recently left Afghanistan, which meant in turn that no credence could be given to their account of events. The courts ultimately upheld the authorities' decisions.

The applicants in both applications complained that their removal to Afghanistan would expose them to a real risk of treatment that would violate Article 3 (prohibition of torture and of inhuman or degrading treatment) or Article 2 (right to life) or both taken together.

No violation of Article 3 - in the event of the applicants' removal to Afghanistan

Interim measure (Rule 39 of the Rules of Court) - not to remove the applicants in application no. 530/18 - still in force until such time as the judgment becomes final or until further order.

12. **ECHR, *Baş v. Turkey*, no. 66448/17, Chamber judgment of 03 March 2020 (Article 5-1, right to liberty and security – Violation; Article 5-4, right to a speedy review of detention – Violation).** The applicant, a Turkish judge, complained about his placement in pre-trial detention following the failure of the 15 July 2016 coup in Turkey. He also complained about the lack of impartiality of the judges tasked with assessing the legality of this pre-trial detention.

ECHR 081 (2020)
03.03.2020

Press release issued by the Registrar

In today's **Chamber** judgment in the case of Baş v. Turkey (application no. 66448/17) the European Court of Human Rights held:

by six votes to one, that there had been a **violation of Article 5 § 1** (right to liberty and security) of the European Convention on Human Rights as regards the alleged unlawfulness of the applicant's initial pre-trial detention;

unanimously, that there had been a **violation of Article 5 § 1** of the Convention 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, and

unanimously, that there had been a **violation of Article 5 § 4** (right to speedy review of the lawfulness of detention) on account of the length of the period during which the applicant had not appeared in person before a judge.

The case concerned the pre-trial detention of Mr Baş, a judge at the time, following the attempted coup of 15 July 2016.

The Court found that according to the case-law of the Court of Cassation, a suspicion of membership of a criminal organisation could be sufficient to characterise the element of *in flagrante delicto* without the need to establish any current factual element or any other indication of an ongoing criminal act. Accordingly, the Court concluded that the national courts' extension of the scope of the concept of *in flagrante delicto* and their application of domestic law, namely section 94 of Law no. 2802, were not only problematic in terms of legal certainty, but also appeared manifestly unreasonable.

The Court found that the mere reference by the Kocaeli magistrate's court to the decision taken by the Council of Judges and Prosecutors on 16 July 2016 to suspend 2,735 judges and prosecutors was insufficient to support the conclusion that there had been a reasonable suspicion justifying the pretrial detention of this particular judge. The evidence before the Court did not warrant the conclusion that there had been a reasonable suspicion against the applicant at the time of his initial detention.

Thus, while accepting the Constitutional Court's conclusion in a separate case that the measures implemented in the aftermath of the coup attempt could be said to have been strictly required for the protection of public safety, the Court observed that in the present case Mr Baş had not appeared before a court for approximately one year and two months, a much longer period than the one previously assessed by the Constitutional Court.

Principal facts

The applicant, Hakan Baş, is a Turkish national who was born in 1978 and lives in Kocaeli (Turkey).

During the night of 15 to 16 July 2016 a group of members of the Turkish armed forces attempted to carry out a military coup aimed at overthrowing the National Assembly, the government and the

President of Turkey. The day after the attempted military coup, the authorities blamed the network linked to Fetullah Gülen, a Turkish citizen living in the United States and considered to be the leader of an organisation referred to as "FETÖ/PDY" ("Gülenist Terror Organisation/Parallel State Structure").

On 20 July 2016 the government declared a state of emergency for a period of three months, which was subsequently extended. 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.

During the state of emergency, the Council of Ministers passed several legislative decrees. Article 3 of Legislative Decree no. 667 provided that the Council of Judges and Prosecutors ("the HSK") was authorised to dismiss any judges or prosecutors who were considered to belong or be affiliated or linked to terrorist organisations or organisations, structures or groups found by the National Security Council to have engaged in activities harmful to national security. The state of emergency was lifted on 18 July 2018.

On 16 July 2016 the HSK suspended 2,735 judges and prosecutors – including the applicant – from their duties for a period of three months, pursuant to sections 77(1) and 81(1) of Law no. 2802 on judges and prosecutors, on the grounds that there was a strong suspicion that they were members of the terrorist organisation that had instigated the attempted coup and that keeping them in their posts would hinder the progress of the investigation and undermine the authority and reputation of the judiciary.

Also on 16 July 2016, the Kocaeli public prosecutor initiated a criminal investigation in respect of the judges serving in Kocaeli suspected of being members of FETÖ/PDY, including the applicant. On 18 July 2016 the applicant was placed under police supervision. On 19 July 2016 he gave evidence to the Kocaeli public prosecutor, who informed him that he had been suspended from his duties as a result of the HSK's decision of 16 July 2016, on the grounds of his suspected membership of FETÖ/PDY. The applicant denied being a member of or having any links with that organisation. Later that day, he was brought before the Kocaeli 1st Magistrate's Court. On 20 July 2016 the magistrate decided to place him in pre-trial detention on suspicion of membership of a terrorist organisation. An objection by the applicant against the order for his detention was dismissed.

On 24 August 2016, applying Article 3 of Legislative Decree no. 667, the plenary HSK dismissed 2,847 judges and prosecutors including the applicant, all of whom were considered to be members of or affiliated or linked to FETÖ/PDY.

On 27 December 2017 the Constitutional Court declared an individual application by the applicant inadmissible, finding that his complaints were manifestly ill-founded**.**

On 19 March 2018 the 29th Assize Court found Mr Baş guilty of the offence of membership of an armed terrorist organisation, sentenced him to seven years and six months' imprisonment and, taking into account the period already spent in detention, ordered his release. Mr Baş's conviction was upheld on appeal. The case is currently pending before the Court of Cassation.

Complaints, procedure and composition of the Court

Relying on Article 5 §§ 1, 3 and 4 (right to liberty and security/right to be brought promptly before a judge/right to speedy review of the lawfulness of detention), the applicant complained about being placed in pre-trial detention. He disputed that there had been a case of *in flagrante delicto*. He argued that there had been no specific evidence giving rise to a reasonable suspicion that he had committed the alleged offence and thus necessitating his pre-trial detention. He submitted that the domestic courts had given insufficient reasons for the decisions on his detention. The applicant also complained that no hearing had been held during the reviews of his detention, that he had not been provided with a copy of the public prosecutor's opinion and that access to the investigation file had been restricted. Lastly, he alleged a lack of independence and impartiality on the part of the magistrates who had decided on his pre-trial detention.

The application was lodged with the European Court of Human Rights on 30 January 2017.

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

Robert **Spano** (Iceland), *President*,
Marko **Bošnjak** (Slovenia),
Valeriu **Grițco** (Republic of Moldova),
Egidijus **Kūris** (Lithuania),
Ivana **Jelić** (Montenegro),
Arnfinn **Bårdsen** (Norway),
Saadet **Yüksel** (Turkey),

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

Decision of the Court

Article 5 §§ 1 and 3

Lawfulness of the applicant's initial pre-trial detention

Mr Baş's pre-trial detention had been ordered on the basis of the ordinary rules governing detention, that is, Articles 100 et seq. of the Code of Criminal Procedure (CCP).

The Court pointed out that in circumstances similar to those of the present case, it had held that the national courts' extension of the scope of the concept of *in flagrante delicto* and their application of domestic law appeared manifestly unreasonable and were problematic in terms of the principle of legal certainty (*Alparslan Altan v. Turkey***,** no. 12778/17, 16 April 2019). The Court could see no reason to reach a different conclusion as regards the courts' interpretation of the concept of *in flagrante delicto* and the application of section 94 of Law no. 2802 in the circumstances of the present case.

The Court observed that it had not been alleged that the applicant had been arrested and placed in pre-trial detention while in the process of committing an offence linked to the attempted coup, although the Ankara public prosecutor's office had initially mentioned the offence of attempting to overthrow the constitutional order. That offence had not been taken into consideration by the Kocaeli magistrate's court in ordering the applicant's pre-trial detention. The applicant had been deprived of his liberty on suspicion of membership of FETÖ/PDY. In the view of the Kocaeli magistrate's court, there had been a case of discovery *in flagrante delicto* within the meaning of section 94 of Law no. 2802, but the magistrate had provided no legal basis for that finding.

The Court noted that in its leading judgment adopted on 26 September 2017, the Court of Cassation had held that at the time of the arrest of judges suspected of the offence of membership of an armed organisation, there was a situation of discovery *in flagrante delicto*. The leading judgment indicated that in cases involving the offence of membership of a criminal organisation, it was sufficient that the conditions laid down in Article 100 of the 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 emphasised that the principle of legal certainty could be compromised if courts introduced exceptions in their case-law which ran counter to the applicable statutory provisions. Article 2 of the CCP provided a conventional definition of the concept of *in flagrante delicto*, relating to the discovery of an offence during or immediately after its commission. However, according to the case-law of the Court of Cassation, a suspicion of membership of a criminal organisation could be sufficient to characterise the element of *in flagrante delicto* without the need to establish any current factual element or any other indication of an ongoing criminal act. In the Court's view, this amounted to an extensive interpretation of the concept of *in flagrante delicto*, expanding the scope of that concept so that judges suspected of belonging to a criminal association could be deprived of the judicial protection afforded by Turkish law to members of the judiciary. Furthermore, the Court could not see how the Court of

Cassation's settled case-law concerning the concept of a continuing offence could have justified extending the scope of the concept of *in flagrante delicto*, which related to the existence of a current criminal act, as provided in Article 2 of the CCP.

The Court found that the national courts' extension of the scope of the concept of *in flagrante delicto* and their application of domestic law, namely section 94 of Law no. 2802, in the present case were not only problematic in terms of legal certainty, but also appeared manifestly unreasonable.

It considered that the mere application of the concept of *in flagrante delicto* and the reference to section 94 of Law no. 2802 in the order of 20 July 2016 for the applicant's detention had not fulfilled the requirements of Article 5 § 1 of the Convention.

In the Court's view, 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 legal framework of the state of emergency. It was in no way justified by the special circumstances of the state of emergency. 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 of the Convention on account of the unlawfulness of the applicant's initial pre-trial detention.

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

The Court observed that the Constitutional Court had referred to Mr Baş's use of the ByLock messaging application. It had to be noted that the relevant evidence had not been adduced until long after the applicant's initial detention. The Constitutional Court had not explained how evidence obtained several months after Mr Baş's initial pre-trial detention could have formed a basis for a reasonable suspicion that he had committed the offence of which he had been accused.

In the present case, the Court observed that it appeared from the order for the applicant's pre-trial detention that the Kocaeli magistrate's court had based its finding of a reasonable suspicion that the applicant had committed the alleged offence on the decision taken by the HSK on 16 July 2016 and on the request by the Ankara public prosecutor's office to initiate an investigation in respect of him. In its decision, the HSK had suspended 2,735 judges and public prosecutors, including the applicant, on the basis of strong suspicion that they were members of the terrorist organisation that had instigated the attempted coup. The HSK had referred to a number of disciplinary and criminal investigations that had been initiated in respect of a number of judges and prosecutors prior to the coup attempt. However, its decision did not contain any facts or information relating to the applicant personally. He did not feature among the individuals mentioned as being the subject of disciplinary and criminal investigations. Accordingly, the disciplinary and criminal investigations mentioned in the HSK's decision could not have formed the basis for the suspicion giving rise to the order for the applicant's detention. The Court further noted that in its decision, the HSK had made a general reference to information from the intelligence services, without providing any clarification of its contents or explaining how it related to the applicant and his situation.

The Court took the view that the Government had not provided a sufficient factual basis for the HSK's decision in the present case. It found that the mere reference by the Kocaeli magistrate's court to the HSK's decision was insufficient to support the conclusion that there had been a reasonable suspicion justifying the applicant's pre-trial detention. The magistrate's court had sought to justify its decision by referring to Article 100 of the CCP and to the evidence in the file, but it had simply cited the wording of the Article in question. The vague and general references to the wording of Article 100 of the CCP and to the evidence in the file could not be regarded as sufficient to justify the "reasonableness" of the

suspicion on which the applicant's detention 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 also observed that the applicant had not been suspected of having been involved in the events of 15 July 2016. Admittedly, on 16 July 2016, the Ankara public prosecutor's office had issued instructions describing the applicant as a member of FETÖ/PDY 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 those instructions by the Ankara public prosecutor's office. The fact that, before being placed in pre-trial detention, the applicant had been questioned by the Kocaeli 1st Magistrate's Court on 19 and 20 July 2016 in connection with an offence of membership of an illegal organisation revealed, at most, that the authorities had suspected him of having committed that offence. That fact alone would not satisfy an objective observer that the applicant could have committed the offence in question.

The Court found that the evidence before it did not warrant the conclusion that there had been a reasonable suspicion against the applicant at the time of his initial detention. It considered that the requirements of Article 5 § 1 (c) of the Convention regarding the reasonableness of a suspicion justifying detention had not been satisfied.

The Court concluded that there had been a violation of Article 5 § 1 of the Convention 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.

Article 5 § 4

Mr Baş had been placed in pre-trial detention on 20 July 2016 after being heard by the Kocaeli magistrate's court and had next appeared before a court at the first hearing on 19 September 2017, after his trial had begun. Throughout this period of approximately one year and two months, he had not appeared before any of the courts deciding on his detention. His applications for release and his objections had all been examined without his having been heard by the courts. The last objection lodged by the applicant had been dismissed by the Assize Court on 15 August 2017, without a hearing. The Government argued that the situation complained of by the applicant was covered by the notice of derogation under Article 15 which the Turkish authorities had submitted to the Secretary General of the Council of Europe on 21 July 2016.

The Court reiterated that the difficulties facing Turkey in the aftermath of the attempted military coup of 15 July 2016 were a contextual factor which had to be fully taken into account in interpreting and applying Article 15 (*Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019). It accepted the conclusion reached by the Constitutional Court in the case of *Aydın Yavuz and Others* to the effect that the measures implemented in the aftermath of the coup attempt and the fact for a period of eight months and eighteen days the applicants had not appeared before the judges deciding on their detention could be said to have been strictly required for the protection of public safety. The Court observed, however, that in the present case Mr Baş had not appeared before a judge for approximately one year and two months, a much longer period than the one assessed by the Constitutional Court in its *Aydın Yavuz and Others* judgment.

The Court therefore concluded that there had been a violation of Article 5 § 4 on account of the length of time during which the applicant had not appeared in person before a judge.

Moreover, as regards the complaint of a restriction of access to the investigation file, the Court considered it unnecessary to examine the matter any further. Regarding the non-disclosure of the public prosecutor's opinion, it held that this complaint was manifestly ill-founded and rejected it. Lastly, the Court considered that, having regard to the constitutional and legal safeguards afforded to the magistrates' courts, and in the absence of any relevant arguments giving cause to doubt their independence and impartiality in the applicant's case, the complaint alleging a lack of independence and impartiality on the magistrates' part should be rejected as being manifestly ill-founded.

Just satisfaction (Article 41)

The Court held that Turkey was to pay the applicant 6,000 euros (EUR) in respect of non-pecuniary damage and EUR 4,000 in respect of costs and expenses.

Separate opinions

Judge Bårdsen expressed a concurring opinion and Judge Yüksel expressed a partly dissenting opinion. The opinions are annexed to the judgment.

The judgment is available in English and French.

13. **ECHR, *Asady and Others v. Slovakia*, no. 24917/15, Chamber judgment of 24 March 2020 (Article 4 of Protocol No. 4, prohibition of collective expulsion of aliens – No violation).** The applicants, nineteen Afghan nationals, complained about their expulsion from Slovak territory, where they had been found hidden in a truck.

ECHR 099 (2020)
24.03.2020

Press release issued by the Registrar

In today's **Chamber** judgment in the case of **Asady and Others v. Slovakia** (application no. 24917/15) the European Court of Human Rights held, **by four votes to three**, that there had been:

no violation of Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) to the European Convention on Human Rights.

The case concerned the applicants' expulsion to Ukraine by the Slovakian police.

The Court examined the complaints of only seven of the 19 applicants, striking the case out of its list in respect of the others. It found in particular that despite short interviews at the police station, they had been given a genuine possibility to draw the authorities' attention to any issue which could have affected their status and entitled them to remain in Slovakia. Their removal had not been carried out without any examination of their individual circumstances.

Principal facts

The applicants are 19 Afghan nationals born on various dates between 1980 and 1999.

In November 2014 the applicants were found hidden in a truck by the Slovak Border and Foreigners Police near the border with Ukraine. The applicants were part of a group of 32 people who were subsequently taken to the border police station in Petrovce to establish their identities.

The police subsequently issued individual decisions on the administrative expulsion of each applicant with a three-year ban on re-entry. They were removed to Ukraine late in the evening of the same day they had been apprehended and were placed in temporary detention in the town of Chop. Twelve of the people apprehended at the same time as the applicants asked for asylum and were transferred to an asylum-seekers' reception centre.

The first four applicants appealed against the Slovakian administrative expulsion decisions, alleging violations of Article 13 (right to an effective remedy) of the European Convention on Human Rights, taken in conjunction with Article 3 (prohibition of torture and inhuman and degrading treatment) and Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) to the Convention. The Slovak border police directorate dismissed their appeals in January 2015.

Complaints, procedure and composition of the Court

The applicants complained about their expulsion under Article 4 of Protocol No. 4 and Article 13.

The application was lodged with the European Court of Human Rights on 17 May 2015.

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

Paul **Lemmens** (Belgium), *President*,
Helen **Keller** (Switzerland),

Dmitry **Dedov** (Russia),
Alena **Poláčková** (Slovakia),
Gilberto **Felici** (San Marino),
Erik **Wennerström** (Sweden),
Lorraine **Schembri Orland** (Malta),

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

Decision of the Court

The Court first decided by a majority to strike out of the list the case as it far it concerned 12 of the applicants and, unanimously, to not strike out of its list the case concerning applicants 4 to 8, and applicants 10 and 12. Those applicants had provided sufficient information to show that they still wished to pursue the proceedings, including contact on Facebook with their legal representative.

These applicants were respectively Sher Badov Shinwari, residing in Austria as an asylum-seeker; Abdul Hamid Nasri, living in Denmark as an asylum-seeker; Mohammad Azam, residing in Kabul; Samiuddin Faizy, currently in France as an asylum-seeker; Mohammad Shakib, residing in Odessa; Zabiullah Zazai, living in Mazar-e-Sharif, Afghanistan; and Abobaker Jamil, residing in Afghanistan.

Article 4 of Protocol No. 4

The Court found that the applicants' removal had amounted to an expulsion within the meaning of the Convention. The question was whether it had been collective in nature. It thus had to determine whether they had been given the opportunity to submit arguments against their removal and whether their personal circumstances had been genuinely and individually taken into account.

The Court noted that the parties disagreed as to whether proper interviews had been carried out or whether the applicants had said they intended to seek asylum.

According to the official transcripts, the applicants' interviews had lasted 10 minutes each and had been conducted by two police officers in the presence of an interpreter. Some of the times of the interviews had overlapped, but that was not by itself sufficient to find that the applicants had not had individual interviews. In any case, the Convention did not guarantee a right to an individual interview. The Court reiterated that what mattered was whether the applicants had been able to present their arguments against expulsion in an effective manner.

The Court accepted that the applicants had been asked standardised questions and had given similar answers, although that was possibly because of the similarity of their experiences. However, the sums of money mentioned as being in their possession were different, which suggested an individualised approach. Moreover, the short length of the interviews could have been due to the fact that they had not stated anything which had required a more thorough examination.

Nor had the applicants put forward any arguments to refute their statements as recorded in the interviews that they had not suffered persecution in Afghanistan or had faced the death penalty there; rather they had left that country for economic reasons and had wished to travel on to Germany without seeking asylum in Slovakia.

The Court did not have any proof that the transcripts were not a genuine record, that they had been wrongly translated, or that requests for asylum by the applicants had been ignored. It had to be noted that no personal reasons to support requests for asylum had been mentioned in their conversations with their Ukrainian lawyer or in their expulsion appeals.

Furthermore, it was significant that 12 peopled detained at the same time as the applicants in Slovakia had expressed a wish to claim asylum and had not been returned to Ukraine.

Lastly, the applicants did not dispute the fact that an interpreter had been present at the police station at least during the time of their interviews. The Court also did not doubt that, as affirmed by documents which they and the interpreter had signed, they had been informed of their right to legal aid and to comment on the case file and adduce evidence.

In conclusion the Court did not find that the applicants had been deprived of the possibility to draw the attention of the national authorities to any circumstance which might have affected their status and entitled them to remain in Slovakia, or that their removal to Ukraine had been carried out without any form of examination of their individual situation.

The Court held by a majority that had therefore been no violation of Article 4 of Protocol No. 4.

Other articles

The Court noted that it had not been persuaded that the applicants' expulsion had been collective. Nor had they raised any separate complaints under Article 2 (right to life) or Article 3 (prohibition of torture or inhuman or degrading treatment) of the Convention. The Court thus found that the applicants did not have an arguable claim under Article 13. It therefore by a majority rejected the complaint under that provision as being manifestly ill-founded and thus inadmissible.

Separate opinions

Judge Keller expressed a dissenting opinion. Judges Lemmens, Keller and Schembri Orland expressed a joint dissenting opinion.

The judgment is available only in English.

14. **ECHR, *Bilalova and Others v. Poland*, no. 23685/14, Chamber judgment of 26 March 2020 (Article 5-1, right to liberty and security – Violation).** The case concerned the placement and the retention of the applicants, a mother and her five children, in a closed centre for aliens pending the outcome of their application for refugee status.

ECHR 101 (2020)
26.03.2020

Press release issued by the Registrar

The applicants are Ms Dagmara Bilalova, who was born in 1982, and her five children Zalina Bilalova, Zukhra Bilalova, Akhiad Bilalov, Akhmed Bilalov, and Liana Bilalova. At the material time the children were between three and nine years old. They are currently living in Kurchaloi in the Chechen Republic (Russia).

The case concerned the placement and retention of Ms Dagmara and her five children in a closed centre for aliens pending the outcome of their application for refugee status.

In June 2013 Ms Bilalova's husband lodged with the Aliens' Office an application for refugee status for the whole family, who were in Polish territory at the time. The family then left for Germany, without awaiting the outcome of their request.

In November 2013 the applicants were handed over to the Polish authorities by their German counterparts, in accordance with the provisions of the Dublin II Regulation3. The next day, during a hearing attended by Ms Bilalova, with the assistance of an interpreter, the District Court ordered the applicants' detention in a closed centre for aliens, for an initial period of 60 days, which was subsequently extended. The applicant unsuccessfully contested the decision to continue the family's detention in the closed centre.

In January 2014 the Aliens' Office dismissed the request for refugee status, refused to grant the family subsidiary protection and ordered their expulsion.

In March 2014 the applicant submitted a fresh application for refugee status, pleading domestic violence. That application too was dismissed. Subsequently the applicants were expelled.

Relying in particular on Article 5 § 1 (f) (right to liberty and security), the applicants complained about their placement and retention in the closed centre for aliens, alleging, *inter alia*, that they were illegal.

Violation of Article 5 § 1 f) – in respect of the applicant children, concerning their retention in the closed centre

Just satisfaction: EUR 10,700 (non-pecuniary damage) to the applicant children jointly

15. **ECHR, *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, Chamber judgment of 26 May 2020 (Article 2, right to life – Violation by Azerbaijan, No violation by Hungary; Article 14, prohibition of discrimination – Violation by Azerbaijan; Article 38, obligation to furnish necessary facilities for the examination of the case - No violation).** The case concerned the presidential pardon given to a convicted murderer and his release following his transfer from Hungary to Azerbaijan to serve the rest of his sentence. R.S., a military officer from Azerbaijan, killed an Armenian military officer and attempted to kill another one when they were attending a course in Hungary in 2004. The case also concerned more generally the hero's welcome given to R.S. in Azerbaijan upon his return.

ECHR 140 (2020)
26.05.2020

Press release issued by the Registrar

The case **Makuchyan and Minasyan v. Azerbaijan and Hungary** (application no. 17247/13) concerned the presidential pardon given to a convicted murderer and his release following his transfer from Hungary to Azerbaijan to serve the rest of his sentence. R.S., a military officer from Azerbaijan, killed an Armenian military officer and attempted to kill another one when they were attending a course in Hungary in 2004. The case also concerned more generally the hero's welcome given to R.S. in Azerbaijan upon his return.

In today's **Chamber** judgment in the case the European Court of Human Rights held:

by six votes to one, that there had been **no substantive violation by Azerbaijan of Article 2 (right to life)** of the European Convention on Human Rights;

unanimously, that there had been a **procedural violation by Azerbaijan of Article 2** of the Convention**;**

by six votes to one, that there had been **no procedural violation by Hungary of Article 2;**

by six votes to one, that there had been **a violation by Azerbaijan of Article 14 (prohibition of discrimination) taken in conjunction with Article 2**, and

unanimously, that **neither the Azerbaijani nor Hungarian Governments had failed to comply with Article 38 (obligation to furnish necessary facilities for the examination of the case).**

The Court found that although Azerbaijan had clearly endorsed R.S.'s acts, not only by releasing him but also by promoting him, paying him salary arrears and granting him a flat upon his return, it could not be held responsible under the stringent standards of international law which required a State to "acknowledge" such acts "as its own". Moreover, those acts had been part of a private decision and had been so flagrantly abusive and far removed from the official status of a military officer that the Court could not see how his commanding officers could have foreseen them or how Azerbaijan could be responsible for them just because he was a State agent.

However, it found that there had been no justification for the Azerbaijani authorities' failure to enforce the punishment of R.S. and to in effect grant him impunity for a serious hate crime.

Moreover, the applicants had provided sufficient evidence to show that R.S.'s pardon and other measures in his favour had been ethnically motivated, namely statements by high-ranking officials expressing their support for his conduct, and in particular the fact that it had been directed against Armenian soldiers, and a specially dedicated page to R.S. on the President of Azerbaijan's website.

Principal facts

The applicants are two Armenian nationals, Hayk Makuchyan and Samvel Minasyan, who is now deceased, who were born in 1975 and 1958 respectively. Mr Minasyan's widow and their two children are pursuing the case in his stead.

In 2004, Mr Makuchyan and Mr Minasyan's nephew, G.M., both members of the Armenian military, attended an English-language course in Budapest organised by the NATO-sponsored "Partnership for Peace" programme. The course included two participants from each of the former Soviet states, including Azerbaijan.

During the course, R.S., a member of the Azerbaijani military, murdered Mr Minasyan's nephew while he was asleep by decapitating him with an axe. R.S. also tried to break into Mr Makuchyan's room before being arrested by the Hungarian police.

R.S. was convicted of exceptionally cruel and premeditated murder and preparation of murder and sentenced to life imprisonment by the Hungarian courts, with a possibility of conditional release after 30 years.

During the criminal proceedings R.S. showed no remorse, admitting that he had murdered Mr Minasyan's nephew on account of his Armenian origin and because the Armenian participants in the course had provoked and mocked him.

In 2012, following a request by the Azerbaijani authorities, R.S. was transferred to Azerbaijan, in accordance with the Council of Europe Convention on the Transfer of Sentenced Persons, to serve the rest of his sentence.

However, upon his arrival in Azerbaijan, R.S. was informed that he had received a presidential pardon and was released. He was also promoted to the rank of major at a public ceremony, granted a flat and paid eight years of salary arrears.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 25 February 2013.

The applicants alleged that Azerbaijan had been responsible for substantive and procedural violations of Article 2 (right to life) of the European Convention on Human Rights because the attack had been carried out by an Azerbaijani military officer and because he had been granted a pardon which prevented the full enforcement of his sentence. They complained that Hungary had also violated Article 2 of the Convention by granting and executing the request for the officer's transfer without obtaining adequate binding assurances that he would complete his prison sentence in Azerbaijan.

They further alleged under Article 14 (prohibition of discrimination) in conjunction with Article 2 that the attack had been an ethnically motivated hate crime which the Azerbaijani Government had acknowledged and endorsed by granting the officer a presidential pardon and a promotion.

Lastly, the applicants complained that both Governments had failed to disclose documents requested by them in the proceedings before the Strasbourg Court, in breach of Article 38 (obligation to furnish necessary facilities for examination of the case).

Third-party comments were received from the Armenian Government, which had exercised its right to intervene in the case (under Article 36 § 1 of the Convention and Rule 44 § 1 (b) of the Rules of Court).

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),
Robert **Spano** (Iceland) *ad hoc judge*,
Faris **Vehabović** (Bosnia and Herzegovina),
Egidijus **Kūris** (Lithuania),
Lətif **Hüseynov** (Azerbaijan),

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

Decision of the Court

Whether Azerbaijan was responsible for the murder of G.M. and attempted murder of Mr Makuchyan under the substantive aspect of Article 2

The Court noted that the current standard under international law set a very high threshold for State responsibility for an act otherwise non-attributable to a State at the time it had been committed. In particular, to find a State responsible under international law it had to have "acknowledged" and "adopted", not just "approved" and "endorsed" the act.

The Azerbaijani Government actions as a whole, including the decision to pardon R.S., promote him, award him salary arrears and grant him the use of a flat, had clearly and unequivocally demonstrated their "approval" and "endorsement" of his conduct.

Such endorsement was mirrored in statements submitted by the applicants that had been given by various Azerbaijani officials and other persons expressing personal approval of R.S.'s conduct, his transfer and/or pardon. The Court agreed that many of the statements in question, as well as a special section on the official webpage of the President of Azerbaijan with letters thanking the President for R.S.'s pardon, were particularly disturbing in that they glorified R.S. as a national hero for the gruesome crimes that he had committed.

However, the Court was not convinced that Azerbaijan had "clearly and unequivocally" "acknowledged" and "adopted" "as its own" R.S.'s deplorable acts, which had been part of a private decision. Furthermore, the attack had taken place at night, outside of training hours, and there was no suggestion that he had committed the crimes on orders given by his superiors.

The Court was not convinced either that such flagrantly abusive private acts, so far removed from R.S.'s official status as a military officer, could have been foreseen by his commanding officers or that the Azerbaijani State could be held responsible for them under international law just because he had been an agent of the State.

Nor was there anything in the case file to suggest that the procedure in Azerbaijan for the recruitment of members of the armed forces and the monitoring of their fitness to serve at the time that R.S. was sent on his mission to Hungary had been inadequate.

Stressing that its assessment was based on the very stringent standards set out by international law, the Court held that there had been no substantive violation of Article 2 by Azerbaijan.

Whether Azerbaijan had complied with its duty under the procedural aspect of Article 2 to ensure enforcement of R.S.'s punishment

The Court considered that Azerbaijan had assumed responsibility for the enforcement of R.S.'s prison sentence upon his transfer, and from that point on, it had been called upon to provide an adequate response to a very serious ethnically-biased crime for which one of its citizens had been convicted in another country. Given the extremely tense political situation between Azerbaijan and Armenia, the authorities should have been all the more cautious.

Instead of enforcing R.S.'s sentence, however, he had been set free and treated as an innocent or wrongfully convicted person and bestowed with benefits that had not apparently had any legal basis under domestic law.

Moreover, the Court was not convinced by the reasons submitted by the Azerbaijani Government for R.S.'s immediate release. As concerned the alleged unfairness of the criminal proceedings, the Court found that R.S. had been tried in Hungary before courts at two levels, which had handed down well-reasoned decisions. In any event, if R.S. had considered his trial unfair, he could have, but had not, lodged an application with the European Court against Hungary once the criminal proceedings against him had come to an end.

As to R.S.'s personal history and mental difficulties, they could hardly justify the Azerbaijani authorities' failure to enforce the punishment of one of their citizens for a serious hate crime. In any case, his mental capacities had been thoroughly assessed during his trial in Hungary by medical experts who found that he had been able to understand the consequences of his actions at the time. Indeed, the subsequent decision to promote R.S. would clearly suggest that the Azerbaijani authorities had deemed him fit to continue to serve in the military and that he had not therefore suffered from a serious mental condition.

R.S. had in effect been granted impunity in Azerbaijan for the crimes committed against his Armenian victims. That was not compatible with Azerbaijan's obligation under Article 2 to effectively deter the commission of offences which put others' lives at risk. The Court therefore held that there had been a procedural violation of Article 2 by Azerbaijan.

Whether Hungary had failed in its duty under Article 2 to ensure that R.S. would continue to serve his prison sentence even after he had left the country

First, the Court noted that the Hungarian authorities had followed to the letter the procedure set out in the Council of Europe Convention on the Transfer of Sentenced Persons when extraditing R.S.

No tangible evidence had been brought before the Court to show that the Hungarian authorities had unequivocally been aware or should have been aware that R.S. would be released by Azerbaijan.

Indeed, given the time already served by R.S. in a Hungarian prison, the Court did not see how the authorities of that country could have done anything more than respect the procedure and the spirit of the Transfer Convention and trust that another Council of Europe State would act in good faith.

There had therefore been no procedural violation of Article 2 by Hungary.

Whether the Armenian ethnic origin of R.S.'s victims had played a role in the measures taken by the Azerbaijani authorities following his return

The Court noted that the Hungarian courts had found that the sole motive for R.S.'s acts had been the fact that his victims were Armenian. The ethnic bias of his crimes had thus been fully investigated by Hungary and the Court could see no reason to question the courts' conclusions.

Furthermore, it was satisfied that the applicants had a sufficiently convincing *prima facie* case to show that the Azerbaijani measures in favour of R.S. had been racially motivated. In particular, he had been pardoned on his return, without any apparent formal request or any kind of reflection process or legal procedure. He had also been promoted and given various benefits, which, in the absence of any legal basis, had quite understandably been perceived as rewards for his conduct.

Moreover, it noted again the statements by Azerbaijani officials calling R.S. a patriot and a hero, as well as the special page dedicated to R.S. on the President of Azerbaijan's website. It deplored the fact that the majority of those statements had expressed particular support for the fact that R.S.'s crimes had been directed against Armenian soldiers and considered that the very existence of the website suggested that he had been pardoned because of the ethnic nature of his attack.

Two statements provided by the Azerbaijani Government, on the other hand, denying that R.S.'s actions had been approved at an official level and that he had not been considered a hero in the country, were not sufficient to refute the overwhelming body of evidence from the applicants that the various measures leading to R.S.'s virtual impunity, coupled with the glorification of his extremely cruel hate crime, had had a causal link to the victims' Armenian ethnicity.

The Government had failed to disprove the applicants' arguable allegation of discrimination and there had been a violation of Article 14 in conjunction with Article 2 by Azerbaijan.

Whether the Azerbaijani and Hungarian Governments had failed to disclose documents

The applicants complained that both Governments had failed to disclose documents requested by them, referring in particular to Azerbaijan's presidential order pardoning R.S. and the minutes of the meetings held by the president and the instructions issued by him relating to R.S.

The Court found to the contrary that, at its request, both the Azerbaijani and Hungarian Governments had submitted the documents requested by the Court within the time-limit, including the presidential pardon decision. It was not aware of any further document which the Governments could have provided for a proper and effective examination of the applicants' case, but had failed to do so.

In conclusion, neither of the respondent Governments had failed to cooperate with the Court and there had been no violation of Article 38.

Just satisfaction (Article 41)

The Court held, unanimously, that Azerbaijan was to pay the applicants, jointly, 15,143.33 pounds sterling (GBP) in respect of costs and expenses.

Separate opinion

Judge Pinto de Albuquerque expressed a partly dissenting opinion which is annexed to the judgment.

The judgment is available only in English.

16. **ECHR, *Graner v. France*, no. 84536/17, Chamber decision of 28 May 2020 (Inadmissible).** The applicant, a French researcher investigating France's role in Rwanda before, after and during the genocide of the Tutsis in 1994**,** complained that there had been an arbitrary restriction of his right to consult public archives with a view to historical research and of the public's right to receive information of general interest. Relying on Article 13 (right to an effective remedy), he complained that he had not had an effective remedy by which to assert his right to freedom of expression.

ECHR 148 (2020)
28.05.2020

Press release issued by the Registrar

In its decision in the case of Graner v. France (application no. 84536/17) the European Court of Human Rights has unanimously declared the application inadmissible.

The case concerned a refusal to allow the applicant to consult certain documents in the archives of the French President's office concerning Rwanda for the period between 1990 and 1995.

In accordance with the principle of subsidiarity it was the role of the *Conseil d'État*, to which the applicant had duly appealed on points of law, to verify whether the examination by the Paris Administrative Court of his Convention-based arguments had met the requirements of the Court's case-law. As the *Conseil d'État* had not yet ruled on the applicant's appeal, he was not in a position to rely on a final domestic decision.

The application was rejected for failure to exhaust domestic remedies.

The decision is final.

Principal facts

The applicant, Mr François Graner, is a French national who was born in 1966 and lives in Paris.

Being a physicist and research director at the CNRS and at Paris Diderot University, Mr Graner has for a number of years, in parallel to his research activity, been investigating France's role in Rwanda before, after and during the genocide of the Tutsis in 1994.

On 7 April 2015 the Secretary General of the Presidency of the French Republic decided to declassify certain documents in its archives concerning Rwanda for the period between 1990 and 1995. On 14 July 2015 Mr Graner, who was writing a book on "the African policy of President François Mitterrand in Central Africa (1981-1995)", applied to the director of the "Archives de France" for permission to consult eighteen dossiers among the archives of François Mitterrand's presidency.

The administrator of President Mitterrand's archives gave him permission to consult the first two dossiers, but not the other sixteen, on the grounds that they were capable of "causing excessive harm to legally protected interests". The administrator indicated that the sixteen dossiers contained one or more documents classified as "secret", "secret defence matters" and "confidential defence matters".

On 7 December 2015 the director of the Archives informed Mr Graner that in the light of the administrator's opinion he would allow consultation of the first two but not the other sixteen. Mr Graner referred the matter to the Commission on access to administrative documents which, on 3 March 2016, concluded that as the administrator had not wished to allow the consultation of those archives by derogation, the commission was obliged to refuse the request. On 2 December 2016 the Minister of

Culture and Communication, with the administrator's agreement, allowed the applicant to consult five of the sixteen dossiers in question.

On 12 December 2016 Mr Graner lodged an application with the Paris Administrative Court seeking the annulment of the decision of 7 December 2015, on grounds of misuse of authority, and an order obliging the Ministry of Culture and Communication to give him access to the documents he wished to consult. In parallel, Mr Graner submitted a priority question of constitutionality ("QPC") to the Administrative Court.

He argued that the provisions of Article L. 213-4 of the Heritage Code were incompatible with Article 15 of the Declaration of the Rights of Man and the Citizen, in that they conferred on the archive administrator the power to oppose, at her sole discretion and without explanation, the right of citizens to have free access to public archives.

He added that the discretionary nature of the refusal, together with the fact that the Minister was in turn obliged to refuse access to the relevant public archives in such a case, precluded the exercise of the right to an effective remedy under Article 16 of the above-mentioned Declaration.

The Administrative Court referred the preliminary question to the *Conseil d'État* which, on 28 June 2017, forwarded it to the Constitutional Council. Before the Constitutional Council, Mr Graner further argued that the mechanism provided for under Article L. 213-4 of the Heritage Code breached the public's right to receive information, linked as it was to the right to freely impart thoughts and opinions, and was incompatible with the right to an effective remedy.

On 15 September 2017 (decision no. 2017-655 QPC) the Constitutional Council declared the second paragraph and the first sentence of the last paragraph of Article L. 213-4 of the Heritage Code to be compliant with the Constitution. On 17 May 2018 the Paris Administrative Court decided that there was no need to rule on the application for annulment, on grounds of misuse of authority, in so far as it concerned the consultation of the five dossiers to which access had been granted, and rejected the remaining complaints.

Mr Graner appealed on points of law to the *Conseil d'État* and those proceedings are still pending.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 14 December 2017.

Relying on Article 10 of the Convention (freedom of expression), the applicant complained that there had been an arbitrary restriction of his right to consult public archives with a view to historical research and of the public's right to receive information of general interest. Relying on Article 13 (right to an effective remedy), he complained that he had not had an effective remedy by which to assert his right to freedom of expression.

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

Síofra **O'Leary** (Ireland), *President*,
Gabriele **Kucsko-Stadlmayer** (Austria),
Ganna **Yudkivska** (Ukraine),
André **Potocki** (France),
Yonko **Grozev** (Bulgaria),
Lətif **Hüseynov** (Azerbaijan),
Anja **Seibert-Fohr** (Germany),

and also Victor **Soloveytchik**, *Deputy Section Registrar*.

Decision of the Court

Article 10

The Court pointed out that, where available, an application for the annulment of a decision on the grounds of misuse of authority, in the context of which it was possible to expound arguments alleging a violation of the Convention, was one of the domestic remedies that had to be exhausted in principle. It added that an appeal on points of law was one of the procedures that ordinarily had to be used to satisfy the requirements of Article 35 of the Convention.

In order to fully exhaust domestic remedies, it was therefore necessary in principle to pursue domestic proceedings through the courts up to cassation level and to submit to that supreme court the Convention complaints which could subsequently be referred to the European Court of Human Rights.

In the present case, the applicant had lodged an application for annulment, on the grounds of a misuse of authority, of the decision partly rejecting his request to consult President Mitterrand's archives.

The applicant submitted that in view of Decision no. 2017-655 QPC of 15 September 2017, delivered by the Constitutional Council in the context of the proceedings before the Paris Administrative Court, the appeal that he had subsequently brought before the *Conseil d'État* had no chance of success. He argued that the priority question (QPC) referred to the Constitutional Council on his initiative had concerned the non-compliance of Article L. 213-4 of the Heritage Code with the provisions of constitutional law relating to the right of access to public archives and to the right to an effective remedy before a court of law.

The QPC had thus concerned individual rights similar to the rights under Articles 10 and 13 of the Convention, a violation of which the applicant had complained. However, according to the applicant, a domestic remedy based on Convention complaints which were substantively identical to constitutional complaints already rejected by the Constitutional Council had no chance of success, especially in his case, since the authorities' hands were tied. The applicant inferred from this that the fact that the proceedings were pending in the *Conseil d'État* did not prevent the Court from examining his application on the merits.

In the Court's view, it could not be inferred from the Constitutional Council's decision that the application for annulment initiated by the applicant on the basis of those same rights, as guaranteed by the Convention, was clearly doomed to fail.

As the Court had noted in the Charron and Merle-Montet case, the review of constitutionality carried out by the Constitutional Council and the review of Convention compliance carried out by the ordinary courts were distinct procedures.

In the present case, admittedly, the Paris Administrative Court had already dismissed the applicant's appeal. However, a litigant could not conclude that an appeal was ineffective solely from the fact that he or she had not won his or her case.

Secondly, the Paris Administrative Court had drawn a distinction between the argument alleging an infringement by Article L. 213-4 of the Heritage Code of the rights and freedoms guaranteed by the Constitution and the arguments alleging a violation of rights and freedoms guaranteed by the Convention. It had dismissed the former arguments on the ground that Constitutional Council decision no. 2017-655 QPC of 15 September 2017 had concluded that the relevant provision was in conformity with the Constitution. It had dismissed the latter argument without relying on that decision, on the ground that there was no infringement of the exercise of the freedom of expression and communication guaranteed by Article 10 § 1 of the Convention or of the right to an effective remedy before a court under Article 13 of the Convention.

Regardless of whether the review carried out by the Paris Administrative Court as regards Convention compliance was sufficient, this being primarily for the *Conseil d'État* to assess, in the Court's view this showed that, although the Administrative Court was bound by the decision of the Constitutional

Council, that decision had not precluded it from examining the merits of the applicant's arguments concerning a violation of those same rights and freedoms under the Convention.

Moreover, the fact that Article L. 213-4 of the Heritage Code tied the authorities' hands, obliging them to follow the opinion of the archives administrator, did not preclude the Administrative Court, in the context of an action for annulment for misuse of power, from examining arguments based on the Convention.

It could not therefore be said that, in so far as it was based on the applicant's arguments alleging a violation of Articles 10 and 13 of the Convention, the action for annulment on the grounds of misuse of powers before the administrative courts had been "clearly doomed to fail" following Constitutional Council decision no. 2017-655 QPC of 15 September 2017.

In accordance with the principle of subsidiarity it was the role of the *Conseil d'État*, to which the applicant had duly appealed on points of law, to verify whether the examination by the Paris Administrative Court of his Convention-based arguments had met the requirements of the Court's case-law. As the *Conseil d'État* had not yet ruled on the applicant's appeal, he was not in a position to rely on a final domestic decision within the meaning of Article 35 § 1 of the Convention.

This part of the application was thus premature and had to be rejected for non-exhaustion of domestic remedies.

Article 13

As the case was still pending before the *Conseil d'État*, the complaint under Article 13 of the Convention was also premature and had to be rejected for failure to exhaust domestic remedies.

The decision is available only in French.

17. **ECHR, *M.S. v. Slovakia and Ukraine*, no. 17189/11, Chamber judgment of 11 June 2020 (Article 3, prohibition of torture and inhuman or degrading treatment – Violation by Ukraine; Article 5-2, right to be informed promptly of reasons for arrest – Violation by Ukraine; Article 5-4, right to have lawfulness of detention decided speedily by a court – Violation by Ukraine; Article 34, right to individual petition – Violation by Ukraine; All complaints against Slovakia declared inadmissible).** The applicant, an Afghan migrant, complained about his arrest in Slovakia and return to Ukraine, then Afghanistan, with limited access to legal advice and interpreters.

ECHR 166 (2020)
11.06.2020

Press release issued by the Registrar

The case concerned an Afghan migrant's complaint about his arrest in Slovakia and return to Ukraine, then Afghanistan, with limited access to legal advice and interpreters.

The applicant, Mr M.S., is an Afghan national. His date of birth was in dispute: the applicant alleged that he was born in 1993 or 1994, while the authorities in Slovakia and Ukraine recorded the date of January 1992.

According to the applicant, he left Afghanistan in May 2010, after his father, who used to work for the National Security Department of Afghanistan, had been killed in 2005 and a member of his family had received a threatening letter.

He entered Ukraine in early July 2010. On 23 September 2010 he was arrested by the Slovakian border police while crossing into Slovakia illegally. He was interviewed, interpreting being provided from Slovak to English and then, by a fellow Afghan migrant, from English to Pashto. According to the record of the interview, he stated that his intention was not to apply for asylum in Slovakia, but to travel to western Europe.

A decision was taken to expel him to Ukraine and he was handed over to the Ukrainian authorities the next day and placed in a temporary holding facility. In October 2010 a court ordered his expulsion from Ukraine and his detention pending expulsion. He was transferred to temporary accommodation for foreign nationals and stateless persons before eventually being expelled to Kabul in March 2011.

In the meantime, he had lodged an asylum request with the Ukrainian migration authorities, submitting that he feared persecution if returned to Afghanistan. However, the authorities had rejected his request because they had found that he did not meet the definition of a refugee under domestic law and the Refugee Convention.

He maintained that throughout these procedures he had tried to bring to the attention of both the Slovakian and Ukrainian authorities the fact that he was a minor, without any action being taken.

He is currently living in Afghanistan, and alleged that he was forced to change his place of residence frequently for fear of the people who had killed his father.

The applicant made several complaints under in particular Article 3 (prohibition of inhuman or degrading treatment) and Article 5 §§ 2 and 4 (right to be informed promptly of reasons for arrest/right to have lawfulness of detention decided speedily by a court), alleging, inter alia, that he had been expelled to Afghanistan without proper examination of his asylum claim and the risks he faced, and that he had not been informed of the reasons for his detention in Ukraine.

He also submitted, under Article 34 (right to individual petition), that an NGO representative had been denied access to him in Ukraine, preventing him from lodging an application for an interim measure with the European Court of Human Rights.

Complaints against Slovakia declared **inadmissible**
Violation of Article 3 (investigation) by Ukraine
Violation of Article 5 §§ 2 and 4 by Ukraine
No violation of Article 34 by Ukraine

Just satisfaction: EUR 2,300 (non-pecuniary damage)

18. **ECHR, *Vujnović v. Croatia*, no. 32349/16, Chamber judgment of 11 June 2020 (Article 6-1, right to a fair trial and right of access to court – No violation).** The applicant, a Croatian national whose parents had died in 1993 during a military operation by the Croatian army, unsuccessfully claimed that the dismissal of his claim for damages as statute-barred violated his right to a fair trial and his right of access to court.

ECHR 167 (2020)
11.06.2020

Press release issued by the Registrar

In today's **Chamber** judgment1 in the case of Vujnović v. Croatia (application no. 32349/16) the European Court of Human Rights held, by four votes to three, that there had been:

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

The case essentially concerned the civil proceedings for damages following the death of the applicant's parents during a military operation by the Croatian army in 1993. The applicant's claim was ultimately dismissed as statute-barred.

The applicant argued that the Supreme Court had been inconsistent when deciding on cases concerning compensation for the death of family members, as it had not used the same approach each time for calculating the statutory limitation period, and that the manner in which this time-limit had been calculated in his case had deprived him of access to a court.

The Court found that the cases relied on by the applicant as examples of inconsistency had concerned disappearances which had never been elucidated, whereas he had known that his parents had been killed in the 1993 operation several years before bringing his claim for damages. The Supreme Court cases referred to by the applicant had therefore involved different facts to the case concerning his parents and there could be no conflicting case-law.

Moreover, the manner in which the statutory limitation period had been calculated in his case, namely from 2001 when an indictment by the International Criminal Tribunal for the former Yugoslavia ("the ICTY") against a Croatian general had listed his parents among the victims of the operation, had not amounted to a disproportionate restriction on his right of access to court. The indictments against the Croatian generals had been widely reported in the media, and yet the applicant had not contacted the authorities for information about his parents' fate until 2007 in the context of the proceedings for damages. Nor had he instituted proceedings with a view to having his parents declared dead until 2011, some 18 years after their disappearance.

Principal facts

The applicant, Dušan Vujnović, is a Croatian national who was born in 1963 and lives in Zagreb.

The applicant's parents were killed during the war in 1993 when the Croatian army conducted a military operation to regain control from the Serbian forces over territory known as the "Medak Pocket".

Several years later investigations were carried out into the role of the Croatian army generals in the Medak Pocket military operation during which 51 people had been killed. The ICTY indicted several generals and passed the cases to the Croatian authorities for prosecution.

In particular, a Croatian general, R.A., was indicted in 2001 by the ICTY and then in 2006 by the Croatian authorities with crimes against humanity and violations of the laws and customs of war in the

course of "Operation Pocket-93", notably for failing to prevent the massacring of civilians of Serbian ethnicity. Both indictments listed the applicants' parents among the victims. The Croatian courts acquitted General R.A. of the charges in 2008, which decision became final in 2009.

In 2008 the applicant brought a civil claim against the State seeking damages for the killing of his parents by Croatian soldiers. The courts ultimately ruled against him in 2015. In particular the Supreme Court held that the applicant had had an objective possibility to learn about the death of his parents in 2001 when the ICTY indictment against General R.A. had listed both of them among the victims and that the five-year statutory limitation period should therefore have run from this point. As he had brought his claim in 2008, it was statute-barred.

In 2011 the applicant brought proceedings before the courts to have his parents declared dead and the courts issued decisions to that effect which became final in 2012 and 2013.

Complaints, procedure and composition of the Court

Relying on Article 2 (right to life), the applicant complained that the investigation into the death of his parents had been ineffective as it had failed to identify those responsible.

Also relying on Article 6 § 1 (right to a fair trial/access to court), he complained about the civil proceedings for damages, alleging that the practice of the Supreme Court for calculating the statutory limitation period had been inconsistent, and that the manner in which it had been applied in his case had deprived him of his right of access to a court.

The application was lodged with the European Court of Human Rights on 2 June 2016.

Judgment was given by a Chamber of seven judges, composed as follows:
Krzysztof **Wojtyczek** (Poland), *President*,
Ksenija **Turković** (Croatia),
Aleš **Pejchal** (the Czech Republic),
Pere **Pastor Vilanova** (Andorra),
Pauliine **Koskelo** (Finland),
Tim **Eicke** (the United Kingdom),
Jovan **Ilievski** (North Macedonia),

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

Decision of the Court

Article 2 (right to life/investigation)

The Government submitted that although the State Attorney's Office had continued to investigate crimes committed during Operation Pocket-93 after General R.A.'s acquittal in 2008, as of that time the applicant's parents had not been considered to be victims of a criminal offence. Moreover, despite a criminal complaint lodged by three persons (not the applicant) in September 2015, to date no new information had come to light which would undermine such a conclusion.

The Court reiterated that applicants whose close relatives had been killed could be expected to display due diligence and take the initiative as far as necessary to obtain information about the progress made in the related investigation.

However, the applicant had not attempted to request information after the criminal proceedings against General R.A. had ended in November 2009, only turning to the Court with his complaint in June 2016, long after its six-month deadline for lodging applications.

The Court therefore rejected the applicant's complaint about the ineffectiveness of the investigation into his parents' death as inadmissible for being lodged out of time.

Article 6 § 1

Legal certainty

The applicant argued that the statutory limitation period for lodging a civil claim for damages in his case should have been calculated from the date on which the decisions declaring his parents dead had become final, as in several other cases decided by the Supreme Court concerning compensation for the death of family members.

The Court reiterated that it had previously accepted that giving two disputes different treatment could not be considered to give rise to conflicting case-law when they concerned different facts.

It noted that the applicant had relied on Supreme Court judgments concerning the disappearance of plaintiffs' family members whose fate remained unknown, whereas it was known what had happened to the applicant's parents. Information that they had been killed in September 1993 became known before the applicant had instituted civil proceedings for damages (in 2008) and certainly before he had sought to have them declared dead (in 2011). Indeed, he had admitted that he had learned about his parents' fate in 2006, when the indictment against General R.A. had been brought before the Croatian criminal courts.

The cases relied on by the applicant had therefore involved different facts to the case concerning his parents. The fact that the domestic courts had not calculated the statutory limitation period for lodging the civil claim for damages from the date on which the decisions declaring his parents dead had become final could not therefore be considered to give rise to conflicting case-law and there had been no breach of the principle of legal certainty. There had accordingly been no violation of Article 6 § 1 on that account.

Access to court

The applicant argued that calculating the statutory limitation period for lodging his claim from 2001, when the Supreme Court considered that he had had an objective possibility to learn of his parents' death, had deprived him of access to a court.

First, the Court did not find it unreasonable that in circumstances where the exact day on which the plaintiffs had learned about the death of their family members could not be established, the domestic courts would rely on the time at which they had had an objective opportunity to learn about it.

Furthermore, it noted that the indictments filed against the Croatian army generals before the ICTY for crimes committed in the Medak Pocket in September 1993 had been widely covered by the media in Croatia. The applicant, as the son of persons who had gone missing during the 1993 military operation, could not have remained unaware of those publications. Nor had it been unreasonable to expect that he should show due diligence and turn to the Croatian authorities for information.

However, he had not contacted the police or the State Attorney's Office about their fate, except in the context of the civil proceedings for damages in 2007. Nor had he instituted proceedings with a view to having them declared dead until 2011, some 18 years after their disappearance.

Had he turned to the State authorities for information regarding his parents' fate at any point after November 2001 when the ICTY indictment had been filed against general R.A., he could have learned that they had been killed by Croatian soldiers and therefore could have obtained all the information necessary to seek damages from the State.

The Court therefore concluded that the manner in which the Supreme Court had calculated the statutory limitation period for the applicant to lodge his claim for damages had not constituted a disproportionate restriction on his right of access to court.

There had accordingly been no violation of Article 6 § 1 of the Convention on that account either.

Separate opinions

Judges Ksenija Turković, Aleš Pejchal and Jovan Ilievski expressed a joint partly dissenting opinion. This opinion is annexed to the judgment.

The judgment is available only in English.

19. **ECHR, *Ghoumid and Others v. France*, nos. 52273/16, 52285/16, 52290/16, 52294/16 and 52302/16, Chamber judgment of 25 June 2020 (Article 8, right to respect for private and family life – No violation).** The applicants, four Moroccan nationals and one Turkish national, complained about the revocation of their French nationality after they were convicted of participation in a criminal conspiracy to commit an act of terrorism.

ECHR 191 (2020)
25.06.2020

Press release issued by the Registrar

In today's **Chamber** judgment in the case of **Ghoumid and Others v. France** (application nos. 52273/16, 52285/16, 52290/16, 52294/16 and 52302/16) 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 five individuals, formerly having dual nationality, who were convicted of participation in a criminal conspiracy to commit an act of terrorism. After serving their sentences they were released in 2009 and 2010, then stripped of their French nationality in October 2015.

The Court reiterated the point, already made in a number of judgments, that terrorist violence constituted in itself a serious threat to human rights. As the applicants already had another nationality, the decision to deprive them of French nationality had not had the effect of making them stateless. In addition, loss of French nationality did not automatically entail deportation from France, but if such a measure were to be decided against them they would have the appropriate remedies by which to assert their rights.

Lastly, the Court observed that deprivation of nationality under Article 25 of the Civil Code was not a criminal sanction, within the meaning of Article 4 of Protocol No. 7 (right not to be tried or punished twice), and that this provision was therefore inapplicable.

Principal facts

The applicants, Bachir Ghoumid, Fouad Charouali, Attila Turk, Redouane Aberbri and Rachid Ait El Haj are Moroccan nationals, except for the third applicant, who is Turkish. Mr Ghoumid, Mr Charouali and Mr Turk live in Mantes-la-Jolie, and Mr Aberbri and Mr Ait El Haj live in Les Mureaux.

In a judgment of 11 July 2007 the Criminal Court of Paris convicted the five applicants for having, during the period 1995 to 2004, participated in a criminal conspiracy to commit an act of terrorism. Mr Turk and Mr Aberbri lodged an appeal with the Paris Court of Appeal, which upheld their convictions on 1 July 2008.

In April 2015 the Minister of the Interior informed the applicants that, in view of the judgment of 11 July 2007 convicting them of an offence constituting an act of terrorism, he had decided to initiate the procedure to have their French nationality revoked, under Articles 25 and 25-1 of the Civil Code.

After the *Conseil d'État* had approved the procedure on 1 September 2015, the Prime Minister, by five decrees dated 7 October 2015, deprived the applicants of their French nationality. The applicants applied to the *Conseil d'État* for an interim measure to stay the execution of the decrees of 7 October 2015 and for their annulment on grounds of misuse of authority. The requests for an interim measure were rejected by five similar decisions on 20 November 2015 and, on 8 June 2016, the *Conseil d'État* rejected the requests for annulment in five similar decisions.

Mr Aberbri and Mr Ait El Haj were interviewed by the Deportation Board of the Yvelines *département* on 8 September 2016. On 21 October 2016 the Prefect of the Yvelines informed them that the Board had given a favourable opinion on their deportation. They were summoned on 26 October 2016 by the police, but they were not notified of a deportation order.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), the applicants argued that the revocation of their nationality had breached their right to respect for their private life. Under Article 4 of Protocol No. 7 (right not to be tried or punished twice), they argued that their loss of nationality was a "disguised punishment" constituting a sanction for conduct in respect of which they had already been convicted and sentenced in 2007 by the Paris Criminal Court.

The application was lodged with the European Court of Human Rights on 2 September 2016. Judgment was given by a Chamber of seven judges, composed as follows:

Síofra **O'Leary** (Ireland), *President*,
Gabriele **Kucsko-Stadlmayer** (Austria),
Ganna **Yudkivska** (Ukraine),
André **Potocki** (France),
Lətif **Hüseynov** (Azerbaijan),
Lado **Chanturia** (Georgia),
Anja **Seibert-Fohr** (Germany),

and also Victor **Soloveytchik**, *Deputy Section Registrar*.

Decision of the Court

Article 8

The Court noted that while the removal of an alien from a country in which his or her relatives were living could interfere with his or her right to respect for family life, the deprivation of French nationality had no consequence for the presence on French territory of the person concerned. The applicants had applied for "private and family life" residence permits and had been issued with acknowledgments of those applications, allowing them to live in France. They would be able, if necessary, to challenge in the administrative courts any rejection of their applications and any subsequent deportation measures. It followed that the deprivation of the applicants' nationality did not constitute interference with the exercise of their right to respect for their family life.

Arbitrary deprivation of nationality might, however, engage Article 8 of the Convention because of its impact on the private life of the person concerned. The Court therefore examined the case from that perspective. It looked at two points: it assessed whether the measures taken against the applicants had been arbitrary (whether they were lawful, whether the applicants had been afforded procedural safeguards, including access to appropriate judicial review, and whether the authorities had acted diligently and promptly); and it examined the consequences of the deprivation of nationality for the private life of the applicants.

The Court found that the administrative authorities had not immediately initiated proceedings for deprivation of nationality after the applicants' convictions. It was, however, able to accept that, faced with events of that kind, a State might re-assess, with greater stringency, whether individuals who had been convicted of a criminal offence constituting an act of terrorism still maintained a bond of loyalty and solidarity with the State, and that it might therefore, subject to a strict proportionality test, decide to take measures against them which it had not initially chosen. The Court accordingly took the view that, in the particular circumstances of the case, the time which had elapsed between the applicants' convictions, enabling the procedure for deprivation of nationality to be initiated under French law, and

the date on which that procedure had ultimately been implemented against them was not sufficient in itself to render that deprivation arbitrary.

As to the lawfulness of the measure, the Court noted that, at the time of the events, Article 25-1 of the Civil Code provided that deprivation of nationality could only be ordered within 10 years from the commission of the acts on which the criminal conviction was based.

However, the decisions depriving the applicants of French nationality had been taken in 2015, whereas the most recent events had dated from 2004. The Court noted that the legislature had extended that time-limit to 15 years in January 2006 and that the *Conseil d'État* had taken the view, in accordance with its case-law, that, in matters of administrative sanctions, the administrative and regulatory provisions laying down procedural conditions and formalities applied with immediate effect. The Court thus found that the measures taken against the applicants had been lawful.

The Court found that the applicants had enjoyed substantial procedural safeguards. In accordance with Article 61 of Decree no. 93-1362 of 30 December 1993, the authorities had given them prior notice of their intention to deprive them of French nationality and had explained to them the legal and factual grounds on which that measure would be based. The applicants had then been given one month to submit observations in their defence, which they had done.

The matter was subsequently referred to the *Conseil d'État* for an opinion, which had to give its approval for any deprivation of nationality. Having regard to that approval, the orders depriving the applicants of their nationality were drawn up, giving factual and legal reasoning, and the applicants had been given the opportunity –which they had used – to apply to the urgent applications judge and to the *Conseil d'État* to seek the annulment of the measure on grounds of misuse of authority. They had thus been able to assert their Convention rights, and in the annulment proceedings the *Conseil d'État* had carried out a proportionality review and had issued a reasoned decision. The Court concluded that the decisions to deprive the applicants of French nationality could not therefore be regarded as arbitrary.

As to the consequences of those decisions for the applicants' private life, it was true that their prospect of remaining in France had consequently become more uncertain; as foreigners on French soil they could now be deported. A measure of that type would be likely to have an impact on their private life as it could lead to a loss of employment, separation from family, and the disruption of any social ties they had forged in France. However, since no deportation order was forthcoming, the Court was of the view that the consequence of the deprivation of nationality for their private life had been the loss of an element of their identity.

That being said, the Court was able to accept the Government's arguments. As it had repeatedly emphasised in previous cases, terrorist violence in itself constituted a serious threat to human rights. It could therefore understand the decision of the French authorities, following the attacks in France in 2015, to show greater firmness with regard to persons convicted of a terrorism offence. The applicants' participation in a criminal conspiracy to commit a terrorist act, of which they were all found guilty, had continued for 10 consecutive years.

The Court also noted that some of the applicants had just acquired French nationality when they had committed the offence in question and that the others had acquired it during the period of the offence. It further observed that all the applicants already had another nationality; the decision to deprive them of French nationality had not therefore had the effect of rendering them stateless.

In addition, loss of French nationality did not automatically entail deportation from France, but if such a measure were to be decided against them they would have the appropriate remedies by which to assert their rights.

The Court accordingly found that the decision to deprive the applicants of French nationality had not had disproportionate consequences for their private life. There had therefore been no violation of Article 8 of the Convention.

Article 4 of Protocol No. 7

In order for Article 4 of Protocol No. 7 to be engaged, it was necessary, in particular, for an applicant to have been "tried" or "punished in criminal proceedings" for an offence in respect of which he or she had already been finally acquitted or convicted.

It was clear that the applicants had been "convicted", within the meaning of Article 4 of Protocol No. 7, as they had been convicted and sentenced for the offence of conspiring to commit a terrorist act. That conviction, dating from 2007, had in fact become final by the time they were deprived of French nationality, in 2015.

As to whether the measure of deprivation of nationality under Article 25 of the Civil Code was "criminal" in nature, the Court first noted that it was not classified as such under French law. It was provided for in the Civil Code, not the Criminal Code, and fell within the jurisdiction of the administrative courts rather than the criminal courts; the *Conseil d'État* had characterised it as an "administrative sanction".

Secondly, the Court found that, going beyond its punitive connotation, the deprivation of nationality under Article 25 of the Civil Code pursued a specific objective, as it sought to reflect the fact that an individual who had been granted French nationality had subsequently broken the bond of loyalty to France by committing a particularly serious offence, and in the case of terrorism undermining the very foundation of democracy. The measure was thus a solemn confirmation of the severance of the bond between the individual and France.

Thirdly, the Court did not underestimate the seriousness of the message that the State was thus addressing to those concerned or the potential impact on their identity. However, the degree of severity of the measure had to be seen in relation to the fact that deprivation of nationality under Article 25 of the Civil Code was a response to conduct which, when it came to terrorism, constituted an attack on democracy itself. Besides, this measure in itself did not entail the deportation from France of those concerned.

Consequently, deprivation of nationality under Article 25 of the Civil Code was not a criminal sanction, within the meaning of Article 4 of Protocol No. 7, and this provision was therefore inapplicable in the present case.

The judgment is available only in French.

20. **ECHR, *Moustahi v. France*, no. 9347/14, Chamber judgment of 25 June 2020 (Article 3, prohibition of torture and of inhuman or degrading treatment – Violation; Article 4 of Protocol No. 4, prohibition of the collective expulsion of aliens – Violation; Article 5-1, right to liberty and security – Violation; Article 5-4, right to a speedy decision on the lawfulness of detention – Violation; Article 8, right to respect for private and family life – Violation; Article 13, right to an effective remedy, in conjunction with Article 8 and Article 4 of Protocol No. 4 – Violation).** The case concerned the conditions in which two children, apprehended when they unlawfully entered French territory in Mayotte, were placed in administrative detention together with adults, arbitrarily associated with one of them for administrative purposes, and expeditiously returned to the Comoros without a careful and individual examination of their situation.

ECHR 192 (2020)
25.06.2020

Press release issued by the Registrar

In today's **Chamber** judgment in the case of **Moustahi v. France** (application no. 9347/14) the European Court of Human Rights held that there had been:

unanimously, **a violation of Article 3** (prohibition of inhuman or degrading treatment), of the European Convention on Human Rights, in respect of the second and third applicants on account of the conditions of their detention;

unanimously, **a violation of Article 3,** in respect of the second and third applicants on account of the conditions of their removal to the Comoros;

unanimously, **no violation of Article 3** in respect of the first applicant;

unanimously, **a violation of Article 5 § 1** (right to liberty and security), in respect of the second and third applicants;

by a majority, **a violation of Article 5 § 4** (right to a speedy decision on the lawfulness of detention), in respect of the second and third applicants;

by a majority, **a violation of Article 8** (right to respect for private and family life), in respect of all three applicants;

unanimously, **a violation of Article 4 of Protocol No. 4** (prohibition of collective expulsions of aliens), in respect of the second and third applicants;

unanimously, **no violation of Article 13** (right to an effective remedy) **in conjunction with Article 3** as regards the complaint of a lack of effective remedies against the conditions of removal of the second and third applicants;

by a majority, **a violation of Article 13 in conjunction with Article 8, and of Article 13 in conjunction with Article 4 of Protocol No. 4,** as regards the complaint of a lack of effective remedies against the removal of the second and third applicants.

The case concerned the conditions in which two children, apprehended when they unlawfully entered French territory in Mayotte, were placed in administrative detention together with adults, arbitrarily associated with one of them for administrative purposes, and expeditiously returned to the Comoros without a careful and individual examination of their situation.

The Court was persuaded that the administrative association of the two children with an unrelated adult had not sought to preserve the children's best interests but rather to ensure their speedy removal to the Comoros. Placing them in a detention centre could only have caused them stress and anxiety, with particularly traumatic repercussions for their mental state. The French authorities had not provided for the effective protection of the children and had not taken account of the situation that they risked facing on returning to their country of origin.

The Court further observed that no remedy had been available to the children for the purpose of having the lawfulness of their detention reviewed.

It reiterated that the fact of placing certain family members in a detention centre, while others were free, could be regarded as an interference with the effective exercise of the right to family life, regardless of the duration of the measure.

The circumstances of the case, taken as a whole, led the Court to find that the removal from Mayotte of the children, who were very young (five and three at the time) and were not known to or assisted by any adult, had been decided and implemented without the safeguard of a reasonable and objective examination of their situation and had breached Article 4 of Protocol No. 4.

Principal facts

The three applicants are Mohamed Moustahi and his children Nadjima Moustahi and Nofili Moustahi, who were aged five and three at the relevant time. They are Comorian nationals, who were born in 1982, 2008 and 2010, and now live in Mayotte.

Mr Moustahi entered the territory of Mayotte in 1994 and he has since lived there lawfully and continuously with a temporary residence permit that has been extended. The two children were born in Mayotte to an unlawfully resident Comorian mother. In 2011 a removal order was issued against the mother, who was sent back to the Comoros with the two children; she entrusted them to their paternal grandmother and returned to Mayotte.

On 13 November 2013 the two children travelled on a makeshift boat bound for Mayotte. The 17 people on board were intercepted at sea by the French authorities on the morning of 14 November 2013. At 9 a.m. they underwent an identity check on a beach, then a health check at Dzaoudi hospital, and finally an administrative removal procedure was initiated against them on the same day. Pending their removal they were detained for approximately one hour and 45 minutes on the premises of the Pamandzi gendarmerie. The two children were administratively associated with Mr M.A., one of the migrants present on the boat, who had reportedly declared that he was accompanying the children. The children's names were entered on the removal order issued to M.A.; however, they were placed in detention without their names appearing on any detention order.

Mr Moustahi was notified of the presence of his children at the gendarmerie, in a holding cell, but was unable to make contact with them. The same day at 3 p.m. he lodged an appeal with the prefect requesting the suspension of the removal order and at 5.30 p.m. he referred the matter to the urgent applications judge of the Administrative Court of Mayotte.

The two children were placed on board a ship at 4.30 p.m. and returned to the Comoros.

On 18 November 2013, two days after the expiry of the time-limit laid down by Article L. 521-2 of the Code of Administrative Justice, the urgent applications judge of the Administrative Court of Mayotte dismissed Mr Moustahi's request. On 3 December 2013 he appealed against this order to the urgent applications judge of the *Conseil d'État*. The Defender of Rights (Ombudsman), the GISTI and the CIMADE intervened to support him. On 10 December 2013 the *Conseil d'État* dismissed the appeal.

On 13 January 2014 Mr Moustahi submitted an application for family reunification to the consular authorities in the Comoros. In August 2014 long-stay visas were issued to the two children, who have been living with their father since September 2014.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman and degrading treatment), the second and third applicants complained about their detention in the company of unknown adults, and the fact that they had been arbitrarily associated with one of them for administrative purposes, followed by their immediate return to the Comoros, without any individual and careful examination of their situation. Under Article 3, the first applicant complained of feelings of fear, anxiety and helplessness in relation to the treatment suffered by his children. Relying on Article 5 § 1 (right to liberty and security), the second and third applicants complained that they had been deprived of their liberty unlawfully and unjustifiably. Under Article 5 § 4 (right to a speedy decision on the lawfulness of detention), they complained that there had been a violation of their right to judicial review of a custodial measure, as there had been no legal act formalising their detention that they could appeal against. Relying on Article 8 (right to respect for private and family life), the three applicants complained of the French authorities' refusal to entrust the children to their father rather than placing them alone in administrative detention and to allow contact between them during the children's detention. Under Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens), the second and third applicants claimed to have been subjected to a measure of collective expulsion without any individual examination of their situation. Lastly, relying on Article 13 (right to an effective remedy) in conjunction with Articles 3 and 8 and with Article 4 of Protocol No. 4, they submitted that they had not had an effective remedy by which to complain about their removal. They alleged that the removal had been implemented without the authorities having taken any precautions to ensure that they would return to their country of origin in safe conditions, that it had breached their right to respect for their family life and that there had been no examination of their individual situation.

The application was lodged with the European Court of Human Rights on 20 January 2014.

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

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

and also Victor **Soloveytchik**, *Deputy Section Registrar*.

Decision of the Court

Article 3 (in respect of the second and third applicants)

The Court, regarding the second and third applicants as unaccompanied minors, found that they had been arbitrarily associated with M.A. It was persuaded that this formality had not sought to preserve the children's best interests but rather to ensure their speedy removal to the Comoros.

The Court observed that the conditions of the two children's detention had been the same as those of the adults apprehended at the same time as them. Having regard to the age of the children and to the fact that they had been left to cope on their own, it concluded that their detention could only have caused them stress and anxiety, with particularly traumatic repercussions for their mental state.

The Court took the view that the authorities had failed to ensure that the children were treated in a manner compatible with the Convention provisions and found that this treatment exceeded the threshold of seriousness for the purposes of Article 3. There had therefore been a violation of this Article.

Furthermore, the French authorities had not ensured that the children were effectively protected and had failed to take account of the situation which they risked facing on their return to their country of origin. The Court was of the view that their removal in such conditions must necessarily have caused them extreme anxiety and demonstrated a flagrant lack of humanity towards them in view of their age and their situation as unaccompanied minors, such that it reached the threshold required to be characterised as inhuman treatment. In removing them the French authorities had also failed to comply with their positive obligations, as they should have taken the necessary steps and precautions.

There had been a violation of Article 3 on account of the conditions of the children's return to the Comoros.

Article 3 (in respect of the first applicant)

The Court had no doubt that the first applicant, as a father, had suffered distress and anxiety. However, it noted that the children's detention had been of a short duration. It further observed that their journey between the Comoros and Mayotte had been made on the initiative of the first applicant, who had arranged the children's illegal and dangerous crossing from the Comoros on a makeshift boat without ensuring that they were accompanied by a responsible adult. In contrast, the return journey had been made in satisfactory conditions on board a ferry belonging to a company that frequently operated the crossing between Mayotte and the Comoros. Moreover, the applicant knew that his own mother would take care of the children on their arrival.

In those conditions, the Court found that the threshold of seriousness required by Article 3 had not been reached and there had been no violation under this head.

Article 5 § 1 (in respect of the second and third applicants)

The Court noted that the children had not been placed in a detention centre with the aim of keeping them together with a relative. On the contrary, they had been arbitrarily associated with M.A. to enable their detention pending removal, even though this was not permitted by the domestic law applicable at the time. The urgent applications judge of the Mayotte Administrative Court had precisely noted the manifest unlawfulness of the measure.

The Court failed to find any legal basis to justify the decision to deprive the two children of their liberty. There had thus been a violation of Article 5 § 1.

Article 5 § 4 (in respect of the second and third applicants)

There had been no administrative detention order or removal order issued specifically against the two children; their names had simply been mentioned in the removal order issued to M.A. The children had not been placed in a detention centre with a relative, but had been arbitrarily associated by the authorities with an unrelated adult. The Court found that the children, in the company of a stranger, had fallen into a legal vacuum, as they had had no means of using the remedy that was available to M.A. The children had not been accompanied in the detention centre by someone who had the legal authority to act on their behalf in the domestic courts and who had their interests at heart.

The Court thus found that the second and third applicants had not been guaranteed the protection required by this Article, since no remedy had been available to them for the purpose of having the lawfulness of their detention reviewed. There had thus been a violation of Article 5 § 4.

Article 8 (all three applicants)

The Court took the view that the fact of placing certain members of a family in a detention centre, while other members of the family were free, could be regarded as an interference with the effective exercise of the right to family life, regardless of the duration of the custodial measure. Having regard to its finding of a violation of Article 5 § 1, the Court found that the interference with the applicants' family life was not in accordance with the law. That was sufficient in itself to find a violation of Article 8.

This violation of the right to respect for family life had been aggravated by the fact that the national authorities had arbitrarily placed the children in the company of a stranger who had no authority over them, without enquiring as to whether there was any connection between them. The Court was convinced that the refusal to reunite the applicants had nothing to do with the best interests of the children but served to fulfil the authorities' aim of ensuring that their removal would take place expeditiously, in breach of the domestic law. The Court could not accept this as a legitimate aim for the purposes of Article 8 § 2.

Article 4 of Protocol No. 4 (in respect of the second and third applicants)

In the Court's view, where a child was accompanied by a relative or the like, the requirements of Article 4 of Protocol No. 4 could be met if that adult was in a position to submit, meaningfully and effectively, arguments against the expulsion on behalf of the child.

The particular circumstances of the case, taken as a whole, led the Court to find that the removal of the children, who were very young (five and three at the time) and were not known to or assisted by any accompanying adult, had been decided and implemented without affording them the safeguard of a reasonable and objective examination of their situation. The Court thus found that the children's expulsion had breached Article 4 of Protocol No. 4.

Article 13 in conjunction with Articles 3 and 8, and in conjunction with Article 4 of Protocol No. 4 (in respect of the second and third applicants)

Article 13 in conjunction with Article 3

The Court emphasised that the present complaint concerned the practical arrangements of the removal measure: the fact that the children were unaccompanied, the failure to make arrangements at their destination and their late time of arrival. The scope of the States' obligation under Article 13 varied depending on the nature of the complaint.

The Court was mindful of the fact that the practical arrangements for the removal of aliens to another State would often remain unknown to the authorities until just before the implementation of the measure and that those arrangements would not usually, in themselves, constitute a violation of Article 3. Article 13 did not require any remedies to have suspensive effect. The possibility of a remedy that could be used by the applicant at a subsequent stage would thus suffice under this Article and there was no evidence from the exchanges between the parties that such a remedy was ineffective or inexistent in the circumstances of the present case.

The Court thus found that there had been no violation of Article 13 in conjunction with Article 3.

Article 13 in conjunction with Article 8 and Article 4 of Protocol No. 4

Having regard to the sequence of events, the Court found that no judicial examination of the applicants' requests had been possible. While the urgent application procedures could, in theory, enable the judge to examine arguments and to order, if necessary, the suspension of the removal measure, any such possibility had been precluded by the excessively short time frame. The urgent applications judge of the Mayotte Administrative Court could only reject, for lack of urgency, the application lodged by the first applicant, even though he noted that the decision in question was "manifestly unlawful". Thus the removal of the children was carried out purely on the basis of the decision taken by the administrative authority in respect of a third party who was unrelated to them. Consequently, the Court took the view

that the haste with which the removal measure had been implemented had had the effect of rendering any existing remedies ineffective and thus unavailable to the applicants.

The Court found that the applicants had not had any effective remedies available to them in respect of their complaints under Article 8 and Article 4 of Protocol No. 4 when their removal was being implemented. That failure could not be remedied by the subsequent issuance to them of residence permits.

The Court thus found that there had been a violation of Article 13 taken in conjunction with Article 8 and Article 4 of Protocol No. 4.

Articles 41 (just satisfaction) and 46 (binding force and enforcement)

The Court noted the positive legislative and jurisprudential developments that had taken place since the time of the removal in question.

The urgent applications judge of the *Conseil d'État* had found that the administrative authority was obliged to verify the identity of foreign minors placed in administrative detention and deported as a result of a removal measure adopted against a third party, having verified whether there was any connection between them. It had also been emphasised that the administrative authority was obliged to verify the conditions in which the minors would be received on arrival at their destination. Compliance by the authorities with these judge-made requirements was intended to prevent the repetition, in respect of other minors, of most of the violations that had been found by the Court in the present case.

The Court held that France was to pay the applicants 22,500 euros (EUR) in respect of non-pecuniary damage, consisting of EUR 2,500 for the first applicant and EUR 10,000 for each of the other two applicants.

Separate opinion

Judge Grozev expressed a separate opinion, which is annexed to the judgment.

The judgment is available only in French.

21. **ECHR, *Muhammad Saqawat v. Belgium*, no. 54962/18, Chamber judgment of 30 June 2020 (Article 5, right to liberty and safety – Violation).** The applicant, a Bangladeshi asylum-seeker, contested the lawfulness of his detention for several months pending his removal from Belgian territory.

ECHR 197 (2020)
30.06.2020

Press release issued by the Registrar

The applicant, Hossain Muhammad Saqawat, is a Bangladeshi national who was born in 1986 and lives in Liège (Belgium).

The case concerned the detention for several months of an asylum-seeker pending his removal from Belgian territory. The applicant contested the lawfulness of his detention.

Mr Saqawat arrived at Zaventem airport in December 2017 and lodged an initial asylum request. On the same day the Aliens Office decided to refuse him entry and to retain him in a specified location. Mr Saqawat was then placed in detention in a transit centre near the airport. A few weeks later his asylum request was rejected. Subsequently, he submitted further asylum requests, which were also rejected. Meanwhile Mr Saqawat had been the subject of several successive detention orders, which he unsuccessfully contested. He was released in April 2018 following a judgment delivered by the Indictments Division.

Relying on Article 5 (right to liberty and security) of the European Convention on Human Rights, Mr Saqawat alleged that his detention had been incompatible with that Article and complained that he had had no access to an effective remedy to contest that detention.

Violation of Article 5 § 1 – concerning the periods of detention from 20 to 27 February 2018 and from 6 to 14 May 2018
Violation of Article 5 § 4

Just satisfaction: 7,500 euros (EUR) (non-pecuniary damage) and EUR 1,600 (costs and expenses)

22. **ECHR, *N.H. and Others v. France*, nos. 28820/13, 75547/13 and 13114/15, Chamber Judgment of 2 July 2020 (Article 3, prohibition of torture and of inhuman or degrading treatments – Violation).** The applicants, five asylum-seekers, complained that they had been unable to receive the material and financial support to which they were entitled under French law and had thus been forced to sleep rough in inhuman and degrading conditions for several months.

ECHR 202 (2020)
02.07.2020

Press release issued by the Registrar

In today's **Chamber** judgment in the case of N.H. and Others v. France (application nos. 28820/13, 75547/13 and 13114/15) 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 **in respect of the applicants N.H. (no. 28820/13), K.T. (no. 75547/13) and A.J. (no. 13114/15), and**

no violation of Article 3, in respect of the applicant S.G. (no. 75547/13).

The applications concerned five asylum-seekers, single men, living in France. They complained that they had been unable to receive the material and financial support to which they were entitled under French law and had thus been forced to sleep rough in inhuman and degrading conditions for several months.

The Court observed that the applicant N.H. had been living in the street without any resources; this was also the case for K.T. and A.J. who had only received the Temporary Allowance after 185 and 133 days respectively. In addition, before being able to register as asylum-seekers, N.H., K.T. and A.J. had been forced to survive for a certain period without any evidence of that status.

The French authorities had failed in their duties under domestic law. They were found responsible for the conditions in which the applicants had been living for several months: sleeping rough, without access to sanitary facilities, having no means of subsistence and constantly in fear of being attacked or robbed. The applicants had thus been victims of degrading treatment, showing a lack of respect for their dignity.

The Court found that such living conditions, combined with the lack of an appropriate response from the French authorities and the fact that the domestic courts had systematically objected that the competent bodies lacked resources in the light of their status as single young men, had exceeded the threshold of severity for the purposes of Article 3 of the Convention. The three applicants N.H., K.T. and A.J. had thus found themselves, through the fault of the French authorities, in a situation that was incompatible with Article 3 of the Convention.

Principal facts

Application no. 28820/13 – N.H.

The applicant N.H., who was born in 1993, is an Afghan national who lives in Paris. Having arrived in France in March 2013 he obtained a postal address with the association France Terre d'Asile. On 4 April 2013 he filed an asylum application at the Paris Police Prefecture and was given an appointment for 9 July 2013. On 18 April 2013 he lodged an urgent application with the Administrative Court of Paris seeking an order obliging the authorities to examine his asylum application and to issue him with a provisional residence permit. The urgent applications judge rejected his request. N.H. appealed against

this decision before the *Conseil d'État* (highest administrative court). The urgent applications judge of that court rejected his application. On 3 October 2013 N.H. was informed that his asylum application would be examined by the French Office for the Protection of Refugees and Stateless Persons (OFPRA), but that he was not allowed to reside in France with asylum-seeker status as he had already lodged an asylum application in Denmark. On the same day N.H. went to the job centre to apply for the Temporary Allowance due to asylum-seekers. This allowance was refused on the grounds that he had not submitted the letter informing him that OFPRA had registered his asylum application. The applicant was forced to live rough, without any material or financial support. On 13 November 2013 OFPRA refused to grant him refugee status, but granted him subsidiary protection because of the violence prevalent in his province of origin. On 17 December 2013 the association Corot Entraide Auteuil, 60% subsidised by the State, found him accommodation.

Application no. 75547/13 – S.G., K.T. and G.I.

The applicant S.G., who was born in 1987, is a Russian national who lives in Carcassonne. He arrived in France on 15 July 2013 and the next day lodged an asylum application at the Prefecture. He was offered accommodation in a reception centre for asylum seekers (CADA), acceptance of this offer being a condition for receiving the Temporary Allowance. But as there was no space available, he had to live in a tent lent by private individuals on the banks of the Aude. On 2 August 2013 the OFPRA registered his asylum application. On 18 September 2013 he was granted the Temporary Allowance. On 7 October 2013 he applied to the urgent applications judge of Montpellier Administrative Court for an order instructing the State to find him accommodation as an asylum seeker. The judge rejected his request. On 13 October 2014 OFPRA rejected his application. The Prefect of the Hérault *département* issued him with three successive orders to leave France. S.G. appealed, seeking to have them annulled.

The applicant G.I., who was born in 1988, is a Georgian national who lives in Carcassonne. He arrived in France on 25 May 2013 and on 28 May filed an asylum application with the Prefecture of the Languedoc-Roussillon region. He was sleeping rough.

The OFPRA registered his asylum application on 19 June 2013 and he was granted the Temporary Allowance on 23 August 2013. On 7 October 2013 G.I. applied to the urgent applications judge of Montpellier Administrative Court for an order similar to that sought by S.G., but the judge rejected the application on the same grounds.

On 11 April 2014 G.I. withdrew his asylum application and sought assistance for his voluntary return to his country of origin.

The applicant K.T., who was born in 1990, is a Russian national who lives in Carcassonne. He arrived in France on 7 January 2013 and filed an asylum application with the Prefecture. His application was registered on 14 June 2013 by the OFPRA and he received the Temporary Allowance from 15 July 2013. He had to live in a tent on the banks of the Aude. On 7 October 2013 K.T. applied to the urgent applications judge of Montpellier Administrative Court for an order similar to that sought by S.G., but the judge rejected the application.

On several occasions K.T. tried, in vain, to obtain a residence permit.

Application no. 13114/15 – A.J.

The applicant A.J., an Iranian national, was born in 1974 and lives in Paris. He managed to flee Iran, where he had worked as a journalist, and reached France on 9 September 2014. He was given a postal address on 14 October 2014 by the association France Terre d'Asile. A.J. went to the Paris Police Prefecture on 23 October 2014 to file his asylum application, which was not registered, and he was given an appointment for 7 January 2015. On 4 November 2014 he applied for accommodation to the Prefect of the Ile-de-France region, who replied that he could not grant his request due to the lack of capacity in the national asylum-seeker reception system. On 13 November 2014 A.J. lodged an application with the urgent applications judge of the Paris Administrative Court for an order instructing the Prefect to examine his application for residency under asylum law and to direct him to a reception

or accommodation centre. The judge rejected his request. The *Conseil d'Etat* also rejected the application. At a meeting at the Prefecture on 7 January 2015, A.J. received an application form for residency under asylum law, which he completed on 22 January 2015, the date on which he was granted a temporary residence permit to remain in France. On 28 January 2015 A.J. went to the job centre to claim his entitlement to the Temporary Allowance, but it refused to register his application as he was unable to present an acknowledgment of receipt of his asylum application.

OFPRA registered his asylum application on 5 February 2015. On 12 February 2015 A.J. was granted the Temporary Allowance. From 14 April 2015 he was accommodated in a hotel as part of the hotel accommodation scheme for single adults. On 23 April 2015 OFPRA granted him refugee status and in June 2015 he found accommodation in Paris in the "House of Journalists" in a single room. He also received daily restaurant and transport tickets.

Complaints, procedure and composition of the Court

The applicants all complained of inhuman and degrading treatment relying on Article 3 of the Convention. N.H. and A.J. also complained of an infringement of their right to an effective remedy (Article 13 in conjunction with Article 3 of the Convention). N.H. further complained under Article 8 (right to respect for private and family life), taken alone and in conjunction with Article 13 of the Convention.

The application was lodged with the European Court of Human Rights on 29 April 2013.

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

Síofra **O'Leary** (Ireland), *President*,
Gabriele **Kucsko-Stadlmayer** (Austria),
André **Potocki** (France),
Mārtiņš **Mits** (Latvia),
Lətif **Hüseynov** (Azerbaijan),
Lado **Chanturia** (Georgia),
Anja **Seibert-Fohr** (Germany),

and also Victor **Soloveytchik**, *Deputy Section Registrar*.

Decision of the Court

Article 3

The Court considered it appropriate to examine the applicants' allegations under Article 3 of the Convention taken alone.

G.I.'s lawyer (application no. 75547/13) had informed the Court that he had been unable to contact his client, despite several attempts and unsuccessful searches. It concluded that the applicant no longer intended to pursue his application and that the case should therefore be struck out of the list as far as he was concerned.

The Court noted that the applicants had criticised the French authorities, first, for not enabling them to benefit in practice from the material and financial support due to them under domestic law, in order to meet their basic subsistence needs and, secondly, for showing indifference towards them. The Court had to determine whether the applicants had been faced with a situation of extreme material deprivation which could engage Article 3.

The applicants, who were single men in France, had found themselves in a situation of material deprivation. In order to meet their basic needs, they relied entirely on the material and financial support which was due to them under domestic law for as long as they were authorised to remain in France as

asylum-seekers. Under the French system in force at the time, unlawful migrants who wished to seek asylum in France had to apply for an asylum-seeker's residence permit. Article R 742- 1 of the Code on the Entry and Residence of Aliens and the Right of Asylum set a time-limit of 15 days, from the time the would-be asylum-seeker presented the requisite documents at the Prefecture, for the authorities to register the asylum application and authorise the person to reside legally. At the relevant time, in practice, this period averaged between 3 and 5 months, depending on the Prefecture.

The Court noted that between the time when N.H. and K.T. had gone to the Prefecture to apply for asylum and the date on which their asylum application was registered by the Prefecture, 95 days had elapsed for N.H. and 131 days for K.T.; A.J. had been given an asylum-seeker's provisional residence permit 90 days after he had applied for asylum at the Prefecture; and, lastly, S.G. had obtained an acknowledgement of his asylum application 28 days after his first appointment at the Prefecture.

N.H., K.T. and A.J. had thus argued that, during those periods, they had not been granted status as asylum-seekers and that, consequently, they could not claim either accommodation or the Temporary Allowance, remaining unlawful residents in France.

The Court found that, prior to the registration of their asylum applications, the applicants had not been able to prove their status as asylum-seekers. For this reason, N.H. and A.J. had appealed to the urgent applications judge of the Administrative Court to order the Prefect to examine their applications for residence on the basis of asylum and to issue them with a provisional residence permit. Those procedures had been unsuccessful. Moreover, the Court noted that under domestic law, receipt of the Temporary Allowance was conditional on the presentation to the job centre of an asylum-seeker's residence permit and proof that the relevant application had been lodged with OFPRA.

N.H., K.T. and A.J. stated that, as they had been unable to prove their status as asylum-seekers, they had lived for 95 days, 131 days and 90 days, respectively, in fear of being arrested and deported to their country of origin. The Court noted that, prior to obtaining an asylum-seeker's residence permit, they could indeed have been deported. Relying on the observations of the third-party interveners and on official reports from the French authorities, the Court did not question the reality of those applicants' fears of deportation.

The Court noted that throughout the entire asylum procedure, which began with the applicants being given a postal address by an association or with their first appointment at the Prefecture, they had all been living rough, either under bridges in Paris or on the banks of a river (the Aude) in tents lent by private individuals. Moreover, N.H. had never received the Temporary Allowance in spite of the official steps he had taken. He had lived under the bridges of the Saint Martin Canal in an extremely precarious situation from 26 March to 17 December 2013, i.e. for 262 days. A.J. had lived on the street in similar conditions for 170 days, from 23 October 2014 to 14 April 2015. Despite A.J.'s representations and appeals, he had been granted the Temporary Allowance only on 12 February 2015 and he had actually received the allowance from 5 March 2015 onwards. A.J. had therefore remained without resources from 23 October 2014 to 5 March 2015, i.e. 133 days.

Lastly, the Court noted that S.G. and K.T. had lived for at least nine months on the banks of the Aude, each in a single tent. K.T., who had no longer been an unlawful resident in France since 21 May 2013, had begun receiving the Temporary Allowance on 15 July 2013. From the time of his first attendance at the Prefecture, K.T. had thus remained without resources for 185 days. S.G. had received the Temporary Allowance 63 days after his first attendance at the Prefecture. The Court therefore noted that N.H. had lived rough without any financial resources and that K.T. and A.J., living in the same conditions, had only received the Temporary Allowance after delays of 185 and 133 days respectively.

The Court stressed that it was aware of the constant increase in the number of asylum-seekers since 2007 and of the gradual saturation of the National Reception Service. It noted that the facts of the case were connected with that gradual development, without there being an exceptional humanitarian emergency. It noted the efforts made by the French authorities to create additional accommodation and to reduce the time taken to examine asylum applications. However, those circumstances did not rule out the possibility that the situation of asylum-seekers might have engaged Article 3 of the Convention.

The Court pointed out, first, that before their asylum applications had been registered, N.H., K.T. and A.J. had been unable, as a result of delays, to justify their status as asylum-seekers for long periods. N.H. had been granted subsidiary protection 229 days after his arrival in France; 188 days had elapsed between A.J.'s first appointment at the Prefecture and the recognition of his refugee status by OFPRA; and in the cases of S.G. and K.T., their asylum applications had been rejected by OFPRA after periods of 448 and 472 days respectively.

The Court concluded that the French authorities had failed in their duties towards the applicants under domestic law. They therefore had to be held responsible for the conditions in which the applicants had been living for several months: sleeping rough, without access to sanitary facilities, having no means of subsistence and constantly in fear of being attacked or robbed. The applicants had thus been victims of degrading treatment, showing a lack of respect for their dignity. It had aroused in them feelings of fear, anxiety and inferiority, likely to cause despair. The Court found that such living conditions, combined with the lack of an appropriate response from the French authorities and the fact that the domestic courts had systematically objected that the competent bodies lacked resources for them in the light of their status as single young men, had exceeded the threshold of severity for the purposes of Article 3 of the Convention. The three applicants N.H., K.T. and A.J. had thus found themselves, through the fault of the French authorities, in a situation that was incompatible with Article 3 of the Convention. There had thus been a violation of that Article.

With regard to the applicant S.G., the Court noted that he had obtained an acknowledgment of his asylum application 28 days after his first appointment at the Prefecture and that – although he had in fact been living in a tent – he had received the Temporary Allowance 63 days after that first appointment. As difficult as this period must have been for him, he had at that point been provided with the means to meet his basic needs. The Court therefore took the view that his conditions of subsistence had not reached the threshold of severity required by Article 3 and that there had therefore been no violation of Article 3 in respect of S.G.

Article 8 and Article 13 in conjunction with Article 8 (application no. 28820/13)

Having regard to the facts of the case, to the parties' arguments and to the conclusions already reached under Article 3, the Court found that there was no need to address these complaints separately.

Just satisfaction (Article 41)

The Court held that France was to pay 10,000 euros (EUR) to N.H., EUR 10,000 to K.T. and EUR 12,000 to A.J. in respect of non-pecuniary damage, and EUR 2,396.80 to N.H. in respect of pecuniary damage.

The judgment is available only in French.

23. **ECHR, *Michnea v. Romania*, no. 10395/19, Chamber judgment of 7 July 2020 (Article 8, right to respect for private and family life – Violation).** The case concerned the applicant's complaint about Romanian courts in a child custody dispute. The applicant invoked the dispositions of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Hague Convention").

ECHR 205 (2020)
07.07.2020

Press release issued by the Registrar

The applicant, Gheorghe Michnea, is a Romanian national who was born in 1974 and lives in Bresso, Italy.

The case concerned his complaint about Romanian courts in a child custody dispute.

The applicant married another Romanian national, X, in 2016, who moved to be with him in Italy, where he had lived and worked since 2006. They had a daughter, Y, in March 2017. They all lived together in Italy, with the parents exercising joint authority over Y from birth. In August 2017 X took the child to Romania without the applicant's consent.

In February 2018 the applicant lodged an action with Bucharest County Court under the provisions of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Hague Convention"), seeking the return of the child to Italy.

In April 2018 the County Court allowed the request, but in June of the same year the Bucharest Court of Appeal quashed the decision and found that the child should stay in Romania, which was where she was habitually resident. Among other things, it found that the lawful residence of the applicant and his wife was still in Romania and that their flat in Italy had been rented temporarily.

In May 2018 a court granted the couple a divorce, giving the mother sole parental responsibility.

The applicant complained under Article 8 (right to respect for private and family life) about the refusal of the Romanian courts to order the return of his child to Italy.

Violation of Article 8

Just satisfaction: EUR 7,500 (non-pecuniary damage) and EUR 4,225 (costs and expenses)

24. **ECHR, *Voica v. Romania*, no. 9256/19, Chamber judgment of 7 July 2020 (Article 8, right to respect for private and family life – No violation).** The applicant, a French and Romanian national, complained about Romanian court decisions ordering her to return her children to joint parental authority in France.

ECHR 205 (2020)
07.07.2020

Press release issued by the Registrar

The applicant, Alexandra-Livia Voica, is a French and Romanian national born in 1982 who lives in Bucharest.

The case concerned the applicant's complaint about Romanian court decisions ordering her to return her children to joint parental authority in France.

In September 2016 a French court granted the applicant and her former husband, X, joint parental authority over their two children. It established the children's residence as being with the applicant, who at that time was living in France, while the former partner was granted contact rights.

In 2017 she moved to Romania with the children after receiving a job offer and X subsequently began proceedings for the return of the children under the Hague Convention, lodging an action with Bucharest County Court in March 2018, which upheld his request.

Among other things, it found that the children's habitual residence had been in France and that the parents had had joint parental authority. Under French law, the children's residence could only be changed if both parents agreed or, in there was no such agreement, by a court authorisation.

The court also examined the French court decisions on parental authority in the case and considered alleged abusive behaviour by X, but found that it did not constitute the exception of "grave risk" preventing the children's return in accordance with the Hague Convention. The County Court's decision was upheld on appeal in August 2018. The courts also dismissed objections by the applicant to enforcement of the return decision.

In October 2019 the Paris Court of Appeal dismissed an appeal by the applicant against the original custody decision of September 2016. It also established the children's residence as being with their father in France and granted the applicant contact rights only in that country. The parents were required to obtain each other's approval before taking the children abroad.

The applicant raised complaints about the Romanian court decisions in her case under various Articles of the Convention. The Court dealt with them under Article 8 (right to respect for private and family life) alone.

No violation of Article 8

25. **ECHR, *D v. France*, no. 11288/18, Chamber judgment of 16 July 2020 (Article 8, right to respect for private and family life – No violation; Article 14, prohibition of discrimination, read in conjunction with Article 8 – No violation).** The case concerned the refusal to record in the French register of births, marriages and deaths the details of the birth certificate of a child born abroad through a gestational surrogacy arrangement in so far as the certificate designated the intended mother, who was also the child's genetic mother, as the mother.

ECHR 215 (2020)
16.07.2020

Press release issued by the Registrar

In today's **Chamber** judgment in the case of D v. France (application no. 11288/18) the European Court of Human Rights held, unanimously, that there had been:

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

no violation of Article 14 (prohibition of discrimination) read in conjunction with Article 8.

The case concerned the refusal to record in the French register of births, marriages and deaths the details of the birth certificate of a child born abroad through a gestational surrogacy arrangement in so far as the certificate designated the intended mother, who was also the child's genetic mother, as the mother.

The Court observed that it had previously ruled on the issue of the legal parent-child relationship between a child and its intended father where the latter was the biological father, in its judgments in *Mennesson v. France* and *Labassee v. France*. According to its case-law, the existence of a genetic link did not mean that the child's right to respect for his or her private life required the legal relationship with the intended father to be established specifically by means of the recording of the details of the foreign birth certificate. The Court saw no reason in the circumstances of the present case to reach a different decision regarding recognition of the legal relationship with the intended mother, who was the child's genetic mother.

The Court also pointed to its finding in advisory opinion no. P16-2018-001 that adoption produced similar effects to registration of the foreign birth details when it came to recognising the legal relationship between the child and the intended mother.

Principal facts

The applicants, Mrs D, Mr D, and Ms D, were born in 1972, 1957 and 2012 respectively and live in Canet en Roussillon. The third applicant was born in Ukraine through a gestational surrogacy arrangement. Her birth certificate, issued on 3 October 2012 in Kyiv, states that the first applicant is her mother and the second is her father.

Mr and Mrs D were married in France in 2008. The child was born in Ukraine in September 2012 to a surrogate mother. The birth certificate issued in Kyiv names the first applicant as the mother and the second applicant as the father, without mentioning the woman who gave birth to the child.

On 20 September 2014 the first two applicants applied to the French embassy in Kyiv to have the details of the birth certificate entered in the French register of births, marriages and deaths. The deputy consul replied that on account of the specific nature of the situation she had decided to defer recording the details and issuing the family record book (*livret de famille*) and to refer the matter to the public prosecutor in Nantes. The latter informed the couple that pending instructions from the Ministry of

Justice concerning the follow-up to the Court's judgments in *Mennesson v. France* and *Labassee v. France*, all applications relating to surrogacy arrangements had been suspended.

On 27 January 2016 Mr and Mrs D brought proceedings against the public prosecutor in the Nantes *tribunal de grande instance* seeking an order for the details of the child's birth certificate to be entered in the French register.

On 12 January 2017 the Nantes *tribunal de grande instance* granted the application. It emphasised, among other points, that the fact that the birth certificate designated the first applicant as the mother, even though she had not given birth, could not, having regard to the best interests of the child as determined by the European Court of Human Rights, justify a refusal to recognise the legal mother-child relationship, which was "the only relationship recognised as legally established in the country of birth" and which therefore corresponded to the legal reality.

On 18 December 2017 the Rennes Court of Appeal upheld the judgment of 12 January 2017 in so far as it approved the application to record the details of the birth certificate in respect of the father-child relationship, but overturned it with regard to the mother-child relationship. The judgment stated in particular that "... concerning the designation of the mother on the birth certificate, the reality within the meaning of [Article 47 of the Civil Code] is the very fact of giving birth. While the law may transform that reality within the meaning of [that provision], positive law permits an exemption from the principle *mater semper certa est* only in a limited number of situations expressly provided for by the legislature, in the context of full adoption (Article 356, first paragraph, of the Civil Code), thus enabling an adoptive mother who has not given birth to be properly designated as the mother ..."

The applicants did not appeal to the Court of Cassation.

On 12 September 2019, in response to a request for information from the President of the Chamber, the applicants informed the Court that Mrs D was Ms D's genetic mother.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for family life), taken separately and in conjunction with Article 14 (prohibition of discrimination), the applicants complained of a violation of the child's right to respect for her private life, and of discrimination on the grounds of "birth" in her enjoyment of that right.

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

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

Síofra **O'Leary** (Ireland), *President*,
Gabriele **Kucsko-Stadlmayer** (Austria),
Ganna **Yudkivska** (Ukraine),
André **Potocki** (France),
Mārtiņš **Mits** (Latvia),
Lado **Chanturia** (Georgia),
Anja **Seibert-Fohr** (Germany),

and also Victor **Soloveytchik**, *Deputy Section Registrar*.

Decision of the Court

Article 8

The Court noted that the Rennes Court of Appeal had granted the request for the details of the third applicant's Ukrainian birth certificate to be entered in the French register of births in so far as it designated the second applicant, who was the intended father and the biological father, as the father,

but had refused the request in so far as the birth certificate designated the first applicant as the mother. However, the Court of Appeal had stressed that the mother-child relationship could be legally established by means of adoption.

The Court observed that the applicants had argued in substance that the refusal to record the details of the third applicant's Ukrainian birth certificate in so far as it designated the first applicant as her mother amounted to disproportionate interference with the child's right to respect for her private life, given that the first applicant was her genetic mother.

The Court had previously ruled on the issue of the legal parent-child relationship between the child and the intended father where the latter was the biological father (see the judgments in *Mennesson v. France* and *Labassee v. France*). According to its case-law, the fact that a genetic link existed did not mean that the child's right to respect for his or her private life required the legal relationship with the intended father to be established specifically by means of registration of the details of the foreign birth certificate. The Court saw no reason in the circumstances of the present case to reach a different decision with regard to recognition of the legal relationship with the intended mother, who was also the genetic mother.

It could not therefore be said that the refusal of the request to register the details of the third applicant's Ukrainian birth certificate in respect of the first applicant amounted to disproportionate interference with the child's right to respect for her private life simply because the first applicant was her genetic mother, given that the legal mother-child relationship could in fact be established by other means.

As to the proportionality of the interference with the third applicant's right to respect for her private life, the Court considered it decisive that the refusal of the request for registration of the details of the Ukrainian birth certificate in so far as it designated the first applicant as the mother did not preclude the establishment of the legal mother-child relationship. Indeed, the Rennes Court of Appeal had been careful to stress that the possibility of adoption was available, a position confirmed by the case-law of the Court of Cassation.

As far as the third applicant's right to respect for her private life was concerned, she had to have access to an effective and sufficiently speedy mechanism enabling her legal relationship with the first applicant to be recognised.

As emphasised by the Government, since the first and second applicants were married and the Ukrainian birth certificate made no mention of the woman who had given birth to the child, it was open to the first applicant to apply to the courts to adopt her spouse's child by way of full adoption.

As the Court had observed in its advisory opinion no. P16-2018-001, adoption produced similar effects to registration of the foreign birth details when it came to recognising the legal relationship between the child and the intended mother.

The Court observed that it transpired from the information provided by the Government that the average time taken to obtain a decision on full adoption was only 4.1 months. Hence, if the adoption procedure had been initiated following the Rennes Court of Appeal's judgment of 18 December 2017, the situation of the third applicant regarding the legal mother-child relationship would in all likelihood have been resolved before she reached the age of six, and at around the time when the applicants had applied to the Court.

Thus, the Court concluded that adoption of the spouse's child constituted in the present case an effective and sufficiently speedy mechanism enabling the legal relationship between the first and third applicants to be recognised.

Accordingly, in refusing to record the details of the third applicant's Ukrainian birth certificate in the French register of births in so far as it designated the first applicant as the child's mother, the respondent State had not overstepped its margin of appreciation in the circumstances of the present case.

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

Article 14 read in conjunction with Article 8

In their further observations of 11 February 2020 the applicants argued that refusing to record the details of the birth certificate of a child born abroad through surrogacy in so far as the certificate designated the intended mother, who was the genetic mother, as the child's mother, while recording the details in respect of the intended father, the child's biological father, amounted to discrimination against the mother.

The Court noted that the applicants' argument amounted to a complaint of discrimination within the meaning of Article 14 of the Convention in respect of the first applicant. It observed that this complaint was separate from the other complaints, which concerned only the rights of the third applicant, and that it was based on a fact – the circumstance that the first applicant was the child's genetic mother – which the applicants had omitted to mention in their application of 2 March 2018, and which they had disclosed to the Court only on 12 September 2019. The applicants had likewise omitted to inform the domestic authorities and courts of this fact, which had therefore not been examined in the domestic proceedings. The Court found that this fresh complaint did not comply with the six-month time-limit under Article 35 § 1 of the Convention, and therefore dismissed it under Article 35 §§ 1 and 4 of the Convention.

However, the Court noted that the complaint concerning the discrimination allegedly suffered by the third applicant in the enjoyment of her right to respect for her private life was not manifestly illfounded, nor was it inadmissible on any other ground referred to in Article 35 of the Convention. It therefore declared it admissible.

In the Court's view, the difference in treatment between French children born abroad through surrogacy and other French children born outside the country did not lie in the fact that the former – unlike the latter – could not obtain recognition in domestic law of a legal mother-child relationship with the person named on the foreign birth certificate. Rather, it consisted in the fact that at the relevant time the former, in contrast to the latter, could not obtain the entry in the register of the full details of that birth certificate and had to have recourse to adoption in order to have the mother-child relationship legally established. As the Court had already emphasised, adoption of the spouse's child constituted in the present case an effective mechanism for recognition of the legal relationship between the first and third applicants.

The Government had explained that this difference in treatment regarding the means of establishing the legal mother-child relationship was designed to ensure, in the specific circumstances of each case, that it was in the best interests of the child born through surrogacy for such a relationship to be established with the intended mother. The Court therefore accepted that the difference in treatment of which the applicants complained with regard to the means of recognition of the legal relationship between such children and their genetic mother had an objective and reasonable justification. Hence, there had been no violation of Article 14 read in conjunction with Article 8.

The judgment is available only in French.

26. **ECHR, *Veljkovic-Jukic v. Switzerland*, no. 59534/14, Chamber judgment of 21 July 2020 (Article 8, right to respect for private and family life – No violation).** The case concerned the withdrawal of the permanent residence permit of a Croatian national who has lived in Switzerland since the age of 14, because of her criminal conviction for drug trafficking, and her possible removal from Switzerland.

ECHR 221 (2020)
21.07.2020

Press release issued by the Registrar

In today's **Chamber** judgment in the case of **Veljkovic-Jukic v. Switzerland** (application no. 59534/14) the European Court of Human Rights held, by a majority, that there had been:

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

The case concerned the withdrawal of the permanent residence permit of a Croatian national who has lived in Switzerland since the age of 14, because of her criminal conviction for drug trafficking, and her possible removal from Switzerland.

The Court found that Switzerland had not overstepped the margin of appreciation afforded to it, particularly given the seriousness of her conviction for a drug-related offence and the fact that the applicant and her family members could integrate without major difficulties in one of the destination countries proposed by the Federal Supreme Court: Bosnia and Herzegovina, Croatia or Serbia.

The Court also noted that the applicant had been refused entry to Swiss territory for a period of seven years (until 30 August 2021), and that the Federal Aliens Act enabled her to request a temporary suspension of this exclusion order so that she could visit her family members in Switzerland.

However, the Court considered it desirable that the national authorities reassess the applicant's situation in the light of developments since the Federal Supreme Court's judgment prior to taking a decision on whether to enforce the measures, especially in view of her conduct throughout the proceedings and the possibility, open to her, of applying for a new residence permit.

Principal facts

The applicant, Renata Veljkovic-Jukic, is a Croatian national who was born in 1980 and lives in Gerlafingen, Switzerland, with her husband, a Serbian national, and their three children (born in 2007, 2008 and 2012). Ms Veljkovic-Jukic and her husband were granted leave to remain in Switzerland at the ages of 14 (in 1995) and 8 (in 1991) respectively.

In June 2012 the Canton of Zurich Higher Court, on appeal, sentenced Ms Veljkovic-Jukic to three years' imprisonment, 30 months of which were suspended, for a drugs offence and for driving a vehicle while incapacitated. In particular, she was found guilty of the trafficking in April 2010 of approximately 1 kg of heroin and 56 g of cocaine for a sum of 126,000 Swiss francs (CHF), of which CHF 6,000 was apparently intended for her, and of driving a vehicle after using cocaine. She served her sentence under a semi-custodial regime and was released in July 2013.

In September 2013, relying on Ms Veljkovic-Jukic's conviction and long-term custodial sentence, the Migration Office of the Canton of Solothurn withdrew her permanent residence permit and ordered her removal from Switzerland. She appealed against this decision, but her appeal was rejected at first instance and on appeal. The Federal Supreme Court held, in particular, that the security interest in the applicant's removal took precedence over her private interests and that this ground was also valid for

persons who, like the applicant, had been residing in Switzerland for more than 15 years continuously and in a lawful manner. It also held that the applicant's return to Bosnia and Herzegovina (where she had spent 14 years as a child) or to Serbia or Croatia did not appear to be precluded for any reason. It further considered that her husband and children could follow her or that, if the family were to remain in Switzerland, contact could be maintained through visits and the use of available means of communication. Furthermore, it indicated that the applicant also had the possibility of applying for a new residence permit.

In August 2014 the Migration Office of the Canton of Solothurn issued an exclusion order against Ms Veljkovic-Jukic, banning her from Switzerland for the period from 31 August 2014 to 30 August 2021. However, the deportation order against the applicant was not enforced, pending the outcome of the proceedings before the European Court of Human Rights.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), Ms Veljkovic-Jukic complained that her permanent residence status had been revoked because of her criminal conviction.

The application was lodged with the European Court of Human Rights on 26 August 2014.

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

Paul **Lemmens** (Belgium), *President*,
Georgios A. **Serghides** (Cyprus),
Helen **Keller** (Switzerland),
María **Elósegui** (Spain),
Gilberto **Felici** (San Marino),
Erik **Wennerström** (Sweden),
Ana Maria **Guerra Martins** (Portugal),

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

Decision of the Court

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

The Court considered that the decision to withdraw Ms Veljkovic-Jukic's permanent resident permit and to order her removal from Switzerland amounted to an interference with her right to respect for her "private" and "family" life, given the very long period that she had been resident in Switzerland and the fact that she lived there with her husband and children. The interference had been in accordance with the Federal Aliens Act and pursued a legitimate aim: the prevention of disorder or crime. As to whether the measure was necessary in a democratic society, the Court noted the following.

The measure was imposed following Ms Veljkovic-Jukic's conviction for drug trafficking. The Court considered that this conviction weighed heavily in its assessment; in view of the destructive effect of drugs on people's lives, the Court had always understood why the authorities showed great firmness with regard to those who actively contributed to the spread of this scourge.

On the date that the Federal Supreme Court's judgment was adopted, Ms Veljkovic-Jukic had been resident in Switzerland for 19 years, and her conduct following her release had been irreproachable. This positive development, particularly the fact that she had been released on probation after serving part of her sentence, could be taken into consideration in weighing up the interests at stake.

As to her ties with her country of origin, Ms Veljkovic-Jukic had spent some of her youth in Bosnia and Herzegovina, where her mother still lived. Her husband, who had been resident in Switzerland since 1991, was a Serb national. Thus, the family's integration in one of the possible destination countries,

namely Bosnia and Herzegovina, Croatia or Serbia, although it would be difficult, did not seem impossible. The children (7, 11 and 13 years) were still at an age at which they could adapt to a new environment.

The national authorities had conducted an adequate and convincing examination of the facts and relevant considerations, balancing Ms Veljkovic-Jukic's personal interests against the general interests of society. The Federal Supreme Court had admittedly attached great significance of the seriousness of the drug trafficking offence committed by Ms Veljkovic-Jukic, but it had also taken account of the criteria set out by the Court in the *Üner* judgment, including, in particular, Ms Veljkovic-Jukic's personal situation, the extent to which she was integrated into Swiss life and the potential difficulties that she and her family would face were they to return to their country of origin. Thus, the Federal Supreme Court had acknowledged that Ms Veljkovic-Jukic's removal after 18 years spent in Switzerland was a very harsh measure, which was, however, to be nuanced by her young age and the fact that she had arrived in Switzerland aged 15, after having spent all of her childhood and part of her youth in Bosnia and Herzegovina. A return to Bosnia and Herzegovina, Croatia or Serbia would not therefore be impossible. The Federal Supreme Court had also examined the situation of the children, finding that separation from their mother would amount to a serious interference in their family life. However, it considered that Ms Veljkovic-Jukic's husband, a Serb national, could follow her to her country of origin, and that the children's integration ought not to pose a problem, given that they were still young enough to adapt.

Thus, the Court was satisfied that the national authorities, especially the Federal Supreme Court, had carried out a sufficient and convincing examination of the facts and relevant considerations and a thorough weighing up of the competing interests. Moreover, it noted that Ms Veljkovic-Jukic had been refused entry to Swiss territory for a period of seven years (until 30 August 2021), and that the Federal Aliens Act enabled her to request a temporary suspension of this exclusion order so that she could visit her family members in Switzerland.

In consequence, having regard in particular to the seriousness of Ms Veljkovic-Jukic's conviction for a drug-related offence, and the fact that she and her family members could integrate without major difficulties in one of the destination countries proposed by the Federal Supreme Court (Bosnia and Herzegovina, Croatia or Serbia), the Court considered that Switzerland had not overstepped the margin of appreciation afforded to it.

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

However, the Court considered it desirable that the national authorities reassess Ms Veljkovic-Jukic's situation in the light of the developments since the Federal Supreme Court's judgment prior to deciding whether to enforce the measure, having regard in particular to her conduct throughout the proceedings and the possibility, available to her, of applying for a new residence permit (section 43 of the Federal Aliens Act).

Separate opinion

Judges Felici and Guerra Martins expressed a joint dissenting opinion, which is annexed to the judgment.

The judgment is available only in French.

27. **ECHR, *M.K. and Others v. Poland*, nos. 40503/17, 42902/17 and 43643/17, Chamber judgment of 23 July 2020 (Article 3, prohibition of torture and of inhuman or degrading treatment – Violation; Article 4 of Protocol No. 4, prohibition of collective expulsion of aliens – Violation; Article 13, right to an effective remedy in conjunction with Article 4 of Protocol No. 4 – Violation; Article 34, right to individual petition – Violation).** The case concerned the repeated refusal of Polish border guards on the border with Belarus to admit the applicants, who had come from Chechnya asking for international protection.

ECHR 224 (2020)
23.07.2020

Press release issued by the Registrar

The case of **M.K. and Others v. Poland** (application nos. 40503/17, 42902/17 and 43643/17) concerned the repeated refusal of Polish border guards on the border with Belarus to admit the applicants, who had come from Chechnya and had asked for international protection.

In today's **Chamber** judgment1 in the case, 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**, and**

a violation of Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) to the Convention, and

a violation of Article 13 (right to an effective remedy) of the Convention, **in conjunction with Article 3 and Article 4 of Protocol No. 4.**

It also held, unanimously, that **Poland had failed to comply with its obligations under Article 34 (right to individual petition)** of the Convention.

The Court found in particular that the applicants had repeatedly arrived at the Terespol border crossing between Poland and Belarus and had made it clear, despite the Polish authorities' statements to the contrary, that they wished to seek international protection.

Instead, the border guards had returned them consistently to Belarus, without a proper review of their applications. Furthermore, the Government had ignored interim measures issued by the European Court to prevent the removal of the applicants, who had argued that they were at a real risk of chain-*refoulement* and treatment contrary to the Convention.

The Polish State had demonstrated a consistent practice of returning people to Belarus in such circumstances, a policy which amounted to collective expulsion. Given the authorities' refusal to implement the Court's interim measures, the Polish State had also failed to live up to its obligations under the Convention.

Principal facts

M.K. v. Poland, application no. 40503/17

The applicant, Mr M.K., is a Russian national.

Between July 2016 and June 2017 he travelled to the border crossing between Poland and Belarus at Terespol approximately 30 times. He each time informed Polish border guards that he was from

Chechnya and expressed fears for his safety in that region of Russia, expressly stating that he wished to lodge an application for international protection. He several times carried with him a written application.

He told the guards that he had been detained many times in Chechnya without a legal basis, had been arrested and ill-treated. His Belarus visa had expired, he could not remain in that country and in practice it was impossible to find international protection there.

The border guards turned the applicant away each time on the basis of administrative decisions that he did not have any authorisation to enter Poland and he had not stated that he was at risk of persecution in his home country but that he was actually trying to emigrate for economic or personal reasons. He lodged at least one appeal against those decisions, which was upheld by the head of the National Border Guard. An appeal against the latter decision is still pending completion.

On 8 June 2017 the European Court of Human Rights, after a request from the applicant's legal representative, indicated an interim measure to the Polish Government under Rule 39 of the Rules of Court that he should not be removed to Belarus, however, he was returned the same day. He returned several times to the border and, despite the interim measure, was each time turned away.

On at least one occasion when he went to the border his legal representative sent copies of his international protection request by email, fax and a public service Internet platform to the border guards at Terespol and border guard headquarters in Warsaw. The representative also informed the Foreign Ministry department responsible for proceedings before international human rights bodies, including the Strasbourg Court and referred to the interim measure.

The Court twice rejected a Government request to end the interim measure. The applicant eventually left Belarus owing to fears of deportation to Chechnya.

M.A. and Others v. Poland, application no. 42902/17

The applicants are Mr M.A. and Mrs M.A. and their five children, who are minors. They are all Russian nationals.

The applicants travelled to the border crossing at Terespol on two occasions in April 2017, where they expressed a wish for international protection owing to fears for their safety in Chechnya.

They were both times turned away under administrative decisions owing to the absence of any authorisation to enter Poland and because they had not stated that they were at risk of persecution in their home country. The border guards' official notes stated that they were seeking to emigrate for economic or personal reasons.

In April and May 2017 they sought protection from Lithuania, a situation which was the subject of a separate Court judgment in late 2018 (M.A. and Others v. Lithuania).

On 16 June 2017 they again went to the Polish-Belarusian border, when their lawyer asked the Court for an interim measure. The Court applied Rule 39 and indicated to the Polish Government that the applicants not be removed to Belarus, nevertheless, they were returned the same day.

Several days later they returned to the border with a letter seeking international protection and a copy of the letter about the interim measure, but were turned away. Their representative also sent a copy of the first applicant's application for protection to the border guards and the Foreign Ministry.

The applicants made further unsuccessful efforts to be admitted to Poland between August and December 2017. The first applicant subsequently went to a police station in Brest in Belarus after a summons by the police in Chechnya. The whole family left Belarus and went to Smolensk in Russia, where the first applicant was detained and later transferred to Chechnya.

The second applicant returned to Belarus with the children and in January 2018 again applied for protection in Poland, which this time admitted her to a refugee reception centre. The first applicant was released from detention in Chechnya, making serious allegations of ill-treatment. He travelled back to Terespol and was ultimately admitted to the same refugee reception centre as the rest of his family.

The family travelled to Germany in in May 2018, where the authorities lodged requests for them to be transferred back to Poland, although this has not happened to date. Following the applicant's admission to Poland and them subsequently leaving that country, the Court decided to lift the interim measure in their case.

M.K. and Others v. Poland, application no. 43643/17

The applicants are Mr M.K. and Mrs Z.T. and their three children, who are minors. They are all Russian nationals.

Between September 2016 and July 2017 they travelled twelve times to the Terespol crossing, where they expressed a wish to apply for international protection owing to fears for their safety in Chechnya. They were turned away under administrative decisions that they did not have authorisation to enter Poland and had not stated they were at risk of persecution in their home country. Their reason to enter Poland was economic or personal, according to the border guards. They appealed at least once, but were unsuccessful. A further appeal is still pending a decision.

On 20 June 2017 the applicants went again to the border, when their representative lodged a request under Rule 39 for an interim measure preventing their return to Belarus. The measure was granted, but the applicants were nevertheless denied entry to Poland the same day.

Between June and September 2017 the applicants returned at least seven more times to the border, but were turned away each time. They submitted that they had had documents with them about the Court's interim measure and written applications for international protection.

The applicants left Belarus on an unspecified date in order to avoid deportation. They have remained in hiding for fear of being tracked by the Chechen authorities. The Court has rejected requests by the Government to lift the interim measure.

Complaints, procedure and composition of the Court

The applicants complained under Article 3 (prohibition of torture, inhuman or degrading treatment or punishment) of being denied access to asylum procedures and of being exposed to a risk of treatment in Chechnya contrary to the Convention.

They also complained that they had been subjected to collective expulsion, contrary to Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) to the Convention, and under Article 13 (right to an effective remedy) that they had had no effective remedy under Polish law by which to lodge their complaints under Article 3 and Article 4 of Protocol No. 4.

They complained in addition under Article 34 (right to individual petition) of the Convention that the Polish Government had failed to comply with the Court's interim measures.

The applications were lodged on 8, 16 and 20 June 2017 respectively.

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

Ksenija **Turković** (Croatia), *President*,
Krzysztof **Wojtyczek** (Poland),
Aleš **Pejchal** (the Czech Republic),
Armen **Harutyunyan** (Armenia),
Pere **Pastor Vilanova** (Andorra),

Tim **Eicke** (the United Kingdom),
Raffaele **Sabato** (Italy),

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

Decision of the Court

Article 3

Joining the applicants' cases because of their similarity, the Court noted the fundamental importance of the prohibition on inhuman and degrading treatment in Article 3 of the Convention.

Furthermore, the Court itself did not examine asylum applications, but assessed the existence of effective guarantees to protect applicants from arbitrary *refoulement*. If a Contracting State decided to remove an asylum-seeker to a third country without examining an asylum claim on the merits, it had to review whether the person would have access to an adequate asylum system in that country.

The Court first noted that the Government had disputed the argument that the applicants had actually expressed a wish to lodge applications for international protection or had expressed any fear for their own safety on their numerous visits to the border crossing.

However, the Court gave more credence to the applicants' statements, which had been corroborated by accounts collected from other witnesses by national human rights institutions, in particular the Ombudsman and the Children's Ombudsman. Those bodies' reports indicated a systemic practice of Polish border guards misrepresenting statements by asylum-seekers in their official notes. The Supreme Administrative Court had also confirmed irregularities in the questioning of foreigners at the border.

The applicants' account was also backed up by documents they had presented to the Court at every stage of the proceedings, especially copies of applications for international protection which they had had with them at the border. The Court did not find it credible that they had not handed those documents to border guards who were to decide on their admission to Poland or return to Belarus.

In any event, the applicants' requests for international protection had been made available to the Government when they had requested interim measures. The Court itself had in addition informed the State that it considered that the applicants had lodged requests for international protection.

The Court could not accept the Polish Government's argument that the applicants had not presented any evidence that they were at risk of being subjected to treatment contrary to Article 3. They had also raised arguments about why they considered that Belarus was not a safe third country and that they faced a risk of "chain-*refoulement*" there. Those arguments had been substantiated by official statistics, which showed that the asylum procedure in Belarus was not effective for Russian citizens.

The Court concluded that the applicants had made an arguable claim that their asylum applications would not be treated seriously by the Belarusian authorities and that their return to Chechnya would violate Article 3. The Polish authorities should have carried out an assessment of those claims in compliance with the procedural obligations of Article 3. Poland had also been under an obligation to ensure the applicants' safety, in particular by allowing them to stay on its territory, until their claims had been properly determined by the domestic authorities.

The Court also considered that a State could not deny access to its territory to people who alleged that they might face ill-treatment if they remained in a neighbouring State, unless adequate measures had been taken to eliminate such a risk.

The Government had argued that it had acted in line with European Union law when it had refused the applicants entry. The Court noted, however, that the non-*refoulement* principle was also found in EU law, including the Schengen Borders Code. The State could thus have met the requirements of that Code if it had accepted their applications for protection and had not returned them to Belarus.

Furthermore, the experience of the applicant in the first application highlighted the real risk of ill-treatment: he had returned to Russia, where he said he had been detained and tortured.

The Court concluded that the fact that the authorities had failed to review the applicants' applications on the 35, eight, and 19 or more occasions when they had presented themselves at the Polish border had led to a violation of Article 3. Given the situation in Belarus, the Polish authorities had also subjected them to a serious risk of chain-*refoulement* and treatment prohibited by the Convention by not allowing them to stay on Polish territory while their applications were examined.

There had accordingly been a violation of Article 3.

Article 4 of Protocol No. 4

The Court first decided that the applicants had been expelled, within the meaning of the Convention. The question was whether that expulsion had been collective.

The Government had submitted that the applicants had been interviewed and given individual decisions. However, the Court noted its findings on the way border officers had disregarded the applicants' statements on international protection and found that the individual decisions in question had not properly reflected the applicants' reasons for their fears of persecution.

Furthermore, they had not been able to consult lawyers and had been denied access to them at the border. Independent reports on the situation at the border indicated that the applicants' cases exemplified a policy of refusing access to foreigners coming from Belarus, whether economic migrants or people who had expressed a fear of persecution in their countries of origin.

Those reports noted a practice of very short interviews which disregarded people's explanations for seeking international protection; of emphasis being put on arguments which allowed them to be classed as economic migrants; and of misrepresentations of foreigners' statements.

The existence of a wider State policy of refusing to review people's requests for international protection and returning them to Belarus was supported by a statement by the then Minister of the Interior and Administration, who had expressed opposition to accepting migrants from Chechnya.

The Court concluded that the decisions in the applicants' cases had been taken without proper regard to their individual situations and were part of a wider policy. Those decisions had amounted to a collective expulsion of aliens, in violation of Article 4 of Protocol No. 4.

Article 13 in conjunction with Article 3 and Article 4 of Protocol No. 4

The Court, noting its findings so far in the case, found that the applicants' complaints had been arguable for the purposes of Article 13.

It had also held that the applicants were asylum-seekers and that an appeal against a refusal to admit them to Poland which had no automatic suspensive effect, as in their cases, and which could not have prevented them being returned to Belarus, could not be regarded as an effective remedy. Nor had the Government pointed to any other remedies which met Convention requirements.

The Court concluded that there had been a violation of Article 13 of the Convention, taken in conjunction with Article 3 and Article 4 of Protocol No. 4.

Article 34

The applicants complained that the Government had failed to comply with the interim measures.

The Court noted that the interim measures had included instructions to the authorities to refrain from returning the applicants to Belarus. In the first and second applications it had also stated that the measures should be interpreted as meaning that the applicants' applications for asylum should be received by the Border Guard service and forwarded to the appropriate body for review.

The Government had continuously questioned the possibility of complying with the interim measures on the grounds that the applicants had not actually been admitted into Poland and could not therefore have been removed. The Government had continued to rely on its arguments against the measures even after the Court had rejected them by refusing its requests to lift them.

Furthermore, the Government had still not complied with the measures in the first and third applications and had only implemented the one in the second application after a long delay. The applicants had thus been put at risk of the kind of treatment the measures had aimed at preventing.

The Court concluded that Poland had failed to comply with its obligations under Article 34.

It also held that the interim measures in the first and third applications had to remain in force until the judgment in the applicants' cases became final or the Court took a further decision.

Just satisfaction (Article 41)

The Court held, by six votes to one, that Poland was to pay:

the applicant in application no. 40503/17 34,000 euros (EUR) in respect of non-pecuniary damage and EUR 140 in respect of costs and expenses;

the applicants in application no. 42902/17 EUR 34,000 jointly in respect of non-pecuniary damage, and EUR 39 in respect of costs and expenses; and,

the applicants in application no. 43643/17 EUR 34,000 jointly in respect of non-pecuniary damage, and EUR 140 in respect of costs and expenses.

Separate opinions

Judge Eicke expressed a dissenting opinion with reference to the question of just satisfaction. The opinion is annexed to the judgment.

The judgment is available only in English.

28. ECHR, *Pormes v. the Netherlands*, no. 25402/14, Chamber judgment of 28 July 2020 (Article 8, right to respect for private and family life – Violation). The applicant, an Indonesian national, complained about the Dutch authorities' refusal to grant him a residence permit, despite him living in the Netherlands since he was almost four years' old.

ECHR 227 (2020)
28.07.2020

Press release issued by the Registrar

The applicant, Hein Pormes, is an Indonesian national who was born in 1987.

The case concerned his complaint about the Dutch authorities' refusal to grant him a residence permit, despite him living in the Netherlands since he was almost four years' old.

Mr Pormes arrived in the Netherlands in 1991 after his mother, who was Indonesian, died. He was brought to the country by his presumed father, a Dutch national, who also died in 1999. He was brought up by an uncle and aunt, who are Dutch nationals and whom he considers to be his foster parents.

In 2004, when he turned 17, he found out that, contrary to what he had always assumed, he might not have Dutch nationality. He learned that he had arrived in the country on a tourist visa which had expired several months after his arrival and that neither his presumed father nor his foster parents had taken any steps to regularise his stay.

In 2006 he thus applied for a temporary residence permit. However, in 2007 the Deputy Minister of Justice rejected his application, because he represented a danger to the public following a recent conviction for indecent assault and four counts of attempted indecent assault. Balancing his ties to the Netherlands and the difficulties he would face adjusting to life in Indonesia against the seriousness of his criminal offences, the Deputy Minister emphasised that his stay in the Netherlands had never been lawful.

In 2008 the Deputy Minister rejected Mr Pormes's objection, maintaining her position and observing that he had in the meantime been convicted again for the same offences.

He appealed against the decision in the courts, but the Administrative Jurisdiction Division of the Council of State ultimately in 2013 held that the Deputy Minister had rightly attached great weight to the offences he had committed given their nature and seriousness and the fact that he was a recidivist. The ruling also pointed out that Mr Pormes was an adult and was aware that he did not have a residence permit when he had committed the offences.

Mr Pormes voluntarily left the Netherlands for Indonesia in 2016, signing a declaration with the International Organization for Migration agreeing to discontinue all proceedings aimed at obtaining a residence permit in the Netherlands in exchange for financial aid.

Relying on Article 8 (right to respect for private and family life) of the European Convention on Human Righs, Mr Pormes alleged that the domestic authorities had attached too much weight to his criminal record, omitting to include in the balance his family life with his foster parents and strong social and cultural ties with the Netherlands, when deciding to refuse him a residence permit.

No violation of Article 8

29. **ECHR, *Shuriyya Zeynalov v. Azerbaijan*, no. 69460/12, Chamber judgment of 10 September 2020 (Article 2, right to life – violation; Article 3, prohibition of torture and inhuman or degrading treatment – violation).** The applicant, an Azebaijani national, complained about his son's death in detention, allegedly due to torture by agents of the Ministry of National Security of the Nakhchivan Autonomous Republic (NAR).

ECHR 249 (2020)
10.09.2020

Press release issued by the Registar

The applicant, Shuriyya Mahmud oglu Zeynalov, is an Azerbaijani national who was born in 1938 and lives in Nakhchivan.

The case concerned the applicant's son's death in detention, allegedly due to torture by agents of the Ministry of National Security of the Nakhchivan Autonomous Republic (NAR).

In August 2011 the applicant's son, Turaj Zeynalov, born in 1980, was placed under arrest by the Ministry of National Security of the NAR and charged with high treason after being accused of collaboration with Iran's intelligence services.

He was detained at the Pre-trial Detention Facility of the Ministry of Justice of the NAR, but on 28 August he was taken to the Ministry of National Security of the NAR for questioning. However, he suddenly felt ill and an ambulance was called. He subsequently died on the way to the hospital.

Following the death, photographs and a video showing signs of ill-treatment on his body were given to the media by members of the family and the incident was widely covered.

The family asked the Ministry of National Security of the NAR, the NAR Prosecutor General, the Prosecutor General of the Republic of Azerbaijan, and the Ombudsman for documents relating to the investigation into the death, however, no such documents were provided. The authorities consistently stated that he had died of a pulmonary embolism and had not been mistreated.

Neither the ordinary nor administrative courts accepted applications from the family to declare unlawful the authorities' failure to provide documents on the investigation and to order them to hand over such information. In November 2012 the applicant appealed to the Supreme Court of the NAR over the decision of the administrative court in his case. He received no reply to his appeal.

The chief investigator of the Ministry of National Security of the NAR two times accused the family of defaming his organisation.

The applicant complained under Article 2 (right to life) of the European Convention on Human Rights that the State had failed to protect his son's life and that there had been no effective investigation into his son's death. He also complained under Article 3 (prohibition of torture or inhuman or degrading treatment) that his son had been tortured by agents of the MNS and that the authorities had failed to carry out an effective investigation.

Violation of Article 2 (right to life) – in respect of the death of Mr Zeynalov's son in custody
Violation of Article 2 (investigation)
Violation of Article 3 (inhuman and degrading treatment) – in respect of the ill-treatment of Mr Zeynalov's son in custody
Violation of Article 3 (investigation)

Just satisfaction: 35,000 euros (EUR) in respect of non-pecuniary damage, and EUR 2,000 in respect of costs and expenses.

30. **ECHR, *B.G. and Others v. France*, no. 63141/13, Chamber judgment of 10 September 2020 (Article 3, prohibition of torture and inhuman or degrading treatment – No violation).** The case concerned the accommodation of 17 Albanian, Bosnian and Kosovar* asylum-seekers for several months in a tent camp set up on a carpark and that they had not been provided with the material and financial support to which they were entitled to under domestic law.

ECHR 252 (2020)
10.09.2020

Press release issued by the Registar

In today's **Chamber** judgment1 in the case of B.G. and Others v. France (application no. 63141/13) 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 the accommodation of asylum-seekers for several months in a tent camp set up on a carpark in Metz and the question whether they had received the material and financial support provided for by domestic law.

Applicants 1 to 12 had not maintained contact with their lawyer and had not provided any indication of their whereabouts or how they could be reached. In those circumstances the Court found that they had lost interest in the proceedings and no longer wished to pursue their application.

As regards applicants 13 to 17, the Court found that there was no specific material in the file allowing it to make a concrete assessment of their living conditions in a tent camp on a carpark located on Avenue de Blida in Metz, where they had lived from 29 June 2013 to 9 October 2013. The Court further observed that the French authorities had taken measures which had brought about a rapid improvement in their material living conditions, in particular ensuring medical care and schooling for the children.

Principal facts

The seventeen applicants, asylum-seekers, are members of four Albanian, Bosnian and Kosovar2 families, including minor children. They complained that they had been accommodated for several months in a tent camp set up on a carpark in Metz, directly on the concrete ground, and that they had not been provided with the material and financial support to which they were entitled under domestic law.

In March 2013 a camp for around forty-five asylum-seekers was set up near the asylum-seekers' reception platform in Metz. The camp was later dismantled by decision of the Moselle prefect. Due to the saturation of accommodation facilities in the Moselle *département*, the prefect opened a camp on 19 June 2013 on a former car park located on Avenue de Blida in Metz. According to the applicants they lived there in tents placed on the concrete ground. The camp was dismantled and closed on 15 November 2013.

Applicants 1 to 12 (see details in appendix to the judgment) are three families accompanied by their children, who were aged between one and a half and nine years at the time. They are Albanian, Bosnian and Kosovar nationals who entered France between 24 April and 29 June 2013 to apply for asylum. The prefect refused to grant leave to remain to applicants 5 to 7, who were from Bosnia, as their country was deemed to be safe, and registered the other asylum applications under the priority procedure. The

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* *All references to Kosovo, whether the territory, institutions or population, in this text shall be understood in full compliance with United Nation's Security Council Resolution 1244 and without prejudice to the status of Kosovo.*

applicants filed urgent applications for the protection of a fundamental freedom with the Administrative Court of Strasbourg. Those applications were rejected on the grounds that the precarity of which they complained was to be remedied promptly (applicants 1 to 4), that having received a repatriation grant in July 2008 they had placed themselves in the impugned difficulties (applicants 5 to 7), or that they had been summoned to the Moselle prefecture on 9 October 2013 for an examination of their situation (applicants 8 to 12).

The applicants lodged an appeal with the *Conseil d'État* (highest administrative court). The urgent proceedings judge of that court dismissed their appeal on the grounds that their specific situation had been examined when they had been received at the prefecture and that initial steps had been taken in that regard.

Applicants 13 to 17 (see details in appendix) are a couple of Kosovar nationality and their three children, aged 2, 9 and 11 at the time. On arrival in France on 29 June 2013 they reported to the prefecture, which issued them with a summons for 10 September 2013 to submit their asylum application files. Pending a permanent accommodation solution, they were placed on 29 June 2013 in the Avenue de Blida camp. On 3 September 2013 they filed an urgent application for the protection of a fundamental freedom before the Administrative Court, requesting that the authorities be ordered to provide them with accommodation, in accordance with national law. The urgent proceedings judge dismissed the application for lack of urgency as their particular situation had been examined when they had been received at the prefecture on 10 September 2013 and preliminary measures had been taken for them. The urgent proceedings judge of the *Conseil d'État*, rejected their appeal for the same reasons. On 21 November 2013 Mr Z. was granted a temporary waiting allowance. His wife was granted this allowance from 12 November 2013. They both received the allowance until they entered an Asylum-Seekers' Reception Centre (CADA) on 29 January 2014. In February 2014 the French Office for the Protection of Refugees and Stateless Persons (OFPRA) rejected the asylum-seekers' applications, and the rejection was confirmed by the National Asylum Court. Mr Z. applied for and obtained a residence permit on grounds of illness, valid from 7 September 2018 to 8 August 2019. His wife was provided with a residence permit receipt allowing her to work, valid from 11 October 2018 to 10 April 2019, and she has been working part-time. Their three children attend school.

All the applicants were found accommodation in council flats between 9 and 16 October 2013.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment), and Article 8 (right to respect for private and family life), the applicants complained that their exclusion from the accommodation facilities provided for under domestic law, from 29 June 2013 to 9 October 2013, and their placement for over three months in a camp had exposed them to inhuman and degrading treatment. They emphasised that the living conditions during this period were particularly inappropriate for very young children.

The application was lodged with the European Court of Human Rights on 7 October 2013.

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

Síofra O'Leary (Ireland), *President*,
Gabriele Kucsko-Stadlmayer (Austria),
Ganna Yudkivska (Ukraine),
Mārtiņš Mits (Latvia),
Lado Chanturia (Georgia),
Anja Seibert-Fohr (Germany),
Mattias Guyomar (France),
and also Victor Soloveytchik, *Deputy Section Registrar*.

Decision of the Court

Applicants 1 to 12 had not maintained contact with their lawyer and had not provided any indication of their whereabouts or how they could be reached. In those circumstances the Court found that they had lost interest in the proceedings and no longer wished to pursue their application. It was no longer justified to continue examining the complaints in respect of those applicants.

Article 3

The Court noted that the *Conseil d'État*, before which the applicants had pleaded a breach of Article 3, had examined their complaint in substance, taking into account the requirements in terms of decent material conditions and respect for the right of asylum.

However, the parties' accounts differed as to the living conditions in the camp, in particular as regards hygiene and safety, and the facilities provided to the asylum-seekers.

The Court observed, first, that the applicants had merely indicated, in a general and unsubstantiated manner, that they had lived in a tent on concrete ground without providing any precise information enabling it to make a proper assessment of their living conditions with their children during the three months and eleven days they had stayed on the site, in particular as regards the possibilities for eating and washing. Secondly, the French authorities had not remained indifferent to the applicants' situation and their basic needs – housing, food and washing – had all been met.

Although the applicants had not received the waiting allowance until 12 and 21 November 2013, it was not in dispute that they had received food aid in the form of vouchers between 29 June and 9 October 2013, the date of their departure from the camp. The children had been under medical supervision and vaccinated and those who were then aged 9 and 11 had been able to attend school. Lastly, accommodation in a permanent structure had been offered three months and eleven days after their arrival in the camp, which was relatively quick.

In the light of all these factors, the Court found that the applicants' living conditions had improved rapidly and significantly. Moreover, during the period in question the applicants had not been left without any prospect of seeing their situation improve. They had been summoned to the prefecture on 10 September 2013 to file their asylum application. OFPRA had examined their application under the fast-track procedure and had decided on their asylum application on 3 February 2014.

While it was true that the camp on Avenue de Blida, where the applicants had lived from 29 June to 3 October 2013, had been overcrowded, that its sanitary conditions had been unsatisfactory and that it had become insalubrious over the weeks, the Court was not in a position to conclude that the applicants had found themselves, during the relevant period, in a situation of material deprivation that had reached the threshold of severity necessary to fall within the scope of Article 3.

There had thus been no violation of Article 3 of the Convention.

Article 8

The Court noted that the applicants had submitted a very general account of their living conditions in the camp on Avenue de Blida without giving details about their own conditions.

The Court found, moreover, that the authorities had provided them with an accommodation solution that was presented as temporary in the camp, before accommodating them on 9 October 2013 in a flat, three months and eleven days after they had arrived in the camp.

The applicants' complaint was thus manifestly ill-founded and had to be rejected.

The judgment is available only in French.

31. **ECHR, *Mirgadirov v. Azerbaijan and Turkey*, no. 62775/14, Chamber judgment of 17 September 2020 (Article 5, right of liberty and security – Violation; Article 6; right to a fair trial – Violation; Article 8, right to respect for private life and family life – Violation; Article 18, limitation on use of restrictions of rights, in conjunction with Article 5 – No violation).** The applicant, a well-known journalist, was working as a correspondent for an Azerbaijani newspaper in Turkey. The Turkish authorities withdrew his press accreditation and residence permit and eventually deported him to his home country. On arrival in Baku airport he was placed under arrest by agents of the Azerbaijani Ministry of National Security ("the MNS"), and, two days later, charged with high treason for allegedly providing secret information to Armenian agents.

ECHR 259 (2020)
17.09.2020

Press release issued by the Registar of the Court

In today's **Chamber** judgment1 in the case of **Mirgadirov v. Azerbaijan and Turkey** (application no. 62775/14) the European Court of Human Rights held, unanimously, that there had been:

by Azerbaijan:

a violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights over the absence of a reasonable suspicion of a criminal offence;

a violation of Article 5 § 1 of the European Convention over the applicant's detention from 19 to 20 November 2014 in the absence of a court order;

a violation of Article 5 § 4 (judicial review of the lawfulness of detention) on account of the domestic courts' failure to assess the applicant's arguments in favour of his release;

a violation of Article 6 § 2 (presumption of innocence);

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

no violation of Article 18 (limitation on use of restrictions of rights) in conjunction with Article 5.

In respect of Turkey:

No need to examine the complaint under Article 5 § 4; rest of complaints inadmissible.

The case concerned the arrest and pre-trial detention of the applicant, a well-known journalist, on charges of high treason as he had allegedly spied for Armenia.

The Court found in particular that the evidence, whether submitted to it or presented domestically, had not been sufficient to find a reasonable suspicion that the applicant had committed high treason. Restrictions placed on him during his pre-trial detention had also violated his rights.

Principal facts

The applicant, Rauf Habibula oglu Mirgadirov, is an Azerbaijani national born in 1961. He currently lives in Thalwil, Switzerland.

While the applicant, a well-known journalist, was working as a correspondent for an Azerbaijani newspaper in Turkey, the Turkish authorities in April 2014 withdrew his press accreditation and residence permit and eventually deported him to his home country.

On arrival in Baku airport he was placed under arrest by agents of the Azerbaijani Ministry of National Security ("the MNS"). Two days later he was charged with high treason for allegedly providing secret information to Armenian agents.

He was held in detention pending trial from April 2014 until his conviction in December 2015 by the Baku Court of Serious Crimes, which sentenced him to six years' imprisonment. In March 2016 the Baku Court of Appeal suspended the sentence for five years and he was released the same day. While in pre-trial detention various restrictions were placed on the applicant, including the right to use the telephone, and to meet or correspond with anyone other than his lawyers. The domestic courts rejected his appeals against his pre-trial detention and the restrictions.

In July 2014 the MNS and the Prosecutor General's Office issued a statement which stated, among other things, that the applicant had supplied various pieces of information relating to Azerbaijan's security to a former Minister of National Security of Armenia.

Complaints, procedure and composition of the Court

The applicant made several complaints under Article 5 (right to liberty and security). He also alleged breaches of Article 6 § 2 (presumption of innocence), Article 8 (right to respect for private and family life), Article 10 (freedom of expression), and Article 18 (limitation on use of restrictions on rights) in conjunction with Article 5. The applicant in addition complained against Turkey under Article 5 §§ 1, 2, 3 and 4 of the Convention and Article 10.

The application was lodged with the European Court of Human Rights on 11 September 2014.

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

Síofra **O'Leary** (Ireland), *President*,
Gabriele **Kucsko-Stadlmayer** (Austria),
Ganna **Yudkivska** (Ukraine),
Latif **Hüseynov** (Azerbaijan),
Saadet **Yüksel** (Turkey),
Anja **Seibert-Fohr** (Germany),
Mattias **Guyomar** (France),

and also Victor **Soloveytchik**, *Section Registrar*.

Decision of the Court

Complaints against Azerbaijan

Article 5 §§ 1 and 3

The Court noted that the applicant had been charged with high treason after meeting L.B., who according to the authorities was an agent of the Armenian intelligence services, and other people on various dates in 2008 and 2009. Those meetings had taken place within the framework of international conferences in which the applicant had participated as a political analyst and journalist.

The Azerbaijani Government had submitted that he had been detained on a reasonable suspicion of having committed a criminal offence, as corroborated by information and evidence, including video-recordings of his meetings with representatives of foreign intelligence services and his receipt of money from them. The Government had also referred to procedural decisions which had shown that the prosecuting authorities had relevant information and had submitted it to the courts.

However, the Court noted that the applicant had not been charged with high treason because of his meetings with L.B. and others, but because of his alleged espionage in providing foreign intelligence services with information collected at their request, along with photographs and technical drawings.

The Azerbaijani Government had also referred in a general way to information and evidence which allegedly corroborated the existence of a reasonable suspicion against the applicant of high treason, without specifying the content of that information and evidence. The only particular pieces of evidence to which the Government had expressly referred were the video-recordings and the alleged receipt of money. However, it did not appear from the first court decision on the applicant's detention in April 2014 or any subsequent decision on that question that any video-recording had been submitted to the courts as their decisions had not referred to that kind of material.

In addition, the Government had not demonstrated that the requirements set down in a decision of the Plenum of the Supreme Court of 3 November 2009 for courts to subject prosecuting authorities' applications for remand decisions to close scrutiny had been taken into account.

Furthermore, none of the court decisions extending the applicant's pre-trial detention had referred to the alleged new fact of Internet correspondence between the applicant and L.B. as confirmation of a reasonable suspicion of high treason. The Azerbaijani Government had also failed, even in the proceedings before the Court, to present any material that would satisfy an objective observer that the applicant might have committed a criminal offence.

The Court concluded that the material put before it had not met the minimum standard set by Article 5 § 1 (c) of the Convention for the reasonableness of a suspicion required for an individual's arrest and continued detention and there had been a violation of that provision. Given that finding, it did not consider it necessary to examine separately the complaint under Article 5 § 3.

It was also clear from the case file that the applicant had been detained for 16 hours, from midnight on 19 November to 4 p.m. on 20 November 2014, without any judicial order authorising his detention. The detention had thus been unlawful and had violated Article 5 § 1.

Article 5 § 4

The applicant submitted that the domestic courts had failed to respond to any of the relevant arguments against detention that he had repeatedly raised. His lawyers had also not been informed of a district court hearing on 20 November 2014. The Government rejected those allegations.

The Court noted that the courts had used short, vague and stereotyped formulae for rejecting the applicant's complaints about his pre-trial detention, limiting their role to the automatic endorsement of the prosecution's applications. They had not therefore conducted a genuine review of the "lawfulness" of his detention and there had been a violation of Article 5 § 4. It did not consider it necessary to examine separately the complaint about the November 2014 hearing.

Article 6 § 2

The Court held that the statement released in July 2014 by the MNS and the prosecutor's office had not been made with the necessary discretion and circumspection and that the overall way it had been formulated had left the reader in no doubt that the applicant had committed the criminal offence of high treason. There had thus been a violation of Article 6 § 2 of the Convention.

Article 8

The applicant relied on Article 8 and Article 10 in his complaint about the restrictions placed on him in pre-trial detention, but the Court dealt with the issues raised only under Article 8.

It first found that the interference with the applicant's right to receive and subscribe to socio-political newspapers or magazines was not in accordance with the law within the meaning of paragraph 2 of Article 8.

The measures had also amounted *de facto* to an outright ban on him having any contact (meetings, telephone calls or correspondence) with the outside world, except for with his lawyers. Neither the investigator who had asked for the restrictions nor the courts had put forward any relevant justification to support such harsh and all-encompassing measures. The Government had also failed to submit any relevant explanation for why it had been necessary to separate the applicant from his family and the outside world.

The Court concluded that the reasons given by the domestic authorities in support of the restriction of the applicant's rights were not relevant and sufficient and there had been a violation of Article 8.

Article 18 in conjunction with Article 5

The applicant submitted that the restrictions imposed on him had been linked to his work as a journalist and political analyst. The Azerbaijani Government submitted that the restrictions had not been applied for any purpose other than one envisaged by Article 5.

The Court observed that the applicant had complained briefly and in a general way that the restrictions in question had been applied by the Azerbaijani Government with the intention of isolating him, as a journalist and political analyst, from his professional activity. However, he had failed to specify what in his work could have been behind the restrictions placed on him.

Having regard to the applicant's submissions and all the material in its possession, the Court could not find beyond reasonable doubt that his arrest and detention had pursued any ulterior purpose. There had accordingly been no violation of Article 18 taken in conjunction with Article 5.

Complaints against Turkey

Article 5 and Article 10

The Court found that the applicant's complaints under Article 5 §§ 1, 2, 3 and 4 were either inadmissible (under Article 5 § 3), that an examination was not required (Article 5 § 4), or that he had not exhausted domestic remedies (complaints under Article 5 §§ 1 and 2 and Article 10).

Just satisfaction (Article 41)
The Court held that Azerbaijan was to pay the applicant 20,000 euros (EUR) in respect of non-pecuniary damage.

The judgment is available only in English.

32. **ECHR, *Grubnyk v. Ukraine*, no. 58444/15, Chamber judgment of 17 September 2020 (Article 5-2 and 3, right to liberty and security – No violation; Article 5-1, right to liberty and security – Violation; Article 6-2, presumption of innocence – Violation).** The applicant, a Ukrainian national with links to a Russian nationalist group, was arrested and detained. Before the Court, he partly successfully complained of several deficiencies in the context of his arrest and detention against the background of a series of terrorist attacks and other violent events in the Crimea and eastern Ukraine in 2014 and 2015.

ECHR 260 (2020)
17.09.2020

Press Release issued by the Registar of the Court

The case **Grubnyk v. Ukraine** (application no. 58444/15) concerned the applicant's arrest and detention in connection with various terrorism offences in Odessa in 2015.

In today's **Chamber** judgment1 in the case the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 5 §§ 2 and 3 (right to liberty and security) concerning the applicant's complaints about not being informed promptly of the reasons for his arrest and about bail not being available to him by law because he was accused of terrorism offences;

two violations of Article 5 § 1 of the European Convention on Human Rights because the applicant's arrest had been carried out without a prior court decision and had not actually been recorded until the next day;

a violation of Article 6 § 2 (presumption of innocence) because the initial pre-trial detention order against him had stated that he was guilty of a particularly "grave offence" while, at the time, he had merely been suspected and not convicted of any terrorism offence.

The Court found in particular that, in the specific circumstances of the applicant's case, the domestic courts had provided sufficient reasons for his pre-trial detention given that he had been suspected of a bomb attack at a time of great tension in Odessa and in the context of defendants in other previous high-profile cases having fled once released.

However, it noted with satisfaction that the Constitutional Court of Ukraine had since decided to declare unconstitutional the law on bail, invoked in the applicant's case, which in some cases had limited the domestic courts' ability to issue properly reasoned detention orders.

Principal facts

The applicant, Volodymyr Yuriyovych Grubnyk, is a Ukrainian national who was born in 1983 and was, until his reported release in a prisoner exchange, in detention in Odessa.

The applicant's arrest and detention took place against the background of a series of terrorist attacks in Odessa – in particular an explosion at the Security Service of Ukraine's ("the SBU") office on 27 September 2015 – and the violent events in the Crimea and eastern Ukraine in 2014 and 2015. The applicant had links to a Russian nationalist group.

On 19 October 2015, following the arrest of some alleged co-conspirators, the applicant was arrested in connection with the attack on the SBU office. The charges were subsequently amended to also include forming and leading a terrorist organisation.

The applicant alleges he was not informed of the reasons for his arrest. Searches of his home and a flat he rented were carried out in his presence, but he only had access to a lawyer from the following day, when a formal arrest report was drawn up. On that same day he was placed in pre-trial detention for 60 days.

That period was extended multiple times and confirmed by higher courts on appeal. In particular, the courts reasoned that, by law, bail was not available for terrorism offences, and that the applicant was a flight risk and might reoffend. The courts did not address the applicant's complaint that there had been a delay of more than 23 hours between his actual arrest and the drawing up of the arrest report. Nor did they deal with his argument that the ground underlined in the report for allowing his arrest without a court order, namely that the offence had just been committed, was not applicable in his case.

According to media reports, on 29 December 2019 the applicant was released and sent to the so-called "Donetsk People's Republic" in a prisoner exchange with Russia.

Complaints, procedure and composition of the Court

Relying on Article 5 (right to liberty and security), Mr Grubnyk complained of various rights infringements regarding his arrest and the extension of his remand. He also complained under Article 6 § 2 (presumption of innocence) that the wording of his initial pre-trial detention order had breached his right to be presumed innocent.

The application was lodged with the European Court of Human Rights on 13 November 2015.

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

Síofra **O'Leary** (Ireland), *President*,
Gabriele **Kucsko-Stadlmayer** (Austria),
Ganna **Yudkivska** (Ukraine),
Mārtiņš **Mits** (Latvia),
Latif **Hüseynov** (Azerbaijan),
Lado **Chanturia** (Georgia),
Anja **Seibert-Fohr** (Germany),

and also Victor **Soloveytchik**, *Section Registrar.*

Decision of the Court

Article 5 § 1
The applicant complained that he had been arrested without a prior court decision and that the arrest report had only been drawn up the day after his arrest and had been worded in vague terms.

The Court noted that there was no dispute that there had been a delay of more than 23 hours between the applicant's actual arrest and the drawing up of the formal arrest report. The applicant had complained about that delay, but no explanation had been provided in the domestic proceedings.

It had been the Court's constant view that unrecorded detention was a serious failing and a negation of the fundamentally important guarantees under Article 5 of the Convention. There had accordingly been a violation of Article 5 § 1.

The Court also found that the applicant's arrest without a prior court decision had not been "in accordance with a procedure prescribed by law", in further violation of Article 5 § 1. The domestic courts had not provided an explanation for why the grounds underlined in the arrest report, namely that the arrest had taken place "immediately after" an offence had been committed, could serve as a legal

basis for the applicant's arrest without a warrant when he had actually been arrested three weeks after the terrorist attack.

Given those findings, the Court held that there was no need to examine the applicant's remaining complaint under Article 5 § 1 concerning the wording of the arrest report.

Article 5 § 2

The applicant denied that SBU officers had informed him of the reasons for his arrest orally, as submitted by the Government.

The Court found, however, that the applicant's denial was vague and unsubstantiated. The Government's explanations on the other hand were corroborated by the context, namely a high profile terrorist attack at a time of great tension in Odessa, and the sequence of events involving searches conducted by SBU officers, accompanied by a demining expert, and resulting in the discovery of explosive devices in the applicant's rented flat. Those factors, plus the fact that the security officers had questioned the applicant about explosives during the search, had to have largely communicated to him the reasons for his deprivation of liberty.

Moreover, the delay in the formal explanation of the reasons for the applicant's arrest had not in any way been prejudicial to him challenging the lawfulness of his detention. He had appeared before a judge the day after his arrest and at that time he had already been informed formally of the suspicion against him.

There had therefore been no violation of Article 5 § 2 of the Convention.

Article 5 § 3

The Court noted that in 2019 the Constitutional Court had decided to declare unconstitutional the Bail Exclusion Clause, the 2014 law which had made it impossible for terrorism suspects to obtain bail. The Constitutional Court's decision underlined in particular that, in practice, that law had limited the domestic courts' ability to issue properly reasoned detention orders, even though the courts retained the power to release such suspects if they presented no risks.

The Court's task, however, was to review the relevant law and practice in the given circumstances of a particular case and not in the abstract.

In the specific circumstances of the applicant's case, the Court considered that it had been self-evident that release had not been an option. The applicant had been suspected of organising and leading a terrorist group which used sophisticated undercover operation techniques to engage in highly dangerous ongoing activities.

Furthermore, his case had been examined against a background of great tension in Odessa and the fleeing of defendants in other previous high-profile cases.

The domestic courts, which had had full jurisdiction to review the applicant's detention, had therefore had before them considerable evidence in support of the suspicion against him and of the risk of him absconding if released.

Moreover, the domestic courts' reasons for extending the applicant's detention had evolved over time; they had notably specified in April 2016 that his role in organising clandestine activities was a further ground for believing that he was a flight risk.

Stressing that the authorities had a duty under the Convention to protect the rights of victims, actual or potential, from violent attacks, the Court found that the domestic courts had given "relevant" and "sufficient" reasons for the applicant's detention. There had therefore been no violation of Article 5 § 3.

Article 6 § 2

The applicant submitted that the District Court had stated in the initial detention order that he "had committed a particularly grave offence", thus prejudging the outcome of the proceedings against him.

The Court found that it could only read that statement as an expression of the District Court's opinion that the applicant had indeed been guilty of the particularly grave offence of which he had merely been suspected, and not convicted, at the time.

Such poor wording might have been a technical error by the District Court, but it had at no point subsequently been acknowledged or rectified by the courts or by any other domestic authority.

There had accordingly been a violation of the applicant's right to be presumed innocent, in breach of Article 6 § 2.

Just satisfaction (Article 41)

The Court considered that the finding of violations constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

The judgment is available only in English.

33. **ECHR, *Muhammad and Muhammad v. Romania*, no. 80982/12, Grand Chamber judgment of 15 October 2020 (Article 1 of Protocol No. 7, procedural safeguards relating to expulsion of aliens – Violation).** The applicants, two Pakistani nationals, living lawfully in Romania, were declared undesirable and deported.

ECHR 292 (2020)
15.10.2020

Press Release issued by the Registrar of the Court

In today's **Grand Chamber** judgment1 in the case of **Muhammad and Muhammad v. Romania** (application no. 80982/12) the European Court of Human Rights held, by a majority, that there had been:

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

The case concerned proceedings as a result of which the applicants, Pakistani nationals living lawfully in Romania, were declared undesirable and deported.

The Court found that the applicants had received only very general information about the legal characterisation of the accusations against them, while none of their specific acts which allegedly endangered national security could be seen from the file. Nor had they been provided with any information about the key stages in the proceedings or about the possibility of accessing classified documents in the file through a lawyer holding authorisation to consult such documents.

Having regard to the proceedings as a whole and taking account of the margin of appreciation afforded to the States in such matters, the Court found that the limitations imposed on the applicants' enjoyment of their rights under Article 1 of Protocol No. 7 had not been counterbalanced in the domestic proceedings such as to preserve the very essence of those rights.

Principal facts

The applicants, Adeel Muhammad and Ramzan Muhammad, are Pakistani nationals who were born in 1993 and 1982 and live in Tehsil Karor (Pakistan) and Dubai (UAE) respectively.

Adeel Muhammad arrived in Romania in September 2012 on a student visa. Having obtained a scholarship, he began his studies in the economic sciences faculty of Lucian Blaga University in Sibiu. Ramzan Muhammad entered Romania on 17 February 2009 on a long-stay student visa. He completed his first year of preparatory studies before going to the same university in Sibiu on being granted a scholarship. His wife joined him in Romania in April 2012.

On 4 December 2012 the Romanian Intelligence Service (*Serviciul român de informații* – "the SRI") asked the public prosecutor's office at the Bucharest Court of Appeal to apply to the appropriate court to assess whether the applicants should be declared undesirable in Romania. In support of its request the SRI provided classified documents. On 4 December 2012 the public prosecutor's office submitted an application to the Administrative Division of the Bucharest Court of Appeal asking it to declare the two applicants undesirable in Romania. The application stated that, according to the intelligence from the SRI, there were serious indications that the applicants intended to engage in activities capable of endangering national security. The classified documents were forwarded to the Court of Appeal. Also on 4 December 2012 the Sibiu police summoned the applicants to appear the next day in the Court of Appeal.

In an interlocutory judgment of 5 December 2012, the bench to which the case had first been allocated relinquished it on the grounds that the judge did not have the statutory authorisation to access the classified document forwarded by the public prosecutor's office. The case was allocated to a different bench, which had been issued by the Office of the National Register for State Secret Information ("ORNISS") with authorisation to access such documents. A hearing took place on the same day at which the applicants were present, assisted by an Urdu interpreter. The applicants indicated that they did not understand the reasons why they had been summoned, as the initiating application merely contained references to legal provisions. The Court of Appeal replied that the documents in the file were classified. The public prosecutor asked the court to declare them undesirable on the ground that, according to the classified intelligence, they had engaged in activities capable of undermining national security.

In a judgment of the same date the Court of Appeal declared the applicants to be undesirable persons in Romania for a 15-year period and ordered that they be placed in administrative custody pending deportation.

On 6 December 2012 the SRI published a press release on the case, which gave details and examples of the activities of which the applicants were accused, in support of an Islamist group ideologically affiliated to al-Qaeda. The information in the press release was reported in certain newspapers, indicating the applicants' names and the details of their university studies.

The applicants appealed to the High Court of Cassation and Justice against the Court of Appeal's judgment, but their appeals were dismissed. The High Court took the view that it could be seen from the classified documents available to it that the court below had rightly taken account of the indications that the applicants had intended to engage in activities capable of endangering national security. It further observed that, pursuant to the law, where a decision to declare an alien undesirable was based on reasons of national security, the data and information, together with the factual grounds underlying the judges' opinion, could not be mentioned in the judgment. They had thus been in a position to know, with the help of an interpreter, the reason why they had been summoned to court in the exclusion and expulsion proceedings.

The applicants left Romania on 27 December 2012.

Complaints, procedure and composition of the Court

Relying on Article 1 § 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens) to the Convention and Article 13 (right to an effective remedy) of the Convention, the applicants complained that they had not been afforded due procedural safeguards and had not been able to defend themselves effectively in the proceedings. More specifically they alleged that they had not been notified of the actual accusations against them, whilst they did not have access to the documents in the file.

The application was lodged with the European Court of Human Rights on 19 December 2012. On 26 February 2019 the Chamber relinquished jurisdiction in favour of the Grand Chamber. A public hearing was held on 25 September 2019.

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

Robert **Spano** (Iceland), *President*,
Linos-Alexandre **Sicilianos** (Greece),
Jon Fridrik **Kjølbro** (Denmark),
Ksenija **Turković** (Croatia),
Angelika **Nußberger** (Germany),
Paul **Lemmens** (Belgium),
Ganna **Yudkivska** (Ukraine),
aulo **Pinto de Albuquerque** (Portugal),

Faris **Vehabović** (Bosnia and Herzegovina),
Iulia Antoanella **Motoc** (Romania),
Carlo **Ranzoni** (Liechtenstein),
Pauliine **Koskelo** (Finland),
Georgios A. **Serghides** (Cyprus),
Marko **Bošnjak** (Slovenia),
Jovan **Ilievski** (North Macedonia),
Péter **Paczolay** (Hungary),
María **Elósegui** (Spain),

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

Decision of the Court

Article 1 of Protocol No. 7

The Court first had to determine the circumstances in which the limitations imposed on the applicants' right to be informed of the reasons for their expulsion would be compatible with Article 1 of Protocol No. 7. It then had to ascertain whether those limitations had been counterbalanced by sufficient legal safeguards.

As to the justification for the limitations imposed on the applicants' procedural rights, the Court noted that the domestic courts, applying the relevant statutory provisions, had found at the outset that the applicants had not been able to access the file because the documents were classified as "secret". Domestic law did not enable the courts to ascertain whether or not the protection of national security imposed non-disclosure of the file in a given case. Nor had the domestic courts assessed the need to restrict the applicants' procedural rights by not disclosing the confidential documents to them. They had not explained the concrete reasons for withholding the classified information and evidence. Lastly, the fact that the SRI had published a press release the day after the judgment, with detailed factual information, contradicted the argument that it had been necessary to deprive the applicants of any concrete information on the factual reasons given in support of their expulsion.

As to whether the limitations had been offset by counterbalancing factors, the Court noted that, at the hearing of 5 December 2012 before the Court of Appeal, the applicants had been notified, through an interpreter, of the application initiating the proceedings, but only the numbers of the legal provisions which governed the alleged misconduct had been referred to in that document, not the allegations themselves. In the proceedings before the Court of Appeal, no specific information as to the factual reasons for the expulsion had been provided to the applicants. The Court further noted that, on the day after the delivery of the Court of Appeal's judgment, while the appeal was pending, the SRI had issued a press release setting out some of the accusations against the applicants. Even assuming that the information contained in the press release had been sufficient for the applicants to prepare their defence, the Court took the view that the press release could not be regarded as a valid source of information. First, the SRI press release did not appear to have been added to the case file before the High Court. It had not been established that the public prosecutor's office had considered the facts stated in that press release to form the basis of its application, or that the High Court had confirmed to the applicants that those were the facts which had given rise to the accusations against them. Third, while the applicants had pleaded their case before the High Court after becoming aware of the acts of which they stood accused according to the press release, it could not be seen from the file or from the wording of its final judgment that the court had relied on the press release in its reasoning. Lastly, and most importantly, a press release could not be regarded as an appropriate means of providing parties to judicial proceedings with the information that they needed in order to plead their case.

Consequently, in the High Court proceedings also, the applicants had not been informed of the allegations against them such as to be able effectively to exercise their procedural rights under Article

1 of Protocol No. 7. Such significant limitations on the disclosure of concrete information called for robust counterbalancing safeguards.

As to whether the applicants had been informed about the conduct of the proceedings and about their procedural rights, the Court noted that on the evening of 4 December 2012 the applicants had been summoned to appear the following day, at 9 a.m., before the Bucharest Court of Appeal. No documents or information concerning the conduct or purpose of the proceedings had been attached to the summons. Subsequently, the Court of Appeal had made sure that the applicants were provided with an interpreter and had informed them that the documents in the file were confidential and that only the court had access to them by virtue of the authorisation given to the judge. The Court of Appeal had thus informed the applicants of the limitation of their right of access to the file and of the counterbalancing safeguard, namely the court's access to those documents.

The Court of Appeal had not considered it necessary to make sure that the applicants were well informed about the conduct of the proceedings before it or about the existence in domestic law of other safeguards that could counterbalance the effects of the limitation on their procedural rights. Thus the Court of Appeal had not enquired whether the applicants knew that they could be represented by a lawyer or provided any information to them about lawyers holding an ORNISS certificate who would be authorised to access the classified documents. In the Court's view, this failure to provide the applicants with information had had the effect of negating the procedural safeguards to which the applicants were entitled.

The Court further noted that the High Court had not, of its own motion, informed the applicants of the procedural safeguards available under domestic law, with the result that this counterbalancing factor had not had any impact in mitigating the limitation of their procedural rights.

As to the applicants' representation in the proceedings, the Court noted that, as the lawyers chosen by them did not hold an ORNISS certificate, they had not been able to access the classified documents in the file. They could have requested the adjournment of the proceedings in order to obtain such a certificate, but the statutory period prescribed for that purpose exceeded the normal length of the proceedings. A request for adjournment would not therefore, in principle, have enabled the applicants' lawyers to obtain such a certificate for use in the appeal proceedings. The presence of the applicants' lawyers before the High Court, without any possibility of ascertaining the accusations against their clients, had not therefore ensured their effective defence. Accordingly, the applicants' representation had not been effective enough to counterbalance, to any significant degree, the limitations to which their procedural rights had been subjected.

As to whether the expulsion decision had been subjected to independent scrutiny, the Court observed that the proceedings under Romanian law with a view to declaring a person undesirable were of a judicial nature. The competent courts in such matters, namely the Court of Appeal and the High Court, enjoyed the requisite independence within the meaning of the Court's case-law. The proceedings had taken place before the superior courts, the High Court in fact being the highest judicial authority. These were significant safeguards to be taken into account in the assessment of the factors capable of mitigating the effects of the limitations imposed on the applicants' procedural rights.

Before those courts, in view of the very limited and general information available to them, the applicants had only been able to base their defence on suppositions and on general aspects of their student life or financial situation, without being able specifically to challenge an accusation of conduct that allegedly endangered national security. In the Court's view, the extent of the scrutiny applied by the national courts as to the well-foundedness of the expulsion should have been all the more comprehensive.

The public prosecutor's office had submitted in evidence before the Court of Appeal a "document" which, in the Government's submission, provided details of the applicants' alleged activities and referred to the specific data and intelligence obtained by the SRI. It was not clear, however, whether the domestic courts had actually had access to all the classified information underlying the expulsion application or only to that one "document". Moreover, when the applicants had expressed their doubts before the High Court about the presence of classified documents in the file, that court had not provided

any clarification on this point. In addition, the High Court had refused to order the addition to the file of the only item of evidence that had been requested by the applicants with the aim of rebutting the allegations that they had been financing terrorist activities. Thus there was nothing in the file to suggest that any verification had actually been carried out by the national courts as to the credibility and veracity of the facts submitted to them by the public prosecutor's office.

The Court accepted that the examination of the case by an independent judicial authority was a very weighty safeguard in terms of counterbalancing any limitation of the applicants' procedural rights. However, such a safeguard did not suffice in itself to compensate for such limitation if the nature and degree of any scrutiny applied by the independent authorities did not transpire, at least summarily, from the reasoning of their decisions.

In any event, it could not been seen from the domestic courts' decisions in the present case that they had effectively and adequately exercised the powers vested in them for the present purposes.

The Court concluded that the applicants had sustained significant limitations in the exercise of their right to be informed of the facts underlying the decision to deport them and their right to have access to the content of the documents and the information relied upon by the competent authority which had made that decision. It did not appear from the file that the need for such limitations had been examined and identified as duly justified by an independent authority.

The Court observed that the applicants had received only very general information about the legal characterisation of the accusations against them, while none of their specific acts which allegedly endangered national security could be seen from the file. Nor had they been provided with any information about the key stages in the proceedings or about the possibility of accessing classified documents in the file through a lawyer holding an ORNISS certificate.

Having regard to the proceedings as a whole and taking account of the margin of appreciation afforded to the States in such matters, the Court found that the limitations imposed on the applicants' enjoyment of their rights under Article 1 of Protocol No. 7 had not been counterbalanced in the domestic proceedings such as to preserve the very essence of those rights.

There had accordingly been a violation of Article 1 of Protocol No. 7.

Just satisfaction (Article 41)

The Court held that Romania was to pay each applicant 10,000 euros (EUR) in respect of non-pecuniary damage and to pay the applicants EUR 1,365 jointly for costs and expenses.

Separate opinions

Judges Nußberger, Lemmens et Koskelo expressed a joint concurring opinion; Judge Pinto de Albuquerque expressed a concurring opinion, joined by Judge Elósegui; Judge Serghides expressed a concurring opinion; Judge Elósegui expressed a concurring opinion; Judges Yudkivska, Motoc and Paczolay expressed a joint dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

34. **ECHR, *Napotnik v. Romania*, no. 33139/13, Chamber judgment of 20 October 2020, (Article 1 Protocol No. 12, general prohibition of discrimination – No violation)**. The applicant, a Romanian diplomat, was posted to Ljubljana, where she was in charge of consular duties, mainly consisting in helping Romanian nationals who found themselves in emergency situations. She alleges that she had been recalled from her post because she was pregnant.

ECHR 299 (2020)
20.10.2020

Press Release issued by the Registar of the Court

In today's **Chamber** judgment1 in the case of **Napotnik v. Romania** (application no. 33139/13) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 1 of Protocol No. 12 (general prohibition of discrimination) to the European Convention on Human Rights.

The case concerned a diplomat's allegation that she had been recalled from her post in the Romanian Embassy in Ljubljana because she was pregnant.

The Court found that the applicant had been treated differently on grounds of sex, but that the domestic authorities had sufficiently justified such difference in treatment by the need to ensure the functioning of the embassy's consular section, and ultimately to protect the rights of others, namely Romanians in need of assistance abroad.

In any case, the applicant had not suffered any significant setbacks: she had neither been dismissed nor disciplined, and had in fact been promoted twice.

Principal facts

The applicant, Oana-Cornelia Napotnik, is a Romanian national who was born in 1972 and lives in Bucharest.

Ms Napotnik, a Romanian diplomat, was posted to Ljubljana in March 2007. She was in charge of consular duties: her work mainly consisted in helping Romanian nationals who found themselves in emergency situations, such as police detention, without identity papers, or hospitalised.

She married a Slovenian national in April 2007 and they had two children together, born in June 2008 and July 2009.

During her first pregnancy, she was absent from the office from November 2007 to February 2008, partly because her obstetrician had ordered bed rest and partly because she took annual leave. The consular services were suspended during that period and requests for assistance were redirected to neighbouring countries. A temporary replacement was found for her when she went on maternity leave in June 2008.

As soon as Ms Napotnik announced her second pregnancy in January 2009, the Ministry of Foreign Affairs ("the MFA") decided to terminate her posting in Ljubljana and recall her to Bucharest. It was considered that she would be unable to carry out her work because of absences for medical appointments and maternity leave.

She immediately requested parental leave and then leave to accompany her husband on a diplomatic posting abroad, resuming her work in Bucharest in September 2015.

In the meantime, she had lodged a civil action against the MFA in September 2009, alleging that the termination of her posting abroad was discriminatory because the only reason for it had been her

pregnancies. The courts dismissed her action, in a final judgment of November 2012, ruling that the decision to terminate her posting had not been a disciplinary measure and had been taken with a view to ensuring the functioning of the Ljubljana Embassy's consular section.

Complaints, procedure and composition of the Court

Relying on Article 1 of Protocol No. 12 (general prohibition of discrimination), Ms Napotnik alleged that she had been discriminated against at work, arguing that the sequence of events clearly indicated that her diplomatic posting had been terminated because she was pregnant.

The application was lodged with the European Court of Human Rights on 8 May 2013.

Judgment was given by a Chamber of seven judges, composed as follows:
Yonko **Grozev** (Bulgaria), *President*,
Iulia Antoanella **Motoc** (Romania),
Carlo **Ranzoni** (Liechtenstein),
Stéphanie **Mourou-Vikström** (Monaco),
Georges **Ravarani** (Luxembourg),
Jolien **Schukking** (the Netherlands),
Péter **Paczolay** (Hungary),

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

Decision of the Court
The Court held that the case-law standards it had developed on the protection provided by Article 14 (prohibition of discrimination) were applicable to cases brought under Article 1 of Protocol No. 12. Among other things, it noted that for the purposes of Article 14, a difference in treatment was discriminatory if it "has no objective and reasonable justification".

The Government had acknowledged that Ms Napotnik's pregnancy had played a role in the decision to terminate her diplomatic assignment. Only women could be treated differently on that ground, and the Court therefore considered that she had effectively been treated differently on grounds of sex.

That difference in treatment could only however amount to discrimination if it had not been justified. In the Court's view, the domestic authorities had provided relevant and sufficient reasons to justify the termination of her posting abroad.

Indeed, the decision had been necessary to ensure and maintain the functional capacity of the embassy's consular section, and ultimately to protect the rights of others, namely Romanians in need of assistance abroad. Bearing in mind the nature of the applicant's work and the urgency of the requests she had been called upon to deal with, her absence from the office could jeopardise consular services in the embassy. That had been clearly demonstrated when such services had had to be suspended and requests for assistance redirected to neighbouring countries for a certain
period during her first pregnancy.

In any case, the consequences of the decision had not caused the applicant any significant setbacks. She had not been dismissed, a decision which would have been expressly prohibited by the domestic equal opportunity laws and in contravention of Romania's international commitments. Nor, as expressly reiterated by the domestic courts, had the decision been a disciplinary measure. She had in fact continued to be promoted by her employer, first in December 2007 while she had been absent during her first pregnancy, and again in September 2016, about a year after her return to work.

Accordingly, the Court held that there had been no violation of Article 1 of Protocol No. 12.

The judgment is available only in English.

35. **ECHR, *M. A. v. Belgium*, no. 19656/18, Chamber judgment of 27 October 2020, (Article 3, prohibition of inhuman or degrading treatment – Violation; Article 13, right to an effective remedy, taken together with Article 3 – Violation)**. The applicant, a Sudanese national, was removed to Sudan by the Belgian authorities in spite of a court decision ordering the suspension of the measure.

ECHR 309 (2020)
27.10.2020

Press Release issued by the Registar of the Court

In today's **Chamber** judgment1 in the case of M.A. v. Belgium (application no. 19656/18) 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, and

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

The case concerned the applicant's removal to Sudan by the Belgian authorities in spite of a court decision ordering the suspension of the measure.

The Court found in particular that on account of procedural defects attributable to the Belgian authorities prior to the applicant's removal to Sudan, he had been prevented from pursuing the asylum application that he had lodged in Belgium and the Belgian authorities had not sufficiently assessed the real risks that he faced in Sudan.

In addition, by deporting the applicant in spite of the court order to suspend the measure, the authorities had rendered ineffective the applicant's successful appeal.

Principal facts

The applicant, M. A., is a Sudanese national who was born in 1993.

M A. entered Belgium unlawfully on an unknown date, having passed through Italy and with the intention of going on to the United Kingdom. He slept in Parc Maximilien in Brussels with about 100 other Sudanese migrants. While trying to reach the UK, he was stopped by the Belgian police on 18 August 2017. He was issued with an order to leave the country and to be held pending removal. On the same day, the Belgian authorities transferred him to a migrant detention centre near Brussels Airport.

Exercising his right to be heard before his removal, M.A. told an official at the centre that he had fled because of the situation in his country, where he was a wanted person. On 6 September 2017 he submitted an asylum application containing his statements. Shortly afterwards, social media and the Sudanese press relayed an announcement by the Belgian authorities that they were working with the Sudanese authorities to identify and repatriate Sudanese nationals who had unlawfully entered Belgium. M.A. withdrew his application a few days later, referring to these developments and to the fact that he did not have a lawyer. On 27 September 2017, in the detention centre, M.A. was present at a meeting with members of the Sudanese embassy and the Sudanese identification mission, following which the embassy issued him with a travel permit to return to his country.

After consulting a lawyer on 30 September 2017, M.A. filed a request for release with the Louvain Court of First Instance. On 12 October 2017, before the request could be examined, he was warned that he would have to board a flight to Khartoum (Sudan). Ruling on an application from M.A., the President of the Dutch-speaking Court of First Instance in Brussels held that the Belgian State could not deport the applicant before the courts had ruled on the custodial measure, subject to a coercive fine of 10,000

euros (EUR). The deportation, arranged for the following day, was cancelled, but M.A. was nevertheless taken to the airport. He alleged that he had been met there by a man in uniform who explained to him in Arabic that if he refused to board the plane, further attempts to remove him would be organised and that he had been threatened with sedatives if he refused. The applicant signed a statement authorising his departure and boarded the flight.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights, the applicant complained that there had been no prior examination prior to his deportation of the risks he was facing in Sudan. Under Article 13 (right to an effective remedy), he also alleged that he had not had any effective remedy by which to submit his complaints under Article 3 or a suspensive remedy in respect of his removal. He also argued that the Belgian authorities had breached his rights under Article 6 § 1 (right to a fair hearing / right of access to a court) by infringing the court order. Lastly, he complained that his detention had been incompatible with Article 5 (right to liberty and security).

The application was lodged with the European Court of Human Rights on 13 April 2018.

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

Georgios A. **Serghides** (Cyprus), *President*,
Paul **Lemmens** (Belgium),
Helen **Keller** (Switzerland),
Dmitry **Dedov** (Russia),
Darian **Pavli** (Albania),
Anja **Seibert-Fohr** (Germany),
Peeter **Roosma** (Estonia),

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

Decision of the Court

Article 3 (prohibition of inhuman or degrading treatment)

As to the information available on the situation in Sudan, it was well known that the general human rights situation there had been problematic at the time. In those circumstances, it could not readily beargued, as the Government had done, that the existence of a serious and established risk for the applicant was to be ruled out. The Court emphasised that a post-removal finding that the applicant did not run any risk in his country of origin, as made in the present case, could not serve to release the authorities retrospectively of their procedural obligations during the removal process.

As to whether the applicant had had a real and effective opportunity to make submissions about the personal risks that he faced if returned to Sudan, the Court noted that he had repeatedly expressed his fears. It reiterated that, while the burden of proof with regard to substantiating the individual risks lay on the person submitting an asylum application, the rules concerning the burden of proof should not render ineffective the rights protected under Article 3 of the Convention. It was also important to take into account the practical difficulties that an alien might encounter in pursuing an asylum application.

The Court attached weight to the applicant's allegation that he had not consulted a lawyer during the first few weeks of his detention, a fact which was not contradicted by the evidence. It also noted that during the interview organised on the applicant's arrival in the detention centre, no official interpreter had been present, even though he only understood Arabic. The Court found that these circumstances undoubtedly represented obstacles which could explain the applicant's inconsistent procedural attitude and the brevity of the information he had provided to the authorities and that he had not been provided with a realistic prospect of access to international protection. It appeared from the form which had been filled in on the basis of his statements that only general questions had been asked about the risks he

might face, without any reference or question concerning his region of origin, ethnic origin or reasons for having left Sudan. The Court was therefore of the opinion that the Government had not carried out a sufficient prior assessment of the risks faced by the applicant under Article 3.

Furthermore, the Court was of the view that the conditions in which the applicant had been identified raised concerns. The official who had interviewed him was not fluent in Arabic, the language in which the interviews had been conducted, and the applicant had not been informed beforehand that such an interview would take place.

In the light of those procedural defects, the Court found that there had been a violation of Article 3.

Article 13 (right to an effective remedy) taken together with Article 3

As to whether the applicant had been afforded effective access to the remedies available against arbitrary *refoulement*, the Court found that having regard to the reasoning which led it to find a violation of Article 3 in the present case, there was no justification for a separate examination of the same facts and complaints under Article 13.

Turning to the applicant's allegation that he had not been afforded a suspensive remedy in respect of his deportation, the Court found that in the present case it had been a combination of the remedy he had exercised – the application for release combined with the urgent application to the President of the Court of First Instance – which had provided the applicant with protection against arbitrary removal, at least temporarily. As the President's decision prohibiting his return had been enforceable and thus binding on the authorities, the applicant had been entitled to expect compliance with the order.

Having regard to the fact that the applicant could not be considered to have voluntarily left Belgium or even to have voluntarily signed a statement accepting his removal, and in view of the speed with which the authorities had acted the very next day, in spite of the order prohibiting the deportation, it had to be concluded that, by failing to suspend the measure in compliance with a court decision, the Belgian authorities had rendered ineffective the applicant's successful appeal.

There had thus been a violation of Article 13 taken together with Article 3 of the Convention.

Other Articles

The Court found that it did not need to examine the applicant's complaints under Article 6 § 1 of the Convention (right to a fair hearing / right of access to a court) and declared the complaints under Article 5 (right to liberty and security) inadmissible.

Just satisfaction (Article 41)

As the applicant had not made any claim by way of just satisfaction, the Court found that there was no call to make an award under this head.

The judgment is available only in French.

36. **ECHR, *Ayetullah Ay v. Turkey*, nos. 29084/07 and 1191/08, Chamber judgment of 27 October 2020, (Article 6-1 and 3, right to a fair trial – Violation)**. The applicant is a Turkish national who is currently serving a prison sentence. The case concerned criminal proceedings brought against him in connection with activities and attacks by the Kurdistan Workers' Party (PKK), an illegal organisation.

ECHR 306 (2020)
27.10.2020

Press Release issued by the Registar of the Court

The applicant, Ayetullah Ay, is a Turkish national who was born in 1980 and is currently serving a sentence in Kırıkkale.

The case concerned criminal proceedings brought against him in connection with activities and attacks by the Kurdistan Workers' Party (PKK), an illegal organisation.

Mr Ay was taken into police custody in October 2004. Two indictments were filed against him, in February 2005 and January 2006, for seeking to destroy the unity of the Turkish State and to remove part of the country from the State's control.

The first indictment accused him of being involved in three incidents between June and September 2004: first, the killing of two police officers at a police checkpoint; second, an armed attack against a battalion command post in Hani; and third, forcing a farmer, M.Ç., to give him his mobile telephone and identity card. The investigating authorities had found the mobile's SIM card inside a telephone operated bomb used by the PKK for an attempted attack during the Victory Day parade held in August 2004, while the mobile itself had allegedly been found in a search of the applicant's apartment in Istanbul following his being taken into custody.

The second indictment was brought in January 2006, following notes found on the applicant during a body search in prison, which led to a second search of his apartment, and the discovery of plastic explosives, bomb-making equipment and a handgun.

During the applicant's trial, in May 2006, the prosecutor referred to another mobile phone, purchased by the applicant using M.Ç.'s ID, and requested that the applicant also be convicted for the attempted bombing of the Victory Day Parade.

In April 2007 the trial court held that there was insufficient evidence in the case file to establish the applicant's guilt in the killing of the two police officers and the armed attack in Hani, but found him guilty as charged of the two incidents involving M.Ç.,'s stolen telephone and ID and the other mobile phone and SIM card used in the attempted Victory Day attack. Among other evidence, the courts relied on the notes allegedly discovered during the prison body search and the second search of his apartment.

The applicant was sentenced to aggravated life imprisonment without the possibility of parole.

The applicant denied the accusations against him throughout the proceedings. In particular, in an appeal of January 2008, he argued that his conviction had been based on unilateral allegations that had failed to take into account his requests, objections, evidence and witnesses. He further contended that the judgment was ambiguous as it did not indicate with sufficient clarity whether he had also been found guilty in respect of the attempted Victory Day attack. In February 2008, the Court of Cassation upheld the trial court's judgment.

Mr Ay brought several complaints under Article 6 (right to a fair trial) of the Convention, essentially related to the way the evidence against him had been taken and examined. In particular he complained about allegedly flawed collection of evidence, the resulting use of such unreliable and, according to him, manufactured evidence, and the domestic courts' failure to use procedural safeguards vis-à-vis

such evidence and to address his objections. He also alleged further unfairness because the grounds for the accusations against him had changed after the lodging of the indictments, without any opportunity for him to prepare an additional defence.

Violation of Article 6 §§ 1 and 3

Just satisfaction: EUR 5,500 (costs and expenses)

37. **ECHR, *B and C v. Switzerland*, nos. 43987/16 and 889/19, Chamber judgment of 17 November 2020 (Article 3, prohibition of torture – Violation)**. The applicant, a Gambian national and homosexual, risked being returned to Gambia following the rejection of his partner's application for family reunification. He alleged he was at risk of ill-treatment if returned.

ECHR 332 (2020)
17.11.2020

Press release issued by the Registar of the Court

The case B and C v. Switzerland (applications nos. 43987/16 and 889/19) concerned a homosexual couple, one of whom risked being returned to the Gambia following the rejection of his partner's application for family reunification. He alleged he was at risk of ill-treatment if returned.

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 inhuman or degrading treatment) of the European Convention on Human Rights if the first applicant were deported to the Gambia on the basis of the domestic decisions in his case.

The Court considered that criminalisation of homosexual acts was not sufficient to render return contrary to the Convention. The Court found, however, that the Swiss authorities had failed to adequately assess the risk of ill-treatment for the first applicant as a homosexual person in the Gambia and the availability of State protection against ill-treatment from non-State actors. Several independent authorities noted that the Gambian authorities were unwilling to provide protection for LGBTI people.

The Court furthermore considered that the indication made to the Government under Rule 39 of the Rules of Court must remain in force until the present judgment became final.

Principal facts

The applicants, Mr B and Mr C, are a Gambian and a Swiss national who were born in 1974 and 1948 respectively and lived in St Gall (Switzerland) together until the second applicant's death on 15 December 2019.

The first applicant had been in Switzerland since 2008. His application for asylum was rejected, as the authorities found his claims of previous ill-treatment not credible.

In 2014 the applicants registered their partnership. The second applicant lodged a request for family reunification in respect of the first applicant. The application was rejected. On appeal, the Office for Security and Justice of the Canton of St Gall ("the OSJ") denied Mr B the right to stay in Switzerland during the family-reunification proceedings. That decision was ultimately upheld by the Federal Supreme Court, which also noted his criminal record in the Canton of Lucerne and his time spent in prison. Mr B remained in Switzerland for the duration of the family-reunification proceedings, following the indication of an interim measure by the European Court.

Subsequently, the OSJ decision was upheld regarding family reunification. The Federal Supreme Court stated that the first applicant had a family network he could rely on in the Gambia, where the situation for homosexuals had improved. It did not believe that the first applicant's sexual orientation would come to the attention of the Gambian authorities or population. It furthermore noted that he was not well-integrated in Switzerland, and referred to his criminal record. It held that there was a "major public interest" in the applicant's leaving the country and that the interference with his rights was justified.

Complaints, procedure and composition of the Court

Relying on Articles 3 (prohibition of inhuman or degrading treatment) the first applicant complained that his return to the Gambia would expose him to the risk of ill-treatment. Relying on Article 8 (right to respect for private and family life) the first and second applicants complained that deportation would interfere with their family life.

The application was lodged with the European Court of Human Rights on 31 December 2018.

Judgment was given by a Chamber of seven judges, composed as follows:
Paul **Lemmens** (Belgium), President,
Helen **Keller** (Switzerland),
Dmitry **Dedov** (Russia),
Georges **Ravarani** (Luxembourg),
Darian **Pavli** (Albania),
Anja **Seibert-Fohr** (Germany),
Peeter **Roosma** (Estonia),

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

Decision of the Court

The Court joined the applications. It ruled that there were no special circumstances requiring the examination of the second applicant's application following his death.

Article 3

The first applicant submitted that he had left the Gambia because of the active persecution of homosexuality, which was central to his identity. Homosexual acts remained illegal.

The Court reiterated that legislation prohibiting homosexual acts did not render removal to that county contrary to the Convention. It noted that it was not disputed that he was a homosexual, but agreed with the domestic courts that his claims of past ill-treatment were not credible.

It noted that the first applicant was still in Switzerland, and so the present-day situation in the Gambia had to be examined. It considered that a person's sexual orientation formed a fundamental part of his or her identity and that no one should be obliged to conceal his or her sexual orientation in order to avoid persecution. The first applicant's sexual orientation could be discovered if he were removed to the Gambia. The domestic authorities had held the contrary and furthermore had not assessed whether the Gambian authorities would be able and willing to provide the necessary protection to the first applicant against ill-treatment caused by his sexual orientation by non-State actors. The United Kingdom Home Office and the third-party intervenors, among others, stated that the Gambian authorities were currently unwilling to provide protection for LGBTI people in that State.

The court concluded that the Swiss courts had failed to sufficiently assess the risks of and State protection against ill-treatment from non-State actors, leading to a violation of the Convention.

Article 8

The applicants claimed that the first applicant's expulsion would disrupt their protected right to family life and that hiding his homosexuality would infringe his right to private life.

The first applicant acknowledged that the second applicant's death had changed those circumstances, but he nevertheless asserted that he wanted to continue to live in and visit the environment that he had shared with his former partner.

The Court considered that given, in particular, that the question of the physical separation of the two applicants was no longer pertinent, there was no need to give a separate ruling under this Article.

Just satisfaction (Article 41)

The Court held that Switzerland was to pay the applicant 14,500 euros (EUR) in respect of costs and expenses.

The judgment is available only in English.

38. **ECHR, *Unuane v. the United Kingdom*, no. 80343/17, Chamber judgment of 24 November 2020 (Article 8, right to respect for private and family life – Violation)**. The applicant, a Nigerian national, was deported to Nigeria following a criminal conviction, forcing him to leave his partner and three children in the United Kingdom.

ECHR 339 (2020)
24.11.2020

Press Release issued by the Registar of the Court

The applicant, Charles Unuane, is a Nigerian national who was born in 1963.

The case concerned the applicant's deportation to Nigeria, following a criminal conviction, forcing him to leave his partner and three children in the United Kingdom.

The applicant came to the UK as a visitor in 1998 and was granted a right of residence the following year. In December 2000, the applicant's Nigerian partner entered the UK, and their three children were born thereafter.

In 2009 he and his partner were convicted of offences relating to the falsification of some 30 applications for leave to remain in the UK. He was ultimately sentenced to a period of five years and six months' imprisonment, while his partner was sentenced to 18 months' imprisonment.

In 2014 the Secretary of State for the Home Department issued a deportation order against the applicant, his partner, and two of their children, who at the time were not British citizens, as dependent family members of the applicant's partner. The Secretary of State considered that the applicant and his partner were foreign criminals and their deportation was for the public good.

The applicant appealed against the Secretary of State's decision on the grounds that he had an established family life and private life in the UK and his deportation to Nigeria would be in breach of the European Convention on Human Rights. The applicant's partner and the two children also appealed.

Ultimately, in 2016, the domestic courts allowed the appeals of the applicant's partner and children, concluding that separating them would be "unduly harsh" on the children. The courts further acknowledged an acute need for parental support in the case of the eldest of the children who had a heart defect and was to have forthcoming surgery in the UK which was not available in Nigeria.

The applicant's appeal was, on the other hand, dismissed because he could not identify, as required by the Immigration Rules, "very compelling circumstances" against his deportation, over and above the parental relationship with his children.

The applicant was deported in February 2018.

Relying in particular on Article 8 (right to respect for private and family life) of the Convention, the applicant complained that his deportation to Nigeria had disproportionately interfered with his family and private life.

Violation of Article 8

Just satisfaction: EUR 5,000 (non-pecuniary damage)

39. **ECHR, *Makhmudova v. Russia*, no. 61984/17, Chamber judgment of 1 December 2020 (Article 8, right to respect for private and family life – Violation)**. The applicant, an Estonian national, attempted several times to have an order for her children to be returned to her enforced in the Russian Federation.

ECHR 344 (2020)
01.12.2020

Presse Release issued by the Registar of the Court

The applicant, Aminat Makhmudova, is an Estonian national who was born in 1987 and lives in Haabneeme (Estonia).

The case concerned the applicant's attempts to have an order for her children to be returned to her enforced in the Russian Federation.

Between 2010 and 2014 the applicant had two children with her then husband, A., a Russian national. The children hold Russian and Estonian nationality and divided their time between both States. In 2016 A. took the children without her consent from Estonia to Dagestan in Russia to live.

On 9 February 2016 the applicant commenced proceedings under the 1980 Hague Convention on the Civil Aspects of International Child Abduction in Estonia for the children's return. On 5 July 2016 the applicant divorced A. and was awarded custody of the children.

On 20 January 2017 the Russian courts ordered the children's return and the surrender of their passports in a final decision. The enforcement procedure commenced in March 2017 under the aegis of bailiffs in Dagestan. A. informed the applicant that she had to come to Dagestan for the handover to take place. The handover did not take place. In May 2017 enforcement was attempted again. A. avoided the handover, despite the applicant's having travelled to Dagestan.

The applicant lodged a request for the Federal Bailiffs Service to ensure enforcement by an external team. She also challenged the decisions of the bailiffs in Dagestan, alleging bias. In September 2017 enforcement was transferred to the Federal Bailiffs Service. In November 2017 a third attempt was made to enforce the judgment, but this was abandoned after two hours spent in the children's company.

In 2019 the applicant commenced proceedings to have the children transferred to her care regardless of their wishes, especially in the light of A.'s non-cooperation. That application was dismissed. That dismissal was upheld on appeal.

Relying on Article 8 (right to respect for private and family life) of the European Convention, the applicant complained that the failure of the Russian authorities to enforce the return of her children had infringed her rights.

Violation of Article 8

Just satisfaction: 12,500 euros (EUR) (non-pecuniary damage) and EUR 4,000 (costs and expenses).

40. **ECHR, *M.M v. Switzerland*, no. 59006/18, Chamber judgment of 8 December 2020 (Article 8, right to respect for private and family life – No violation)**. The applicant, a Spanish national who was born in Switzerland, was expulsed from Switzerland for a period of five years following the imposition of a 12-month suspended prison sentence for having committed acts of a sexual nature against a child and for the consumption of narcotics.

ECHR 362 (2020)
08.12.2020

Press Release issued by the Registar of the Court

In today's **Chamber** judgment1 in the case of **M.M. v. Switzerland** (application no. 59006/18) the European Court of Human Rights held, unanimously, that there had been:

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

The case concerned the applicant's expulsion from Switzerland for a period of five years following the imposition of a 12-month suspended prison sentence for having committed acts of a sexual nature against a child and consumed narcotics.

The Court recognised that the cantonal courts and the Federal Supreme Court had carried out a serious assessment of the applicant's personal situation and the various interests at stake. These authorities had thus had very solid arguments in favour of the applicant's expulsion from Switzerland for a limited duration. In consequence, the Court concluded that the interference had been proportionate to the legitimate aim pursued and had been necessary in a democratic society, within the meaning of the Convention.

Principal facts

The applicant, M.M., is a Spanish national who was born in 1980 in Switzerland. Until his expulsion from Switzerland, he was in possession of a settlement permit. He currently lives in Spain.

On 10 January 2018 the X Police Court convicted the applicant of committing acts of a sexual nature on two occasions against a minor and of having consumed narcotics. The court imposed a fine and a 12-month prison sentence, suspended for three years, conditional on his receiving treatment in a prevention centre and taking part in an occupational activity. The police court did not order the applicant's expulsion or his exclusion from Switzerland.

By a judgment of 12 June 2018, the criminal division of the Y Cantonal Court upheld an appeal by the prosecution and amended the first-instance judgment, ordering that the applicant be expelled from Switzerland for a period of five years.

The Federal Supreme Court dismissed an appeal by the applicant against the decision ordering his expulsion.

By a letter of 14 November 2018, the immigration authority of the Canton of Y set a time-limit for the applicant to leave Switzerland; it expired on 31 December 2018.

In mid-July 2019, on termination of the supervisory measures (social assistance, professional insertion, probation assistance and therapy) that had been imposed on him, the applicant left Switzerland for Spain.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), the applicant alleged that the expulsion and exclusion orders imposed following his criminal conviction had interfered with his private and family life.

The application was lodged with the European Court of Human Rights on 12 December 2018.

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

Paul **Lemmens** (Belgium), *President*,
Georgios A. **Serghides** (Cyprus),
Helen **Keller** (Switzerland),
Dmitry **Dedov** (Russia),
Darian **Pavli** (Albania),
Anja **Seibert-Fohr** (Germany),
Peeter **Roosma** (Estonia),

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

Decision of the Court

Article 8

The Court reiterated that if an immigrant had spent his entire life in the host country very serious reasons were required to justify expulsion. The assessment of the relevant facts had to have been "acceptable".

The Court noted at the outset that, with regard to the expulsion of foreign criminals, Article 66a of the Swiss Criminal Code did not impose automatic expulsion on foreign criminals who had been convicted of offences without judicial review of the proportionality of the measure. It also noted that the courts had to take account, in weighing up the interests involved, of the "particular situation of a foreign national who was born or grew up in Switzerland". In the present case, the Court noted that the applicant had spent all of his life in Switzerland. It had to ascertain whether the domestic courts had put forward very serious reasons to justify his expulsion.

The Court noted that the Federal Supreme Court had taken into consideration the fact that the offences in question were serious ones, that the applicant had committed a sexual assault against a minor, and that he had thus very seriously breached security and public order in Switzerland. The Federal Supreme Court had also found that the applicant had shown a certain contempt for the Swiss legal order, noting that he had been convicted on three previous occasions. The federal judges had also assessed the risk of reoffending, having regard to the applicant's interest in prepubescent girls, as was clear, in particular, from the numerous photographs of girls aged between ten and 12 found on his telephone, and the searches of a paedophile nature made on it.

The Court further noted that the Federal Supreme Court had found that the applicant had conducted himself rather well since committing the offence. A report drawn up by the Post-Sentencing Board indicated that the applicant attended the scheduled interviews, was taking an interest in his occupational activity, attended the prevention centre regularly and seemed to be benefitting from a supervisory structure that was enabling him to develop in a positive manner, although further efforts were still required.

While having regard to these elements, the Court noted that the Federal Supreme Court had nonetheless found that the prospects for the applicant's reintegration in society seemed rather bleak. In this connection, the Court noted the federal judges' finding that the occupational activity or the treatment followed at the prevention centre could not be regarded as indicating any desire to integrate in Switzerland.

The Court further noted that the applicant had never raised before the domestic courts any medical issues which could have prevented his expulsion from Switzerland.

To sum up, the Court recognised that the cantonal courts and the Federal Supreme Court had carried out a serious assessment of the applicant's personal situation and the various interests at stake. These authorities had thus had very solid arguments to justify the applicant's expulsion from Switzerland for a limited duration. The Court accordingly concluded that the interference had been proportionate to the legitimate aim pursued and had been necessary in a democratic society within the meaning of the Convention.

It followed that there had been no violation of Article 8 of the Convention.

The judgment is available only in French.

41. **ECHR, *Shiksaitov v. Slovakia*, no. 56751/16, Chamber judgment of 10 December 2020 (Article 5-1, right to liberty and security – Violation; Article 5-5, enforceable right to compensation – Violation)**. The applicant, a Russian national with refugee status in Sweden, was arrested and detained in Slovakia with a view to his extradition to Russia, following an international arrest warrant issued by a court in the Chechen Republic in Russia.

ECHR 365 (2020)
10.12.2020

Press Release issued by the Registar of the Court

In today's **Chamber** judgment1 in the case of Shiksaitov v. Slovakia (application no. 56751/16) the European Court of Human Rights held, unanimously, that there had been:

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

The case concerned the alleged unlawfulness of the applicant's arrest and detention with a view to his extradition to Russia, despite his having refugee status in Sweden.

The Court found in particular that the applicant's arrest and the individual detention orders had complied with Slovak law and the Convention. However, the overall length that the applicant had been held had been overlong and the grounds for his detention had ceased to be valid, breaching his rights. The Court also found that the applicant had not had an enforceable right to compensation for the above breach.

Principal facts

The applicant, Hamzat Shiksaitov, is a Russian national who was born in 1982 and lives in Alvesta (Sweden).

On 12 July 2007 an international arrest warrant for the applicant was issued by a court in the Chechen Republic in Russia. He was alleged to have committed acts of terrorism. In 2011 the applicant fled from Ukraine to Sweden, fearing extradition from the former. He was granted asylum in Sweden. In 2015 the applicant was arrested in Slovakia en route to Ukraine as he was on Interpol's international watch list.

The Košice Regional Court ordered the applicant's preliminary detention until the circumstances surrounding his status in Sweden could be determined. That decision was upheld following an interlocutory appeal and later by the Constitutional Court, which also stated that his rights had not been infringed.

On 23 February 2015 the applicant was placed in detention pending extradition to Russia. The applicant lodged an interlocutory appeal, arguing that Slovakia was bound by the Swedish courts' decision on his refugee status. That appeal was dismissed by the Supreme Court, a decision later confirmed by the Constitutional Court.

On 8 September 2016 the applicant's extradition to Russia was ordered. The Regional Court noted, in particular, that refugees did not automatically enjoy immunity from prosecution (because the applicant was wanted for a serious non-political crime in this case) and that it was satisfied with the general guarantees given by the Russian authorities.

The Constitutional Court then dismissed a constitutional complaint by the applicant. They remitted the case to the lower-level to establish whether the applicant should have been excluded from being accorded the status of refugee.

The Supreme Court later overturned the decision of 8 September 2016 and ordered the applicant's release on 2 November 2016. The border police expelled the applicant to Sweden.

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security) and **5 § 5** (enforceable right to compensation) of the Convention, the applicant complained that his arrest and detention in Slovakia had violated his right to liberty.

The application was lodged with the European Court of Human Rights on 22 September 2016.

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

Ksenija **Turković** (Croatia), *President*,
Krzysztof **Wojtyczek** (Poland),
Linos-Alexandre **Sicilianos** (Greece),
Alena **Poláčková** (Slovakia),
Péter **Paczolay** (Hungary),
Erik **Wennerström** (Sweden),
Lorraine **Schembri Orland** (Malta),

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

Decision of the Court

The applicant argued that his arrest had not been in compliance with Slovak law, in particular the Police Corps Act and the Code of Criminal Procedure. He argued that as Russia had not requested his detention, and as he had been a refugee in Sweden, his preliminary detention and detention pending extradition should not have been ordered.

The Court reiterated that deprivation of liberty must be "lawful". However, compliance with national law is not sufficient; the decision must be taken in good faith, and for the grounds given, and detention must not be too long. In particular, detention related to extradition must be reasonably considered necessary.

The Court was satisfied that the applicant's preliminary arrest had been lawful, as the Slovak authorities could not have been aware of the applicant's status in Sweden.

Likewise, the Court considered that the applicant's preliminary detention had been lawful, despite the lack of a request from the Russian authorities, as in Slovakia preliminary detention only had to be ordered by a prosecutor.

Regarding the applicant's detention pending extradition, the Court agreed with the domestic courts that that detention had not been fundamentally proscribed, as the Swedish authorities' decisions had not been binding on Slovakia. Furthermore, it was acceptable for the Slovak authorities to have examined the applicant's case thoroughly, especially given that the Swedish authorities had not checked his status with Interpol. Overall, the applicant's detention had been justified by the need to keep him in Slovakia with a view to determining whether there had been any legal or factual impediments to the applicant's extradition.

Overall the applicant's detention had lasted one year, nine months and eighteen days. This is despite the fact that the authorities had had information concerning the applicant's status in Sweden and his prosecution in Russia from a very early stage and that nothing had prevented the courts from reaching a final decision on the admissibility of the applicant's extradition much earlier than they in fact had done.

In the light of the above, the Court concluded that the authorities had not acted with diligence, and the grounds for the applicant's detention had ceased to be valid. This had led to a violation of Article 5 § 1 of the Convention.

The Court also judged that the applicant had not had an enforceable right to compensation for his unlawful detention, in violation of Article 5 § 5.

Just satisfaction (Article 41)

The Court held that Slovakia was to pay the applicant EUR 1,200 in respect of non-pecuniary damage and EUR 8,000 in respect of costs and expenses.

The judgment is available only in English.