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Appendix IV

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

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This document contains press releases 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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ECHR 010 (2021)
14.01.2021

Press release issued by the Registrar of the Court

In its decision in the case of *Ukraine v. Russia (re Crimea)* (application nos. 20958/14 and 38334/18) the European Court of Human Rights has, by a majority, declared the application partly admissible. The decision will be followed by a judgment at a later date.

The case concerns Ukraine's allegations of a pattern ("administrative practice") of violations of the European Convention on Human Rights by the Russian Federation in Crimea.

Firstly, the Court identified the scope of the issue before it and held that what was to be decided was whether the alleged pattern of human-rights violations by Russia in Crimea during the relevant period, namely between 27 February 2014 and 26 August 2015, was admissible. The Court held that it was not called upon in the case to decide whether Crimea's admission, under Russian law, into Russia had been lawful from the standpoint of international law.

Before considering the allegations of an administrative practice, it had to consider whether Russia had "jurisdiction", within the meaning of Article 1 of the Convention, over Crimea as from 27 February 2014 and therefore whether it had competence to examine the application. It found that the facts complained of by the Ukrainian Government did fall within the "jurisdiction" of Russia on the basis of effective control that it exercised over Crimea as of that date. When coming to that decision it took into account in particular the size and strength of the increased Russian military presence in Crimea from January to March 2014, without the Ukrainian authorities' consent or any evidence to prove that there was a threat to Russian troops stationed there under the relevant Bilateral Agreements between them, valid at the time. It also found the Ukrainian Government's account coherent and consistent throughout the proceedings before it; they had provided detailed and specific information, backed up by sufficient evidence, to prove that the Russian troops had not been passive bystanders, but had been actively involved in the alleged events.

That conclusion is without prejudice to the question of Russia's responsibility under the Convention for the acts complained of, which belongs to the merits phase of the Court's procedure.

The Court went on to identify and apply the applicable evidential threshold and its approach to the standard and burden of proof and declared admissible, without prejudging the merits, all but a few of the Ukrainian Government's complaints of an administrative practice of human-rights violations by Russia.

Lastly, it decided to give notice to the Russian Government of the complaint, not raised until 2018, concerning the alleged transfer of Ukrainian "convicts" to the territory of Russia, and, given the overlap, in this respect, with another inter-State application, *Ukraine v. Russia* (no. 38334/18), decided to join the latter application to the present case and examine the admissibility and merits of that complaint and the latter application at the same time as the merits stage of the proceedings.

Aside from this case, there are now two other inter-State cases and over 7,000 individual applications pending before the Court concerning the events in Crimea, Eastern Ukraine and the Sea of Azov. For further information, see the Q & A on Inter-State Cases.

Principal facts

The Ukrainian Government maintains that Russia has from 27 February 2014 exercised effective control over the Autonomous Republic of Crimea (the ARC) and the City of Sevastopol, integral parts of Ukraine, owing to its military presence in Crimea and its support of both the local government and paramilitary forces. They allege that since that time Russia has exercised extraterritorial jurisdiction over a situation which has resulted in an administrative practice of human-rights violations.

In particular they allege that, on 27 February 2014, over 100 heavily armed men stormed the buildings of the Supreme Council and the Council of Ministers of the ARC. On the same day, Russia allegedly also dramatically increased its direct military presence in Crimea, without notifying the relevant Ukrainian authorities or receiving authorisation from them. By nightfall, the legitimate civilian authorities in Crimea had been removed by force and replaced with Russian agents. Russian troops and paramilitaries prevented the Ukrainian military forces from leaving their barracks and other Ukrainian units from being transferred from the mainland to the peninsula.

In the following days Russia deployed ever-increasing numbers of troops and prevented Ukraine from sending military reinforcement by establishing control over the entry and exit points into and from Crimea by land, sea and air and by sabotage operations. Up until 16 March Russia consolidated this control over Crimea by blocking all Ukrainian service personnel in their barracks, depriving them of communication with the outside world. This led to the transfer of power to the new local authorities, which then declared the independence of Crimea after a "referendum" held on 16 March 2014. On 18 March 2014 Russia, the "Republic of Crimea" and the City of Sevastopol signed the "Treaty of Unification".

The Russian Government argue, on the other hand, that they only exercised jurisdiction in Crimea and Sevastopol after 18 March 2014, when those territories became part of Russia under the "Treaty of Unification", and not before. The "referendum" and the "reunification" were the result of a series of protests in Ukraine, known as "Euromaidan" or "Maidan", which had taken place between November 2013 and February 2014, leading to the ousting of the President of Ukraine and a series of political and constitutional changes. The Russian Government maintain that they were not responsible for those events or for any resultant disorder.

They argue, moreover, that Russian armed forces had always been present in Crimea, and their presence was provided for under bilateral agreements between Russia and Ukraine. They submit that, between 1 March and 17 March 2014, those armed forces stood ready to "assist the Crimean people in resisting attack by the Ukrainian armed forces", to "ensure that the Crimean population could make a democratic choice safely without fear of reprisal from radicals", to "ensure the normal expression of the will of those living in Crimea" and/or "to ensure the protection of Russian military forces and objects". This did not mean, however, that Russia had effective control over Crimea in that period.

Complaints, procedure and composition of the Court

The Ukrainian Government complain that Russia was responsible for an administrative practice of human-rights violations. As illustrations of the alleged practice they essentially rely on individual incidents, and on the effects of general measures adopted in respect of Crimea, during the period from 27 February 2014, the date from when they allege that Russia exercised extraterritorial jurisdiction over Crimea, until 26 August 2015, the date of introduction of their second application. They further state that the purpose of their application is not to seek individual findings of violations and just satisfaction but

rather to establish that there was a pattern of violations, to put an end to them and to prevent their recurrence.

The Ukrainian Government relies on several Articles of the Convention, in particular Article 2 (right to life), Article 3 (prohibition of inhuman treatment and torture), Article 5 (right to liberty and security), Article 6 (right to a fair trial), Article 8 (right to respect for private life), Article 9 (freedom of religion), Article 10 (freedom of expression) and Article 11 (freedom of assembly). They also complain under Article 14 (prohibition of discrimination), Article 1 of Protocol No. 1 (protection of property), Article 2 of Protocol No. 1 (right to education) and Article 2 of Protocol No. 4 (freedom of movement).

The case originates in two applications (nos. 20958/14 and 42410/15) against Russia lodged with the Court by Ukraine on 13 March 2014 and 26 August 2015, respectively. Both applications concern events in Crimea and Eastern Ukraine. On 11 June 2018 the two applications were joined and given the new name *Ukraine v. Russia (*re *Crimea)* under application no. 20958/14. Complaints relating to events in Eastern Ukraine were placed under application no. 8019/16.

The Court applied Rule 39 of the Rules of Court (interim measures) to the case. It called upon Russia and Ukraine to refrain from measures, in particular military action, which might bring about violations of the civilian population's Convention rights, notably under Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment).

On 7 May 2018 the Chamber dealing with these inter-State cases relinquished jurisdiction in favour of the Grand Chamber.

The McGill Centre for Human Rights and Legal Pluralism at McGill University, Canada, was granted leave to intervene in the written proceedings as a third party.

A Grand Chamber hearing was held in Strasbourg on 11 September 2019.

The decision 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),

Síofra **O'Leary** (Ireland),

Vincent A. **De Gaetano** (Malta),

Ganna **Yudkivska** (Ukraine),

Aleš **Pejchal** (the Czech Republic),

Krzysztof **Wojtyczek** (Poland),

Stéphanie **Mourou-Vikström** (Monaco),

Pere **Pastor Vilanova** (Andorra),

Tim **Eicke** (the United Kingdom),

Latif **Hüseynov** (Azerbaijan),

Jovan **Ilievski** (North Macedonia),

Gilberto **Felici** (San Marino),

Bakhtiyar **Tuzmukhamedov** (the Russian Federation), ad hoc *Judge*,

and also Søren **Prebensen**, *Deputy Grand Chamber Registrar*.

Decision of the Court

Scope of the case

Firstly, the Court pointed out that what was to be decided in the case was whether the alleged pattern of human-rights violations by Russia in Crimea between 27 February 2014 and 26 August 2015 was admissible. The events relating to the Maidan protests in Kyiv and the issue of the legality, as a matter of international law, of Crimea's purported integration into the Russian Federation following the "referendum" held in Crimea in March 2014 were not relevant for the Court's examination of the case. Nor indeed had those matters actually been referred to the Court and they were therefore outside the scope of the case.

Given that definition of the scope of the case, the Court decided to lift the interim measure applied in March 2014.

Jurisdiction

From 27 February to 18 March 2014

The Court found that there was sufficient evidence for it to conclude that Russia had exercised effective control over Crimea in the period in dispute between the parties, namely from 27 February to 18 March 2014.

In particular, although Russian troops on the peninsula had not exceeded the limit of 25,000 set out in the relevant bilateral agreements, the figures demonstrated that they had nearly doubled within a short space of time, increasing from some 10,000 in late January 2014 to around 20,000 in mid-March 2014. In the Court's view, the increased military presence of Russia in Crimea during that period was, at the very least, significant.

It also noted that the Russian Government had not contested the assertion that the Russian military forces stationed in Crimea had been superior to the Ukrainian troops in technical, tactical, military and qualitative terms.

The Russian Government had not justified such an increase in the Russian military presence by any concrete evidence showing that there had been a threat to the troops stationed in Crimea at the time.

Furthermore, the increase had taken place without the consent or cooperation of the Ukrainian authorities, as evidenced by diplomatic communiqués objecting to the deployments and movements in question.

Moreover, contrary to the Russian Government's arguments that their soldiers deployed in Crimea at the time had been passive bystanders, the Ukrainian Government had provided highly detailed, chronological and specific information, as well as sufficient evidence, showing active participation of Russian service personnel in the immobilisation of Ukrainian forces.

The Ukrainian Government's account had remained coherent throughout the proceedings before the Court, with consistent information regarding the manner, place and time of the alleged events leading to the transfer of power to the new local authorities, which had then organised the "referendum", declared the independence of Crimea and taken active steps towards its integration into Russia.

Lastly, the Court had particular regard to two uncontested statements by President Putin. The first had been made in a meeting with heads of security agencies during the night of 22 to 23 February 2014, saying that he had taken the decision to "start working on the return of Crimea to the Russian Federation", while in the second, during a television interview given on 17 April 2014, he had expressly acknowledged that Russia had "disarm[ed] military units of the Ukrainian army and law-enforcement agencies" and that "Russian servicemen [had] back[ed] the Crimean self-defence forces".

From 18 March 2014

The Court noted that it was common ground between the parties that Russia had exercised jurisdiction over Crimea after 18 March 2014. However, their positions differed as to the legal basis of that jurisdiction. Unlike the Ukrainian Government, who asserted that that jurisdiction was based on "effective control", the Russian Government considered that it "would be inappropriate" to determine that issue because it "would take the Court into questions concerning sovereignty between States that [were] outside its jurisdiction".

For the purposes of this admissibility decision, the Court decided to proceed on the basis of the assumption that the jurisdiction of Russia over Crimea was in the form or nature of "effective control over an area" – rather than of territorial jurisdiction. The Court reiterated in this connection that it was not called upon to decide whether Crimea's admission, as a matter of Russian law, into Russia had been lawful from the standpoint of international law.

Conclusion

The Court considered that the alleged victims of the administrative practice complained of by the Ukrainian Government fell within the "jurisdiction" of Russia and that the Court therefore had competence to examine the application. That conclusion was without prejudice to the question of whether Russia was responsible under the Convention for the acts which formed the basis of the Ukrainian Government's complaints, which belonged to the merits phase of the Court's procedure.

Admissibility

Firstly, the Court found that the rule of non-exhaustion of domestic remedies was not applicable in the circumstances of the present case, which involved allegations of an administrative practice. It therefore dismissed the Russian Government's objection on that point.

The Court then went on to assess the evidence available to it in order to determine whether or not the Ukrainian Government's allegations could be said to meet the evidentiary threshold (prima facie) required at the admissibility stage of the proceedings for allegations of an administrative practice.

The Court considered that, on the whole, there was sufficient prima facie evidence regarding both the "repetition of acts" and "official tolerance", component elements of an alleged administrative practice of:

- enforced disappearances and the lack of an effective investigation into such a practice under Article 2;
- ill-treatment and unlawful detention under Articles 3 and 5;
- extending application of Russian law to Crimea with the result that as from 27 February 2014 the courts in Crimea could not be considered to have been "established by law" within the meaning of Article 6;

- automatic imposition of Russian citizenship and raids of private dwellings under Article 8;
- harassment and intimidation of religious leaders not conforming to the Russian Orthodox faith, arbitrary raids of places of worship and confiscation of religious property under Article 9;
- suppression of non-Russian media under Article 10;
- prohibiting public gatherings and manifestations of support, as well as intimidation and arbitrary detention of organisers of demonstrations under Article 11;
- expropriation without compensation of property from civilians and private enterprises under Article 1 of Protocol No. 1;
- suppression of the Ukrainian language in schools and harassment of Ukrainian-speaking children at school under Article 2 of Protocol No. 1;
- restricting freedom of movement between Crimea and mainland Ukraine, resulting from the *de facto* transformation (by Russia) of the administrative delimitation into a border (between Russia and Ukraine) under Article 2 of Protocol No. 4;
- and, targeting Crimean Tatars under Article 14, taken in conjunction with Articles 8, 9, 10 and 11 of the Convention and with Article 2 of Protocol No. 4 to the Convention.

The Court found in particular that the above allegations were consistent with the conclusions set out in a number of reports by intergovernmental and non-governmental organisations, notably a report of 2017 by the Office of the United Nations High Commissioner for Human Rights.

Moreover, as concerned certain allegations, the regulatory nature and the content of the measures complained of provided in themselves sufficient prima facie evidence.

However, as to the allegations of an administrative practice of killing and shooting, the Court found that the incidents referred to had not amounted to a pattern of violations. Concerning the short-term detention of foreign journalists and the seizure of their equipment in the first half of March 2014, it found that the limited number of allegations did not point to an administrative practice either. Furthermore, the Ukrainian Government had submitted no evidence as concerned the alleged practice of nationalising the property of Ukrainian soldiers. Accordingly, the required standard of proof had not been met and those complaints were rejected as inadmissible.

Lastly, the Court decided to give notice to the Russian Government of the complaint regarding "transfer of convicts" from Crimea to correctional institutions on the territory of Russia. That issue had been raised for the first time in the Ukrainian Government's submissions before the Grand Chamber in December 2018 and the Court could thus not, on the basis of the case file, determine the admissibility of the complaint at the current stage.

Moreover, it considered it appropriate to examine both the admissibility and the merits of the "transfer of convicts" complaint and another inter-State application, *Ukraine v. Russia* (no. 38334/18) in which that complaint was also raised, at the same time as the merits stage of these proceedings. In consequence, it joined application no. 38334/18 to the present case.

The decision is available in English and French.

2. **ECHR, *Munir Johana v. Denmark*, no. 56803/18, and *Khan v. Denmark*, no. 26957/19 Chamber judgments of 12 January 2021 (Article 8, right to respect for private live – no violations):** The case concerned the applicants' expulsions from Denmark being ordered following repeated convictions for various criminal offences, despite their having lived there since a young age.

ECHR 009 (2021)
12.01.2021

Press release issued by the Registrar of the Court

In today's **Chamber** judgments in the cases of Munir Johana v. Denmark (application no. 56803/18) and Khan v. Denmark (no. 26957/19) the European Court of Human Rights held, unanimously and by six votes to one respectively, that there had been:

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

The case concerned the applicants' expulsions from Denmark being ordered following repeated convictions for various criminal offences, despite their having lived there since a young age.

The Court found in particular that the domestic authorities had taken into account the applicant's particular circumstances, in particular the specific crimes and their prior criminal records, and that their ties to Denmark had been properly examined. It considered that the sentences had been proportionate.

Principal facts

The applicant in the first case, Marsel Munir Johana, is an Iraqi national who was born in 1994 and lives in Silkeborg (Denmark). The applicant in the second case, Shuaib Khan, is a Pakistani national who was born in 1986. The applicant in the second case was born in Denmark, while the applicant in the first case came to live there at the age of four.

Both applicants had had a criminal record for many years before the events in question. Convictions were for, among other things, violent, drugs, and driving offences, and offences while in prison.

In 2016 the applicant in the first case was charged in connection with violent offences. The prosecution asked for the applicant to be expelled from Denmark (he had two previous conditional expulsion orders against him). The Danish Immigration Service agreed that that would be the correct course of action. He was convicted. His expulsion and a six-year re-entry ban were ordered. That decision was upheld on appeal by the Western Denmark High Court and the Supreme Court and finally sentenced to six months' imprisonment. The Supreme Court referred to, in particular, the applicant's repeated offences as an adult and the likelihood he would reoffend, considering that those factors were weightier than the applicant's strong ties to Denmark. Following the first-instance expulsion decision he was convicted of another unrelated drugs offence.

On 25 August 2017 the applicant in the second case was charged with threatening a police officer and not having the right residence permit, alongside other offences. He was given a prison sentence and a fine, and a two-year suspended expulsion order. The City Court referred to his leadership of a criminal gang, his numerous convictions for other offences, his lack of a dependent family, and the need to prevent disorder. In 2018 that decision was upheld by the High Court of Eastern Denmark and the Supreme Court, with a final sentence of three months' imprisonment and a 12,200 Danish kroner fine. His expulsion and a six-year re-entry ban were also ordered. It appears that the applicant was released from pre-trial detention in October 2017 and left Denmark soon afterwards.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private life) of the Convention, the applicants complained separately that the decisions to expel them from Denmark had breached their rights.

The applications were lodged with the European Court of Human Rights on 28 November 2018 and 15 May 2019.

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

Marko **Bošnjak** (Slovenia), *President*,
Jon Fridrik **Kjølbro** (Denmark),
Aleš **Pejchal** (the Czech Republic),
Egidijus **Kūris** (Lithuania),
Branko **Lubarda** (Serbia),
Pauliine **Koskelo** (Finland),
Saadet **Yüksel** (Turkey),

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

Decision of the Court

Both applicants submitted that their crimes had not been particularly serious and that the domestic authorities had failed to take the relevant circumstances into account when balancing their rights against the public interest. They argued that their expulsions and re-entry bars had been too severe in the light of the custodial sentences given.

The Court reiterated that a State is entitled to control the entry and residence of foreign nationals there. However, expulsion decisions had to be in accordance with the law and proportionate. As none of the parties disputed that there had been a lawful interference in both cases, the question thus was whether they had been proportionate.

The Court noted that the domestic courts had examined the "nature and seriousness" of the offences thoroughly, in particular their long criminal records and the likelihood they might reoffend. The Court noted, in particular, that the applicant in the first case had been convicted of a drugs offence even after the first-instance ruling in his case. The Court stated that the domestic authorities had taken the applicants' social, cultural and family ties with Denmark and their destination countries into account. Furthermore, the applicants would be free to resume their lives in Denmark after a limited period of time. Lastly, as neither applicant had dependent family members, there had been no interference with their family rights. The Court found that the interferences had been proportionate and thus there had been no violation of their rights.

The judgments are available only in English.

3. **ECHR, *E.K. v. Greece*, no. 73700/13, Chamber judgment of 14 January 2021 (Article 3, prohibition of torture and inhuman or degrading treatment – no violation; Article 5 § 1, right to liberty and security – no violation; Article 5 § 4, right to a speedy decision on the lawfulness of detention – violation)**: The applicant, a Turkish national, who had entered the Greek territory illegally and was arrested by officers and sentenced to a two-year suspended prison sentence. In his application, he contested the conditions of his detention with partial success.

ECHR 014 (2021)
14.01.2021

Press release issued by the Registrar of the Court

In today's Chamber judgment in the case of *E.K. v. Greece* (application no. 73700/13) the European Court of Human Rights held, unanimously, that there had been:

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

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

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

The case concerned the applicant's conditions of detention in the Soufli and Feres border posts, the Attika Sub-Directorate for Aliens (Petrou Ralli) and the Amygdaleza Detention Centre, the lawfulness of his detention, and whether the review of the lawfulness of that detention had been effective.

The Court found in particular that the applicant's conditions of detention had not been contrary to the Convention in any of the establishments in which the applicant had been detained, with reference, in particular, to several reports by international organisations having visited them.

The Court considered that the applicant's detention had not been arbitrary and had been "lawful".

The Court noted, however that the applicant had not benefited from a sufficiently thorough assessment of the lawfulness of his detention.

Principal facts

The applicant, Mr E.K., is a Turkish national who was born in 1985.

On 19 June 2013 Mr E.K., who had entered the country illegally, was arrested by officers from the Soufli border post and brought before the prosecutor at the Alexandroupolis Criminal Court, which imposed a two-year suspended prison sentence. On 21 June 2013 he was placed in pre-trial detention, for an initial duration of three days, with a view to his deportation from the country.

While in detention he submitted an asylum claim, which was transferred to the Attica regional asylum services on 22 June 2013. On the same day the head of the Alexandroupolis police force decided to extend E.K.'s detention pending the decision on his asylum claim, for an initial maximum period of 90 days after submission of that claim. On 26 June 2013 E.K.'s detention was extended on the grounds that he was likely to abscond, for a maximum period of six months.

E.K. was then transferred, first to the premises of the Feres border post, then to the premises of the Attica sub-directorate for aliens, where it was decided on 23 July 2013 to extend his detention for a period of 90 days; he was notified of that decision "in Syrian", a language that he did not understand. On the same

date, this decision was amended in order to reflect the new duration of his detention, now limited to six months, and his asylum interview took place. Mr E.K. was then transferred to the Amygdaleza detention centre.

On 31 July 2013 E.K. challenged the decision of 26 June 2013 before the Piraeus Administrative Court, but subsequently withdrew that appeal. On 1 August 2013 he challenged the decision of 26 June 2013 before the Athens Administrative Court of First Instance, which dismissed his appeal on the grounds that detention was necessary for speedy and effective examination of the asylum claim and to prevent him from absconding. Shortly afterwards E.K. challenged the decisions of 23 July 2013 and 21 June 2013 before the Athens Administrative Court. He also complained about his conditions of detention. His appeals were rejected.

On 10 December 2013 E.K. was granted refugee status and was released three days later.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment), the applicant complained about his conditions of detention in the various premises in which he was held. Under Article 5 § 1 (right to liberty and security), he alleged that his detention had been arbitrary. Lastly, relying on Article 5 § 4 (right to a speedy review of the lawfulness of detention), the applicant maintained that the judicial review of his detention had been ineffective

The application was lodged with the European Court of Human Rights on 18 November 2013.

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

Krzysztof **Wojtyczek** (Poland), *President*,

Linos-Alexandre **Sicilianos** (Greece),

Alena **Poláčková** (Slovakia),

Péter **Paczolay** (Hungary),

Gilberto **Felici** (San Marino),

Erik **Wennerström** (Sweden),

Lorraine **Schembri Orland** (Malta),

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

Decision of the Court

Article 3

Conditions of detention in the Soufli, Feres and Petrou Ralli posts

The Court noted that the applicant had been detained for 22 days in the two border posts and for 18 days at the Attika Under-Directorate for Aliens.

The Court further noted that the applicant's complaint essentially concerned the same problems as regards his conditions of detention on all three premises. Consequently, it considered that it was a case of a

"continuing situation" justifying an assessment of the whole period of detention complained of by the applicant in connection with those premises.

The Court observed that it had previously found a violation of Article 3 of the Convention in respect of the premises in question. Nevertheless, the periods covered by the respective judgments did not coincide with those during which the applicant in the present case had been detained. That having been said, there was no overlooking the fact that the conditions of detention in the Soufli and Feres police premises had been criticised in several reports by international organisations which had visited them shortly before the applicant's detention. According to the CPT, which visited the premises in April 2013, the conditions of detention in the Soufli and Feres police premises had considerably improved since 2011. As regards the premises of the Attika Under-Directorate for Aliens, the Court noted that the CPT, which had also visited the Centre in April 2013, had pointed out that the conditions of detention in the Petrou Ralli Detention Centre had still been completely unsuitable for the detention of illegal migrants for lengthy periods.

The Court observed that the applicant had been detained for short periods in those three units.

Having regard to the foregoing considerations, the Court considered that the applicant's conditions of detention in the Soufli and Feres border posts and the premises of the Attika Under-Directorate for Aliens had not exceeded the severity threshold required by Article 3 of the Convention for characterisation as inhuman or degrading treatment.

Therefore, there had been no violation of Article 3 of the Convention in the present case.

Conditions of detention in the Amygdaleza Detention Centre

The Court noted that the applicant had been detained in the Amygdaleza Detention Centre for a total of four months and thirteen days.

According to the report issued by the CPT, which had visited the Amygdaleza Centre in April 2013, the accommodation had consisted of two bedrooms with two sets of bunkbeds, a table and chairs and a cupboard, each room having a floor area of 9 m2, between which there had been two toilet and shower compartments. The detainees had been able to be outside their rooms for most of the day. There had been no special facilities for resting or engaging in sports or other activities. According to the detainees, there had been a shortage of hygiene items, and they had been unable to wash clothes or bedding. Lastly, the CPT stated that the units had been generally clean and in good condition, with adequate lighting and ventilation.

The Ombudsman, who had paid two visits to the Centre, in September 2012 and March 2013, had reached similar conclusions, and the "Intervention Médicale" NGO had been active in the Centre, where social and psychological support had been provided.

The Court also noted that the Ombudsman had not mentioned any particulier overcrowding and that neither the CPT report nor that of the Ombudsman had been critical of the situation in the Centre.

There had therefore been no violation of Article 3 of the Convention.

Article 5 §1

In the present case, the Court considered that the applicant's detention had been used to prevent him from unlawfully residing in Greek territory and to guarantee his future expulsion. It concluded that the authorities' good faith could therefore not be called into question.

As regards the duration of detention, the Court observed that under Article 5 § 1 only the conduct of the expulsion procedure justified detention under that article, and that if the procedure was not conducted with the requisite diligence the detention ceased to be justified.

However, the Court noted that the applicant had been detained for five months and twenty-four days. The Court held that that period could not be considered excessive for completing all the administrative formalities for his expulsion.

As regards the asylum application, the Court noted that under domestic law, although the lodging of such an application stayed the execution of the expulsion order, it did not suspend the execution of detention; domestic law only required the asylum procedure to be concluded rapidly, which had been the situation in the instant case.

The Court therefore found that there had been no violation of Article 5 § 1 of the Convention.

Article 5 § 4

The Court observed that in its decision of 5 August 2013 the President of the Administrative Court had found, firstly, that there was a risk of the applicant absconding, and secondly, that his detention was necessary for the speedy and effective assessment of his asylum application. On 18 September 2013 the President of the Administrative Court had dismissed the applicant's objections for the same reasons. The Court noted that all the applicant's objections before the Administrative Court had concerned his conditions of detention, and that he had provided documentary evidence of a fixed residence in Athens in support of his allegations.

The Court noted that the applicant had not benefited from a sufficiently thorough assessment of the lawfulness of his detention to highlight the remedies and other channels provided under domestic law and case-law. That was particularly true with regard to the complaints concerning his conditions of detention, in which connection the Court had found violations on several occasions in other cases.

The Court therefore found a violation of Article 5 § 4 of the Convention.

Just satisfaction (Article 41)

The Court held that Greece was to pay the applicant 3,000 euros (EUR) in respect of non-pecuniary damage, plus any tax that might be chargeable on that sums.

The judgment is available only in French.

4. **ECHR, *Georgia v. Russia (II)*, no. 38263/08, Grand Chamber judgment of 21 January 2021 (Article 2, right to life – violation; Article 3, prohibition of torture – violation; Article 5, right to liberty and security – violation; Article 8, right to respect for private and family life – violation; Article 1 Protocol 1, protection of property – violation; Article 2 Protocol 4, freedom of movement – violation; Article 2 Protocol 1, right to education – no violation)**: The case concerned allegations by the Georgian Government of administrative practices on the part of the Russian Federation entailing various breaches of the Convention in connection with the armed conflict between Georgia and the Russian Federation in August 2008.

ECHR 028 (2021)
21.01.2021

Press Release issued by the Registrar of the Court

In today's Grand Chamber judgment in the case of *Georgia v. Russia (II)* (application no. 38263/08) the European Court of Human Rights held:

by eleven votes to six, that the events occurring during the active phase of hostilities (8 to 12 August 2008) had not fallen within the jurisdiction of the Russian Federation for the purposes of Article 1 of the European Convention on Human Rights;

by sixteen votes to one, that the events occurring after the cessation of hostilities (following the ceasefire agreement of 12 August 2008) had fallen within the jurisdiction of the Russian Federation;

by sixteen votes to one, that there had been an administrative practice contrary to Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1 to the Convention;

unanimously, that the Georgian civilians detained by the South Ossetian forces in Tskhinvali between approximately 10 and 27 August 2008 had fallen within the jurisdiction of the Russian Federation for the purposes of Article 1;

unanimously, that there had been an administrative practice contrary to Article 3 as regards the conditions of detention of some 160 Georgian civilians and the humiliating acts which had caused them suffering and had to be regarded as inhuman and degrading treatment;

unanimously, that there had been an administrative practice contrary to Article 5 as regards the arbitrary detention of Georgian civilians in August 2008;

unanimously, that the Georgian prisoners of war detained in Tskhinvali between 8 and 17 August 2008 by the South Ossetian forces had fallen within the jurisdiction of the Russian Federation for the purposes of Article 1;

by sixteen votes to one, that there had been an administrative practice contrary to Article 3 as regards the acts of torture of which the Georgian prisoners of war had been victims;

by sixteen votes to one, that the Georgian nationals who had been prevented from returning to South Ossetia or Abkhazia had fallen within the jurisdiction of the Russian Federation;

by sixteen votes to one, that there had been an administrative practice contrary to Article 2 of Protocol No. 4 as regards the inability of Georgian nationals to return to their homes;

unanimously, that there had been no violation of Article 2 of Protocol No. 1;

unanimously, that the Russian Federation had had a procedural obligation under Article 2 of the Convention to carry out an adequate and effective investigation not only into the events which had occurred after the cessation of hostilities (following the ceasefire agreement of 12 August 2008) but also into the events which had occurred during the active phase of hostilities (8 to 12 August 2008);

by sixteen votes to one, that there had been a violation of Article 2 in its procedural aspect; unanimously, that there was no need to examine separately the applicant Government's complaint under Article 13 in conjunction with other Articles;

by sixteen votes to one, that the respondent State had failed to comply with its obligations under Article 38; and

unanimously, that the question of the application of Article 41 of the Convention was not ready for decision and should therefore be reserved in full.

The case concerned allegations by the Georgian Government of administrative practices on the part of the Russian Federation entailing various breaches of the Convention, in connection with the armed conflict between Georgia and the Russian Federation in August 2008.

The Court found that a distinction needed to be made between the military operations carried out during the active phase of hostilities (from 8 to 12 August 2008) and the other events occurring after the cessation of the active phase of hostilities – that is, following the ceasefire agreement of 12 August 2008.

The Court had regard to the observations and numerous other documents submitted by the parties, and also to reports by international governmental and non-governmental organisations. In addition, it heard evidence from a total of 33 witnesses.

The Court concluded, following its examination of the case, that the events occurring during the active phase of hostilities (8 to 12 August 2008) had not fallen within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention and declared this part of the application inadmissible. However, it held that the Russian Federation had exercised "effective control" over South Ossetia, Abkhazia and the "buffer zone" during the period from 12 August to 10 October 2008, the date of the official withdrawal of the Russian troops. After that period, the strong Russian presence and the South Ossetian and Abkhazian authorities' dependency on the Russian Federation indicated that there had been continued "effective control" over South Ossetia and Abkhazia. The Court therefore concluded that the events occurring after the cessation of hostilities – that is, following the ceasefire agreement of 12 August 2008 – had fallen within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention (obligation to respect human rights).

Principal facts

The application was lodged in the context of the armed conflict that occurred between Georgia and the Russian Federation in August 2008 following an extended period of ever-mounting tensions, provocations and incidents between the two countries.

In the night of 7 to 8 August 2008, after an extended period of ever-mounting tensions and incidents, the Georgian forces launched an artillery attack on the city of Tskhinvali, the administrative capital of South Ossetia. From 8 August 2008 Russian ground forces penetrated into Georgia by crossing through Abkhazia and South Ossetia before entering the neighbouring regions in undisputed Georgian territory.

A ceasefire agreement was concluded on 12 August 2008 between the Russian Federation and Georgia under the auspices of the European Union, specifying that the parties would refrain from the use of force, end hostilities and provide access for humanitarian aid, and that Georgian military forces would withdraw to their usual bases and Russian military forces to the lines prior to the outbreak of hostilities.

Owing to the delay by the Russian Federation in applying that agreement, a new agreement implementing the ceasefire agreement (the Sarkozy-Medvedev agreement) was signed on 8 September 2008.

On 10 October 2008 Russia completed the withdrawal of its troops stationed in the buffer zone, except for the village of Perevi (Sachkhere district), situated in undisputed Georgian territory, from which the Russian troops withdrew on 18 October 2010.

The Court found it appropriate to examine the military operations carried out during the active phase of hostilities separately from the other events occurring after the cessation of the active phase of hostilities.

Complaints, procedure and composition of the Court

The applicant Government submitted that:

- the military operations by the Russian armed forces and/or South Ossetian forces during the conflict had breached Article 2 (right to life);

- killings, ill-treatment, looting and burning of homes had been carried out by the Russian armed forces and South Ossetian forces in South Ossetia and the adjacent buffer zone, in breach of Articles 2, 3 (prohibition of torture and inhuman or degrading treatment) and 8 (right to respect for private and family life) of the Convention and Article 1 of Protocol No. 1 (protection of property);

- the South Ossetian forces had illegally detained 160 civilians (mostly women and elderly people) in indecent conditions for approximately fifteen days before releasing them all on 27 August 2008, and some of the detainees had also been ill-treated, amounting to a violation of Article 3 and Article 5 (right to liberty and security) of the Convention;

- more than 30 Georgian prisoners of war had been ill-treated and tortured by Russian and South Ossetian forces in August 2008, amounting to a violation of Article 3 of the Convention;

- the Russian Federation and the authorities of Abkhazia and South Ossetia had prevented the return of about 23,000 forcibly displaced ethnic Georgians to those regions, amounting to a violation of Article 2 of Protocol No. 4 (freedom of movement);

- Russian troops and the separatist authorities had looted and destroyed public schools and libraries and intimidated ethnic Georgian pupils and teachers, amounting to a violation of Article 2 of Protocol No. 1 (right to education); and

- the Russian Federation had not conducted any investigations into the events as regards Article 2 of the Convention.

Lastly, relying on Article 13 (right to an effective remedy), the applicant Government complained of a lack of effective remedies in respect of their complaints under Articles 3, 5 and 8 of the Convention, Articles 1 and 2 of Protocol No. 1 and Article 2 of Protocol No. 4.

On 11 August 2008 Georgia lodged an application with the Court against the Russian Federation and requested the application of an interim measure (Rule 39 of the Rules of Court). On 12 August 2008 the President of the Court decided to apply Rule 39, calling upon both High Contracting Parties to comply with their engagements, particularly in respect of Articles 2 and 3 of the Convention. The application of Rule 39 was extended several times.

The application was declared partly admissible on 13 December 2011. On 3 April 2012 the Chamber relinquished jurisdiction in favour of the Grand Chamber. A hearing was held on 23 May 2018.

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),

Paul **Lemmens** (Belgium),

Yonko **Grozev** (Bulgaria),

Helena **Jäderblom** (Sweden),

Vincent A. **De Gaetano** (Malta),

Ganna **Yudkivska** (Ukraine),

Paulo **Pinto de Albuquerque** (Portugal),

Helen **Keller** (Switzerland),

Krzysztof **Wojtyczek** (Poland),

Dmitry **Dedov** (Russia),

Armen **Harutyunyan** (Armenia),

Gabriele **Kucsko-Stadlmayer** (Austria),

Georgios A. **Serghides** (Cyprus),

Tim **Eicke** (the United Kingdom),

Lado **Chanturia** (Georgia),

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

Decision of the Court

As regards the assessment of the evidence and establishment of the facts, the Court referred to the principles summarised in the case of *Georgia v. Russia* (I). It relied on the observations and numerous other documents submitted by the parties. It also had regard to reports by international governmental and non-governmental organisations. It asked the parties to provide additional reports. The Court also had regard to the statements of witnesses and experts during a hearing held in Strasbourg from 6 to 17 June 2016. It heard evidence from a total of 33 witnesses.

Active phase of hostilities from 8 to 12 August 2008 – Article 2

The Court considered that in the event of military operations carried out during an international armed conflict, it was not possible to speak of "effective control" over an area. The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos meant that there was no control over that area. This was also true in the present case, as the majority of the fighting had taken place in areas previously under Georgian control.

The Court therefore attached decisive weight to the fact that the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos not only meant that there was no "effective control" over that area, but also excluded any form of "State agent authority and control" over individuals. It thus considered that the conditions it had applied in its case-law to determine the exercise of extraterritorial jurisdiction by a State had not been met in respect of the military operations it was required to examine in the present case concerning the active phase of hostilities in the context of an international armed conflict. That did not mean that States could act outside any legal framework; in such a context, they were obliged to comply with the very detailed rules of international humanitarian law.

The Court concluded that the events occurring during the active phase of hostilities (8 to 12 August 2008) had not fallen within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention and declared this part of the application inadmissible.

Occupation phase after the cessation of hostilities (from the ceasefire agreement of 12 August 2008) - Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1

The Court found that the Russian Federation had exercised "effective control", within the meaning of its case-law (*Loizidou v. Turkey*, *Cyprus v. Turkey*, *Ilaşcu and Others v. Moldova and Russia*, *Al-Skeini and Others v. the United Kingdom*, and *Catan and Others v. the Republic of Moldova and Russia*), over South Ossetia, Abkhazia and the "buffer zone" during the period from 12 August to 10 October 2008, the date of the official withdrawal of the Russian troops. After that period, the strong Russian presence and the South Ossetian and Abkhazian authorities' dependency on the Russian Federation indicated that there had been continued "effective control" over South Ossetia and Abkhazia.

The Court concluded that the events occurring after the cessation of hostilities (following the ceasefire of 12 August 2008) had fallen within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention.

The Court observed that the information appearing in sources including reports by the EU Fact-Finding Mission, the OSCE, the Council of Europe Commissioner for Human Rights, Amnesty International and Human Rights Watch was consistent as regards the existence, after the cessation of active hostilities, of a systematic campaign of burning and looting of homes in Georgian villages in South Ossetia and the "buffer zone". Such information was also consistent with satellite imagery from 9 October 2008 showing that the houses in question had been burnt. That campaign had been accompanied by abuses perpetrated against civilians, and in particular summary executions. Three Georgian witnesses heard by the Court had also mentioned burning and looting of houses by South Ossetian militias while their villages had been under Russian control, and abuses perpetrated against Georgian civilians.

The Court reiterated that an administrative practice was defined not only by a "repetition of acts", but also by "official tolerance": "illegal acts are tolerated in that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied" (see, for example, *Georgia v. Russia* (I)).

Although some witness statements indicated that at times Russian troops had intervened to stop abuses being committed against civilians, in many cases Russian troops had been passively present during scenes of looting. Despite the order given to the Russian armed forces to protect the population and carry out peacekeeping and law-enforcement operations on the ground, the measures taken by the Russian authorities had proved insufficient to prevent the alleged violations. This could be deemed to be "official tolerance" by the Russian authorities, as was also shown by the fact that the latter had not carried out effective investigations into the alleged violations.

The Court held that it had sufficient evidence in its possession to enable it to conclude beyond reasonable doubt that there had been an administrative practice contrary to Articles 2 and 8 of the Convention and Article 1 of Protocol No. 1 as regards the killing of civilians and the torching and looting of houses in Georgian villages in South Ossetia and the "buffer zone". Having regard to the seriousness of the abuses committed, which could be classified as "inhuman and degrading treatment" owing to the feelings of anguish and distress suffered by the victims – who had been targeted as an ethnic group – the Court found that this administrative practice had also been contrary to Article 3 of the Convention. The rule of exhaustion of domestic remedies did not apply where the existence of an administrative practice was established.

There had therefore been a violation of Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1, and the Russian Federation was responsible for that violation.

Treatment of civilian detainees and lawfulness of their detention – Articles 3 and 5

The Court noted that it was not disputed that 160 Georgian civilians, most of whom were fairly elderly and one-third of whom were women, had been detained by South Ossetian forces in the basement of the "Ministry of Internal Affairs of South Ossetia" in Tskhinvali between around 10 and 27 August 2008. Since the Georgian civilians had been detained mainly after the hostilities had ceased, the Court concluded that they had fallen within the jurisdiction of the Russian Federation.

The testimonies of Georgian civilians concerning the conditions of their detention were consistent with the information in the various sources available to the Court. The head of the "detention centre" had acknowledged at the witness hearing that the basement of the "Ministry of Internal Affairs of South Ossetia" had not been designed to accommodate so many detainees. Men and women had been detained together for a certain amount of time, there had not been enough beds and basic health and hygiene requirements had not been met.

Even though the direct involvement of the Russian forces had not been clearly demonstrated, the fact that the Georgian civilians fell within the jurisdiction of the Russian Federation meant that the latter had also been responsible for the actions of the South Ossetian authorities. Although they had been present at the scene, the Russian forces had not intervened to prevent the treatment complained of.

The Court concluded that there had been an administrative practice contrary to Article 3 as regards the conditions of detention of some 160 Georgian civilians and the humiliating acts to which they had been exposed, which had caused them undeniable suffering and had to be regarded as inhuman and degrading treatment. In accordance with the Court's case-law, the rule of exhaustion of domestic remedies did not apply where the existence of an administrative practice was established.

There had therefore been a violation of Article 3 of the Convention, and the Russian Federation was responsible for that violation.

According to the respondent Government, the Georgian civilians had been detained for their own safety owing to potential attacks from South Ossetians seeking to take revenge on Georgians for the attack on Tskhinvali. That justification, which moreover was factually disputed, was not accepted as a ground for detention. Furthermore, the detainees had not been informed of the reasons for their arrest and detention.

The Court concluded that there had been an administrative practice contrary to Article 5 as regards the arbitrary detention of Georgian civilians in August 2008, and that the Russian Federation was responsible for the resulting violation.

Treatment of prisoners of war – Article 3

The Court observed that cases of ill-treatment and torture of prisoners of war by South Ossetian forces had been mentioned in the various sources available to it. At the witness hearing in Strasbourg, two witnesses had described in detail the treatment that had been inflicted on them by the South Ossetian and also the Russian forces.

The Court considered that it had sufficient evidence to enable it to conclude that Georgian prisoners of war had been victims of treatment contrary to Article 3 of the Convention inflicted by the South Ossetian forces. Even though the direct involvement of the Russian forces had not been clearly demonstrated in all cases, the fact that the prisoners of war fell within the jurisdiction of the Russian Federation meant that the latter had also been responsible for the actions of the South Ossetian forces. Although they had been present at the scene, the Russian forces had not intervened to prevent the treatment complained of.

The Court found that the ill-treatment inflicted on the Georgian prisoners of war had to be regarded as acts of torture within the meaning of Article 3 of the Convention. Such acts were particularly serious given that they had been perpetrated against prisoners of war, who enjoyed a special protected status under international humanitarian law.

The Court concluded that there had been an administrative practice contrary to Article 3 of the Convention as regards the acts of torture of which the Georgian prisoners of war had been victims. There had therefore been a violation of Article 3, and the Russian Federation was responsible for that violation.

Freedom of movement of displaced persons – Article 2 of Protocol No. 4

The information in the different sources available to the Court was consistent regarding the refusal of the South Ossetian and Abkhazian authorities to allow the return of many ethnic Georgians to their respective homes, even if some returns in the region of Akhalgori had been authorised. Negotiations were under way in Geneva with a view to finding a political solution. In the meantime, the *de facto* South Ossetian and Abkhazian authorities, and the Russian Federation, which had effective control over those regions, had a duty under the Convention to enable inhabitants of Georgian origin to return to their respective homes.

The Court concluded that there had been an administrative practice contrary to Article 2 of Protocol No. 4.

The situation regarding the inability of Georgian nationals to return to their respective homes had still been ongoing on 23 May 2018, the date of the hearing on the merits in the present case.

There had therefore been a violation of Article 2 of Protocol No. 4 at least until 23 May 2018, and the Russian Federation was responsible for that violation.

Right to education – Article 2 of Protocol No. 1

The Court considered that it did not have sufficient evidence in its possession to conclude beyond reasonable doubt that there had been incidents contrary to Article 2 of Protocol No. 1. There had therefore been no violation of that Article.

Obligation to investigate – Article 2

The Court concluded that the Russian Federation had had an obligation to carry out an adequate and effective investigation not only into the events occurring after the cessation of hostilities, but also into the events occurring during the active phase of the hostilities.

Having regard to the seriousness of the crimes allegedly committed during the active phase of the hostilities, and the scale and nature of the violations found during the period of occupation, the Court found that the investigations carried out by the Russian authorities had not satisfied the requirements of Article 2 of the Convention.

There had therefore been a violation of Article 2 of the Convention in its procedural aspect.

Effective remedies – Article 13

In view of the above conclusions, the Court held that there was no need for a separate examination of the applicant Government's complaint under Article 13 in conjunction with Articles 3, 5 and 8 of the Convention and with Articles 1 and 2 of Protocol No. 1 and Article 2 of Protocol No. 4.

Article 38

After examining the documents submitted to the Court at its request by the applicant Government, the Court found that the applicant Government had complied with their obligation to cooperate under Article 38 of the Convention.

The respondent Government had refused to submit "combat reports", on the grounds that the documents in question constituted a "State secret", despite the arrangements proposed by the Court for the submission of non-confidential extracts. Nor had they submitted any practical proposals to the Court that would have allowed them to satisfy their obligation to cooperate while preserving the secret nature of certain items of information. The Court therefore found that the respondent Government had fallen short of their obligation to furnish all necessary facilities to the Court in its task of establishing the facts of the case, as required under Article 38 of the Convention.

Just satisfaction (Article 41)

The Court held that the question of the application of Article 41 was not ready for decision and consequently reserved it in full.

Separate opinions

Judge **Keller** expressed a concurring opinion; Judge **Serghides** expressed a partly concurring opinion; Judges **Lemmens**, **Grozev**, **Pinto de Albuquerque**, **Dedov** and **Chanturia** each expressed a partly dissenting opinion; Judges **Yudkivska**, **Pinto de Albuquerque** and **Chanturia** expressed a joint partly dissenting opinion; and Judges **Yudkivska**, **Wojtyczek** and **Chanturia** expressed a joint partly dissenting opinion.

The judgment is available in English and French.

5. **ECHR, *Hanan v. Germany*, no. 4871/16, Grand Chamber judgment of 16 February 2021 (Article 2, right to life – no violation)**: The case concerned the investigations carried out following the death of the applicant's two sons in an airstrike near Kunduz, Afghanistan, ordered by a colonel of the German contingent of the International Security Assistance Force (ISAF) commanded by NATO.

ECHR 062 (2021)
16.02.2021

Press release issued by the Registrar of the Court

In today's Grand Chamber judgment in the case of *Hanan v. Germany* (application no. 4871/16) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 2 (right to life) of the European Convention on Human Rights

The case concerned the investigations carried out following the death of the applicant's two sons in an airstrike near Kunduz, Afghanistan, ordered by a colonel of the German contingent of the International Security Assistance Force (ISAF) commanded by NATO.

The Court found that the fact that Germany had retained exclusive jurisdiction over its troops deployed within the International Security Assistance Force with respect to serious crimes, which, moreover, it was obliged to investigate under international and domestic law, constituted "special features" which, taken in combination, triggered the existence of a jurisdictional link for the purposes of Article 1 of the Convention in relation to the procedural obligation to investigate under Article 2.

The Court observed that the Federal Prosecutor General had found that Colonel K. had not incurred criminal liability mainly because he had been convinced, at the time of ordering the airstrike, that no civilians had been present at the sand bank. According to the Prosecutor General, Colonel K. had thus not acted with the intent to cause excessive civilian casualties, which would have been required for him to be liable under the relevant provision of the Code of Crimes against International Law. The Prosecutor General had considered that liability under the Criminal Code was also excluded because the lawfulness of the airstrike under international law served as an exculpatory defence. Colonel K. had believed that the armed Taliban fighters who had hijacked the two fuel tankers were members of an organised armed group that was party to the armed conflict and were thus legitimate military targets. The Court noted that the German civilian prosecution authorities had not had legal powers to undertake investigative measures in Afghanistan under the ISAF Status of Forces Agreement, but would have been required to resort to international legal assistance to that end. However, the Federal Prosecutor General had been able to rely on a considerable amount of material concerning the circumstances and the impact of the airstrike.

The Federal Constitutional Court had reviewed the effectiveness of the investigation on the applicant's constitutional complaint. Noting that the Federal Constitutional Court was able to set aside a decision to discontinue a criminal investigation, the Court concluded that the applicant had had at his disposal a remedy enabling him to challenge the effectiveness of the investigation.

Lastly, the Court observed that the investigation into the airstrike by the parliamentary commission of inquiry had ensured a high level of public scrutiny of the case.

Principal facts

The applicant, Abdul Hanan, is an Afghan national who was born in 1975 and lives in Omar Khel (Afghanistan).

Following the attacks of 11 September 2001, the United States launched military operations in Afghanistan on 7 October 2001 under the name Operation Enduring Freedom. In November 2001 the German Parliament authorised the deployment of German troops as part of that operation.

At the beginning of December 2001, a number of Afghan leaders met in Bonn under the auspices of the United Nations to decide on a plan for governing the country and set up an Afghan Interim Authority. On 5 December 2001 they signed the "Bonn Agreement", requesting the assistance of the international community in maintaining security in Afghanistan, and providing for the establishment of an International Security Assistance Force (ISAF). The same month, the United Nations Security Council authorised the establishment of ISAF, which was to assist the Afghan Interim Authority in maintaining security in Kabul and the surrounding areas and to enable the Interim Authority and the United Nations personnel to operate in a safe environment. The mission of the forces engaged in Operation Enduring Freedom was to undertake counterterrorism and counter-insurgency operations. Also in December 2001, the German Parliament authorised the deployment of German armed forces as part of ISAF.

On 11 August 2003 the North Atlantic Treaty Organization (NATO) assumed command of ISAF. By the end of 2006 ISAF was responsible for security throughout Afghanistan. After April 2009 the security situation in the Kunduz region deteriorated sharply and it became the scene of intense conflict. On 3 September 2009 insurgents hijacked two fuel tankers which became immobilised on a sand bank in the Kunduz River, around seven kilometres from the military base of the Kunduz Provincial Reconstruction Team (PRT). The insurgents enlisted people from the nearby villages to help them move the tankers. At around 8 p.m. PRT Kunduz was informed of the hijacking. Colonel K., the German army officer in command of PRT Kunduz, fearing an attack, gave the order to bomb the fuel tankers, which were still immobilised. The airstrike carried out that night destroyed both tankers and killed several people, both insurgents and civilians, including the applicant's two sons, Abdul Bayan and Nesarullah, aged 12 and 8 respectively.

On the morning of 4 September 2009 Brigadier-General V., who was in charge of the Regional Command (RC) to which PRT Kunduz was attached, sent an investigation team of the German military police to Kunduz to support PRT Kunduz in its investigation. On 5 November 2009 the Dresden Public Prosecutor General requested the office of the Federal Prosecutor General to review the possibility of taking over the prosecution of the case in the light of possible liability under the Code of Crimes against International Law. By this time the Federal Prosecutor General's office was already in the process of establishing whether it had competence, having initiated a preliminary investigation on 8 September 2009.

On 12 March 2010 the Federal Prosecutor General opened a criminal investigation against Colonel K. and Staff Sergeant W., who had assisted Colonel K. on the night of the airstrike. On 16 April 2010 the Federal Prosecutor General discontinued the criminal investigation owing to a lack of sufficient grounds for suspicion that the suspects had incurred criminal liability under either the Code of Crimes against International Law or the Criminal Code. He determined that the situation in the northern part of Afghanistan where the German armed forces were deployed amounted to a non-international armed conflict within the meaning of international humanitarian law. In his view, that situation triggered the applicability of international humanitarian law and of the German Code of Crimes against International Law. The Federal Prosecutor General concluded that Colonel K.'s liability under the Code of Crimes against International Law was excluded because the colonel had not had the necessary intent to kill or harm civilians or damage civilian objects. Liability under the Criminal Code was also excluded because the lawfulness of the airstrike under international law served as an exculpatory defence.

In his discontinuation decision the Federal Prosecutor General considered that two aspects, in particular, had to be clarified: Colonel K.'s subjective assessment of the situation when he had ordered the airstrike, and the exact number of persons who had suffered death or injury as a result. According to Colonel K.'s account, he had assumed that only Taliban insurgents, and no civilians, had been located near the fuel tankers when he had ordered the airstrike. In the Federal Prosecutor General's view, this account was corroborated by a large number of objective circumstances, the statements of the persons who had been present at the time of the events and the video footage from the aircraft prior to and during the airstrike. The Prosecutor General further noted that other persons present at the command post had all credibly testified that they had operated on the assumption that only insurgents and no civilians had been present at the location.

On 12 April 2010 Mr Hanan, through his legal representative, filed a criminal complaint with the Federal Prosecutor General regarding the death of his two sons. He also requested access to the investigation file.

By letter of 27 April 2010 the Federal Prosecutor General informed the applicant's representative that the criminal investigation had been discontinued.

On 15 November 2010 the applicant filed a motion with the Düsseldorf Court of Appeal seeking that public charges be brought against the suspects or, in the alternative, that the competent public prosecutor continue investigating the matter with a view to determining their liability under the Criminal Code. He submitted, in particular, that certain additional investigative measures were required.

On 13 December 2010 the Federal Prosecutor General submitted his observations, taking the view that the motion should be dismissed as inadmissible for failure to comply with the formal requirements or, in the alternative, as ill-founded. He maintained that all the necessary investigative measures had been carried out. On 16 February 2011 the Düsseldorf Court of Appeal dismissed the applicant's motion to compel public charges as inadmissible for failure to comply with the formal requirements.

On 28 March 2011 Mr Hanan filed a complaint of a breach of the right to be heard (Gehörsrüge) in respect of the Court of Appeal's order. The Court of Appeal dismissed the complaint as ill-founded on the grounds that the decision of 16 February 2011 had been based exclusively on the applicant's submissions as such and had related only to compliance with the formal requirements.

Mr Hanan lodged two constitutional complaints with the Federal Constitutional Court – the later complaint encompassing the earlier one – alleging that the criminal investigation had been ineffective. On 8 December 2014 the Federal Constitutional Court refused to admit the constitutional complaint for adjudication in so far as it concerned access to the investigation file. On 19 May 2015 it refused to admit the complaint for adjudication in so far as it concerned the effectiveness of the criminal investigation, finding that it was in any event ill-founded. In the Constitutional Court's view, the Federal Prosecutor General had neither misjudged the importance of the right to life and the resulting obligations of the State to protect it nor the requirement to carry out an effective investigation into deaths as defined by the case-law of the Federal Constitutional Court and of the European Court of Human Rights.

On 16 December 2009 the German Parliament established a commission of inquiry to assess, in particular, whether the airstrike had been in compliance with the mandate given by Parliament to the German armed forces, with the operative planning and with the applicable orders and rules of engagement. On 20 October 2011 the commission published its report, finding that, on the basis of the information available to it, the airstrike could not be considered proportionate and should not have been ordered, but that Colonel K. had acted at the relevant time to the best of his knowledge and to protect "his" soldiers. His decision to order the airstrike had therefore been comprehensible.

Mr Hanan and another individual lodged a civil action for compensation against the Federal Republic of Germany in connection with the killing of their relatives by the airstrike of 4 September 2009. On 6 October 2016, after the Bonn Regional Court and then the Cologne Court of Appeal had rejected the plaintiffs' claims, the Federal Court of Justice rejected their appeal on points of law as ill-founded. The Federal Constitutional Court declined to consider a constitutional complaint lodged by the applicant in respect of those civil proceedings.

Complaints, procedure and composition of the Court

Relying on the procedural limb of Article 2 of the Convention (right to life), the applicant alleged that the respondent State had not conducted an effective investigation into the airstrike carried out on 4 September 2009 near Kunduz in which several people, including his two sons, had been killed. Under Article 13 (right to an effective remedy) taken together with Article 2, he also complained that he had not had an effective domestic remedy by which to challenge the decision of the German Federal Prosecutor General to discontinue the criminal investigation.

The application was lodged with the European Court of Human Rights on 13 January 2016. On 27August 2019 the Chamber relinquished jurisdiction in favour of the Grand Chamber. A hearing was held on 26 February 2020.

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

Jon Fridrik **Kjølbro** (Denmark), *President*,

Linos-Alexandre **Sicilianos** (Greece),

Ksenija **Turković** (Croatia),

Paul **Lemmens** (Belgium),

Yonko **Grozev** (Bulgaria),

Helen **Keller** (),

Aleš **Pejchal** (the Czech Republic),

Faris **Vehabović** (Bosnia and Herzegovina),

Carlo **Ranzoni** (Liechtenstein),

Mārtiņš **Mits** (Latvia),

Tim **Eicke** (the United Kingdom),

Latif **Hüseynov** (Azerbaijan),

Lado **Ch**anturia (Georgia),

Arnfinn **Bårdsen** (Norway),

Erik **Wennerström** (Sweden),

Saadet **Yüksel** (Turkey),

Anja **Seibert-Fohr** (Germany),

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

Decision of the Court

Admissibility – existence of a jurisdictional link for the purposes of Article 1 of the Convention

The applicant complained exclusively under the procedural limb of Article 2 of the Convention about the criminal investigation into the airstrike which had killed his two sons. In its judgment in Güzelyurtlu and Others the Court had set out the principles concerning the existence of a jurisdictional link for the purposes of Article 1 of the Convention in cases where the death had occurred outside the territory of the Contracting State in respect of which the procedural obligation under Article 2 was said to arise.

The Court observed that the German authorities, under their domestic-law provisions, had instituted a criminal investigation into the deaths of the applicant's two sons and of other civilians in connection with the airstrike near Kunduz on 4 September 2009. Nevertheless, the Court found inapplicable in the present case the principle that the institution of a domestic criminal investigation or proceedings concerning deaths which occurred outside the territorial jurisdiction of the State – not within the exercise of its extraterritorial jurisdiction – was sufficient to establish a jurisdictional link between that State and the victim's relatives who brought proceedings before the Court.

However, the Court considered, firstly, that Germany had been obliged under customary international humanitarian law to investigate the airstrike at issue, as it concerned the individual criminal responsibility of members of the German armed forces for a potential war crime.

Secondly, the Afghan authorities had, for legal reasons, been prevented from themselves instituting a criminal investigation against Colonel K. and Staff Sergeant W., as under section I, subsection 3, of the ISAF Status of Forces Agreement, the troop-contributing States had retained exclusive jurisdiction in respect of any criminal or disciplinary offences which their troops might commit on the territory of Afghanistan. That provision constituted a rule on immunity in so far as it shielded the ISAF personnel of troop-contributing States from prosecution by the Afghan authorities. It was also a rule regulating

jurisdiction, which clarified who had jurisdiction over ISAF personnel in criminal matters and provided that only the troop-contributing States were entitled to institute a criminal investigation or proceedings against their personnel, even in cases of alleged war crimes.

Thirdly, the German prosecuting authorities had also been obliged under domestic law to institute a criminal investigation, as confirmed by the Government. That investigation had been conducted by the Federal Prosecutor General.

The Court further observed that in the majority of those Contracting States which participated in military deployments overseas, the competent domestic authorities were obliged under domestic law to investigate alleged war crimes or wrongful deaths inflicted abroad by members of their armed forces, and that the duty to investigate was considered essentially autonomous.

In the present case, the fact that Germany had retained exclusive jurisdiction over its troops with respect to serious crimes, which, moreover, it was obliged to investigate under international and domestic law, constituted "special features" which, taken in combination, triggered the existence of a jurisdictional link for the purposes of Article 1 of the Convention in relation to the procedural obligation to investigate under Article 2. As the applicant did not complain about the substantive act which had given rise to the duty to investigate, the Court did not have to examine whether, for the purposes of Article 1 of the Convention, there was also a jurisdictional link in relation to any substantive obligation under Article 2. It emphasised, however, that it did not follow from the mere establishment of a jurisdictional link in relation to the procedural obligation under Article 2 that the substantive act fell within the jurisdiction of the Contracting State or that the said act was attributable to that State.

Accordingly, the scope of the present case was limited to the investigative acts and omissions by German military personnel in Afghanistan undertaken in accordance with the retention of exclusive jurisdiction under the ISAF Status of Forces Agreement over German troops in respect of any criminal or disciplinary offences which the latter might commit on the territory of Afghanistan, as well as to acts and omissions of the prosecution and judicial authorities in Germany. These were capable of giving rise to the responsibility of Germany under the Convention.

Article 2

The Court considered it appropriate to examine the applicant's complaints solely under the procedural aspect of Article 2 of the Convention.

The Court noted that the criminal investigation had established that the applicant's two sons had been killed by the airstrike ordered by Colonel K. on 4 September 2009. The Federal Prosecutor General had found that Colonel K. had not incurred criminal liability mainly because he had been convinced, at the time of ordering the airstrike, that no civilians had been present at the sand bank. The Prosecutor General concluded that Colonel K. had thus not acted with the intent to cause excessive civilian casualties, which would have been required for him to be liable under the relevant provision of the Code of Crimes against International Law. He had believed that the armed Taliban fighters who had hijacked the two fuel tankers were members of an organised armed group that was party to the armed conflict and were thus legitimate military targets.

In order to answer the relevant questions of law regarding Colonel K.'s criminal liability, the Federal Prosecutor General's investigation had focused, in essence, on clarifying two questions of fact: firstly, Colonel K.'s subjective assessment of the situation when he had ordered the airstrike, which was crucial with regard to both his liability under the Code of Crimes against International Law and the lawfulness of the airstrike under international humanitarian law; and, secondly, the number of victims.

The Court noted that the German civilian prosecution authorities had not had legal powers to undertake investigative measures in Afghanistan under the ISAF Status of Forces Agreement, but would have been required to resort to international legal assistance to that end. However, the Federal Prosecutor General had been able to rely on a considerable amount of material concerning the circumstances and the impact of the airstrike. The Prosecutor General had interrogated the suspects and the other soldiers present at the command centre and found credible their testimonies that they had operated on the assumption that only insurgents and no civilians had been present. He had noted that this account was corroborated by objective

circumstances and evidence such as audio recordings of the radio traffic between the command centre and the pilots of the AmericanF-15 aircraft and the thermal images from the latter's infrared cameras. The Federal Prosecutor General had established that Colonel K. had had at least seven calls put through to the informant in order to verify that no civilians had been present at the scene and that the information given by the informant corresponded to the video feed from the aircraft.The Court had no reason to doubt the assessment of the Federal Prosecutor General, and that of the Federal Constitutional Court, that no additional insights as to whether Colonel K. had acted in the expectation of civilian casualties when ordering the airstrike could have been gleaned by examining further witnesses.

Nor could the Court discern a need for the involvement of additional military experts or for a simulation of the situation at the command centre. The report of the ISAF investigation team had been prepared by military experts from different countries. Relying on that report, the Federal Prosecutor General had concluded that all precautionary measures had been undertaken and that Colonel K., at the time of ordering the airstrike, had had no reason to suspect the presence of civilians near the fuel tankers, and that no advance warning had been required.

As to the establishment of the precise number and status of the victims, the Federal Prosecutor General, having regard to the divergent findings of the different reports, the methods by which they had been established and the available evidence, including the video material, had concluded that about fifty persons were likely to have been killed or injured by the airstrike and that there had been significantly more Taliban fighters than civilians among the victims. The Court acknowledged that a more accurate assessment would not appear to have been possible given the situation of intense conflict in the area. It also observed that the precise number of civilian victims did not have any bearing on the legal assessment in respect of the criminal liability of Colonel K., which focused on his subjective assessment at the time of ordering the airstrike.

The Court found that the facts surrounding the airstrike which killed the applicant's two sons, including the decision-making and target verification process leading up to the ordering of the airstrike, had been established in a thorough and reliable manner in order to determine the legality of the use of lethal force.

The Court reiterated that the procedural obligation in Article 2 of the Convention did not necessarily require a judicial review of investigative decisions as such. The Government had nevertheless indicated that the applicant had had at his disposal two judicial remedies by which to challenge the effectiveness of the investigation, and had used both, namely his motion to compel public charges before the Court of Appeal and his constitutional complaint.

The Court noted that the Court of Appeal had declared the applicant's motion to compel public charges inadmissible. It observed that the application of the admissibility requirements had been consistent with the well-established case-law of the domestic courts and that the Court of Appeal had engaged in a thorough review of the evidence referred to by the applicant and of the decision by the Federal Prosecutor General, as also pointed out by the Federal Constitutional Court.

The latter court had reviewed the effectiveness of the investigation on the applicant's constitutional complaint. Noting that the Federal Constitutional Court was able to set aside a decision to discontinue a criminal investigation, the Court concluded that the applicant had had at his disposal a remedy enabling him to challenge the effectiveness of the investigation.

Lastly, the Court observed that the investigation into the airstrike by the parliamentary commission of inquiry had ensured a high level of public scrutiny of the case.

Having regard to the circumstances of the present case, the Court concluded that the investigation by the German authorities into the deaths of the applicant's two sons had complied with the requirements of an effective investigation under Article 2 of the Convention.

There had accordingly been no violation of the procedural limb of Article 2.

Separate opinion

Judges **Grozev**, **Ranzoni** and **Eicke** expressed a joint partly dissenting opinion which is annexed to the judgment.

The judgment is available in English and French

6. **ECHR, *R.R and Others v. Hungary*, no. 36037/17, Chamber judgment of 02 March 2021 (Article 3, prohibition of inhuman or degrading treatment – violation; Article 5 § 1, right to liberty and security – violation; Article 5 § 4, right to have lawfulness of detention decided speedily by a court – violation)**: The applicants, an Iranian and four Afghan nationals, complained, in particular, of the fact of and the conditions of their detention in the Röszke transit zone on the border with Serbia in April-August 2017, of the lack of a legal remedy to complain of the conditions of detention, the lack of judicial review of their detention, and of the authorities failure to comply with an interim measure concerning them.

ECHR 074 (2021)
02.03.2021

Press release issued by the Registrar of the Court

In today's Chamber judgment in the case of *R.R. and Others v. Hungary* (application no. 36037/17) 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**,**

by 6 votes to 1, **a violation of Article 5 § 1 (right to liberty and security), and**

by 6 votes to 1, **a violation of Article 5 § 4 (right to have lawfulness of detention decided speedily by a court)**.

The case concerned the applicants' confinement in the Röszke transit zone on the border with Serbia in April-August 2017.

The Court found, in particular, that the lack of food provided to R.R. and the conditions of stay of the other applicants (a pregnant woman and children) had led to a violation of Article 3. It also found that that the applicants' stay in the transit zone had amounted to a *de facto* deprivation of liberty and that the absence of any formal decision of the authorities and any proceedings by which the lawfulness of their detention could have been decided speedily by a court had led to violations of Article 5.

Principal facts

The applicants, R.R., S.H., M.H., R.H. and A.R., are an Iranian and four Afghan nationals respectively. They are a family of five. In 2017 they arrived in Hungary and applied for asylum there. On 19 April 2017 the Office for Immigration and Asylum ordered that the applicants be accommodated in the Röszke transit zone. They were accommodated together in a 13 sq. m container, with bunk beds without guard rails. According to the applicants, it was extremely hot and poorly ventilated in summer. There was a common area in the family section and some limited activities were provided. On 29 June 2017 the applicants were moved to an isolation section within the transit zone because the applicant mother and children had hepatitis B. There, they had no baby cot. There was no shared fridge or washing machine, and no activities for the children, who were given only sand to play with. According to the Government, the applicant children were given three meals, fruit and dairy products; however, the applicants submitted that the food had been inadequate for children, and that the mother had not been provided with maternity clothes. The applicants received basic medical care including some hospital visits, but no psychiatric treatment. According to the applicants, male guards had been present even during gynaecological examinations.

Owing to R.R.'s seeking asylum for a third time, he was not entitled to provision of food by the authorities, although the authorities stated that he had not been left starving and could have received food from NGOs or bought food. Following examination of their application, the applicants were granted leave

to enter and temporarily stay in Hungary. On 25 August 2017 the applicants left for Germany, where they were later granted international protection.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment), 13 (right to an effective remedy), 5 (right to liberty and security), and 34 (right of individual petition) of the European Convention, the applicants complained, in particular, of the fact of and the conditions of their detention in the transit zone, of the lack of a legal remedy to complain of the conditions of detention, the lack of judicial review of their detention, and of the authorities failure to comply with an interim measure concerning them. The application was lodged with the European Court of Human Rights on 19 May 2017.

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

Yonko **Grozev** (Bulgaria), *President*,

Branko **Lubarda** (Serbia),

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

Article 3

The Court reiterated that confinement of minors raised particular issues since children, whether accompanied or not, were extremely vulnerable. The Court also reiterated that Article 3 could not be interpreted as entailing any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living.

In the case of *Ilias and Ahmed v. Hungary* (no. 47287/15) the Grand Chamber of the Court had examined the living conditions experienced by adult asylum-seekers in the Röszke transit zone. Noting, in particular, the satisfactory material conditions in the zone, the relatively short length of the applicants' stay there (23 days), and the possibility to have contact with other asylum seekers, UNHCR representatives, NGOs and a lawyer, it had concluded that the conditions in which the applicants had spent twenty-three days in the transit zone had not reached the Article 3 threshold. In the present case, however, the Court considered that the applicants' situation was characterised by the first applicant's repeat asylum-seeker status, the applicant children's young age and the applicant mother's pregnancy and state of health. In particular, R.R. had not had adequate access to food.

As a repeat asylum-seeker, the Government had had in principle been allowed to decide to reduce or even withdraw material aid in respect of him. But such a decision should have contained reasons for the withdrawal or reduction and should have taken into account the principle of proportionality. The Court was not aware of such a decision. The Court noted, in particular, that the applicant had not been able to leave the zone without forfeiting his asylum application and thus had been dependent on the Hungarian authorities. Overall, the authorities had not sufficiently assessed R.R.'s circumstances before denying him

food, leading to a violation of his rights. The Court noted that States were obliged to take into account the specific situation of minors and pregnant women. However, no individualised assessment of the applicants' needs had been made in this case. In particular the Court noted the heat and lack of ventilation in the applicants' accommodation for much of their stay.

The Court noted that the beds had been unsuitable for children and they had no access to activities for part of their stay while in isolation. The Court noted the lack of adequate medical and psychiatric provision, the presence of male officers at gynaecological examinations and the constant security checks. Accordingly, in view of the applicant children's young age, the applicant mother's pregnancy and health situation and the length of the applicants' stay in the conditions in the transit zone, the Court found that the situation complained of had subjected the applicant children and the applicant mother to treatment in breach of the Convention. There had therefore been a violation of Article 3 in respect of those applicants.

Article 5 § 1 and 4

Contrary to the case of *Ilias and Ahmed*, the Court found that, having particular regard to the lack of any domestic legal provisions fixing the maximum duration of the applicants' stay in the transit zone, the excessive duration of that stay and the considerable delays in the domestic examination of the applicants' asylum claims, as well as the conditions in which the applicants were held during the relevant period, the applicants' stay in the transit zone amounted to a *de facto* deprivation of liberty. Article 5 § 1 was found to be applicable. According to the Government, the relevant law (section 80/J of the Asylum Act) stated that asylum applications could only be submitted, with certain exceptions, in the transit zone, and that asylum seekers were required to wait there until a final decision was taken on their asylum applications. However, the Court considered that without any formal decision of the authorities and solely by virtue of an overly broad interpretation of a general provision of the law, the applicants' detention could not be considered to have been lawful. Accordingly, it concluded that in the present case there had been no strictly defined statutory basis for the applicants' detention.

There had thus been a violation of Article 5 § 1 of the Convention.

The Court found that there had been only a *de facto* decision to keep the applicants in the zone and that it had not been established that the applicants could have sought a judicial review of their detention in the transit zone.

The Court found that there had accordingly been a violation of Article 5 § 4 of the Convention.

Other articles

The Court did not find it necessary to examine the complaints under Article 13 and Article 34 of the Convention.

Just satisfaction (Article 41)

The Court held that Hungary was to pay the applicant children 6,500 euros (EUR) each and the adults EUR 4,500 each in respect of non-pecuniary damage, and EUR 5,000 overall in respect of costs and expenses.

Separate opinion

Judge Mourou-Vikström expressed a statement of dissent, which is annexed to the judgment.

The judgment is available only in English.

7. **ECHR, *Hassine v. Romania*, no. 36328/13, Chamber judgment of 09 March 2021 (Article 5 §§ 1 and 4, right to liberty and security/right to a speedy review of the lawfulness of detention – no violation; Article 1 of Protocol No. 7, procedural safeguards relating to expulsion of aliens - violation)**: The case concerned administrative proceedings following which the applicant, an alien, was expelled from Romania on national-security grounds. The applicant complained, *inter alia*, that he had not been afforded any safeguards against arbitrariness.

ECHR 081 (2021)
09.03.2021

Press release issued by the Registrar of the Court

In today's Chamber judgment in the case of Hassine v. Romania (application no. 36328/13) the European Court of Human Rights held, unanimously, that there had been:

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

The case concerned administrative proceedings following which the applicant was expelled from Romania on national-security grounds.

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

Principal facts

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

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

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

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

In a judgment of 12 December 2012 the High Court dismissed Mr Hassine's appeal. It held that the Court of Appeal had correctly ruled that the procedure for summoning the parties had been carried out in the proper manner and that the first-instance court had rejected the request for adjournment properly and

giving reasons. The proceedings had been conducted with due respect for the adversarial principle, and the measure declaring Mr Hassine an undesirable person on national-security grounds had been taken after verification of compliance with the statutory procedures, and had struck a fair balance between the need to take measures to prevent terrorism and the obligation to respect human rights.

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

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

Complaints, procedure and composition of the Court

Relying on Article 5 §§ 1 and 4 (right to liberty and security/right to a speedy review of the lawfulness of detention), the applicant alleged that his placement in administrative detention with a view to his expulsion amounted to an unlawful deprivation of liberty and that he had had no effective remedy in that regard. Relying on Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens), the applicant complained that he had not been afforded any safeguards against arbitrariness. Lastly, he alleged that the measure taken against him had breached his right to respect for his private and family life under Article 8.

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

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

Yonko **Grozev** (Bulgaria), *President*,

Tim **Eicke** (the United Kingdom),

Faris **Vehabović** (Bosnia and Herzegovina),

Iulia Antoanella **Motoc** (Romania),

Armen **Harutyunyan** (Armenia),

Pere **Pastor Vilanova** (Andorra),

Jolien **Schukking** (the Netherlands),

and also Ilse **Freiwirth**, *Deputy Section Registrar*.

Decision of the Court

Article 5 §§ 1 and 4

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

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

Article 1 of Protocol No. 7

The Court observed that under Article 85 § 5 of Emergency Ordinance no. 194/2002 on the status of aliens in Romania, as in force at the relevant time, the data and information, together with the factual

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

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

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

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

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

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

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

Article 8

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

Just satisfaction (Article 41)

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

Separate opinion

Judge **Motoc** expressed a separate opinion which is annexed to the judgment.

The judgment is available only in French.

8. **ECHR, *Feilazoo v. Malta*, No. 6865/19, Chamber judgment of 11 March 2021 (Article 8, prohibition of inhuman and degrading treatment – violation; Article 5 § 1, right to liberty and security – violation; Article 34, right of individual application – violation)**: The case concerned the conditions of the applicant's immigration detention and its lawfulness. It also concerned complaints in relation to the proceedings before the European Court of Human Rights, mainly related to interference with correspondence and domestic legal-aid representation.

ECHR 084 (2021)
11.03.2021

Press release issued by the Registrar of the Court

In today's Chamber judgment in the case of *Feilazoo v. Malta* (application no. 6865/19) the European Court of Human Rights held, unanimously, that there had been:

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

a violation of Article 5 § 1 (right to liberty and security), and

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

The case concerned the conditions of the applicant's immigration detention and its lawfulness. It also concerned complaints in relation to the proceedings before this Court, mainly related to interference with correspondence and domestic legal-aid representation. The Court took issue with many aspects of the applicant's detention, including time spent detained in *de facto* isolation without exercise, and a subsequent period where he had been detained with people under Covid-19 quarantine unnecessarily. Overall it found the conditions inadequate. The Court also found that the authorities had not been diligent enough in processing his deportation, and that the reasons for the applicant's detention had ceased to be valid. It also found that the authorities had not guaranteed the applicant's right to petition before the Court, as they had tampered with his correspondence and had not guaranteed to him adequate legal representation.

Principal facts

The applicant, Joseph Feilazoo, is a Nigerian national who was born in 1975 and lives in Safi (Malta). On 23 February 2010 the applicant pleaded guilty to drug offences and received, besides a prison sentence, a fine and had to pay costs. As he was unable to pay, he was sentenced to an additional 22.5 months' imprisonment. Close to his release the applicant stated that he would return to Spain, where he had been resident.

According to the Government, the Spanish authorities refused him permission to return. On his release he was instead brought to the Immigration Office. There he was told he would be returned to Nigeria. He was deemed to be a "prohibited immigrant" and to be at risk of absconding.

It was alleged that at one point the applicant had become aggressive, causing harm to and even biting prison officers; pepper spray was used on the applicant. He was taken to hospital, where a number of injuries were noted, later confirmed by an expert report. The two injured officers complained to the police. An investigation was opened and the applicant was questioned without his lawyer present. He refused to sign the resulting statement.

On 12 April 2018 assault proceedings were instituted and on 5 February 2019 the applicant was found guilty. He was sentenced to a fine and imprisonment and ordered to pay costs. The domestic court noted that medical documents and eyewitnesses proved beyond reasonable doubt that the correctional officers had suffered slight injuries. On appeal the sentence was reduced and the applicant's immediate

deportation ordered. However, he was returned to prison as he was unable to pay the 4,000 euros fine. The applicant claimed that while in prison he had been moved to different security regimes to impede his access to legal aid. He further claimed other interferences at that time with, for example, access to medical files.

He was released on 14 September 2019 only to be put in immigration detention where he remained until 13 November 2020. The Nigerian authorities refused to issue a travel document and so the applicant has not yet been deported.

On 19 August 2019 the applicant lodged his application, with the Government being notified of many of his complaints. The applicant's legal-aid representative at the time had not submitted any subsequent correspondence or observations despite being requested to do so, with the applicant claiming he had not been contacted by that lawyer and that he hadn't received legal aid. It appeared that owing to difficulties between the applicant and his counsel, the latter had asked to be removed from the case. However, this was not ruled on by the courts owing to the Covid-19 pandemic.

Complaints, procedure and composition of the Court

Relying on Articles 3 (prohibition of inhuman and degrading treatment), 5 § 1 (right to liberty and security) and 34 (right of individual petition) of the Convention, the applicant complained, in particular, of excessive force used on him during his detention, the lack of an investigation into this, his conditions of detention, that some periods of his detention had been unlawful, and that the State had hindered his right of petition before the Court. The application was lodged with the European Court of Human Rights on 19 August 2019.

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

Ksenija **Turković** (Croatia), *President*,

Linos-Alexandre **Sicilianos** (Greece),

Alena **Poláčková** (Slovakia),

Péter **Paczolay** (Hungary),

Gilberto **Felici** (San Marino),

Erik **Wennerström** (Sweden),

Lorraine **Schembri Orland** (Malta),

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

Decision of the Court

Article 3

In respect of excessive use of force, the lack of an investigation into those allegations, and the failure to protect the applicant, the Court found that the applicant had not exhausted domestic remedies, and so the complaint was inadmissible.

Concerning the applicant's conditions of detention, the Court reiterated, in particular, that under the Convention the State had to ensure that people were detained in conditions that respect human dignity and that avoid unnecessary hardship. It furthermore noted that it had already expressed concern about the

appropriateness of the place and the conditions of detention where the applicant had been detained (Safi Barracks). It stated that those conditions had been exacerbated by the Libyan crisis.

The Court noted, in particular that while the applicant had submitted photos of the conditions of detention, the Government merely relied on general, unsubstantiated statements. The Court furthermore noted that the Government had not provided sufficient data on the numbers of detainees held and potential overcrowding, and the applicant had not provided sufficient information either, leading it to be unable to draw conclusions in that area. But the Court remained concerned about the various other aspects of the applicant's allegations that had gone unrebutted by the Government, including concerning ventilation, functioning toilets and pests. In particular, the Court was struck that the applicant had been held alone without access to natural light for 77 days, during much of which time he had also had no access to exercise. The Court was also very concerned by the unrebutted allegations that the applicant had been housed with people in Covid-19 quarantine where there appeared to have been no medical reason to do so.

In the light of the above, the Court found a violation of the applicant's Article 3 rights.

Article 5 § 1

The Court reiterated that Article 5 enshrined a fundamental human right – the protection of the individual against arbitrary interference by the State with his or her right to liberty. The Government submitted, in particular, that the applicant's detention beginning on 15 September 2019 had been for the purposes of deportation, during which time the authorities had tried to secure a passport for the applicant.

The Court did not accept that the entire period of detention had clearly been for the purposes of deportation and that the authorities had acted with diligence during the fourteen-month detention, as it did not appear that the authorities had sufficiently pursued the passport matter with the Nigerian authorities. The Court concluded that the reasons for the applicant's detention had therefore not remained valid throughout the whole period. The Court thus found a violation of the applicant's right to liberty and security.

Article 34

The Court reiterated the importance that, under Article 34 of the Convention, applicants or potential applicants be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints.

In this case, the Court considered that the authorities had failed to ensure that the applicant had been provided with the possibility of obtaining copies of documents which he had needed to substantiate his application, and that his correspondence concerning the case before the Court had not been dealt with confidentially, thus amounting to an unjustified interference with his right of individual application.

The Court also found that the applicant's representation had been inadequate in the light of, especially, the lack of diligence in dealing with his case, the lack of regular lawyer-client contact despite the Court's requests, and the inaction on the part of the authorities to rectify the situation. In the light of the above, the Court found a violation of the applicant's right of individual application.

Just satisfaction (Article 41)

The Court held that Malta was to pay the applicant 25,000 euros in respect of non-pecuniary damage.

The judgment is available only in English.

9. **ECHR, *Hussein and Others v. Belgium*, no. 45187/12, Chamber judgment of 16 March 2021 (Article 6 § 1, right to a fair trial – no violation)**: The case concerned ten Jordanian applicants who lodged a civil-party application with the Brussels investigating judge with a view to the institution of criminal proceedings against high-ranking Kuwaiti officials for crimes under international humanitarian law in respect of acts linked to the first Gulf War (1990-1991).

ECHR 088 (2021)
16.03.2021

Press release issued by the Registrar of the Court

In today's Chamber judgment in the case of *Hussein and Others v. Belgium* (application no. 45187/12) the European Court of Human Rights held, unanimously, that there had been:

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

The case concerned ten Jordanian applicants who lodged a civil-party application with the Brussels investigating judge with a view to the institution of criminal proceedings against high-ranking Kuwaiti officials for crimes under international humanitarian law, in respect of acts linked to the first Gulf War (1990-1991).

In 2001, at the time when the applicants had lodged their civil-party application, Belgian law recognised an absolute form of universal criminal jurisdiction, even in the absence of any connection with Belgium. Subsequently, the Belgian legislature gradually introduced criteria requiring a connection with Belgium and a filtering system for assessing whether a prosecution should be brought. When the 5 August 2003 Act had come into force, the proceedings which the applicants had initially brought in 2001 no longer satisfied the new criteria governing the jurisdiction of the Belgian courts as defined for the future; it could therefore not be retained on that basis. Ultimately, the applicants' action had failed on the grounds that no investigative act had yet been carried out at the time of the entry into force of the 5 August 2003 Act, and the Belgian courts had in any case lacked jurisdiction to hear and determine the action. The Court ruled that the Belgian courts had provided a specific and explicit response to the pleas raised by the applicants and had not failed in their obligation to give reasons. It discerned nothing arbitrary or manifestly unreasonable.

The Court also considered that the decision by the Belgian courts, following the entry into force of the 2003 Act, to decline jurisdiction to hear and determine the civil-party application in 2001, had not been disproportionate to the legitimate aims pursued. Indeed, the reasons given by the Belgian authorities (proper administration of justice and the immunities issue raised by the proceedings under international law) could be considered as compelling grounds of public interest.

Principal facts

The applicants are Jordanian nationals who were born between 1930 and 1973 and live in Amman (Jordan). During the first Gulf War (1990-1991) the applicants, who were living in Kuwait, were prosecuted by the Kuwaiti authorities and deported to Jordan. An association was subsequently set up under Jordanian law ("Cooperative Society for the Gulf War Returnees" for the purposes of providing for mutual aid among its members, and in particular of obtaining compensation for the pecuniary and non-pecuniary damage which they had sustained.

In December 2001 counsel for the 7,738 members of the association, including the applicants, applied to join the proceedings as civil parties in their name and on their behalf to the Brussels investigating judge against 74 persons, most of them senior officials of the State of Kuwait, with a view to launching criminal proceedings for genocide on the basis of the 16 June 1993 Act on the suppression of serious violations of international humanitarian law (the so-called "universal jurisdiction law"), as amended by Act of 10 February 1999 and ultimately superseded by the Act of 5 August 2003. They also claimed compensation

for pecuniary and non-pecuniary damage sustained as a result of the offences of which they were the alleged victims. After the proceedings, which ended with the 18 January 2012 judgment of the Court of Cassation, the applicants' action failed on the grounds that no investigative act had yet been carried out at the time of the entry into force of the 5 August 2003 Law and the Belgian courts had in any case lacked jurisdiction to hear and determine the criminal proceedings.

Complaints, procedure and composition of the Court

The applicants relied, in particular, on Article 6 (right to a fair trial). They submitted that in declaring the proceedings inadmissible and declining jurisdiction, the Belgian courts had provided insufficient reasons for their decisions and deprived them of the right of access to a tribunal. The application was lodged with the European Court of Human Rights on 13 July 2012.

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

Georgios A. **Serghides** (Cyprus), *President*,

Paul **Lemmens** (Belgium),

Georges **Ravarani** (Luxembourg),

María **Elósegui** (Spain),

Darian **Pavli** (Albania),

Anja **Seibert-Fohr** (Germany),

Peeter **Roosma** (Estonia),

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

Decision of the Court

Article 6 § 1 (right to a fair trial)

Reasoning of domestic judicial decisions

In the light of its case-law, the Court considered that the domestic courts had provided a specific and explicit response to the plea raised by the applicants and that they had not failed in their obligation to provide reasons. Furthermore, the Court discerned nothing arbitrary or manifestly unreasonable in the domestic courts' interpretation of the concept of "investigative act". Indeed, that interpretation corresponded to the purpose of the 5 August 2003 Act of reducing universal jurisdiction litigation, while also establishing a transitional mechanism in order to prevent cases pending at the investigative stage from being affected. There had therefore been no violation of Article 6 § 1 of the Convention as regards the reasoning of the decisions given by the Indictments Division and the Court of Cassation.

Access to a tribunal

The Court noted that the applicants had quite evidently sustained a limitation of their right of access to a tribunal since the Belgian courts had declined jurisdiction to hear and determine the criminal proceedings which they had brought by lodging a civil-party application with the Brussels investigating judge. This limitation of jurisdiction had been deduced from the transitional mechanism of the 5 August 2003 Act.
The Government explained that the aim of the new system had been to ensure the proper administration of justice. They submitted that the risk of an excessive workload on the courts which would have resulted from an explosion in the number of cases based on universal jurisdiction without any connection with

Belgium, as well as the practical difficulties in taking evidence. It also transpires from the preparatory work of the 5 August 2003 Act that the reform had been intended to remedy diplomatic tensions elicited by the recognition of the said absolute universal jurisdiction and the blatant political abuse to which it had led. The Court considered that the reasons, concerning the proper administration of justice, that had prompted Parliament to examine the bill, as well as the link with the immunities issue which the proceedings had brought to light under international law, could be seen as compelling grounds of general interest.

The Court then noted that in 2001, at the time of the applicants' civil-party application, Belgian law had recognised an absolute form of universal criminal jurisdiction. Subsequently, the legislature gradually introduced criteria requiring a connection with Belgium and a filtering system for assessing whether a prosecution should be brought. When the 5 August 2003 had come into force on 7 August 2003, the proceedings which the applicants had initially brought in 2001 had no longer satisfied the new criteria governing the jurisdiction of the Belgian courts as defined for the future. The case could therefore not be retained on that basis.

Moreover, having regard to the decision of the Court of Cassation to the effect that the jurisdiction of the Belgian courts could only be retained if an investigative act had already been carried out before the entry into force of the Act, the action brought by the applicants had necessarily been doomed to failure if such an act had not been carried out, as indeed the Indictments Division and the Court of Cassation had later found.

Consequently, the Court held that the decision by the Belgian courts, following the entry into force of the 5 August 2003 Act, to decline jurisdiction to hear and determine the civil-party application lodged in 2001 by the applicants had not been disproportionate to the legitimate aims pursued. There had therefore been no violation of Article 6 § 1 of the Convention.

The judgment is available only in French.

10. **ECHR, *Tortladze v. Georgia*, no. 42371/08, Chamber judgment of 16 March 2021 (Article 8 § 1, respect of private and family life – violation; Article 6 § 1, right to a fair trial – no violation)**: The case concerned the conviction of a former diplomat for drug and firearm offences based upon an unlawful search of the consular premises by the host state authorities.

ECHR 087 (2021)
16.03.2021

Press release issued by the Registrar of the Court

The applicant, Ermile Tortladze, is a Georgian national who was born in 1964 and lives in Tbilisi. He was the Honorary Consul General of Côte d'Ivoire in Georgia at the material time. The case concerned evidence used in the applicant's trial for drugs and firearms offences in which the prosecution had relied on evidence obtained as a result of a search of the premises of the Honorary Consulate General of Côte d'Ivoire in Georgia.

Relying in particular on Article 6 § 1 (right to a fair trial) and Article 8 § 1 (right to respect to private and family life) of the European Convention, the applicant complained, of the alleged unlawfulness and lack of justification for the search of a consular premises and of the unfairness of the criminal trial on account of the use of evidence obtained as a result.

Violation of Article 8 § 1

No violation of Article 6 § 1 (on account of the alleged unfairness of the proceedings and of the lack of access to the Supreme Court)

Just satisfaction: The Court considered that, in the circumstances of the present case, the finding of a violation of Article 8 constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant as a result of that violation. It furthermore held that the respondent State was to pay him EUR 2,000 for costs and expenses.

11. **ECHR, *Bivolaru and Moldovan v. France*, nos 40324/16 and 12623/17, Chamber judgment of 25 March 2021 (Article 3, prohibition of inhuman or degrading treatment – no. 40324/16, violation / no. 12623/17, no violation)**: The case concerned the applicants' surrender by France to the Romanian authorities under European arrest warrants (EAWs) for the purpose of execution of their prison sentences. The case prompted the Court to clarify the conditions for application of the presumption of equivalent protection in such circumstances.

ECHR 101 (2021)
25.03.2021

Press release issued by the Registrar of the Court

In today's Chamber judgment in the case of *Bivolaru and Moldovan v. France* (applications nos. 40324/16 and 12623/17) 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 in application no. 12623/17, lodged by Mr Moldovan**,** and

no violation of Article 3 in application no. 40324/16, lodged by Mr Bivolaru.

The case concerned the applicants' surrender by France to the Romanian authorities under European arrest warrants (EAWs) for the purpose of execution of their prison sentences. The case prompted the Court to clarify the conditions for application of the presumption of equivalent protection in such circumstances.

The Court held that the presumption of equivalent protection applied in Mr Moldovan's case in so far as the two conditions for its application, namely the absence of any margin of manoeuvre on the part of the national authorities and the deployment of the full potential of the supervisory mechanism provided for by European Union (EU) law, were met. The Court therefore confined itself to ascertaining whether or not the protection of the rights guaranteed by the Convention had been manifestly deficient in the present case, such that this presumption was rebutted. To that end it sought to determine whether there had been a sufficiently solid factual basis requiring the executing judicial authority to find that execution of the EAW would entail a real and individual risk to the applicant of being subjected to treatment contrary to Article 3 on account of his conditions of detention in Romania.

The Court noted that Mr Moldovan had provided evidence of the alleged risk that was sufficiently substantiated to require the executing judicial authority to request additional information and assurances from the issuing State regarding his future conditions of detention in Romania. The Court found a violation of Article 3 in so far as it appeared that the executing judicial authorities, in exercising their powers of discretion, had not drawn the proper inferences from the information obtained, although that information had provided a sufficiently solid factual basis for refusing execution of the EAW in question.

In Mr Bivolaru's case the Court considered that, owing to its decision not to request a preliminary ruling from the Court of Justice of the European Union (CJEU) on the implications for the execution of an EAW of the granting of refugee status by a member State to a national of a third country which subsequently also became a member State, the Court of Cassation had ruled without the full potential of the relevant international machinery for supervising fundamental rights having been deployed. The presumption of equivalent protection was therefore not applicable.

There were two aspects to Mr Bivolaru's complaint: the first concerning the implications of his refugee status, and the second concerning conditions of detention in Romania. There was nothing in the file before the executing judicial authority or the evidence adduced by the applicant before the Court to suggest that he would still face a risk of persecution on religious grounds in Romania in the event of his surrender. The Court considered that the executing judicial authority, following a full and in-depth examination of the applicant's individual situation which demonstrated that it had taken account of his refugee status,

had not had a sufficiently solid factual basis to establish the existence of a real risk of a breach of Article 3 of the Convention and to refuse execution of the EAW on that ground.

The Court also considered that the description of conditions of detention in Romanian prisons provided by the applicant to the executing judicial authority in support of his request not to execute the EAW had not been sufficiently detailed or substantiated to constitute prima facie evidence of a real risk of treatment contrary to Article 3 in the event of his surrender to the Romanian authorities. In the Court's view, the executing judicial authority had not been obliged to request additional information from the Romanian authorities. Accordingly, it held that there had not been a solid factual basis for the executing judicial authority to establish the existence of a real risk of a breach of Article 3 of the Convention and to refuse execution of the EAW on those grounds.

Principal facts

The applicants, Gregorian Bivolaru and Codrut Moldovan, are two Romanian nationals. In June 2015 Mr Moldovan was sentenced by the Mures District Court (Romania) to seven years and six months' imprisonment for human trafficking offences committed in 2010 in Romania and France. He returned to France after his trial. On 29 April 2016 the Romanian authorities issued a European arrest warrant (EAW) in respect of Mr Moldovan for the purpose of enforcing that prison sentence.

In June 2016 the applicant, who had been placed under court supervision requiring him to report once a week to the Clermont-Ferrand police, was arrested and the EAW was served on him. In proceedings before the Investigation Division of the Riom Court of Appeal he argued that his surrender could not take place until the Investigation Division had requested and obtained additional information about his future conditions of detention in Romania. The Investigation Division made the relevant request in order to assess whether there existed a real risk of inhuman or degrading treatment. After obtaining the information it held, in a judgment of 5 July 2016, that there was no obstacle to Mr Moldovan's surrender. The applicant lodged an appeal on points of law against that judgment which was dismissed on 10 August 2016. On 26 August 2016 he was surrendered to the Romanian authorities pursuant to the EAW.

Mr Bivolaru, the leader of a spiritual yoga movement since the 1990s, was the subject of criminal proceedings in Romania in 2004. In 2005 he travelled to Sweden, where he applied for political asylum and was issued with a refugee's permanent residence permit, with which he was allowed to travel as from 2007. In a judgment of 14 June 2013 the Romanian High Court of Cassation and Justice sentenced him *in absentia* to six years' imprisonment on charges of sexual relations with a minor. On 17 June 2013 the Sibiu County Court issued an EAW with a view to the enforcement of that sentence. In February 2016 Mr Bivolaru was arrested in Paris while travelling under an assumed identity using false Bulgarian identity papers.

In proceedings before the Investigation Division of the Paris Court of Appeal he challenged the execution of the EAW, arguing that the fact that he had been granted refugee status by Sweden, and the political and religious grounds for his conviction in Romania, placed him at risk of inhuman and degrading treatment and thus constituted an absolute bar to his 3 surrender. The Investigation Division ordered further enquiries. The Swedish authorities provided more detailed information, specifying, among other things, that they had not instituted proceedings to have Mr Bivolaru's refugee status withdrawn.

On 8 June 2016 the Investigation Division ordered Mr Bivolaru's surrender to the Romanian judicial authorities. It found, in particular, that the applicant's surrender had been requested for the purpose of his serving a sentence for an ordinary offence, and it inferred from the Court's case-law that the applicant's assertion that he had been convicted on account of his political views was merely an allegation. It also found that it was not its task to determine whether the applicant faced a real risk of inhuman or degrading treatment on account of the conditions of detention in Romania. Mr Bivolaru lodged an appeal on points of law against that judgment. The Court of Cassation dismissed his appeal on 12 July 2016, ruling that the fact that he had been granted refugee status by Sweden did not preclude execution of the EAW.

On 13 July 2016, under Rule 39 of the Rules of Court, Mr Bivolaru requested a stay of execution of his surrender to the Romanian authorities. On 15 July 2016 the Court refused the request. One week later Mr Bivolaru was transferred to Romania pursuant to the EAW and was imprisoned. He was granted conditional release on 13 September 2017.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment) of the Convention, the applicants submitted that their surrender to the Romanian authorities under the EAWs placed them at risk of treatment in breach of the Convention. The application was lodged with the European Court of Human Rights on 12 August 2016.

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

Síofra **O'Leary** (Ireland), *President*,

Mārtiņš **Mits** (Latvia),

Stéphanie **Mourou-Vikström** (Monaco),

Jovan **Ilievski** (North Macedonia),

Lado **Chanturia** (Georgia),

Arnfinn **Bårdsen** (Norway),

Mattias **Guyomar** (France),

and also Martina **Keller**, *Deputy Section Registrar.*

Decision of the Court

Article 3

When applying international law the Contracting States remained bound by the obligations they had entered into on acceding to the European Convention on Human Rights. A measure taken for the purposes of fulfilling international legal obligations had to be deemed justified where the organisation in question conferred on fundamental rights at least an equivalent or comparable level of protection to that guaranteed by the Convention. If the organisation was considered to provide equivalent protection, the presumption would be that a State had not departed from the requirements of the Convention when it had done no more than implement legal obligations flowing from its membership of the organisation.

The Court had to verify whether the conditions for application of the presumption of equivalent protection were met in the circumstances of the case before it. If so, it had to be satisfied that the authority executing the EAW had established that the latter would not render the protection of the rights guaranteed by the Convention manifestly deficient. If this was not established and the conditions for application of the presumption of equivalent protection were not fully met, the Court had to review the manner in which the executing judicial authority had sought to ascertain whether there was a real and individualised risk of a breach of the rights protected by the Convention in the event of execution of the EAW. It had to determine the issue whether the applicant's surrender was contrary to Article 3.

Mr Moldovan

With regard to the first condition of application of the presumption of equivalent protection, namely the absence of any margin of manoeuvre on the part of the national authorities, the Court noted that the legal

obligation on the judicial authority executing the EAW stemmed from the relevant provisions of Framework Decision 2002/584/JHA, as interpreted by the CJEU since its judgment in *Aranyosi and Căldăraru*. As the CJEU's case-law currently stood, the executing judicial authority was permitted to derogate, in exceptional circumstances, from the principles of mutual trust and mutual recognition between member States by postponing or even, where appropriate, refusing execution of the EAW.

In ruling on the applicant's challenge to execution of the EAW on the grounds that it would expose him to a risk of being detained in Romania in conditions contrary to Article 4 of the Charter of Fundamental Rights, the executing judicial authority had been required to assess the existence of the systemic shortcomings in the issuing member State alleged by the applicant and then, as appropriate, to carry out a specific and detailed examination of the individual risk of inhuman and degrading treatment which the applicant would face in the event of his surrender.

The Court noted the convergence between the requirements laid down by the CJEU and those arising out of its own case-law with regard to the establishment of a real and individual risk. It followed that the Investigation Division should have refused execution of the EAW if, after carrying out the aforementioned assessment, it found that substantial grounds had been shown for believing that the applicant, if surrendered, would in fact face a risk of inhuman and degrading treatment on account of his conditions of detention. However, this discretionary power on the part of the judicial authority to assess the facts and circumstances and the legal consequences which they entailed had to be exercised within the framework strictly delineated by the CJEU's case-law and in order to ensure the execution of a legal obligation in full compliance with European Union law, namely Article 4 of the Charter of Fundamental Rights, which guaranteed equivalent protection to that provided by Article 3 of the Convention. In those circumstances the executing judicial authority could not be said to enjoy an autonomous margin of manoeuvre in deciding whether or not to execute a European arrest warrant, such as to result in non-application of the presumption of equivalent protection.

As to the second condition for application, namely deployment of the full potential of the supervisory mechanism provided for by EU law, the Court noted that no serious difficulty arose, in the light of the CJEU's case-law, with regard to the interpretation of the Framework Decision, and its compatibility with fundamental rights, capable of leading to the conclusion that a preliminary ruling should have been requested from the CJEU. The second condition for application of the presumption of equivalent protection should therefore be considered to have been satisfied. In view of the foregoing, the Court held that the presumption of equivalent protection was applicable in the present case. Accordingly, the Court had to ascertain whether the protection of the rights guaranteed by the Convention had been manifestly deficient in the present case, such that this presumption was rebutted. If that were the case, the interest of international cooperation would be outweighed by observance of the Convention as a "constitutional instrument of European public order" in the field of human rights. To that end the Court would seek to determine whether or not there had been a sufficiently solid factual basis requiring the executing judicial authority to find that execution of the EAW would entail a real and individual risk to the applicant of being subjected to treatment contrary to Article 3 on account of his conditions of detention in Romania.

The Court observed at the outset that in the proceedings before the domestic courts the applicant had produced evidence of systemic or generalised failings in the prisons of the issuing State. It noted the weighty and detailed nature of the evidence adduced before the Investigation Division and subsequently before the Court of Cassation, pointing to shortcomings in the Romanian prison system and in particular in Gherla Prison, where the Romanian authorities intended to place the applicant.

The Court also noted the measures taken by the domestic judicial authority, which had requested additional information from the Romanian authorities. In the light of the details obtained in the course of that exchange of information, the executing judicial authority had taken the view that execution of the EAW would not entail a risk of a breach of Article 3 in the applicant's case. For its part the Court considered that there had been a sufficient factual basis for the authority in question to find that such a risk existed.

Firstly, the Court considered that the information provided by the issuing State had not been placed sufficiently within the context of the Court's case-law, in particular with regard to the situation in Gherla Prison, where the applicant was reportedly to be detained. The Court reiterated that, according to its case-law, 3 sq. m of floor surface per prisoner in a multi-occupancy cell was the applicable minimum standard for the purposes of Article 3 of the Convention. The Court held that the information available to the executing judicial authority concerning the personal space that would be allocated to the applicant had given rise to a strong presumption of a breach of Article 3.

Secondly, the Court observed that the assurances provided by the Romanian authorities concerning the other aspects of the conditions of detention in Gherla Prison, which were allegedly capable of discounting the existence of a real risk of a breach of Article 3, had been described in stereotypical fashion and had not been included in the executing judicial authority's assessment of the risk. Thirdly, the Court considered that, even though the Romanian authorities had not ruled out the possibility that the applicant might be held in a prison other than Gherla Prison, the precautions taken by the executing judicial authority in that regard, in the form of a recommendation that the applicant should be held in a prison that provided identical if not better conditions, were inadequate to guard against a real risk of inhuman and degrading treatment. Consequently, the Court held that there had been a sufficiently solid factual basis, deriving in particular from the Court's own case-law, for the executing judicial authority to establish the existence of a real risk to the applicant of being exposed to inhuman and degrading treatment on account of his conditions of detention in Romania, such that it could not simply defer to the statements made by the Romanian authorities. The Court inferred from this that in the specific circumstances of this case the protection of fundamental rights had been manifestly deficient, with the result that the presumption of equivalent protection was rebutted.

The Court found a violation of Article 3 of the Convention.

Mr Bivolaru

Mr Bivolaru's complaint under Article 3 comprised two aspects: the first concerning the implications of his refugee status, and the second concerning conditions of detention in Romania. With regard to the application of the presumption of equivalent protection, the Court noted that the Court of Cassation had rejected the applicant's request to seek a preliminary ruling from the CJEU on the implications for the execution of a European arrest warrant of the granting of refugee status by a member State to a national of a third country which subsequently also became a member State. This was a genuine and serious issue with regard to the protection of fundamental rights by EU law and its relationship with the protection afforded by the 1951 Geneva Convention, an issue which the CJEU had never previously examined.

The Court considered that, owing to its decision not to refer the matter to the CJEU, the Court of Cassation had ruled without the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the Convention – having been deployed. In view of that decision and of the importance of the issues at stake, the presumption of equivalent protection did not apply.

Accordingly, it fell to the Court to review the manner in which the executing judicial authority had sought to ascertain whether there existed a real risk that the applicant would be subjected to persecution on account of his political and religious beliefs if the EAW were to be executed. It had to determine whether there had been a sufficiently solid factual basis requiring the executing judicial authority to find that execution of the EAW would entail a real and individual risk to the applicant of being subjected to treatment contrary to Article 3 and to refuse execution of the EAW on that ground.

The Court observed that in the domestic proceedings the applicant, in seeking to demonstrate the existence of a real risk of inhuman and degrading treatment in the event of execution of the EAW, had relied primarily on his refugee status under the Geneva Convention and on the prohibition of *refoulement* laid down in Article 33 of that Convention. In reviewing the observance of Article 3 the Court noted that the Framework Decision on the European arrest warrant did not include any grounds for non-execution relating to the refugee status of the person whose surrender was sought. It stressed the fact that, in granting

the applicant refugee status, the Swedish authorities had apparently taken the view that there was sufficient evidence at that time that he was at risk of being persecuted in his country of origin. In carrying out its review, the executing judicial authority had considered that this status was a factor of which it had to take particular account.

The Investigation Division had exchanged information with the Swedish authorities seeking further details about the applicant's refugee status. The Swedish authorities had replied that they proposed to maintain the applicant's refugee status, but without examining whether the risk of persecution in his country of origin persisted, ten years after that status had been granted. There was nothing in the file before the executing judicial authority or in the evidence adduced by the applicant before the Court to suggest that he would still face a risk of persecution on religious grounds in Romania in the event of his surrender. The Court also noted that the executing judicial authorities had verified that the request for execution of the EAW had not pursued a discriminatory purpose, in particular on account of the applicant's political views.

The Court therefore considered that the executing judicial authority, following a full and in-depth examination of the applicant's individual situation which demonstrated that it had taken account of his refugee status, had not had a sufficient factual basis to establish the existence of a real risk of a breach of Article 3 of the Convention and to refuse execution of the EAW on that ground. Regarding the issue of conditions of detention in Romania, the Court observed that in the proceedings before the domestic courts the applicant had merely complained in very general terms about the treatment of political opponents in Romania, including in prison, and not about the conditions of detention in Romanian prisons; as a result, the executing judicial authority had had insufficient information in that regard.

Accordingly, the Court considered that the description of conditions of detention in Romanian prisons provided by the applicant to the executing judicial authority in support of his request not to execute the EAW had not been sufficiently detailed or substantiated to constitute prima facie evidence of a real risk of treatment contrary to Article 3 in the event of his surrender to the Romanian authorities. The Court also noted that, in view of the role of the Court of Cassation, it had served no purpose to rely for the first time before that court on the judgment in *Aranyosi and Căldăraru* in an attempt to demonstrate the existence of the alleged structural shortcomings. In the Court's view, there had been no obligation for the executing judicial authority to request additional information from the Romanian authorities on the applicant's future place of detention, the conditions of detention and the prison regime, for the purpose of identifying the existence of a real risk that he would be subjected to inhuman and degrading treatment on account of his conditions of detention. In these circumstances the Court held that there had not been a solid factual basis for the executing judicial authority to identify the existence of a real risk of a breach of Article 3 of the Convention and to refuse execution of the EAW on that ground.

Accordingly, the execution of the European arrest warrant had not entailed a violation of Article 3 of the Convention.

Just satisfaction (Article 41)

The Court held that France was to pay Mr Moldovan 5,000 euros (EUR) in respect of non-pecuniary damage and EUR 2,520 in respect of costs and expenses.
The judgment is available only in French.

12. **ECHR, *K.I. v. France*, no. 5560/19, Chamber judgment of 15 April 2021 (Article 3, prohibition of inhuman or degrading treatment – violation)**: The case concerned a Russian national of Chechen origin who arrived in France when he was still a minor and obtained refugee status. After being convicted for a terrorism offence and on the grounds that his presence in France represented a serious threat to French society, the French Office for Refugees and Stateless Persons (OFPRA) revoked his status and his deportation to Russia was ordered.

ECHR 124 (2021)
15.04.2021

Press release by the Registrar of the Court

In today's Chamber judgment in the case of *K.I. v. France* (application no. 5560/19) 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 under its procedural aspect if, having had his refugee status withdrawn, the applicant was to be returned to his country of origin without any prior assessment by the French authorities of the actual and current risk that he claimed to be facing in the event of his deportation.

The case concerned a Russian national of Chechen origin who arrived in France when he was still a minor and obtained refugee status. After being convicted for a terrorism offence and on the grounds that his presence in France represented a serious threat to French society, the French Office for Refugees and Stateless Persons (OFPRA) revoked his status in July 2020 under Article L. 711-6 of the Immigration and Asylum Code and his deportation to Russia was ordered.

The Court began by observing that both under the case-law of the Court of Justice of the European Union (CJEU) and under that of the French Conseil d'État, the withdrawal of refugee status had no bearing on the fact of being a refugee. The question whether the applicant remained a refugee thus should have been given specific consideration by the national authorities when they examined, under Article 3 of the Convention, the reality of the risk that he faced in the event of deportation to his country of origin. The Court found that both when his deportation was ordered and when it was reviewed by a court, the French authorities, in assessing the risks that he faced on his return to Russia, had not specifically taken account of the fact that the applicant could be presumed to have remained a refugee in spite of the withdrawal of his status.

The Court concluded that there would be a violation of Article 3 of the Convention in its procedural aspect if the applicant were to be returned to Russia without any prior assessment by the French authorities of the actual and current risk that he claimed to be facing in the event of his deportation being enforced.

Principal facts

The applicant, Mr K.I., arrived in France in August 2011 at the age of 17. In 2013 the OFPRA granted him refugee status. Just over nine months after obtaining refugee status, K.I. was arrested by the French authorities on the basis of a judicial warrant issued in an investigation into a criminal conspiracy to commit an act of terrorism. He was placed under judicial investigation with four compatriots and remanded in custody. He was accused in particular of having travelled to a combat zone in Syria for the purpose of undergoing military training in the handling of military weapons and of having fought as a member of a jihadist group.

In 2015 the Paris Criminal Court sentenced K.I. to five years' imprisonment for participation in a criminal conspiracy to commit an act of terrorism between 1 September 2012 and 19 November 2013, in France and also in Germany, Poland, Ukraine, Turkey and Syria, by preparing and organising his departure together with an accomplice to the combat zone in Syria, with the help of their various contacts, and by travelling to that destination.

On 18 November 2015 the Prefect of Essonne issued a deportation order on the basis of the serious threat that K.I. represented for public safety. On 14 January 2016 he lodged an appeal with the Versailles

Administrative Court to have the deportation order annulled. On 23 June 2016 the OFPRA revoked K.I.'s refugee status under Article L. 711 6 2° of the Immigration and Asylum Code on the grounds that he had been convicted with final effect in France for a terrorism offence and that his presence in France constituted a serious threat to society.

On 14 December 2016 K.I. lodged an appeal with the National Asylum Court (CNDA) seeking the annulment of the OFPRA's decision of 23 June 2016. In its defence, the OFPRA submitted that this appeal should be dismissed. It argued, primarily, that the exclusion clause provided for in Article 1(F)(a) of the Geneva Convention should be applied to the applicant on the grounds that the actions attributable to the armed group that he had joined in Syria were comparable to crimes against humanity and war crimes, and that the acts of terrorism for which he had been convicted in France could be characterised as acts contrary to the purposes and principles of the United Nations. In the alternative, the OFPRA argued that his presence in France constituted a serious threat to State security and for society.

Since his release from prison on 11 December 2017, K.I. has been placed under a compulsory residence order. According to him, he has been obliged to report to the police station three times a day. On 11 January 2019 the CNDA upheld the OFPRA's decision to withdraw his international protection. On 25 January 2019 K.I. applied to the European Court of Human Rights for an interim measure, under Rule 39 of its Rules of Procedure, to stop the French Government from deporting him to Russia. On 28 January 2019 the duty judge took the decision to grant the request up to 4 February 2019 and to seek information from the Government.

On 28 January 2019, while still under a compulsory residence order, K.I. was arrested. The Prefect of Seine Maritime issued an order for his placement in the Lille Lesquin administrative detention centre in order to ensure the enforcement of the deportation order. On 4 February 2019 the Court's duty judge decided to discontinue the application of Rule 39 and informed K.I. that his application was premature because there was no enforceable deportation decision against him, the relevant order not being accompanied by directions as to the country of destination. On 25 February 2019 the Prefect of Seine Maritime made an order specifying the Russian Federation as the country of destination, or any country in which K.I. would be legally admissible.

On 27 February 2019 K.I. filed a new request for an interim measure with the Court. On the same day, the duty judge decided to temporarily apply Rule 39 again, up to and including 8 March 2019. On 1 March 2019 the urgent applications judge of the Lille Administrative Court dismissed an urgent application lodged by the applicant on 27 February 2019 seeking a stay of execution of the order of 25 February 2019. On 16 May 2019 the Lille Administrative Court rejected the applicant's appeal for annulment of the order of 25 February 2019 specifying Russia as the country of destination. On 26 May 2020 the Prefect of Dordogne issued a compulsory residence order against the applicant with a requirement to report to the police station three times a day.

On 29 July 2020 the Conseil d'État dismissed the applicant's appeal against the decision of the CNDA of 11 January 2019 upholding the OFPRA's decision to revoke his refugee status. The Government explained that the applicant, still under a compulsory residence order, was accommodated and supported financially by the State. The applicant alleged that he only had two close relatives still in Chechnya and that the male members of his family had either died or were beneficiaries of international protection in Europe.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment), the applicant argued that his deportation to Russia would expose him to treatment in breach of that Article of the Convention. The application was lodged with the European Court of Human Rights on 25 January 2019.

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

Síofra **O'Leary** (Ireland), *President*,

Mārtiņš **Mits** (Latvia),

Ganna **Yudkivska** (Ukraine),

Stéphanie **Mourou-Vikström** (Monaco),

Lətif **Hüseynov** (Azerbaijan),

Lado **Chanturia** (Georgia),

Mattias **Guyomar** (France),

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

Decision of the Court

Article 3

As regards the general situation in the North Caucasus region, the Court had previously found that the situation was not such that any return to the Russian Federation would constitute a violation of Article 3 of the Convention. The Court noted that the applicant could not be compared to asylum-seekers who had just fled their country and who were vulnerable because of everything they had been through during their recent migration. He had arrived in France in 2011 and had been granted refugee status in January 2013. This status had been revoked in 2016 following his criminal conviction in 2015 for acts committed in France, Germany, Poland, Ukraine, Turkey and Syria between 1 September 2012 and 19 November 2013, and the fact that he had spent almost two months in a combat zone in Syria shortly after obtaining his refugee status. He had left for Syria after thorough and lengthy preparation. The Court therefore took the view that it was not apparent from the facts of the case that the applicant could be regarded as vulnerable, having regard to the distribution of the burden of proof in cases concerning Article 3 of the Convention.

On 14 May 2019, two days before the Lille Administrative Court had ruled on the risks that the applicant claimed to be facing in the event of his return to Russia, the CJEU had held that the "fact of being" a refugee was not affected by the revocation of refugee status on grounds of a threat to the security or society of the host member State. Subsequently, in a judgment of 19 June 2020, the Conseil d'État had applied the case-law of the CJEU.

The Court noted that it was clear from both the case-law of the CJEU and that of the Conseil d'État that the applicant remained a refugee even though formal recognition of his refugee status had been withdrawn on the basis of Article L. 711-6 of the Immigration and Asylum Code, as the CNDA had not accepted the OFPRA's submission that the exclusion clause should be applied to him.

According to the Court's case-law, the fact of being a refugee was a factor that had to be taken into account by the domestic authorities when they examined whether the risk that the person claimed to be facing in the event of expulsion was real. The Court noted that the French authorities, when they had issued and subsequently reviewed the decision to deport him to the Russian Federation, had not taken into consideration that the fact of being a refugee per se was not affected by the withdrawal of the formal recognition of refugee status. The Court thus concluded that the French authorities and the domestic courts had not assessed the risks that the applicant would face if the deportation order were to be enforced.

The Court did not rule out the possibility that, following a thorough and full examination of the applicant's personal situation and verification of whether or not he was still a refugee, the French authorities might still have reached the same conclusion as the Lille Administrative Court, namely that there was no risk to him under Article 3 of the Convention if he were deported to Russia. The Court noted, however, that the CNDA had already advised against the expulsion of certain individuals to their country of nationality on the grounds that, although they had lost refugee status, they had remained refugees. In the relevant opinions, the CNDA had found that the impugned decisions determining the country of destination had disregarded France's obligation to uphold the right to protection of refugees against refoulement, under Article 4 and Article 19 § 2 of the EU Charter of Fundamental Rights and Article 3 of the Convention.

The Court concluded that there would be a violation of Article 3 of the Convention, under its procedural aspect, if the applicant were deported to Russia without a full and up-to-date assessment by the French authorities of the risk that he would face in the event of his return.

Article 2

Having regard to the facts, to the parties' arguments and to the conclusion reached by the Court under Article 3 of the Convention, the Court found that it was not necessary to examine the admissibility or merits of the complaint under Article 2 of the Convention.

Just satisfaction (Article 41)

The Court took the view that its finding to the effect that the applicant's deportation would entail a violation of the Convention, if enforced without an up-to-date assessment of the actual risks faced by him in Russia, constituted sufficient just satisfaction.

The judgment is available only in French.

13. **ECHR, *Centrum för rättvisa v. Sweden*, no. 35252/08, Grand Chamber judgment of 25 May 2021 (Article 8, right to respect for private and family life, the home and correspondence – violation)**: The case concerned the alleged risk that the applicant foundation's communications had been or would be intercepted and examined by way of signals intelligence, as it communicated on a daily basis with individuals, organisations and companies in Sweden and abroad by email, telephone and fax, often on sensitive matters.

ECHR 164 (2021)
25.05.2021

Press release issued by the Registrar of the Court

In today's **Grand Chamber** judgment in the case of *Centrum för rättvisa v. Sweden* (application no. 35252/08) the European Court of Human Rights held, by a majority of 15 votes to 2, that there had been:

a violation of Article 8 (right to respect for private and family life, the home and correspondence)

of the European Convention on Human Rights**.**

The case concerned the alleged risk that the applicant foundation's communications had been or would be intercepted and examined by way of signals intelligence, as it communicated on a daily basis with individuals, organisations and companies in Sweden and abroad by email, telephone and fax, often on sensitive matters.

The Court found, in particular, that although the main features of the Swedish bulk interception regime met the Convention requirements on quality of the law, the regime nevertheless suffered from three defects: the absence of a clear rule on destroying intercepted material which did not contain personal data; the absence of a requirement in the Signals Intelligence Act or other relevant legislation that, when making a decision to transmit intelligence material to foreign partners, consideration was given to the privacy interests of individuals; and the absence of an effective *ex post facto* review. As a result of these deficiencies, the system did not meet the requirement of "end-to-end" safeguards, it overstepped the margin of appreciation left to the respondent State in that regard, and overall did not guard against the risk of arbitrariness and abuse, leading to a violation of Article 8 of the Convention.

Principal facts

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

The applicant foundation argued, in particular, that there was a risk that its communications had been or would be intercepted and examined by way of signals intelligence, as it communicated on a daily basis with individuals, organisations and companies in Sweden and abroad by email, telephone and fax, often on sensitive matters.

The applicant foundation had not brought any domestic proceedings, contending that there was no effective remedy for its Convention complaints.

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

For bulk signals-intelligence gathering, the FRA must apply for a permit to the Foreign Intelligence Court. The Foreign Intelligence Court is composed of a permanent judge and other members appointed on four-

year terms. The court hears applications for signals-intelligence permits. Its activities are in practice carried out in complete secrecy.

The Foreign Intelligence Inspectorate, whose board is presided over by permanent judges or former judges, provides the FRA with access to communications in accordance with a signals-intelligence permit and supervises its activities from the beginning to the end. The Inspectorate reviews, in particular, the interception, analysis, use and destruction of material. It can scrutinise the search terms used and enjoys access to all relevant documents of the FRA. There is a supplementary role for the Data Protection Authority also.

Parliamentary Ombudsmen and the Chancellor of Justice may also give an opinion on the activities of the FRA and the Foreign Intelligence Court.

Complaints, procedure and composition of the Court

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

The application was lodged with the European Court of Human Rights on 14 July 2008. On 19 June 2018 a Chamber of the Court gave judgment. On 19 September 2018 the applicant foundation requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 4 February 2019 the panel of the Grand Chamber accepted that request. A hearing was held on 10 July 2019.

The Governments of Estonia, France, the Netherlands and Norway were given leave to make written comments as third parties.

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

Robert **Spano** (Iceland), *President*,

Jon Fridrik **Kjølbro** (Denmark),

Angelika **Nußberger** (Germany),

Paul **Lemmens** (Belgium),

Yonko **Grozev** (Bulgaria),

Vincent A. **De Gaetano** (Malta),

Paulo **Pinto de Albuquerque** (Portugal),

Faris **Vehabović** (Bosnia and Herzegovina),

Iulia Antoanella **Motoc** (Romania),

Carlo **Ranzoni** (Liechtenstein),

Mārtiņš **Mits** (Latvia),

Gabriele **Kucsko-Stadlmayer** (Austria),

Marko **Bošnjak** (Slovenia),

Tim **Eicke** (the United Kingdom),

Darian **Pavli** (Albania),

Erik **Wennerström** (Sweden),

Saadet **Yüksel** (Turkey),

and also Søren **Prebensen**, *Deputy Grand Chamber Registrar*.

Decision of the Court

Article 8

Owing to the proliferation of threats that States faced from networks of international actors, who used the Internet for communication and who often avoided detection through the use of sophisticated technology, the Court considered that they had a wide discretion ("margin of appreciation") in deciding what kind of surveillance scheme was necessary to protect national security. The decision to operate a bulk interception regime did not therefore in and of itself violate Article 8.

The Court nevertheless considered that, in view of the changing nature of modern communications technology, its ordinary approach towards targeted surveillance regimes needed to be adapted to reflect the specific features of a bulk interception regime with which there was both an inherent risk of abuse and a legitimate need for secrecy. In particular, such a regime had to be subject to "end to end safeguards", meaning that, at the domestic level, an assessment should be made at each stage of the process of the necessity and proportionality of the measures being taken; that bulk interception should be subject to independent authorisation at the outset, when the object and scope of the operation were being defined; and that the operation should be subject to supervision and independent ex post facto review. The Court therefore identified several key criteria which needed to be clearly defined in domestic law before such a regime could be said to be compliant with Convention standards.

Applying these newly elaborated criteria to Sweden's bulk interception regime, the Court noted that Swedish intelligence services had taken great care to discharge their duties under the Convention and that the main features of the Swedish bulk interception regime met the Convention requirements. However, the Court concluded that the regime suffered from three defects, namely: the absence of a clear rule on destroying intercepted material which did not contain personal data; the absence of a requirement in the Signals Intelligence Act or other relevant legislation that, when making a decision to transmit intelligence material to foreign partners, consideration was given to the privacy interests of individuals; and the absence of an effective *ex post facto* review.

These deficiencies meant that the Swedish bulk interception regime overstepped the margin of appreciation left to the authorities of the respondent State in that regard and did not guard against the risk of arbitrariness and abuse, leading to a violation of Article 8 of the Convention.

Other articles

The Grand Chamber also found that no separate issue arose under Article 13, given its finding under Article 8.

Just satisfaction (Article 41)

The Court held that Sweden was to pay the applicant foundation 52,625 euros in respect of costs and expenses.

Separate opinions

Judges Lemmens, Vehabović and Bošnjak expressed a joint concurring opinion. Judge Pinto de Albuquerque expressed a concurring opinion. Judges Kjølbro and Wennerström also expressed a joint declaration of vote. These opinions are annexed to the judgment.

The judgment is available in English and French.

14. **ECHR, *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13, 62322/14 and 24969/15, Grand Chamber judgment of 25 May 2021 (Article 8, right to respect for private and family life/communication – in respect of domestic bulk interception: violation, in respect of international requests, no violation; Article 10, freedom of expression – in respect of domestic bulk interception: violation, in respect of international requests, no violation)**: The case concerned complaints by journalists and human-rights organisations in regard to three different surveillance regimes: (1) the bulk interception of communications; (2) the receipt of intercept material from foreign governments and intelligence agencies; (3) the obtaining of communications data from communication service providers.

ECHR 165 (2021)
25.05.2021

Press release issued by the Registrar of the Court

In today's **Grand Chamber** judgment in the case of Big Brother Watch and Others v. the United Kingdom (application nos. 58170/13, 62322/14 and 24969/15) the European Court of Human Rights held:

unanimously, that there had been a **violation of Article 8 of the European Convention (right to respect for private and family life/communications)** in respect of the bulk intercept regime;

unanimously that there had been a **violation of Article 8** in respect of the regime for obtaining communications data from communication service providers;

by 12 votes to 5, that there had been **no violation of Article 8** in respect of the United Kingdom's regime for requesting intercepted material from foreign Governments and intelligence agencies;

unanimously, that there had been **a violation of Article 10 (freedom of expression)**, concerning both the bulk interception regime and the regime for obtaining communications data from communication service providers; and

by 12 votes to 5, that there had been **no violation of Article 10** in respect of the regime for requesting intercepted material from foreign Governments and intelligence agencies.

The case concerned complaints by journalists and human-rights organisations in regard to three different surveillance regimes: (1) the bulk interception of communications; (2) the receipt of intercept material from foreign governments and intelligence agencies; (3) the obtaining of communications data from communication service providers.

At the relevant time, the regime for bulk interception and obtaining communications data from communication service providers had a statutory basis in the Regulation of Investigatory Powers Act 2000. This has since been replaced by the Investigatory Powers Act 2016. The findings of the Grand Chamber relate solely to the provisions of the 2000 Act, which had been the legal framework in force at the time the events complained of had taken place.

The Court considered that, owing to the multitude of threats States face in modern society, operating a bulk interception regime did not in and of itself violate the Convention. However, such a regime had to be subject to "end-to-end safeguards", meaning that, at the domestic level, an assessment should be made at each stage of the process of the necessity and proportionality of the measures being taken; that bulk interception should be subject to independent authorisation at the outset, when the object and scope of the operation were being defined; and that the operation should be subject to supervision and independent *ex post facto* review.

Having regard to the bulk interception regime operated in the UK, the Court identified the following deficiencies: bulk interception had been authorised by the Secretary of State, and not by a body independent of the executive; categories of search terms defining the kinds of communications that would become liable for examination had not been included in the application for a warrant; and search terms

linked to an individual (that is to say specific identifiers such as an email address) had not been subject to prior internal authorisation.

The Court also found that the bulk interception regime had breached Article 10, as it had not contained sufficient protections for confidential journalistic material.

The regime for obtaining communications data from communication service providers was also found to have violated Articles 8 and 10 as it had not been in accordance with the law.

However, the Court held that the regime by which the UK could request intelligence from foreign governments and/or intelligence agencies had had sufficient safeguards in place to protect against abuse and to ensure that UK authorities had not used such requests as a means of circumventing their duties under domestic law and the Convention.

Principal facts

The applicants are organisations and individuals that campaign on issues relating to civil liberties and the rights of journalists.

The three applications (which have since been joined) were lodged after Edward Snowden, a former US National Security Agency (NSA) contractor, revealed the existence of surveillance and intelligence sharing programmes operated by the intelligence services of the United States and the United Kingdom. The applicants believed that the nature of their activities meant that their electronic communications and/or communications data were likely to have been intercepted by the UK intelligence services or obtained by them from either communications service providers or foreign intelligence agencies such as the NSA.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life and correspondence), the applicants complained about the regimes for the bulk interception of communications, for the receipt of intelligence from foreign governments and/or intelligence agencies and for the acquisition of data from communications service providers. Some of the applicants also raised complaints under Article 10 (freedom of expression) related to their work as journalists and news organisations.

The three *Big Brother Watch and Others* applications were lodged with the European Court of Human Rights on 4 September 2013, 11 September 2014 and 20 May 2015. In a judgment dated 13 September 2018, the Chamber found that the bulk intercept regime had violated

Article 8 of the European Convention on Human Rights (right to respect for private and family life/communications) and Article 10 (freedom of expression). It also found that the regime for obtaining data from communications service providers had violated Articles 8 and 10; but it considered the regime for obtaining intercept material from foreign governments and/or intelligence agencies to have been Convention compliant. On 12 December 2018 the applicants requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber); on 4 February 2019 the panel of the Grand Chamber accepted that request. A hearing was held on 10 July 2019.

In the first case, leave to intervene as third parties was granted to Human Rights Watch, Access Now, Dutch Against Plasterk, Center For Democracy & Technology, European Network of National Human Rights Institutions and the Equality and Human Rights Commission, the Helsinki Foundation For Human Rights, the International Commission of Jurists, Open Society Justice Initiative, The Law Society of England and Wales and Project Moore. In the second case, leave to intervene was granted to the Center For Democracy & Technology, the Helsinki Foundation For Human Rights, the International Commission of Jurists, the National Union of Journalists and the Media Lawyers' Association. In the third case, leave to intervene was granted to Article 19, the Electronic Privacy Information Center and to the Equality and Human Rights Commission.

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

Robert **Spano** (Iceland), *President*,

Jon Fridrik **Kjølbro** (Denmark),

Angelika **Nußberger** (Germany),

Paul **Lemmens** (Belgium),

Yonko **Grozev** (Bulgaria),

Vincent A. **De Gaetano** (Malta),

Paulo **Pinto de Albuquerque** (Portugal),

Faris **Vehabović** (Bosnia and Herzegovina),

Iulia Antoanella **Motoc** (Romania),

Carlo **Ranzoni** (Liechtenstein),

Mārtiņš **Mits** (Latvia),

Gabriele **Kucsko-Stadlmayer** (Austria),

Marko **Bošnjak** (Slovenia),

Tim **Eicke** (the United Kingdom),

Darian **Pavli** (Albania),

Erik **Wennerström** (Sweden),

Saadet **Yüksel** (Turkey),

and also Søren **Prebensen**, *Deputy Grand Chamber Registrar*.

Decision of the Court

Article 8

Regime for bulk interception

The Court examined the regime for bulk interception of communications as governed by section 8(4) of the Regulation of Investigatory Powers Act (RIPA) 2000.

Owing to the proliferation of threats that States faced from networks of international actors, who used the Internet for communication and who often avoided detection through the use of sophisticated technology, the Court considered that they had a wide discretion ("margin of appreciation") in deciding what kind of surveillance scheme was necessary to protect national security. The decision to operate a bulk interception regime did not therefore in and of itself violate Article 8.

The Court nevertheless considered that, in view of the changing nature of modern communications technology, its ordinary approach towards targeted surveillance regimes needed to be adapted to reflect the specific features of a bulk interception regime with which there was both an inherent risk of abuse and a legitimate need for secrecy. In particular, such a regime had to be subject to "end to end safeguards", meaning that, at the domestic level, an assessment should be made at each stage of the process of the necessity and proportionality of the measures being taken; that bulk interception should be subject to independent authorisation at the outset, when the object and scope of the operation were being defined; and that the operation should be subject to supervision and independent *ex post facto* review. The Court therefore identified several key criteria which needed to be clearly defined in domestic law before such a regime could be said to be compliant with Convention standards.

Applying these newly elaborated criteria to the United Kingdom's bulk interception regime, the Court concluded that the UK regime had suffered from three defects, namely: the absence of independent authorisation for bulk interception warrants; the failure to include the categories of search terms ("selectors") in the application for a warrant; and the failure to ensure that search terms linked to an individual (that is to say specific identifiers such as an email address) were subject to prior internal authorisation. In reaching this conclusion, the Court acknowledged the valuable oversight and robust judicial remedy provided by the (then) Interception of Communications Commissioner, an official charged with providing independent oversight of intelligence service activities, and the Investigatory Powers Tribunal, a judicial body set up to hear allegations from citizens that their communications had been wrongfully interfered with. However, those safeguards had not been enough to offset the shortcomings in the regime.

These shortcomings meant that the bulk interception regime had been incapable of keeping the "interference" with citizens' private life rights to what had been "necessary in a democratic society". There had accordingly been a violation of Article 8 of the Convention.

Receipt of intelligence from foreign governments and/or intelligence agencies

The Court concluded that UK law had set out clear, detailed rules governing when intelligence services had been authorised to request intercept material from foreign intelligence agencies and how, once received, the material requested should be examined, used and stored. It also had regard to the role played by the Interception of Communications Commissioner and the Investigatory Powers Tribunal. The Court was therefore satisfied that the regime for requesting and receiving intelligence had been subject to adequate supervision and that an effective *ex post facto* review of activities conducted under this regime had been available.

In these circumstances, sufficient safeguards had been in place to protect against abuse and to ensure that UK authorities had not used requests for intercept material from foreign intelligence partners as a means of circumventing their duties under domestic law and the Convention.

There had, accordingly, been no violation of Article 8 in respect of the regime for the receipt of intelligence from foreign intelligence services.

Acquisition of data from communications service providers

The court noted that the applicants in the second of the joined cases had complained that the regime for the acquisition of communications data under Chapter II of RIPA had been incompatible with their rights under Article 8 of the Convention.

The Court agreed with the Chamber's findings, which the government had not contested, that there had been a violation of Article 8 of the Convention on account of the fact that the operation of the regime had not been "in accordance with the law".

Article 10

The Court reiterated that the protection of a journalist's sources was one of the cornerstones of the freedom of the press. Undermining this protection would have a detrimental impact on the vital public-watchdog role of the press and its ability to provide accurate and reliable information.

The Court was therefore concerned that UK law governing the bulk interception of communications had contained no requirement that the use of selectors or search terms known to be connected to a journalist be authorised by a judge or other independent and impartial decision-making body.

Moreover, when it had become apparent that a communication which had not been selected for examination through the deliberate use of a selector or search term known to be connected to a journalist had nevertheless contained confidential journalistic material, there had been no safeguards to ensure that it could only continue to be stored and examined by an analyst if authorised by a judge or another independent decision-making body.

As a result of those weaknesses there had also been a breach of Article 10 of the Convention.

When it came to requests for data from communications service providers under Chapter II, the Court agreed with the Chamber that the relevant regime had also been in breach of Article 10 of the Convention because it had "not [been] in accordance with the law". However, it found that the regime for receiving intercept material from foreign governments and/or communications service providers did not breach Article 10 of the Convention.

Just satisfaction (Article 41)

The applicants did not claim any award in respect of pecuniary or non-pecuniary damage and the Court saw no reason to make one. It nevertheless made awards to the applicants in the joined cases in respect of costs and expenses incurred as part of their proceedings before the Grand Chamber amounting to 91,000 euros.

Separate opinions

Judges Lemmens, Vehabović, and Bošnjak expressed a joint partly concurring opinion. Judge Pinto de Albuquerque expressed a partly concurring and partly dissenting opinion. Judges Lemmens, Vehabović, Ranzoni and Bošnjak expressed a joint partly dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

15. **ECHR, *Y.S. and O.S. v. Russia*, no. 17665/17, Chamber judgment of 15 June 2021 (Article 8, right to respect for private and family life - violation):** The applicants, a mother and her underaged child, living in Nakhodka, Primorye Region (Russia) complained that a domestic court decision ordering the child, the second applicant, to be returned to live with her father in Donetsk (Ukraine) interfered with their family life, and that if enforced, the second applicant would run the risk of physical harm in that State.

ECHR 198 (2021)
24.06.2021

Press Release issued by the Registrar of the Court

The applicants, Y.S. and O.S., are both Russian and Ukrainian nationals who live in Nakhodka, Primorye Region (Russia). They were born in 1976 and 2006 respectively. The first applicant is the second applicant's mother.

The case concerns a court order for O.S. to be returned to live with her father in Donetsk (Ukraine).

In 2001 the first applicant married a Ukrainian national, A.S., and settled in Donetsk. After the birth of O.S. in 2006, the marriage broke down and in 2011 Y.S. moved to Nakhodka. There she successfully applied for a temporary and subsequently permanent residence permit. The second applicant remained in Donetsk.

In 2014 civil unrest broke out in Eastern Ukraine. An illegal secessionist movement, the "Donetsk People's Republic", took control of Donetsk. The first applicant tried to have the second applicant moved to Russia, but was prevented from doing so by A.S. So, in January 2016 she went to Donetsk and took her daughter to Nakhodka anyway. She applied for Russian citizenship for both of them.

In March 2016, A.S. began renting a flat outside of the conflict zone.

A.S. lodged an application before the Russian courts for the child's return to Ukraine under the Hague Convention on the Civil Aspects of International Child Abduction, which was allowed by the Tsentralniy District Court of Khabarovsk and on appeal by the Khabarovsk Regional Court, despite the first applicant's arguments concerning the risk to the second applicant of harm if returned to a conflict zone.

Relying on Articles 8 (right to respect for private and family life), 2 (right to life) and/or 3 (prohibition of inhuman or degrading treatment), the applicants complain that the court judgment ordering the second applicant's return to Donetsk interfered with their family life, and that if enforced, the second applicant would run the risk of physical harm in that State.

Violation of Article 8

Just satisfaction:

Non-pecuniary damage: the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants;

Costs and expenses: EUR 4,150

16. **ECHR, *Imeri v. Croatia*, no. 77668/14, Chamber judgment of 24 June 2021 (Article 1 of Protocol No. 1, protection of property – violation):** The case concerned administrative-offence proceedings against the applicant, a Norwegian national, in which he was fined 530,000 Norwegian kroner (NOK). He had crossed into Croatia from Slovenia with 43,500 euros and NOK 730,000 without declaring this to customs officials. He complained that the decision to confiscate NOK 530,000 from him had been excessive.

ECHR 198 (2021)
24.06.2021

Press Release issued by the Registrar of the Court

The applicant, Ardian Imeri, is a Norwegian national who was born in 1980 and lives in Ski (Norway).

The case concerns administrative-offence proceedings against the applicant in which he was fined 530,000 Norwegian kroner (NOK). He had crossed into Croatia from Slovenia with 43,500 euros and NOK 730,000 without declaring this to customs officials. He was charged under sections 40(1) and 69(1) of the Foreign Currency Act and section 74 of the Prevention of Money Laundering and Financing of Terrorism Act.

Relying on Article 1 of Protocol No. 1 (protection of property) to the Convention, the applicant complains that the decision to confiscate NOK 530,000 from him had been excessive.

Violation of Article 1 of Protocol No. 1

Just satisfaction:

non-pecuniary damage: the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant; costs and expenses: EUR 3,000

17. **ECHR, *Khachaturov v. Armenia*, no. 59687/17, Chamber judgment of 24 June 2021 (Article 3, prohibition of inhuman or degrading treatment – violation should the applicant be extradited to Russia without a proper assessment of his state of health by the Armenian authorities)**: The case concerned the Armenian authorities' decision to extradite the applicant to Russia, where he is suspected of corruption offences. The applicant has serious health problems resulting from a stroke. He complained, in particular, that his transfer, if extradited to Russia, would be a risk to his health and thus in breach of the Convention.

ECHR 198 (2021)
24.06.2021

Press Release issued by the Registrar of the Court

The applicant, Suren Khachaturov, is a Russian national who was born in 1974 and lives in Yerevan. He was first deputy director of one of the State budgetary establishments of the City of Moscow.

The case concerns the Armenian authorities' decision to extradite the applicant to Russia, where he is suspected of corruption offences. The applicant has serious health problems resulting from a stroke.

Relying on Article 2 (right to life), Article 3 (prohibition of inhuman or degrading treatment), Article 18 (limitation on use of restrictions of rights), Article 34 (right of individual petition) and Article 38 (adversarial examination of the case) of the European Convention on Human Rights, the applicant complains, in particular, that his transfer, if extradited to Russia, would be a risk to his health and thus in breach of the Convention.

Violation of Article 3 - should the applicant be extradited to Russia without a proper assessment of his state of health by the Armenian authorities

Interim measure (Rule 39 of the Rules of Court): still in force until the present judgment becomes final or until further notice;

Just satisfaction:

non-pecuniary damage: the finding of a potential breach of Article 3 of the Convention constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage that may have been sustained by the applicant; costs and expenses: 2,000 euros (EUR).

18. **ECHR, *D.A. and Others v. Poland*, no. 51246/17, Chamber judgment of 8 July 2021 (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 3 and Article 4 of Protocol 4 – violation; Article 34, individual applications - violation)**: The case concerned alleged pushbacks of the applicants at the Polish-Belarusian border. The applicants alleged, *inter alia*, that the Polish authorities repeatedly denied them the possibility of lodging applications for international protection, that their situation was not reviewed individually and that they were victims of a general policy followed by the Polish authorities aiming at reducing the number of asylum applications registered in Poland.

ECHR 218 (2021)
08.07.2021

Press Release issued by the Registrar of the Court

The applicants, D.A., M.A. and S.K., were born in 1987, 1992 and 1993 respectively. They are Syrian nationals who currently reside in Belarus.

The case concerns alleged pushbacks of the applicants at the Polish-Belarusian border.

Relying on Article 3 (prohibition of torture and of inhuman or degrading treatment) and Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens), the applicants allege that the Polish authorities repeatedly denied them the possibility of lodging applications for international protection, that their situation was not reviewed individually and that they were victims of a general policy followed by the Polish authorities aiming at reducing the number of asylum applications registered in Poland.

Relying on Article 13 (right to an effective remedy), they allege that lodging an appeal against a decision denying someone entry into Poland did not constitute an effective remedy for asylum-seekers as it would have no suspensive effect.

Moreover, they complain under Article 34 (individual applications) that the Polish authorities returned them to Belarus, despite the European Court's interim measure to the Government indicating that they should not be removed.

Violation of Article 3

Violation of Article 4 of Protocol No. 4

Violation of Article 13 in conjunction with Article 3 and Article 4 of Protocol 4

Violation of Article 34

Interim measure (Rule 39 of the Rules of Court): still in force until the present judgment becomes final or until further notice.

Just satisfaction:

non-pecuniary damage: EUR 10,000 to each applicant.

19. **ECHR, *Shahzad v. Hungary*, no. 12625/17, Chamber judgment of 08 July 2021 (Article 4, Protocol No. 4, prohibition of collective expulsion of aliens –violation; Article 13, in conjunction with Article 4, Protocol No. 4, right to an effective remedy – violation)**: The case concerned the applicant's entry from Serbia to Hungary as part of a group and his subsequent summary expulsion by the police. The Court found, in particular, that the applicant had been subject to a "collective" expulsion as his individual situation had not been ascertained by the authorities, and they had not provided genuine and effective ways to enter Hungary, and removal had not been a result of his conduct. Furthermore, it found that the applicant had not had an adequate legal remedy available to him.

ECHR 220 (2021)
08.07.2021

Press release issued by the Registrar of the Court

In today's Chamber judgment in the case of *Shahzad v. Hungary* (application no. 12625/17) the European Court of Human Rights held, unanimously, that there had been:

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

and a violation of Article 13 (right to an effective remedy) taken in conjunction with Article 4 of Protocol No. 4

The case concerned the applicant's entry from Serbia to Hungary as part of a group and his subsequent summary expulsion by the police. The Court found in particular that the applicant had been subject to a "collective" expulsion as his individual situation had not been ascertained by the authorities, and they had not provided genuine and effective ways to enter Hungary, and removal had not been a result of his conduct. Furthermore, it found that the applicant had not had an adequate legal remedy available to him.

Principal facts

The applicant, Khurram Shahzad, is a Pakistani national who was born in 1986 and lives in Gujrat (Pakistan). The applicant left Pakistan in about 2008-09 owing to alleged ill-treatment by the Pakistani military. He entered Greece but was unable to enter other European countries. In 2016 he arrived in Serbia via North Macedonia. According to the applicant he applied for asylum in Serbia unsuccessfully. He attempted to enter Hungary to claim asylum. He was returned. He stayed in the Subotica area and tried to enter Hungary several times, in vain.

On 11 August 2016 the applicant again crossed the border irregularly with a group of others. Several hours later he and the other members of the group were apprehended by Hungarian police and removed to the other side of the border fence between Hungary and Serbia. No formal decision had been taken. Video footage showed the applicant and the others being left at the Serbian side of the border fence. The only way for the applicant to enter Hungary lawfully was through two transit zones. According to the applicant, access them at the time was limited to 15 people. Asylum-seekers also had to register with one of the migrants ("the list manager") before entry (he was refused once for being a single man). There was no official procedure for registering names on the waiting list and then allowing people from that list to enter the transit zone. As the applicant was unable to enter Hungary he stayed in Serbia.
In late 2016 the applicant returned to Pakistan voluntarily.

Complaints, procedure and composition of the Court

Relying on Articles 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) and Article 13 (right to an effective remedy) taken in conjunction with Article 4 of Protocol No. 4, the applicant complained

that his expulsion from Hungary had been part of a collective expulsion, and that he had no remedy for his complaint.

The application was lodged with the European Court of Human Rights on 10 February 2017.

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

Ksenija **Turković** (Croatia), *President*,

Péter **Paczolay** (Hungary),

Krzysztof **Wojtyczek** (Poland),

Alena **Poláčková** (Slovakia),

Raffaele **Sabato** (Italy),

Lorraine **Schembri Orland** (Malta),

Ioannis **Ktistakis** (Greece),

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

Decision of the Court

Article 4 of Protocol No. 4

The Court found that despite having been removed to the strip of land on the other side of the border fence, which was technically Hungarian territory bordering on Serbia, the applicant had been expelled within the meaning of Article 4 of Protocol No. 4. The Court reiterated that the decisive criterion for an expulsion to be characterised as "collective" was the absence of "a reasonable and objective examination of the particular case of each individual alien of the group". There were possible exceptions depending on the conduct of the individuals involved. It was not in dispute between the parties that the applicant had not been identified or had his situation ascertained before removal to Serbia. For the Court, the remaining question was whether this had been a result of his own conduct.

The Court noted that the applicant had entered Hungary as part of a group. However, the Government had not argued that that had created a disruptive situation or a public-safety risk. There had been sufficient Government agents to control the situation; in any case the applicant and his companions had not used force or resisted. The Court reiterated that with regard to Contracting States like Hungary, which had an external Schengen Area border, the effectiveness of the Convention rights required that those States made available genuine and effective means of legal entry, in particular border procedures for arrivals at the border. In the applicant's case, the access points available had been located 40 and 84 km away from where he had been returned to Serbia. The applicant argued that those zones had been inaccessible for him owing to the daily limit on entrants and the need to register beforehand. The Court considered that due to the daily admission limits, which had been quite low, and lack of any formal procedure accompanied by appropriate safeguards governing the admission of migrants Hungary had failed to provide an effective means of entry.

As a result, the Court found that the applicant's expulsion had been "collective" leading to a violation of his rights.

Article 13 taken in conjunction with Article 4 of Protocol No. 4
The Court took note of the Government's argument that individuals being removed under section 5(1a) of the State Borders Act were informed of their right to complain against the police measure. However,

they had submitted neither the legal basis for such a complaint nor any relevant case-law. Nor had they referred to any other remedy.

The Court found that the applicant had not had an adequate remedy at his disposal, leading to a violation the Convention.

Just satisfaction (Article 41)

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

The judgment is available only in English.

20. **ECHR, *M.A. v. Denmark*, no. 6697/18, Grand Chamber judgment of 09 July 2021 (Article 8, right to respect for private and family life - violation)**: The case concerned a delay of three years imposed in 2016 pursuant to Danish law on the applicant's right of the applicant, a Syrian national, to family reunification owing to his temporary protection status.

ECHR 221 (2021)
09.07.2021

Press release issued by the Registrar of the Court

In today's Grand Chamber judgment in the case of M.A. v. Denmark (application no. 6697/18) the European Court of Human Rights held, by a majority of 16 votes to 1, 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 delay of three years imposed in 2016 pursuant to Danish law on the applicant's right to family reunification owing to his temporary protection status.

The Court found in particular that, given the lack of an individualised assessment of the applicant's case and the length of the wait to be able to avail of his right to family reunification, the authorities had failed to strike a fair balance between the needs of the applicant individually and the economic well-being of the country in their assessment of his application to be reunited with his wife.

Principal facts

The applicant, M.A., is a Syrian national who was born in 1959 and lives in Marstal (Denmark).

The applicant fled Syria in January 2015 and requested asylum in Denmark in April of that year. His wife had remained in Syria. On 8 June 2015 the Immigration Service granted him "temporary protection status" (section 7(3) of the Aliens Act) for one year. That status was extended at yearly intervals. However, the authorities did not find that he met the requirements for being granted protection status (section 7(2) of the Aliens Act). The applicant appealed against that decision to the Refugee Appeals Board.

The Board upheld the decision not to grant him protection status, stating that the applicant had not been "subjected to specific and personal persecution during his stay in Damascus". That decision was final.

In the meantime, in November 2015, the applicant requested family reunification with his wife. That request was rejected in 2016 as the applicant had not had a residence permit for the previous three years. That decision was upheld by the Immigration Appeals Board.

The applicant went to court, complaining that the decision was in breach of his Convention rights. He also claimed that he was being discriminated against vis-à-vis people who had been granted protection. His action was dismissed at two levels of jurisdiction and then finally by the Supreme Court. The latter court stated, in extensive reasoning and with reference to European Court of Human Rights case-law, the following:

"Moreover, it appears that the number of newcomers determines whether the subsequent integration becomes successful and that it is necessary to strike the right balance to maintain a good and safe society.

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

On 22 October 2018 the applicant reapplied for family reunification. On 29 September 2019 the applicant's wife came to Denmark having been granted a residence permit.

Complaints, procedure and composition of the Court

Relying on Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination), the applicant complained that the authorities' decision to refuse to temporarily grant him family reunification with his wife on the grounds that he had not possessed a residence permit under section 7(3) of the Aliens Act for the previous three years had been in breach of his rights.

The application was lodged with the European Court of Human Rights on 30 January 2018. On 7 September 2018 the Danish Government was given notice of the application, with questions from the Court. On 19 November 2019 the Chamber relinquished jurisdiction in favour of the Grand Chamber. A hearing was held on 10 June 2020.

Third party submissions were received from the Council of Europe Commissioner for Human Rights, the United Nations High Commissioner for Refugees, the Governments of Norway and Switzerland, and the Danish Institute for Human Rights.

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

Robert **Spano** (Iceland), *President*,

Jon Fridrik **Kjølbro** (Denmark),

Ksenija **Turković** (Croatia),

Paul **Lemmens** (Belgium),

Síofra **O'Leary** (Ireland),

Yonko **Grozev** (Bulgaria),

Faris **Vehabović** (Bosnia and Herzegovina),

Iulia Antoanella **Motoc** (Romania),

Carlo **Ranzoni** (Liechtenstein),

Stéphanie **Mourou-Vikström** (Monaco),

Georges **Ravarani** (Luxembourg),

Pere **Pastor Vilanova** (Andorra),

Georgios A. **Serghides** (Cyprus),

Jolien **Schukking** (the Netherlands),

Péter **Paczolay** (Hungary),

María **Elósegui** (Spain),

Lorraine **Schembri Orland** (Malta),

and also Søren **Prebensen**, *Deputy Grand Chamber Registrar*.

Decision of the Court

Article 8

The Court noted from the outset that the applicant's complaint related to his 4 November 2015 application for family reunification with his wife only. At that time he had had a residence permit under section 7(3) of the Aliens Act for five months. This case concerned thus the deferral for three years of the applicant's right to be granted family reunification. The applicant did not however call into question that a waiting

period of one year was "reasonable". The Court also pointed out that it was the first time it had had to consider whether the imposition of a waiting period for granting family reunification to individuals who benefit from subsidiary or temporary protection status was Convention-complaint.

The Court reiterated that a State was entitled to control the entry of aliens into its territory and their residence there. The Convention did not guarantee the right of a foreign national to enter or to live in a particular country. The Court also pointed out that the particular immigration status of the individuals requesting family reunification – in particular their rights as beneficiaries of subsidiary protection – and the temporary nature of any refusal owing to a statutory waiting period of a given length, had not been at issue to date in its case-law. It concluded that States have wide discretion in this area, but that the processes set in place must be practical and effective.

The core question for the Court was whether the Danish authorities had struck a fair balance between the competing interests of the individual and of the community as a whole. Under Danish law, applicants with "temporary protection status" (section 7(3) of the Aliens Act) had their right to family unification restricted, which was not the case for others who had been given protection by the State (under sections 7(1) or (2)). The Court saw no reason to question the distinction between these two categories.

The Court stated that a waiting period of three years was a long time to be separated from family, and that that period did not include the actual decamping, meaning the period would inevitably be longer. This separation would disrupt family life. It accepted that there had been family life between the applicant and his wife. However, it noted that the applicant had not had deep ties with Denmark when he had made the application, having been in the State only for a matter of months. The Court observed that the sharp fall in the number of asylum seekers in 2016 and 2017 had not prompted Parliament to review the length of the waiting period.

The Court did state that the authorities had not had access to case-law relevant to the situation at hand. The Supreme Court had "accepted" that the spouses had faced insurmountable obstacles to cohabiting in Syria, but it had emphasised that the obstacle to their exercise of family life together had only been temporary. It found that the three-year waiting period fell within the State's discretion.

The Court however found that the Aliens Act did not allow for individualised assessment of a particular family's case. This had made the applicant's wait for family reunification obligatory. Given this, and the length of the applicant's marriage and the impossibility for him and his wife to live together in Syria, the Court found that the authorities had failed to strike a fair balance between the needs of the individual and the economic well-being of the country.

There had accordingly been a violation of the Convention.

Other articles

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

Just satisfaction (Article 41)

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

Separate opinions

Judge Mourou-Vikström expressed a dissenting opinion, which is annexed to the judgment.

The judgment is available in English and French.

21. **ECHR, *N.A. v. Finland*, no. 25244/18, revision of Chamber judgment of 14 November 2019**: The case concerns submissions by the Finnish Government that they suspect that documents submitted by the applicant regarding her father's death had in fact been forged and that he was alive and well and living in Iraq.

ECHR 223 (2021)
13.07.2021

Press Release issued by the Registrar of the Court

The applicant, N.A, is an Iraqi national who lives in Finland.

The applicant had previously received a judgment by the European Court of Human Rights on 14 November 2019 in her favour concerning violations of Article 2 (right to life) and Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights in respect of her father. The case concerns submissions by the Finnish Government that they suspect that documents submitted by the applicant regarding her father's death had in fact been forged and that he was alive and well and living in Iraq.

Relying on Rule 80 of the Rules of Court, the Government request revision of that judgment.

The Court decided to revise its judgment of 14 November 2019 and declared the application inadmissible.

22. **ECHR, *D v. Bulgaria*, no. 29447/17, Chamber judgment of 20 July 2021 (Article 3, prohibition of inhuman and degrading treatment – violation; Article 13, right to an effective remedy - violation)**: The case concerned the arrest at the border between Bulgaria and Romania of a Turkish journalist claiming to be fleeing from a risk of political persecution in his own country, and his immediate removal to Turkey. The events occurred three months after the 2016 attempted coup in Turkey.

ECHR 230 (2021)
20.07.2021

Press Release issued by the Registrar of the Court

In today's **Chamber** judgment in the case of D v. Bulgaria (application no. 29447/17) the European Court of Human Rights held, unanimously, that there had been:

a **violation of Article 3 (prohibition of inhuman and degrading treatment)** and a **violation of Article 13 (right to an effective remedy)** of the European Convention on Human Rights.

The case concerned the arrest at the border between Bulgaria and Romania of a Turkish journalist claiming to be fleeing from a risk of political persecution in his own country, and his immediate removal to Turkey. The events occurred three months after the 2016 attempted coup in Turkey.

Before the Court, the applicant complained that the Bulgarian authorities had refused to initiate asylum proceedings and had returned him to Turkey, thus exposing him to a real risk of illtreatment.

The Court held in particular that despite the fact that the applicant had expressed fears that he might face ill-treatment in the event of being returned to Turkey, the Bulgarian authorities had not examined his application for international protection.

Principal facts

The applicant, D, is a Turkish national who was born in 1985. He is a journalist and previously worked for the Zaman daily newspaper and the Cihan press agency, both belonging to the Feza Media Group, which was viewed as "Gülenist" and as critical of the existing political regime in Turkey.

On 6 March 2016 the group's entire board was replaced by a committee of three members appointed by an Istanbul court. According to the international press, from that date onwards Zaman adopted a pro-government editorial policy. D stated that after that date he had been dismissed and had his press card withdrawn.

Following the adoption of a legislative decree issued on 27 July 2016 in the context of the state of emergency introduced in Turkey after the attempted coup of 15 July 2016, Zaman was closed down. According to D's explanations, he left Turkey after those events, at a time when a range of measures were being taken against media outlets and journalists (dismissal, arrest, detention and confiscation of passports).

Between September and October 2016, D and eight other passengers (six Turkish and two Syrian nationals) crossed the border between Turkey and Bulgaria hidden in a heavy goods vehicle. During the night of 13 October 2016 the vehicle arrived at the border between Bulgaria and Romania.

On 14 October 2016, at 1.40 a.m., Romanian and Bulgarian customs officers carried out a joint customs inspection and found the nine stowaways in the trailer attached to the vehicle. According to D's account, they were detained at the Ruse border police station and questioned by police officers. The team of officers changed several times. On each occasion, the applicant and his fellow passengers stated that they wished to seek asylum and to be granted the assistance of a lawyer and an interpreter. Their requests were to no avail. They were also allegedly compelled to sign forms without being given a translation of their contents.

The seven Turkish clandestine passengers were subsequently put in a car. Despite being under the impression that they were being taken to the migrant camp in Sofia, they arrived (at about 11.30 p.m.) at the Lyubimets reception centre for foreigners, near the Turkish border. They repeated their wish, again without success, to apply for international protection and to be granted the assistance of a lawyer and an interpreter.

On 15 October 2016, at about 5.30 a.m., D was allegedly handcuffed and taken with the other six Turkish passengers to the Kapitan Andreevo border post, where they were handed over to the Turkish authorities.

The Turkish authorities subsequently took the applicant into custody in Edirne Prison (Turkey). D was tried for membership of a terrorist organisation ("FETÖ/PDY"[1]), and in December 2017 he was convicted and sentenced to seven years and six months' imprisonment for that offence. He appealed, and the proceedings are ongoing.

D is currently detained in Kandıra Prison (Kocaeli, Turkey).

Complaints, procedure and composition of the Court

Relying in particular on Articles 3 (prohibition of inhuman and degrading treatment) and 13 (right to an effective remedy), D complained that the Bulgarian authorities had refused to initiate asylum proceedings in his case and had returned him to Turkey, thus exposing him to a real risk of ill-treatment.

The application was lodged with the European Court of Human Rights on 13 April 2017.

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

Tim **Eicke** (the United Kingdom), *President*,

Yonko **Grozev** (Bulgaria),

Armen **Harutyunyan** (Armenia),

Gabriele **Kucsko-Stadlmayer** (Austria),

Pere **Pastor Vilanova** (Andorra),

Jolien **Schukking** (the Netherlands),

Ana Maria **Guerra Martins** (Portugal),

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

Decision of the Court

Articles 3 (prohibition of inhuman and degrading treatment) and 13 (right to an effective remedy)

Whether D had made the Bulgarian authorities aware of his fears of being subjected to ill-treatment in breach of Article 3 if returned to Turkey: The Court reiterated that the wish to apply for asylum did not have to be expressed in any particular form. The decisive factor was the fear expressed at the prospect of returning to a country. In the present case, it found that although the explanations given by D to the Turkish authorities did not contain the word "asylum", they stated that he was a Turkish journalist who had been dismissed from his job in the context of the state of emergency introduced in Turkey following the coup attempt, and made it clear that he was afraid of being sought by the prosecuting authorities.

The Court also noted that the authorities responsible for D's detention and those who had ordered his removal to Turkey had learned that the Turkish consulate in Burgas had indicated that the applicant and his Turkish fellow passengers were thought to have been involved in the coup attempt. It added that press releases and opinions issued by international observers, including comments by the Council of Europe Commissioner for Human Rights, in the three months leading up to the events in the applicant's case had raised serious concerns about the implementation of the measures adopted in connection with the state of

[1] *FETÖ/PDY*: "Gülenist Terror Organisation/Parallel State Structure".

emergency, including those targeting journalists. Various reports had criticised the use of violence, reprisals and arbitrary imprisonment against journalists. However, during the detention and subsequent removal of the applicant and his fellow citizens, the authorities had not made any effort to examine the relevant aspects of the personal account given by D on 14 October 2016 in the light of the situation as outlined above.

Accordingly, the Court found that the applicant's explanations as recorded on 14 October 2016 were sufficient, for the purposes of Article 3, to conclude that he had expressed his fears in substance to the Bulgarian border police authorities before being returned to Turkey.

Whether the authorities properly examined the fears expressed by the applicant that he would be subjected to treatment in breach of Article 3 if returned to Turkey: The Court observed that the Bulgarian authorities involved in the matter had not found that the explanations given by the applicant amounted to an application for protection. The Bulgarian Government explained that no proceedings had been instituted with the authorities responsible for international protection.

The Court reiterated that in view of the absolute nature of the right guaranteed under Article 3 of the Convention, and the position of vulnerability in which asylum seekers often found themselves, if a Contracting State was made aware of facts relating to a specific individual that could expose that individual to a risk of ill-treatment in breach of that Article upon returning to the country in question, the obligations incumbent on States under Article 3 implied that the authorities should assess such a risk of their own motion. This applied in particular to situations where the national authorities had been made aware of the fact that the asylum seeker might plausibly be a member of a group systematically exposed to a practice of ill-treatment and there were substantial grounds for believing in the existence of the practice in question and in the individual's membership of the group concerned. Given that, as shown above, the Bulgarian authorities had had sufficient information to indicate that the applicant could have had genuine concerns from the standpoint of Article 3, the Court was surprised at the blatant failure to examine his particular situation.

It also had to be acknowledged that, as far as procedural guarantees were concerned, the applicant had neither been provided with the assistance of an interpreter or translator, nor with information about his rights as an asylum seeker, including the relevant procedures. The Court was therefore unable to conclude that the Bulgarian authorities had fulfilled their requisite duty of cooperation in protection procedures.

Moreover, the applicant had not been granted access to a lawyer or a representative of specialist organisations that would have helped him assess whether his circumstances entitled him to international protection. In addition, the Bulgarian Ombudsman had not been consulted for the purpose of supervising the removal of the foreign nationals in question, contrary to the express legal requirement to that effect. The Court also observed other failings in the conduct of the domestic proceedings. Such failings, in the Court's view, reflected the extreme haste with which the applicant had been removed, in addition to the fact that his removal had been in breach of the rules of domestic law. As a result of such haste and the failure to comply with the relevant domestic procedures, which had nevertheless been designed to offer protection against the prospect of rapid removal without an examination of individual circumstances, the applicant had been deprived in practice of an assessment of the risk he allegedly faced in the event of his return.

The Court further observed, in relation to the possibility of challenging the removal order, that the order had been implemented immediately without the applicant being given the chance to understand its contents, and that as a result, he had been deprived of the opportunity available under domestic law to apply to the courts for a stay of execution of the order. Accordingly, the haste with which the removal order had been implemented – within 24 hours of the applicant's arrest at the border between Bulgaria and Romania – had had the consequence of rendering the available remedies ineffective in practice and therefore inaccessible. D had therefore been removed to Turkey, his country of origin from which he had fled, without a prior examination of the risks he faced from the standpoint of Article 3 of the Convention and hence of his application for international protection.

The Court thus concluded that, despite the fact that D had expressed fears that he might face ill-treatment in the event of being returned to Turkey, the Bulgarian authorities had not examined his application for international protection. There had therefore been a violation of Articles 3 and 13 of the Convention.

Just satisfaction (Article 41)

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

The judgment is available only in French.

23. **ECHR, *E.H. v. France*, no. 39126/18, Chamber judgment of 22 July 2021 (Article 3, prohibition of inhuman or degrading treatment – no violation; Article 13, in conjunction with Article 3, right to an effective remedy – no violation)**: The case concerned the return to Morocco of an applicant who claimed to be at risk of treatment contrary to Article 3 on account of his Sahrawi origins and his activism in support of the Sahrawi cause.

ECHR 237 (2021)
22.07.2021

Press Release issued by the Registrar of the Court

In today's Chamber judgment in the case of *E.H. v. France* (application no. 39126/18) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the European Convention on Human Rights, and

no violation of Article 13 (right to an effective remedy) taken in conjunction with Article 3 of the Convention.

The case concerned the return to Morocco of an applicant who claimed to be at risk of treatment contrary to Article 3 on account of his Sahrawi origins and his activism in support of the Sahrawi cause. In general terms, the Court found that Moroccan nationals who were activists for Western Saharan independence and the Sahrawi cause constituted a group at particular risk.

In this specific instance, in the light of all the circumstances of the case, the Court agreed with the conclusion reached by the French Office for the Protection of Refugees and Stateless Persons (OFPRA), the National Asylum Court (CNDA) and the Paris and Melun Administrative Courts, all of which had given properly reasoned decisions, in view of the lack of specific information in the file substantiating the applicant's alleged fears stemming from his involvement with the Sahrawi cause and from the Moroccan authorities' efforts to find and prosecute him. The Court also noted that the applicant had not produced any document or evidence in the proceedings before it besides those he had previously produced before the domestic authorities. The Court inferred from this that the evidence in the file did not provide substantial grounds for believing that the applicant's return to Morocco had placed him at real risk of treatment contrary to Article 3 of the Convention.

As to the effectiveness of the remedies made available to the applicant under domestic law, the Court noted that he had on four occasions exercised a remedy that suspended the enforcement of the order for his return to Morocco. In the context of these different remedies he had given evidence on four occasions and had been given an opportunity, despite the short deadlines, to present his claims in an effective manner by virtue of the safeguards afforded to him (assistance of an interpreter, support from an approved association, appointment of a legal-aid lawyer).

After assessing the proceedings as a whole, the Court concluded that the remedies exercised by the applicant, taken together, had been effective in the particular circumstances of this case. There had therefore been no violation of Article 13 read in conjunction with Article 3 of the Convention.

Principal facts

The applicant, E.H., is a Moroccan national of Sahrawi origin who was born in 1993 and lives at the home of his representative in Paris.

E.H. stated that he had become involved in the Sahrawi cause at the end of his secondary schooling. He said that he had been arrested, arbitrarily detained and tortured by the police on several occasions. In March 2018 he had learned that he was being sought by the Moroccan authorities and that police officers

had issued threats against him and his family. Fearing for his life, he had decided to flee Morocco. He had obtained a passport, followed by a "student" visa issued by the Ukrainian consulate in Rabat, and had booked a seat on a flight from Marrakesh because the police checks there were less strict than in Casablanca.

On 18 July 2018 E.H. arrived at Roissy Charles de Gaulle airport. He was refused entry into France on the grounds that he did not have a "Schengen visa" or a valid residence permit. He was placed in the airport's waiting zone for persons whose case was being processed (ZAPI). On 19 July 2018 E.H. requested permission to enter the country in order to claim asylum. He sought leave to remain in France so that he could submit an asylum application to the French Office for the Protection of Refugees and Stateless Persons (OFPRA). He was held in the waiting zone for four days while his request was being examined. On the same day E.H. was invited to attend an interview with a protection officer of the OFPRA, scheduled for 20 July 2018. The invitation, which had been translated into Arabic, mentioned the option of being accompanied by a lawyer or by an approved representative of one of the associations authorised by the OFPRA to operate in the waiting zone. On 20 July 2018 at 10 a.m. E.H., assisted by an Arabic interpreter, was interviewed by an OFPRA official who had come to the waiting zone.

In an order of 20 July 2018 issued on the basis of the OFPRA's recommendation, the Minister of the Interior refused the applicant leave to enter France in order to claim asylum, on the grounds that his request was manifestly unfounded. The Minister ordered the applicant's removal to Morocco or any country which he could lawfully enter, on the basis of Article L.213-4 of the Entry and Residence of Aliens and Right of Asylum Code (CESEDA). On 21 July 2018 E.H., who was still in the waiting zone, applied to the Paris Administrative Court to have the order of 20 July 2018 set aside.

In an order of 22 July 2018 the Liberties and Detention Judge of the Bobigny *tribunal de grande instance* authorised the extension of the applicant's stay in the waiting zone for a further eight days on the grounds that his application to the Paris Administrative Court was pending. E.H. appealed against that order to the Paris Court of Appeal. On 24 July 2018 the latter declared the appeal inadmissible. In a judgment of 25 July 2018 the Paris Administrative Court rejected the application to set aside the order of 20 July 2018. E.H. did not appeal against that judgment.

On 26 and 27 July 2018 E.H. objected to his removal to Morocco and refused to board the aircraft.

On 28 July 2018 he again refused to board a flight to Morocco. He was therefore arrested and taken into police custody for wilfully evading the enforcement of an order refusing entry to French territory, and thus entered the country *de facto*.

On 29 July 2018 the prefect of Seine-Saint-Denis issued an order requiring E.H. to leave French territory, naming Morocco as the receiving country. E.H. was placed in the Mesnil-Amelot administrative detention centre. On 30 July 2018 E.H., who was receiving legal assistance from the *Comité intermouvements auprès des évacués* (CIMADE), lodged an application with the Melun Administrative Court to have the order of 29 July 2018 set aside. On 31 July 2018 the Liberties and Detention Judge authorised the extension of the applicant's administrative detention for twenty-eight days. That decision was upheld by the Court of Appeal on 1 August 2018.

On 2 August 2018 E.H. lodged an asylum application. On the same day the prefect issued an order refusing him leave to remain as an asylum-seeker and authorising his continued detention in the administrative detention centre. The prefect specified that the OFPRA would examine the applicant's asylum claim under the expedited procedure. On 6 August 2018 E.H. lodged a fresh application with the Melun Administrative Court for the setting-aside of the order of 2 August 2018.

On 9 August 2018 an interview with a protection officer from the OFPRA took place by videoconference, lasting fifty-five minutes. E.H. was assisted by a Hassaniya Arabic interpreter. The applicant asserted that because his asylum claim was being examined under the expedited procedure he had not had sufficient

time to gather together all the necessary documents. In a decision of 9 August 2018 taken under the expedited procedure the OFPRA rejected the applicant's asylum application.

On 13 August 2018 the Melun Administrative Court held a hearing at which the two applications lodged by E.H. (concerning the order of 29 July 2018 in so far as it specified the receiving country, and the order of 2 August 2018) were entered in the list and joined. E.H. attended the hearing and was represented by a court-appointed lawyer and assisted by an interpreter. On the same date the Administrative Court rejected the applications in a single judgment. E.H. did not appeal.

On 14 August 2018 the OFPRA's decision was served on the applicant. On 16 August 2018 he refused to board a flight to Morocco. On 17 August 2018 he lodged an application with the National Asylum Court (CNDA) to set aside the OFPRA's decision rejecting his asylum application. He asked for his asylum claim to be examined by a bench of judges, in accordance with the ordinary procedure. On the same day he also applied to the legal-aid office of the CNDA for legal aid. On 17 August 2018 he asked the prefect of Seine-Saint-Denis to submit an application to the Ukrainian authorities for "reentry" into Ukraine. The prefect turned down his request. On 22 August 2018 E.H. requested the Court to apply an interim measure under Rule 39 of the Rules of Court with a view to preventing his removal to Morocco. The Court refused the request.

E.H. was removed to Morocco on 24 August 2018.

On 7 September 2018 the CNDA appointed a legal-aid lawyer to assist the applicant in the proceedings before it.

On 4 November 2019, after hearing evidence from the applicant's legal-aid lawyer at a public hearing held on 25 October 2019, the CNDA rejected the application to set aside the OFPRA's decision. The CNDA's ruling was served on the applicant on 23 December 2019.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of torture and inhuman or degrading treatment), the applicant alleged that the enforcement of the order for his removal to Morocco had been apt to put him at risk of treatment contrary to that Article of the Convention. He also asserted that the treatment contrary to Article 3 to which he had been subjected before fleeing Morocco had been repeated on his return to that country following his removal by the French authorities.

Relying on Article 13, he also alleged a breach of his right to an effective remedy by which to assert his complaints under Article 3 of the Convention.

The application was lodged with the European Court of Human Rights on 14 September 2018.

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

Síofra **O'Leary** (Ireland), *President*,

Stéphanie **Mourou-Vikström** (Monaco),

Lətif **Hüseynov** (Azerbaijan),

Jovan **Ilievski** (North Macedonia),

Lado **Chanturia** (Georgia),

Ivana **Jelić** (Montenegro),

Mattias **Guyomar** (France),

and also Martina **Keller**, *Deputy Section Registrar*.

Decision of the Court

Article 3

The Court observed that this was the first case concerning a return to Morocco in which it was called upon to rule on the merits of a complaint under Article 3 of the Convention raised by an applicant who alleged that the risks to which he had been exposed resulted from the fact that he was of Sahrawi origin and had been active in support of that cause. It emerged from various international reports concerning Morocco that Moroccan nationals who were activists for Western Saharan independence and for the Sahrawi cause could be regarded as categories of the Moroccan population who were at particular risk.

With regard to the applicant's individual situation, the Court noted at the outset that he had used the two procedural remedies available under domestic law to aliens claiming to be at risk of treatment contrary to Article 3 of the Convention if they were returned to their country of origin. These were an application to the OFPRA potentially leading to the granting of refugee status, subject to review by the CNDA, which had full jurisdiction, and an application to the administrative courts to set aside the refusal of leave to enter France in order to claim asylum and the order for his removal to Morocco.

After the applicant had given evidence (in two interviews with a protection officer of the OFPRA and at the two public hearings), the Paris Administrative Court ruled that he had provided imprecise and unsubstantiated information on the nature and extent of his political involvement and his responsibilities as an activist. The OFPRA, in its decision rejecting the applicant's asylum application, had taken the view that his description of his political activism in support of the Sahrawi cause, his allegations concerning threats made against him since 2011 and his account of the circumstances of his arrest had contained few personal details; the Melun Administrative Court had reached the same conclusion. Like the OFPRA and the aforementioned courts, the CNDA had taken the view, after hearing evidence from the applicant's lawyer, that the documents in the file did not suffice for the applicant's fears to be regarded as well founded.

The Court noted that the applicant had not produced any documents in the proceedings before it besides those previously examined by the domestic authorities and courts, which had unanimously found them to be inconclusive, especially on account of their stereotypical nature. While the applicant alleged that the Moroccan authorities had been actively searching for him on account of his activism before he left Morocco, there was nothing in the case file to corroborate that assertion, which the OFPRA and the Paris and Melun Administrative Courts had also found to be unproven. The applicant had not offered any explanation for the inconsistencies in his account, remaining very evasive as to how he had managed to obtain a passport, as well as a "student" visa from the Ukrainian consular authorities in Rabat, and to leave Morocco by plane. It seemed highly unlikely that an individual whose activities had already attracted the attention of the authorities in his country of nationality would be issued with an international travel document. Lastly, the Court noted that the applicant asserted that he had been summoned to appear before a court in Agadir, but had not specified the reasons for the summons, the date or the name of the court. Similarly, the Court observed that the applicant remained very evasive on the subject of the treatment to which he claimed to have been subjected on his return to Morocco following his removal by the French authorities, and that he had not produced any evidence or document before the Court substantiating the alleged treatment.

Accordingly, and despite the fact that Moroccan nationals who were activists for Western Saharan independence constituted a group at particular risk, the Court, in the light of all the circumstances of the case, could not but agree with the conclusion reached by the OFPRA, the CNDA and the Paris and Melun Administrative Courts, all of which had given duly reasoned decisions, in view of the lack of specific evidence in the file substantiating the applicant's alleged fears stemming from his involvement with the Sahrawi cause and the Moroccan authorities' efforts to find and prosecute him before he left Morocco and after his forcible return. Furthermore, the applicant had not produced any document or evidence before the Court besides those he had previously produced before the national authorities.

Accordingly, the Court found that the evidence in the case file did not provide substantial grounds for believing that the applicant's return to Morocco had placed him at real risk of treatment contrary to Article 3 of the Convention. There had therefore been no violation of Article 3 of the Convention.

Article 13 read in conjunction with Article 3

The issue that arose in the present case concerned the effectiveness of the various remedies exercised by the applicant in order to have a complaint under Article 3 of the Convention examined before his removal to Morocco, while he was being held in the waiting zone and subsequently in the administrative detention centre. The Court observed that it had previously addressed these issues in 2007 and 2012 respectively, in the cases of *Gebremedhin* [*Gaberamadhien] v. France* and *I.M. v. France*, in which it had found a violation of Article 13 taken together with Article 3.

The Court noted that the legislature had made the legislative amendments required for the proper execution of those judgments. Under the Act of 20 November 2007, appeals against decisions refusing leave to enter the country in order to claim asylum now had automatic suspensive effect. Furthermore, asylum applications lodged by aliens in administrative detention were no longer examined systematically under the expedited procedure, which under the relevant legislation was now applied only in cases where the application was deemed to be aimed solely at circumventing the removal measure. The Court also observed that the legislation applicable to the applicant's situation, whether in the waiting zone or in the administrative detention centre, had been amended substantially compared with the legislation applicable or in force in the cases of *Gebremedhin [Gaberamadhien] v. France* and *I.M. v. France*, cited above, owing to the introduction of the Act of 29 July 2015 and to a lesser extent the Act of 7 March 2016. The Court inferred from this that the applicant's complaints were to be examined on the merits in the context of the new legislation.

The applicant's complaints concerned the practical and legal obstacles he had allegedly encountered and which, in his view, had undermined in concrete fashion the effectiveness of all the remedies he had attempted. The facts of the case, viewed from the standpoint of Article 13 in conjunction with Article 3 of the Convention, could be broken down into three stages corresponding to the applicant's status at each successive stage: the period spent in the waiting zone, the applicant's placement in the administrative detention centre, and his situation in Morocco following his removal by the French authorities on 24 August 2018.

The effectiveness of the remedies used by the applicant to assert a complaint under Article 3 of the Convention before his removal to Morocco, while he was held in the waiting zone.

The Court observed that decisions refusing leave to enter France in order to claim asylum were taken by the Minister responsible for immigration after consulting the OFPRA, one of whose officials had to interview the alien concerned first, either in person or by videoconference. The Court stressed that when the person's situation was being examined, the fact that he or she claimed to belong to a group that was systematically exposed to a practice of ill-treatment had to be given particular consideration. The Court noted that during the interview of 20 July 2018 the applicant's replies to the OFPRA official's questions had been particularly evasive, whether on the subject of his involvement with the Sahrawi cause, the persecution he claimed to have suffered as a result, the reasons for and circumstances of his departure from Morocco, or his fears in the event of a return to that country.

The Court also noted that while aliens who had been refused entry into France did not have access to a remedy with automatic suspensive effect, this was not true in the applicant's case since he had submitted an asylum application at the border. Under Article L. 213-9 of the CESEDA as applicable at the relevant time, the applicant had had a remedy with automatic suspensive effect enabling him to take proceedings in the Paris Administrative Court challenging the order of 20 July 2018 refusing him leave to enter the country in order to claim asylum, within forty-eight hours of that order being served. The Court pointed

out that until the administrative court had ruled on his application the applicant could thus not be returned to Morocco, where he claimed to be at risk of treatment contrary to Article 3 of the Convention.

The Court stressed that it did not underestimate the difficulties that might be faced by aliens claiming asylum who were being held in the waiting zone, stemming in particular from the fact that the CESEDA did not provide for them to receive legal aid, unlike aliens who had been placed in an administrative detention centre. Nevertheless, the Court observed that while the applicant had not been assisted by a lawyer or by one of the associations operating in the waiting zone, either before or during the interview of 20 July 2018 with the OFPRA official, a lawyer assigned by the legal-aid office had assisted him in the proceedings before the Paris Administrative Court. Furthermore, it was the task of the administrative court to review whether the asylum application was manifestly unfounded, and if necessary, to set aside the order of the Minister responsible for immigration as being *ultra vires*.

In the present case the Court noted that the applicant had given evidence at the hearing of 25 July 2018. Hence, he had been given an opportunity to invoke the risks he allegedly faced if he was returned to Morocco and to produce evidence in support of his allegations. The Paris Administrative Court had ruled on the applicant's application by means of a duly reasoned decision, after hearing evidence from the applicant in person.

The effectiveness of the remedies used by the applicant to assert a complaint under Article 3 of the Convention before his removal to Morocco, while he was in the administrative detention centre

The Court noted that on 29 July 2018 the prefect of Seine-Saint-Denis had issued the applicant with an order to leave French territory and had placed him in administrative detention. After the applicant had lodged his asylum application, an order had been issued on 2 August 2018 refusing him leave to remain as an asylum-seeker. On 30 July 2018 and 6 August 2018 the applicant had lodged applications with the Melun Administrative Court seeking the setting-aside of the removal order, the definition of Morocco as the receiving country and the decision refusing him leave to remain as an asylum-seeker. Those applications had been rejected in a single judgment of 13 August 2018. The applicant had also lodged an asylum application with the OFPRA on 2 August 2018, which had been rejected on 9 August 2018.

With regard to the examination by the OFPRA of asylum applications submitted by persons being held in an administrative detention centre, the Court noted at the outset that under the legislation as applicable to the facts of the present case such applications were no longer examined under the expedited procedure as a matter of course. Even if it were true that the prefectures systematically found such applications to have been submitted with the sole purpose of circumventing the removal measure, Article L. 556-1 of the CESEDA nevertheless provided that the administrative authority's assessment had to be based on objective criteria relating, among other things, to the timing and seriousness of the application. Under Article L. 723-2 of the same Code, the OFPRA always had the option of giving a decision under the ordinary procedure where it deemed this necessary in order to ensure that the application was given the proper consideration.

In the present case the Court noted that the applicant, who had applied to the Melun Administrative Court to set aside the order of 29 July 2018 requiring him to leave French territory, could not be removed to Morocco until that court had ruled on his application. While the time-limit of forty-eight hours for appealing was short, the Court noted that the applicant had received legal assistance from the CIMADE in preparing his application and that it had been open to him, under Article R. 776-26 of the Administrative Courts Code, to make additions to his application until the close of the Administrative Court hearing, and that he had in fact done so.

At the hearing before the Melun Administrative Court, which had examined all the appeals lodged against the removal order and against the decision extending the applicant's administrative detention and refusing him leave to remain as an asylum-seeker, the applicant had been assisted by an interpreter and a lawyer

designated by the legal-aid office to plead his case. Both appeals had been dismissed in a judgment of 13 August 2018 which had become final.

The effectiveness of the remedy used by the applicant against the OFPRA's decision rejecting his asylum application, which the CNDA ruled on after the applicant's removal to Morocco on 24 August 2018

After the applicant had been forcibly removed by the French authorities, the CNDA found that no risks had been established and dismissed the appeal against the OFPRA's decision. While it was regrettable that the CNDA considered itself bound to draw inferences from the fact that the applicant was not present at the hearing, the fact remained that the applicant had not produced any new information regarding the risks he allegedly faced, either in those proceedings or in the proceedings before the Court. Lastly, the Court held that, in view of the circumstances of the case and in particular all the safeguards afforded to the applicant and the remedies with suspensive effect which he had exercised before his forcible removal to Morocco, the fact that the remedy he exercised before the CNDA did not have suspensive effect had not infringed his right to an effective remedy.

Conclusion

The Court noted that the applicant had been able on four occasions to make use of remedies which suspended the enforcement of his return to Morocco. In the context of these different remedies he had given evidence four times and had been given an opportunity, despite the short deadlines, to present his claims in an effective manner by virtue of the safeguards afforded to him (assistance of an interpreter, support from an approved association, appointment of a legal-aid lawyer).

After assessing the proceedings as a whole, the Court concluded that the remedies exercised by the applicant, taken together, had been effective in the particular circumstances of this case. There had therefore been no violation of Article 13 read in conjunction with Article 3 of the Convention.

The judgment is available only in French.

24. **ECHR, *M.D. and A.D. v. France*, no. 57035/18, Chamber judgment of 22 July 2021 (Article 3, prohibition of inhuman and degrading treatment – violation; Article 5 § 1, right to liberty and security – violation; Article 5 § 4, right to a speedy review of the lawfulness of detention - violation)**: The case concerned the administrative detention of a mother and her four-month-old daughter in the Mesnil-Amelot no. 2 administrative detention centre pending their transfer to Italy, the country responsible for examining their application for asylum.

ECHR 239 (2021)
22.07.2021

Press Release issued by the Registrar of the Court

In today's Chamber judgment in the case of M.D. and A.D. v. France (application no. 57035/18) the European Court of Human Rights held, by a majority, that there had been:

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

a violation of Article 5 § 1 (right to liberty and security); and

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

The case concerned the administrative detention of a mother and her four-month-old daughter in the Mesnil-Amelot no. 2 administrative detention centre pending their transfer to Italy, the country responsible for examining their application for asylum.

Having regard to the very young age of the child, the reception conditions at the Mesnil-Amelot no. 2 administrative detention centre and the length of the detention (11 days), the Court found that the competent authorities had subjected the child and her mother to treatment exceeding the level of severity required for Article 3 of the Convention to apply.

The Court also found a violation of paragraphs 1 and 4 of Article 5 of the Convention. In principle, it was not the Court's task to substitute its own assessment for that of the national authorities. However, in view of the circumstances of the case, the Court held that the evidence before it was sufficient to conclude that the domestic authorities had not carried out a proper examination, as required by the legal rules now applicable in France, to satisfy themselves that the initial administrative detention of the mother, accompanied by her infant daughter, and its subsequent extension were measures of last resort which could not be replaced by a less restrictive alternative.

The Court observed that neither the liberties and detention judge at the Meaux tribunal de grande instance nor the judge delegated by the President of the Paris Court of Appeal had had sufficient regard, while performing their function of judicial review, to the second applicant's status as a minor in the assessment of the lawfulness of the initial administrative detention and the decision to order its extension for 28 days, a period that had ended after 11 days following the indication of an interim measure by the Court. It had been the task of the domestic courts to carry out an effective review of the lawfulness of the child's initial and continued detention while considering whether a less restrictive alternative such as a compulsory residence order might be envisaged, a measure to which the applicants had previously been subjected. The minor applicant had therefore not had the benefit of a judicial review encompassing all the conditions required for administrative detention to be lawful for the purposes of Article 5 § 1 of the Convention.

Principal facts

The applicants, Ms M.D. and Ms A.D., are Malian nationals who were born in 1995 and 2018 respectively and live in France.

Having fled from Mali claiming to be at risk of female genital mutilation and forced marriage, M.D. arrived in France, via Italy, on 15 January 2018. On 14 June 2018 the prefect of Loir-et-Cher issued an order for her transfer to the Italian authorities, which were responsible under the "Dublin III" Regulation for examining her application for asylum. In a decision of 6 July 2018 the Orléans Administrative Court dismissed an application for judicial review of the order.

On 20 July 2018 M.D. gave birth to her daughter in France.

In an initial order of 17 October 2018 M.D. was subjected to compulsory residence for 45 days pending her transfer to Italy. The order was set aside on the grounds that it imposed excessive obligations on her, and it was replaced by another order entailing less restrictive conditions. The Orléans Administrative Court dismissed an application for judicial review of that order.

On 26 November 2018 the first applicant was notified of an order by which the prefect of Loir-et- Cher, finding that there was a considerable risk of her absconding, decided to place her in an administrative detention centre together with her child for a maximum duration of 48 hours with a view to her transfer to Italy. M.D. and A.D. were taken to the Mesnil-Amelot no. 2 administrative detention centre.

On 27 November 2018, after refusing to board a flight to Italy, M.D. and her daughter were taken back to the administrative detention centre.

In an order of 28 November 2018, the judge responsible for matters relating to civil liberties and detention ("the liberties and detention judge") at the Meaux tribunal de grande instance dismissed an appeal by M.D. against the order for her administrative detention and allowed an application by the prefect of Loir-et-Cher for her detention to be extended by 28 days. In an order of 1 December 2018 the judge delegated by the President of the Paris Court of Appeal upheld the order made on 28 November 2018 by the liberties and detention judge.

Following an urgent application by M.D. for protection of a fundamental freedom, the urgent-applications judge of the Melun Administrative Court instructed the prefect of Loir-et-Cher to send the necessary information about the particular situation of M.D. and her child to the Italian authorities, in accordance with the requirements of the Dublin III Regulation, in advance of the implementation of the order for their transfer to Italy, so that those authorities would be in a position to provide the first applicant with adequate assistance.

On 6 December 2018 the applicants made a request to the Court for an interim measure under Rule 39 of the Rules of Court. On the same day, the Court granted the request and asked the French authorities to end the applicants' administrative detention. The authorities executed the measure.

M.D. and her child were subsequently taken into the care of the département council services.

As the order for M.D.'s transfer had not been implemented by 6 January 2020, France became responsible for examining her application for asylum. She lodged an asylum application with the Office for the Protection of Refugees and Stateless Persons and was granted a temporary residence permit on that account.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman and degrading treatment), the applicants complained that their administrative detention had amounted to inhuman and degrading treatment. They submitted that the child's detention was in breach of Article 5 § 1 (right to liberty and security).

Relying on Article 5 § 4 (right to a speedy decision on the lawfulness of detention), they complained that the second applicant had not had an effective remedy by which to challenge the lawfulness of her initial administrative detention and its extension. Relying on Article 8 (right to respect for family life), they also submitted that their detention breached that Article.

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

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

Síofra **O'Leary** (Ireland), *President*,

Mārtiņš **Mits** (Latvia),

Stéphanie **Mourou-Vikström** (Monaco),

Jovan **Ilievski** (North Macedonia),

Lado **Chanturia** (Georgia),

Arnfinn **Bårdsen** (Norway),

Mattias **Guyomar** (France),

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

Decision of the Court

Article 3

The Court pointed out that the absolute right protected by Article 3 prohibited an accompanied minor from being held in administrative detention in conditions such as those in the present case for a period whose excessive length contributed to crossing the severity threshold for proscribed treatment. The parent's behaviour – in this instance, the first applicant's refusal to board the flight – was not decisive for the assessment of whether the proscribed level of severity had been attained in respect of the child. The Court found that the detention of a four-month-old baby in the conditions observed at the time of the events in question in the Mesnil-Amelot no. 2 administrative detention centre, for a period extending over 11 days which had only ended after the Court had indicated an interim measure, was excessive in terms of the requirements of Article 3.

Having regard to the very young age of the second applicant, the reception conditions at the Mesnil-Amelot no. 2 administrative detention centre and the length of the detention, the Court found that the competent authorities had subjected the child to treatment exceeding the level of severity required for Article 3 of the Convention to apply. In view of the ties between a mother and her fourmonth-old baby, the interaction between them as a result of breastfeeding, and the emotions they shared, the Court held that in the particular circumstances of the case, the same finding applied to the first applicant.

There had therefore been a violation of Article 3 of the Convention in respect of both applicants.

Article 5 § 1

The Court observed firstly that since its judgment in A.B. and Others v. France (no. 11593/12, 12 July 2016), there had been significant amendments to French legislation. French law now set out an exhaustive list of cases in which the administrative detention of a person accompanied by minor children could be ordered, and the conditions in which the duration of such detention could be extended. French law also provided, in accordance with the requirements of Article 5 § 1, that the administrative detention of a minor could only be ordered as a measure of last resort and for the shortest appropriate period of time.

Secondly, the Court observed that it was apparent from the order for the administrative detention of the first applicant, issued the day before a flight had been scheduled to transfer her to Italy, that the prefect had sought to determine whether, in view of the presence of a minor, a less restrictive alternative to detention was possible. The prefect had considered that the compulsory residence orders initially in place were no longer feasible, in view of the risk of absconding that, in the prefect's view, could be inferred from the first applicant's stated refusal to comply with the transfer procedure. The order of 28 November 2018 indicated that the liberties and detention judge had carried out similar checks and assessments before extending the applicants' administrative detention for a further 28 days.

Although it was not the Court's task to substitute its own assessment for that of the national authorities, the evidence before it was sufficient to conclude that the domestic authorities had not carried out a proper examination, while applying the legal rules now in force in France, to satisfy themselves that the initial administrative detention of the first applicant, accompanied by her infant daughter, and its subsequent extension were measures of last resort which could not be replaced by a less restrictive alternative.

There had therefore been a violation of Article 5 § 1 of the Convention in respect of the second applicant.

Article 5 § 4

First of all, the Court noted with satisfaction that French law gave a precise definition of the conditions in which the liberties and detention judge reviewed the lawfulness of the initial detention order (Article L. 512-1 III of the Entry and Residence of Aliens and Right of Asylum Code (CESEDA)) and then decided, where appropriate, to extend the duration of the detention (Article L. 552-1 of the CESEDA).

Secondly, the Court found that the liberties and detention judge and subsequently the judge delegated by the President of the Paris Court of Appeal had had regard, while performing their function of judicial review, to the presence of the child in the assessments they were required to make as to the lawfulness of the initial detention and the need for its extension. The Court observed, however, that the liberties and detention judge had simply noted that the administrative detention centre was authorised to admit families and had specially equipped facilities, and, when assessing the lawfulness of the detention order and whether it could be extended beyond a brief period, had also mentioned the limited duration of the detention without addressing the specific conditions in which the baby had been deprived of her liberty.

Next, the Court noted that despite the fact that no flights to Italy had been scheduled in the short term, the liberties and detention judge had held that no alternative solutions were available after finding that the applicants had not put forward any alternative accommodation and did not satisfy the conditions for a compulsory residence order as laid down in Article L. 552-4 of the CESEDA. The Court observed, nevertheless, that no serious consideration had been given to the fact that until they had been admitted to the detention centre, the applicants had been the subject of compulsory residence orders, which they had complied with.

Lastly, the Court noted that neither the liberties and detention judge at the Meaux tribunal de grande instance nor the judge delegated by the President of the Paris Court of Appeal had had sufficient regard to the presence of the second applicant and her status as a minor before assessing the lawfulness of the initial detention and ordering its extension for 28 days.

The Court found a violation of Article 5 § 1 on the grounds that the domestic authorities had not carried out a proper examination to satisfy themselves that the initial administrative detention of the first applicant, accompanied by her infant daughter, and its subsequent extension were measures of last resort which could not be replaced by a less restrictive alternative. This failure to conduct an effective review of compliance with the conditions relating both to the lawfulness of the detention order and to the principle of legality for the purposes of the Convention was attributable in particular to the domestic courts, which had been under an obligation to ensure that the child's initial and continued detention was in fact lawful. The minor applicant had therefore not had the benefit of a judicial review encompassing all the conditions required for administrative detention to be lawful for the purposes of paragraph 1 of Article 5.

There had therefore been a violation of Article 5 § 4 of the Convention in respect of the second applicant.

Article 8

Having found a violation of Article 3 of the Convention in respect of both applicants, the Court found that in the circumstances of the case, there was no need for a separate examination of the complaint under Article 8.

Rule 39 of the Rules of Court

As the applicants' administrative detention had ended on 6 December 2018, the Court found that the interim measure had become devoid of purpose and decided to discontinue it.

Just satisfaction (Article 41)

The Court held that France was to pay the applicants 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 6,780 in respect of costs and expenses.

Separate opinions

Judge **Mourou-Vikström** expressed a separate opinion, which is annexed to the judgment.

The judgment is available only in French.

25. **ECHR, *Aarrass v. Belgium*, no. 16371/18, Chamber decision of 07 September 2021 (Article 1, obligation to respect human rights, in conjunction with Article 3, prohibition of torture, inhuman or degrading treatment – inadmissible)**: The case concerned a Belgian and Moroccan national who unsuccessfully alleged that the Belgian State had failed to provide consular protection in order to defend him from the serious breaches of his physical and psychological integrity to which he had been subjected while imprisoned in Morocco.

ECHR 286 (2021)
30.09.2021

Press release issued by the Registrar of the Court

In its decision in the case of *Aarrass v. Belgium* (application no. 16371/18) the European Court of Human Rights has unanimously declared the application inadmissible.

The case concerned a Belgian and Moroccan national who alleged that the Belgian State had failed to provide consular protection in order to defend him from the serious breaches of his physical and psychological integrity to which he had been subjected while imprisoned in Morocco. He relied on Articles 1 (obligation to respect human rights) and 3 (prohibition of torture and inhuman or degrading treatment) of the European Convention on Human Rights.

The Court noted that the Belgian authorities had not remained passive or indifferent and that they had taken steps to intercede with the Moroccan authorities, on both a diplomatic basic or on humanitarian grounds, in order to improve the applicant's situation. Those efforts had not been successful and appeared to have had no impact on the applicant's conditions of detention. However, this situation did not arise from inertia on the part of the Belgian consular officials working in Morocco, but from the systematic refusal on the part of Moroccan authorities, who had exercised exclusive control over the applicant's person.

The application was thus manifestly ill-founded. The decision is final.

Principal facts

The applicant, Ali Aarrass, is a Belgian and Moroccan national who was born in 1962. Mr Aarrass was arrested on 1 April 2008 in Melilla (Spain) under an international arrest warrant issued against him by the Moroccan authorities so that he could be tried in that country on charges of criminal conspiracy, belonging to a terrorist organisation, and carrying out terrorist attacks likely to cause disrupt public order. In December 2010 he was extradited to Morocco and immediately detained pending trial. In October 2012 the Rabat Court of Appeal sentenced him to 12 years' imprisonment.

Between 2010 and 2013 lawyers representing Mr Aarrass contacted the Moroccan authorities on several occasions, without success, to complain of the conditions in which he was being held (solitary confinement, inhuman and degrading conditions of detention – no contact with his family, no mattress in the cell, lack of food, no access to healthcare). They also wrote to the successive Belgian Ministers of Foreign Affairs, requesting that the applicant be granted consular protection by the Belgian consular authorities in Morocco. These requests were refused on the grounds that Belgium applied customary international law relating to consular relations, under which a State may not afford diplomatic protection to one of its nationals against another State if the individual concerned also possesses the nationality of the latter State.

In November 2013 Mr Aarrass applied to the Brussels First-Instance Court for an injunction ordering the Belgian State to provide consular protection and/or to ensure that his physical and psychological integrity was preserved.

In February 2014 the President of the First-Instance Court, sitting as the judge responsible for urgent applications, held that Article 36 § 1 of the Vienna Convention on Consular Relations of 24 April 1963 granted the applicant only subjective rights, to be exercised against the State of residence, that is, Morocco. The president also noted that Belgian consular officials were entitled under Article 36 § 1 of

the Vienna Convention to communicate with the applicant. In consequence, holding that the allegations of inhuman and degrading treatment were proven in view of the reports submitted in support of the request, and considering that the applicant had a subjective right not to be subjected to such treatment, the president urged the Belgian State to afford the applicant its consular protection, to the effect that he should be granted the possibility of communicating with the Belgian consul in Morocco if he asked to do so.

In March 2014 the Belgian Embassy in Rabat asked the Moroccan authorities to allow the applicant to communicate with the Belgian consul. This request was refused by the Moroccan authorities, as they wished to avoid creating a precedent that would be contrary to Morocco's practice of not providing consular assistance to its own nationals where the latter were detained in the State of their other nationality.

In September 2014 the Brussels Court of Appeal upheld the order by the president of the firstinstance court and instructed the Belgian State, on pain of penalty for non-compliance, to request the Moroccan State to authorise the Belgian consular authorities in Morocco to visit the applicant and to speak with him.

Between 2014 and 2017 the Belgian authorities unsuccessfully contacted their Moroccan counterparts, through written notes and telephone exchanges, asking to be able to visit the applicant, sometimes in the context of consular protection, and sometimes from a humanitarian standpoint. On one occasion, in October 2015, it proved possible to organise a visit by members of the Moroccan National Commission for Human Rights, and the applicant's sister was able to visit him in hospital.

In the meantime, in September 2017 the Belgian Court of Cassation quashed the court of appeal's judgment, holding that, while the Vienna Convention recognised that the sending State and its nationals enjoyed certain rights, it did not impose an obligation on the sending State to provide consular assistance to one of its nationals. The case was remitted to the Liège Court of Appeal, before which it is pending.

The applicant was released in April 2020 after serving his sentence. He subsequently returned to Belgium on 15 July 2020.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 29 March 2018. Relying on Articles 1 (obligation to respect human rights) and 3 (prohibition of torture, inhuman or degrading treatment) of the European Convention on Human Rights, Mr Aarrass alleged that the Belgian State had failed to comply with its positive obligation to provide him with consular protection with a view to ending the serious breaches of his physical and psychological integrity to which he had been subjected during his imprisonment in Morocco.

The non-governmental organisation Redress was given leave to intervene as a third party (Article 36 § 2 of the Convention and Rule 44 § 3 (a) of the Rules of Court).

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

Georgios A. **Serghides** (Cyprus), *President*,

Paul **Lemmens** (Belgium),

Dmitry **Dedov** (Russia),

Georges **Ravarani** (Luxembourg),

Anja **Seibert-Fohr** (Germany),

Peeter **Roosma** (Estonia),

Andreas **Zünd** (Switzerland),

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

Decision of the Court

The issue in the present case was whether the Belgian State was under a positive obligation to afford consular assistance to the applicant during his imprisonment in Morocco, in order to avoid the risk of ill-treatment from materialising.

The Court noted that the Belgian authorities had not remained passive or indifferent. On the contrary, they had, on several occasions and especially following the order by the President of the Brussels First-Instance Court, taken steps to intercede with the Moroccan authorities, either on a diplomatic basic or on humanitarian grounds, in order to improve the applicant's situation. It was true that those efforts had not been successful and appeared to have had no impact on the applicant's conditions of detention. However, this situation did not arise from inertia on the part of the Belgian consular officials working in Morocco, but from the systematic refusal of the Moroccan authorities, who exercised exclusive control over the applicant, to create a precedent that would be contrary to Morocco's practice of not authorising consular assistance to Moroccan nationals where they were detained in the State of their other nationality.

In consequence, the Court considered that, assuming that a positive obligation to intervene could be inferred from Article 1 taken together with Article 3 of the Convention, the application was manifestly ill-founded and had to be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

The decision is available only in French.

26. ECHR, *M.D. and Others v. Russia*, no. 71321/17 and nine other applications, Chamber judgment of 14 September 2021 (Article 2, right to life, and, Article 3, prohibition of inhuman or degrading treatment – violation in the event of the expulsion of eight of the applicants to Syria; Article 5 § 1, right to liberty and security – violation in respect of two of the applicants / no violation in respect of three of the applicants; Article 5 § 4, right to have lawfulness of detention decided speedily by a court – violation in respect of two of the applicants): A group of 10 applicants claimed, with varying degrees of success, that their expulsion from Russia to Syria after overstaying their visas would put them at grave physical risk. Certain applicants successfully claimed that their conditions of detention and trial violated their rights under Article 5 of the Convention.

ECHR 269 (2021)
14.09.2021

Press Release issued by the Registrar of the Court

The applicants are 11 Syrian nationals.

Between 2011 and 2014 the applicants entered the Russian Federation and then overstayed their visas. The case concerns their arrest and detention, the immigration charges brought against them individually, and subsequent orders for their expulsion.

Relying on Article 2 (right to life) and Article 3 (prohibition on inhuman or degrading treatment), the applicants complain that their expulsion to Syria would put them at grave physical risk. Some of the applicants also complain under Article 13 (right to an effective remedy) that they had no effective domestic remedies in respect of their complaints under Articles 2 and 3 that their detention pending removal was arbitrary and the examination of their complaints against detention orders was not speedy.

Violation of Articles 2 and 3 (in the event of the expulsion of eight of the applicants to Syria)

Violation of Article 5 § 1 (in respect of two of the applicants)

No violation of Article 5 § 1 (in respect of three of the applicants)

Violation of Article 5 § 4 (in respect of two of the applicants)

Interim measure (Rule 39 of the Rules of Court): still in force until the present judgment becomes final or until further notice as regard eight of the applicants.

Just satisfaction: for details of the amounts awarded please see the operative part and the appendix to the judgment.

27. **ECHR, *Carter v. Russia*, no. 20914/07, Chamber judgment of 14 September 2021 (Article 38, obligation to furnish necessary facilities for the examination of a case – violation; Article 2, right to life – violation)**: The case concerned the poisoning and death of the applicant's husband, Aleksandr Litvinenko, in the United Kingdom, and the investigations into his death. The applicant successfully alleged that her husband was murdered by agents of the Russian government.

ECHR 278 (2021)
21.09.2021

Press release issued by the Registrar of the Court

In today's Chamber judgment in the case of *Carter v. Russia* (application no. 20914/07) the European Court of Human Rights held that there had been:

unanimously, **a failure by the Government to comply with their obligations under Article 38**

(obligation to furnish necessary facilities for the examination of a case) of the European Convention on Human Rights**,**

by 6 votes to 1, **a violation of Article 2 (right to life) in its substantive and procedural aspects.**

The case concerned the poisoning and death of the applicant's husband, Aleksandr Litvinenko, in the United Kingdom, and the investigations into his death. Mr Litvinenko had worked for the Russian security services before defecting to the United Kingdom where he was granted asylum. In 2006 he was poisoned with polonium 210 (a radioactive substance) in London and died. A public inquiry in the UK found that the assassination had been carried out by a certain Mr Lugovoy and a Mr Kovtun, who had been acting on behalf of someone else.

The Court found in particular that there was a strong prima facie case that, in poisoning Mr Litvinenko, Mr Lugovoy and Mr Kovtun had been acting as agents of the Russian State. It noted that the Government had failed to provide any other satisfactory and convincing explanation of the events or counter the findings of the UK inquiry.

The Court also found that the Russian authorities had not carried out an effective domestic investigation capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible for the murder.

Principal facts

Background

The applicant, Maria Anna Carter aka Marina Litvinenko, is a British and Russian national who was born in 1962 and lives in London. She is the widow of Aleksandr Litvinenko, a Russian and British national who was born in 1962.

Mr Litvinenko had worked for the Soviet and Russian security services (the KGB and later the FSB). In November 1998 he went public with allegations that he had been asked to examine the possibility of assassinating a wealthy businessman. He was fired from the security service and fled from Russia. In 2001 he and his family were granted asylum in the United Kingdom; they acquired British citizenship in 2006. They changed their names. Mr Litvinenko became involved in exposing corruption and links to organised crime in the Russian intelligence services. It is alleged that Mr Litvinenko also worked with the British, Spanish and Italian authorities, advising on Russian organised crime and KGB operations in Europe.

Mr Litvinenko's death

In October 2006 Andrey Lugovoy, a long-standing acquaintance of Mr Litvinenko, visited London three times, each time in the company of Dmitriy Kovtun. During the first visit on 16 October 2006, a meeting took place between Mr Lugovoy, Mr Kovtun and Mr Litvinenko and others and they went together to dinner. Mr Litvinenko vomited later that night and remained ill for two days. The following day Mr Lugovoy and Mr Kovtun checked out of their hotel one day early. The room was later found to contain significant polonium contamination, with signs pointing to the substance having been poured down the sink plughole. Further evidence of polonium contamination was found in areas that the pair had visited in London, including the room where the meeting had taken place and the restaurant in which they had dined.

From 25 to 28 October 2006 Mr Lugovoy visited London for a second time, apparently meeting with Mr Litvinenko, among other things. A pattern of polonium contamination consistent with accidental spillage was detected in his hotel room.

On 31 October 2006 Mr Lugovoy and Mr Kovtun returned to London for a third time. The following day they met with Mr Litvinenko, drinking tea in their hotel bar. Extensive traces of polonium were found, including in the teapot and the men's toilets, which had been used by the former two but not by Mr Litvinenko. On 3 November 2006 they returned to Moscow. Polonium contamination was found in the aeroplane and in their seats in the Emirates Stadium in London, where they had watched a football match.

On 2 November 2006 Mr Litvinenko was taken ill, with vomiting, abdominal pain and bloody diarrhoea. The next day he was admitted to hospital. Following a transfer to University College Hospital, it was suspected that he had been poisoned using chemotherapeutic agents or radioisotopes. Mr Litvinenko died on 23 November 2006. The cause of death was established to be acute radiation syndrome caused by very high levels of polonium 210, which had entered the body as a soluble compound via ingestion.

Proceedings following Mr Litvinenko's death

A police investigation was opened in the UK before Mr Litvinenko's death. On 22 May 2007 the Crown Prosecution Service determined that there was sufficient evidence against Mr Lugovoy to charge him with Mr Litvinenko's murder. The authorities attempted to have him extradited to the UK for trial. That was refused by the Russian authorities because of the constitutional protection against extradition of Russian nationals. In 2011 Mr Kovtun was also charged with the murder and an arrest warrant against him was sought. On 2 December 2007 Mr Lugovoy became a member of the Russian Parliament and thus acquired parliamentary immunity. Mr Lugovoy and Mr Kovtun both remain wanted for the murder.

On 7 December 2006 the Russian Prosecutor General launched a domestic criminal investigation, of which the Court has little information. In the UK, an inquest and a public inquiry were carried out. In January 2016 the inquiry found it established, beyond reasonable doubt, that Mr Litvinenko had been poisoned using polonium and that the poison had been administered by Mr Lugovoy and Mr Kovtun. It excluded accidental or deliberate self-poisoning. It also rejected the suggestion that Mr Lugovoy had been set up by British intelligence.

The inquiry noted the motives that entities within the Russian State may have had for wishing Mr Litvinenko dead, and the evidence of links between Mr Lugovoy and Mr Kovtun and the Russian State. On the strength of both open and closed evidence, it found that Mr Lugovoy had been acting under FSB direction and Mr Kovtun had also been acting under FSB direction, possibly indirectly through Mr Lugovoy but probably with his knowledge.

Complaints, procedure and composition of the Court

Relying on Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment), the applicant complained that her husband, Mr Litvinenko, had been murdered in a particularly painful manner by Mr Lugovoy (with others) while acting as an agent for, or in connivance with, or with the knowledge and support of, the Russian authorities, and that the Russian authorities had failed to conduct an effective investigation into the murder.

The application was lodged with the European Court of Human Rights on 21 May 2007. The proceedings before the Court were suspended from 16 December 2014 until 8 March 2016 pending the outcome of the public inquiry in the United Kingdom.

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

Paul **Lemmens** (Belgium), *President*,

Georgios **Serghides** (Cyprus),

Dmitry **Dedov** (Russia),

Georges **Ravarani** (Luxembourg),

Darian **Pavli** (Albania),

Anja **Seibert-Fohr** (Germany),

Peeter **Roosma** (Estonia),

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

Decision of the Court

Preliminary issues

The Court firstly ruled that Russia had failed to provide, without justification, the requested material (documents from the investigation file, including Mr Lugovoy's statements and copies of legal assistance requests addressed to the United Kingdom authorities) necessary for the Court's investigation into the case, in violation of Article 38 of the Convention.

The Court also dismissed the Russian Government's objection to the use of the UK public inquiry report as evidence. It found that, as the inquiry had met the requirements of independence, fairness and transparency, it could not disregard its findings solely because the Russian authorities had abstained from exercising their right to participate in those proceedings.

Article 2 (procedural aspect)

The Court considered that a procedural jurisdictional link between Russia and the death of Mr Litvinenko in the UK had been established by reason of Russia's having launched a domestic investigation into the matter. In addition, the fact that Russia retained exclusive jurisdiction over an individual (Mr Lugovoy) who was accused of a serious human-rights violation constituted a "special feature" of the case, establishing Russia's jurisdiction in respect of the alleged procedural violation of Article 2.

Although the Government had provided the Court with an outline of the investigative steps taken, the Court pointed out that no documentary evidence had been submitted to corroborate their claims. The Court had asked the Government to submit documentary evidence with their observations, which the Government had declined to do. Owing to this, the Government had failed to demonstrate that the Russian authorities had carried out an effective investigation capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible for the murder. The Court furthermore noted that parliamentary immunity which Mr Lugovoy had held since 2007 was not an absolute bar to his being investigated or even prosecuted; the relevant legal provisions and their application indicated he could have been deprived of his immunity with the consent of the lower chamber of Parliament of which he was a member.

The Court considered that there had been a violation of the procedural limb of Article 2 on account of the Russian authorities' failure to conduct an effective investigation into the death of Mr Litvinenko.

Article 2 (substantive aspect)

Mr Litvinenko had been in the UK when poisoned, and therefore not in an area where Russia exercised effective control. To decide whether Russia had jurisdiction by virtue of its agents operating outside its

territory ("personal concept of jurisdiction"), the Court considered two interrelated questions: (i) whether the assassination of Mr Litvinenko had amounted to the exercise of physical power and control over his life in a situation of proximate targeting, and (ii) whether it had been carried out by individuals acting as State agents. The Court found it established, beyond reasonable doubt, that the assassination had been carried out by Mr Lugovoy and Mr Kovtun. The planned and complex operation involving the procurement of a rare deadly poison, the travel arrangements for the pair, and repeated and sustained attempts to administer the poison indicated that Mr Litvinenko had been the target of the operation and that he had been under the physical control of Mr Lugovoy and Mr Kovtun, who had wielded power over his life.

As to whether Mr Lugovoy and Mr Kovtun had acted as agents of the respondent State, the Court found that there was no evidence that either man had had any personal reason to kill Mr Litvinenko and that, if acting on their own behalf, they would not have had access to the rare radioactive isotope used to poison him. The UK inquiry had discarded several theories as to why the assassination had been carried out, leaving State involvement as the only remaining plausible explanation. The Court held that the identification of the perpetrators of the killing and the indication of their connection with the Russian authorities had established a strong prima facie case that, in killing Mr Litvinenko, Mr Lugovoy and Mr Kovtun had been acting on the direction or control of the Russian authorities.

Had the pair been involved in a "rogue operation", the information to prove that theory would lie entirely in the Russian authorities' hands. However, the Government had made no serious attempt to provide such information or to counter the findings of the UK authorities.

The Court thus drew conclusions from the Russian Government's refusal to provide the documents from the domestic investigation file and its failure to rebut the prima facie case of State involvement. It found that Mr Litvinenko's assassination was imputable to Russia.

As the Government had not sought to argue that the killing of Mr Litvinenko could be justified by the exceptions in the second paragraph of Article 2, the Court found that there had been a violation of that Article in its substantive aspect.

Just satisfaction (Article 41)

The Court held that Russia was to pay the applicant 100,000 euros (EUR) in respect of non-pecuniary damage and EUR 22,500 in respect of costs and expenses. It also rejected the applicant's claim for "punitive" damages.

Separate opinions

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

The judgment is available only in English.

28. **ECHR, *J.C. and Others v. Belgium*, no. 11625/17, Chamber judgment of 12 October 2021 (Article 6 § 1, right of access to a court – no violation)** The case concerned an action for compensation brought by 24 applicants against the Holy See, *inter alia*, for the structurally deficient manner in which the State had dealt with the problem of sexual abuse within the Catholic church. The case was frustrated at a national level by the jurisdictional immunity of the Holy See, a result which the applicants unsuccessfully claimed violated their rights under Article 6 of the Convention.

ECHR 301 (2021)
12.10.2021

Press release issued by the Registrar of the Court

In today's Chamber judgment in the case of *J.C. and Others v. Belgium* (application no. 11625/17)the European Court of Human Rights held, by a majority (six votes to one), that there had been:

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

The case raised the question of the immunity of the Holy See from the jurisdiction of domestic courts. It concerned in particular an action for compensation brought by 24 applicants against the Holy See and against a number of leaders of the Catholic Church of Belgium and Catholic associations, claiming that damage had been caused by the structurally deficient manner in which the State had dealt with the problem of sexual abuse in the Church. As the Belgian courts had found that they did not have jurisdiction in respect of the Holy See, the applicants argued that they had been deprived of access to a court and relied on Article 6 § 1 before the European Court of Human Rights.

The Court found that the dismissal of the proceedings by the Belgian courts in declining jurisdiction to hear the tort case brought by the applicants against the Holy See had not departed from the generally recognised principles of international law in matters of State immunity, and the restriction on the right of access to a court could not therefore be regarded as disproportionate to the legitimate aims pursued.

Principal facts

The applicants are 24 Belgian, French and Dutch nationals. They allege that they were victims of sexual abuse by Catholic priests when they were children.

In July 2011 the applicants filed a class action in the Ghent Court of First Instance, complaining of the structurally deficient way in which the Church had dealt with the known problem of sexual abuse within it. The action was brought against the Holy See as well as an archbishop of the Catholic Church in Belgium and his two predecessors, several bishops and two associations of religious orders.

Basing their action on Articles 1382 and 1384 of the Civil Code, the applicants requested primarily that the defendants be held jointly and severally liable for the damage they claimed to have sustained as a result of the alleged sexual abuse by Catholic priests or members of religious orders.

They also claimed that the defendants should be jointly and severally liable to pay compensation of EUR 10,000 to each of them because of the Catholic Church's policy of silence on the issue of sexual abuse.

In October 2013 the Ghent Court of First Instance declined jurisdiction in respect of the Holy See.

In February 2016 the Ghent Court of Appeal upheld this judgment. It found, in particular, that it did not have a sufficient jurisdictional basis to rule on the claimants' action because of the Holy See's immunity from legal proceedings. It also stated that Belgium's recognition of the Holy See as a foreign sovereign with the same rights and obligations as a State was conclusively established. This recognition resulted from a series of commonly agreed elements of customary international law, foremost among which were the conclusion of treaties and diplomatic representation. The Holy See therefore enjoyed diplomatic immunity and all State privileges under international law, including jurisdictional immunity. The Court

of Appeal also noted that the dispute did not fall within any of the exceptions to the principle of State immunity from jurisdiction.

In August 2016 a lawyer at the Court of Cassation gave a negative opinion on the chances of success of a possible appeal to the Court of Cassation.

Subsequently, all but four claimants who did not apply were able to obtain compensation through the arbitration centre for sexual abuse claims set up within the Catholic Church.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right of access to a court), the applicants complained that the application to the Holy See of the principle of State immunity from jurisdiction had prevented them from asserting their civil claims against it.

The application was lodged with the European Court of Human Rights on 2 February 2017.

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

Georgios A. **Serghides** (Cyprus), *President*,

Paul **Lemmens** (Belgium),

Georges **Ravarani** (Luxembourg),

María **Elósegui** (Spain),

Darian **Pavli** (Albania),

Peeter **Roosma** (Estonia),

Andreas **Zünd** (Switzerland),

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

Decision of the Court

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

The present case was the first one to deal with the immunity of the Holy See.

The Court noted that the Court of Appeal had found that the Holy See was recognised internationally as having the common attributes of a foreign sovereign, with the same rights and obligations as a State. The Court of Appeal had noted in particular that the Holy See was a party to some major international treaties, that it had signed agreements with other sovereign entities and that it enjoyed diplomatic relations with some 185 States worldwide. As regards Belgium, more specifically, diplomatic relations with the Holy See dated back to 1832 and it was recognised as a State. The Court did not find anything unreasonable or arbitrary in the detailed reasoning which led the Court of Appeal to reach that conclusion. It pointed out that it had itself previously characterised agreements between the Holy See and other States as international treaties.[2] Therefore the Holy See could be recognised as having characteristics comparable to those of a State. The Court of Appeal had thus been justified in inferring from those characteristics that it was a sovereign power with the same rights and obligations as a State.

[2] *Fernández Martínez v. Spain* [GC], no. 56030/07, § 118, ECHR 2014 (extracts), and *Travaš v. Croatia*, no. 75581/13, § 79, 4 October 2016.

The Court pointed out that it had also accepted that the granting of State immunity in civil proceedings pursued the legitimate aim of observing international law for the sake of comity and good relations between States, by ensuring respect for the sovereignty of another State.

As to the proportionality of the limitation sustained by the applicants in their right of access to a court, the Court found that the Court of Appeal's approach corresponded to international practice in such matters. It had not noted anything arbitrary or unreasonable in the Court of Appeal's interpretation of the applicable legal principles, or in the way it had applied them to the facts of the case, taking account of the basis of the applicants' action.

The Court also noted that the question whether the case could fall within one of the exceptions to the application of the jurisdictional immunity of States[3] had also been discussed before the Court of Appeal. The exception invoked by the applicants applied to proceedings relating to "an action for pecuniary compensation in the event of the death or physical injury of a person, or in the event of damage to or loss of tangible property". The Court of Appeal had rejected this exception on the grounds, among others, that the misconduct of which the Belgian bishops were accused could not be attributed to the Holy See, as the Pope was not the principal in relation to the bishops; that the misconduct attributed directly to the Holy See had not been committed on Belgian territory but in Rome; and that neither the Pope nor the Holy See had been present on Belgian territory when the misconduct attributed to the leaders of the Church in Belgium had been committed. It was not for the Court to substitute its own assessment for that of the national courts, since their assessment on this point had not been arbitrary or manifestly unreasonable.

The Court also noted that the proceedings brought by the applicants in the Ghent Court of First Instance had not been directed solely against the Holy See, but also against officials of the Catholic Church in Belgium whom the applicants had identified. However, the applicants' claim on this ground was unsuccessful owing to the applicants' failure to comply with procedural rules laid down in the Judicial Code and substantive rules concerning civil liability in summoning the other defendants. The reason why the applicants' action had been totally unsuccessful had thus been the result of procedural choices that they failed to cure in the course of the proceedings in order to specify and individualise the facts submitted in support of their claims.

Consequently, the Court found that the dismissal of the proceedings by the Belgian courts in declining jurisdiction to hear the tort case brought by the applicants against the Holy See had not departed from the generally recognised principles of international law in matters of State immunity and the restriction on the right of access to a court could not therefore be regarded as disproportionate to the legitimate aims pursued. **There had therefore been no violation of Article 6 § 1 of the Convention.**

Separate opinion

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

The judgment is available only in French.

[3] They are enshrined by the European Convention on State immunity and the United Nations Convention on Jurisdictional Immunities of States and Their Property.

29. **ECHR, *Khojoyan and Vardazaryan v. Azerbaijan*, no. 62161/14, Chamber judgment of 04 November 2021 (In respect of the victim: Article 2, right to life – violation; Article 3, prohibition of torture – violation; Article 5, right to liberty and security – violation; in respect of the applicants: Article 3, prohibition of cruel or degrading treatment – no violation):** The case concerned the captivity and alleged ill-treatment of the applicants' father, an Armenian national, by Azerbaijani authorities.

ECHR 330 (2021)
04.11.2021

Press release issued by the Registrar of the Court

The applicants, Hasmik Khojoyan, Heghine Vardazaryan and Haykaz Khojoyan (now deceased), are three Armenian nationals who were born in 1964, 1967 and 1959, respectively.

The case concerns the captivity and alleged ill-treatment of the applicants' father, Mamikon Khojoyan, in Azerbaijan in early 2014. The applicants' father left his home in Armenia, close to the border with Azerbaijan on the morning of 28 January 2014. It was reported in the Azerbaijani news two days later that he was an armed guide of an Armenian sabotage group and was being detained. He was handed over to the Armenian authorities on 4 March 2014 and died at home ten weeks later.

Relying on Article 2 (right to life), Article 3 (prohibition of torture), Article 5 (right to liberty and security), Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination) of the European Convention on Human Rights, the applicants allege that their father was tortured during his captivity, including severe beatings, being burnt with incandescent metal and drug injections, which had posed a danger to his life and which had not been investigated, that he was unlawfully deprived of his liberty, that they did not have an effective legal remedy and that the alleged violations occurred as a result of discrimination based on ethnic origin.

Violation of Article 2 (right to life) in respect of Mamikon Khojoyan

Violation of Article 2 (investigation) in respect of Mamikon Khojoyan

Violation of Article 3 (prohibition of torture) on account of Mamikon Khojoyan's torture

No violation of Article 3 in respect of the applicants

Violation of Article 5 in respect of Mamikon Khojoyan

Just satisfaction:

non-pecuniary damage: 40,000 euros (EUR) jointly to the applicants

costs and expenses: the Court rejected the applicants' claim for costs and expenses

30. **ECHR, *Petrosyan v. Azerbaijan*, no. 32427/16, Chamber judgment of 04 November 2021 (Article 2, right to life – violation; Article 3, prohibition of torture – violation, in respect of both the deceased and the applicant):** The case concerned the captivity, alleged ill-treatment and ultimate death of the applicant's son, an Armenian national, at the hands of the Azerbaijani military.

ECHR 330 (2021)
04.11.2021

Press release issued by the Registrar of the Court

The applicant, Artush Petrosyan, is an Armenian national who was born in 1957 and lives in Chinari (Armenia).

His son, Karen Petrosyan, born in 1981, lived with him in Chinari, close to the border with Azerbaijan. On 7 August 2014 his son crossed the border into Azerbaijan and was captured by the Azerbaijani armed forces. He died while in captivity.

Relying on Article 2 (right to life), Article 3 (prohibition of torture), Article 5 (right to liberty and security), Article 8 (right to respect for private and family life), Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination) of the European Convention, the applicant complains that his son was tortured and killed in illegal detention, that his body was not repatriated in a timely manner, that there was no effective investigation and that the alleged violations occurred as a result of discrimination based on ethnic origin.

Violation of Article 2 (investigation and right to life)

Violation of Article 3 in respect of Karen Petrosyan

Violation of Article 3 in respect of the applicant

Just satisfaction:

non-pecuniary damage: EUR 40,000

costs and expenses: EUR 8,37

31. **ECHR, *M.H. and Others v. Croatia*, nos. 15670/18 and 43115/18, Chamber judgment of 18 November 2021 (Article 2, right to life – violation concerning the investigation into the death of the Afghan family's daughter; Article 3, prohibition on inhuman and degrading treatment – violation in respect of the applicant children; Article 3 – no violation in respect of the adult applicants; Article 5 § 1, right to security and liberty - violation in respect of all the applicants; Article 4 of Protocol No. 4 to the Convention, prohibition of collective expulsions of aliens - violation in respect of the applicant mother and her five children; Article 34, right of individual petition – violation in respect of all the applicants)**: The case concerned the death of a six-year-old Afghan child, MAD.H., who was hit by a train after allegedly having been denied the opportunity to seek asylum by the Croatian authorities and ordered to return to Serbia via the tracks. It also concerned, in particular, the applicants' detention while seeking international protection.

ECHR 348 (2021)
18.11.2021

Press release issued by the Registrar of the Court

In today's **Chamber** judgment in the case of M.H. and Others v. Croatia (applications nos. 15670/18 and 43115/18) the European Court of Human Rights held that there had been:

unanimously, **a violation of Article 2 (right to life)** of the European Convention on Human Rights as concerned the investigation into the death of the Afghan family's daughter

by six votes to one, **a violation of Article 3 (prohibition on inhuman and degrading treatment)** in respect of the applicant children

unanimously, **no violation of Article 3** in respect of the adult applicants

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

unanimously, **a violation of Article 4 of Protocol No. 4 to the Convention (prohibition of collective expulsions of aliens)** in respect of the applicant mother and her five children**, and**

unanimously, **a violation of Article 34 (right of individual petition)** in respect of all the applicants.

The case concerned the death of a six-year-old Afghan child, MAD.H., who was hit by a train after allegedly having been denied the opportunity to seek asylum by the Croatian authorities and ordered to return to Serbia via the tracks. It also concerned, in particular, the applicants' detention while seeking international protection. The Court found in particular that the investigation into the death had been ineffective, that the applicant children's detention had amounted to ill-treatment, and that the decisions around the applicants' detention had not been dealt with diligently. It also held that some of the applicants had suffered a collective expulsion from Croatia, and that the State had hindered the effective exercise of the applicants' right of individual application by restricting access to their lawyer among other things.

Principal facts

The applicants are a family of 14 Afghan citizens. They are a man, his two wives, and their 11 children.

In 2016 the family left Afghanistan, travelling through Pakistan, Iran, Turkey, Bulgaria and Serbia before arriving at the Croatian border.

On the night of 21 November 2017, the first and second applicants' six-year-old daughter, MAD.H., died after being hit by a train in Serbia near the Croatian-Serbian border.

Investigation

In December 2017 the applicants lodged a criminal complaint against unidentified Croatian border police officers, stating that after encountering them on Croatian territory, the officers had denied the first applicant and her six children any possibility of seeking asylum, and had ordered them to return to Serbia by the train tracks. En route, MAD.H. had been hit by a train and died.

A criminal investigation concluded that the applicants had not crossed the border and entered Croatia, talked to the Croatian police officers or sought asylum. It found that the police officers' conduct had been unrelated to the accident.

The applicants lodged a constitutional complaint, with the Constitutional Court deeming the investigation into the death to have been effective. The minority opinion did state that there had been several serious deficiencies in the investigation.

Entry into Croatia and placement in the Tovarnik centre

On 21 March 2018 the Croatian police caught the applicants as they were entering Croatia clandestinely from Serbia and took them to a police station. The applicants did not have any identification documents with them. They asked to apply for international protection.

The police placed them in a transit immigration centre in Tovarnik in order to verify their identities. On 10 May the police submitted that they had still not managed to establish the applicants' identities. They deemed that the applicants' placement in Tovarnik had also been justified by the flight risk, in that it was possible that the applicants would leave Croatia for other countries.

In May 2018 the Administrative Court partly allowed the third applicant's administrative action and ordered that she and her two children (the seventh and eight applicants) be released from the Tovarnik centre. The remaining applicants' administrative actions were dismissed in that their placement in Tovarnik was still justified. On 4 June 2018 all the applicants were transferred to an open-type centre in Kutina.

The Constitutional Court found that the conditions of the applicants' placement in the Tovarnik centre had not been in breach of Article 3 of the Convention and that the applicants had been deprived of their liberty in accordance with Article 5 § 1 (f) of the Convention.

International Protection

On 23 March 2018 the applicants submitted applications for international protection. Later that month the Ministry of the Interior dismissed their applications on the grounds that they should be returned to Serbia, which was considered a safe third country. That decision was upheld by the administrative courts at two levels. In March 2021 the Constitutional Court quashed the administrative courts' judgments finding that they had failed to properly examine whether Serbia could be considered a safe third country.

Contact with lawyer

Upon the applicants' entry to Croatia in March 2018, their lawyer asked the authorities to allow her to meet the applicants and to represent them. The authorities denied this request on the grounds that she did not have a valid power of attorney. They also initiated an investigation, suspecting that the applicants' signatures on the power of attorney had been forged.

On 31 March 2018 the first and second applicants confirmed to the investigating judge that they had signed the impugned power of attorney. The investigation nevertheless continued. The police arrived at the lawyer's law firm and asked for the original power of attorney. They questioned the lawyer and other lawyers at the firm. The Court had no information about the subsequent steps taken in this investigation.

On 2 May 2018 the Croatian Children's Ombudswoman visited the applicants in the Tovarnik centre and they confirmed to her that they understood their lawyer had instituted proceedings before the Court on their behalf, and that they wished to meet her and be represented by her. On 7 May she met the applicants.

Rule 39

On 4 April 2018 the applicants' lawyer submitted a request under Rule 39 of the Rules of Court, asking the Court to allow the applicants to contact her, to order their release from the Tovarnik centre, and to prevent their removal to Serbia. An interim measure stating that the applicants should be placed "in such an environment which complied with requirements of Article 3 of the Convention, taking into account the presence of minors" was granted and later extended. The decision on the interim measure in respect of the lack of access to their lawyer was adjourned pending the receipt of factual information from the parties.

Noting that the applicants had been allowed to meet their lawyer and that therefore the matter had been resolved, on 11 May 2018 the Court rejected the Rule 39 request as regards the issue of the applicants' legal representation.

On 3 July 2018 the Court granted an interim measure indicating to the Government that the applicants should not be removed to Serbia.

After the applicants were transferred to an open-type centre in Kutina they tried to leave Croatia for Slovenia on several occasions, ultimately managing to do so. Their subsequent whereabouts were unknown to the Court.

On 14 March 2019 the Court lifted the two interim measures because the applicants had left Croatia.

Complaints, procedure and composition of the Court

Relying on Article 2 (right to life), the applicants complained that the State had been responsible for the death of their daughter and sister MAD.H., and that the investigation into her death had been ineffective. They complained that their placement in the Tovarnik centre had been in breach of Articles 3 (prohibition on inhuman and degrading treatment), 5 (right to liberty and security) and 8 (right to respect for private and family life). Under Article 4 of Protocol No. 4 to the Convention (prohibition of collective expulsions of aliens), they complained that they had been subject to summary removals from Croatia to Serbia. Under Article 34 (right of individual petition), they complained of the authorities' failure to comply with a Rule 39 decision of the Court, and hindrance of the effective exercise of their right of individual application. They also complained of discrimination under Article 14 (prohibition of discrimination) taken in conjunction with Articles 3, 5 and 8 and Article 4 of Protocol No. 4, and Article 1 of Protocol No. 12 (general prohibition on discrimination).

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

Péter **Paczolay** (Hungary), *President*,

Ksenija **Turković** (Croatia),

Krzysztof **Wojtyczek** (Poland),

Alena **Poláčková** (Slovakia),

Gilberto **Felici** (San Marino),

Erik **Wennerström** (Sweden),

Raffaele **Sabato** (Italy),

and also Liv **Tigerstedt**, *Deputy Section Registrar*.

Decision of the Court

Article 2

The Court noted, in particular, that the investigating authorities had failed to look into the discrepancies between the police officers' statements and had never verified their allegation that there had been no recordings of the impugned events. Proposals by the applicants and the Croatian Ombudswoman to establish contacts between the applicants and the police by inspecting the signals from their mobile telephones and the police car GPS had been ignored, and the statement by the Serbian authorities that the applicants had been forced back into Serbia had not been addressed. Lastly, the authorities had refused to provide the applicants' lawyer with information regarding the investigation and the applicants had been allowed to meet her only belatedly.

The Court concluded that the investigation into MAD.H.'s death had been ineffective, leading to **a violation of the procedural limb of Article 2.**

Article 3

The Court found that the material conditions in the Tovarnik centre had been satisfactory and that the applicants had been provided with medical and psychological assistance. However, some aspects did resemble a prison, such as the presence of police officers, barriers in the hallways and bars on the windows. The Court took note of the comments made by the Croatian Ombudswoman and the Croatian Children's Ombudswoman regarding, in particular, the inadequacy of the centre for housing children. It also noted the fact that the children had been in a particularly vulnerable condition, as most of them had witnessed the death of their sister near the border. Furthermore, the children had spent almost two months without any organised activities to occupy their time. As their detention had lasted for a protracted period, namely two months and fourteen days, caused by the domestic authorities' failure to act with the required expedition, it must have been perceived by the applicant children as a never-ending situation, and could thus be sufficiently severe to engage Article 3 of the Convention.

The Court thus found a **violation of this Article in respect of the applicant children.**

Regarding the adults, the Court was mindful of the fact that they had been mourning the death of their daughter, but noted that the authorities had provided them with psychological support. They had not been separated from their children and had been aware of the progress of their asylum case. The Court was unable to conclude that the otherwise acceptable conditions at the Tovarnik centre for adult applicants were particularly ill-suited to their individual circumstances and found that there had been **no violation of their rights under this Article.**

Article 5

The Court had serious doubts as to whether the authorities had carried out an assessment as to whether, in view of the number of children involved, a less coercive alternative measure to detention had been possible.

It further questioned whether the authorities had acted in good faith, given that they had detained the applicants on 21 March 2018 for the purpose of verifying their identities, but had started checking their identity only on 10 April 2018, after an inquiry by the Croatian Ombudswoman. By then, the applicants' application for international protection had already been dismissed by the Ministry of the Interior ten days before.

The Court further criticised the protracted length of the proceedings before the Administrative Courts concerning the applicants' asylum application and review of the lawfulness of their detention, during which time the applicants had languished in detention. The Court questioned the diligence of the authorities in this case and found that they had failed to take all the necessary steps to limit, as far as possible, the detention of the applicant family.

The detention of the applicants had therefore **not been compliant with this Article, resulting in a violation.**

Article 4 of Protocol No. 4 to the Convention

The Court considered it to be truthful that on 21 November 2017 the Croatian police officers had returned the first applicant and her children to Serbia without considering their individual situation.

The Government argued that the applicants had engaged in "culpable conduct" by circumventing the legal procedures that existed for entry into Croatia. However, the Court was unable to establish, on the basis of the information before it, whether at the material time the respondent State had provided the applicants with genuine and effective access to procedures for legal entry into Croatia, in particular with a view to claiming protection under Article 3.

It thus held that the removal to Serbia of the first applicant and her children on 21 November 2017 was of a collective nature, **in breach of Article 4 of Protocol No. 4 to the Convention.**

Article 34

The Court took note of, in particular, the denial of contact with the applicants' lawyer, even after a Rule 39 request in that connection, and the undue criminal-law pressure put on the lawyer over the power of attorney, despite the applicants' confirmation of that agreement before the courts. The Court concluded that the evidence before it was sufficient to deduce that the restriction of contact between the applicants and their lawyer and the criminal investigation and pressure to which that lawyer was subjected were aimed at discouraging them from taking their case to Strasbourg.

There had been **a violation of the applicants' right of individual petition.**

Other articles

The Court held that it was not necessary to examine complaints under Article 2 in its substantive aspect, the complaint under Article 5 § 4, and the complaints under Articles 8 and 14 and Article 1 of Protocol No. 12. It also held that it was not necessary to examine the complaint under 34 of the Convention regarding the alleged failure to comply with the interim measure indicated by the Court.

Just satisfaction (Article 41)

The Court held that Croatia was to pay the applicants 40,000 euros (EUR) non-pecuniary damage and EUR 16,700 in respect of costs and expenses.

Separate opinions

Judge Turković expressed a concurring opinion. Judge Wojtyczek expressed a dissenting and partly concurring opinion. These opinions are annexed to the judgment.

The judgment is available only in English.

32. **ECHR, *S.N. and M.B.N. v. Switzerland*, no. 12937/20, Chamber judgment of 23 November 2021 (Article 8, right to private and family life – no violation)** The case concerned the return of the daughter (M.B.N.) of the first applicant (S.N.) to Thailand (where the father, a French national, lives) ordered by the Swiss courts in an international child abduction case under the Hague Convention.

ECHR 355 (2021)
23.11.2021

Press release issued by the Registrar of the Court

In today's **Chamber** judgment in the case of *S.N. and M.B.N. v. Switzerland* (application no. 12937/20) the European Court of Human Rights held, unanimously, that there had been:

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

The case concerned the return of the daughter (M.B.N.) of the first applicant (S.N.) to Thailand (where the father, a French national, lives) ordered by the Swiss courts in an international child abduction case.

The Court found that, in proceedings which had been adversarial, fair and included hearings, the Swiss courts had based their judgments on the relevant facts of the case and had taken due account of all the parties' arguments. They had also given detailed decisions which they regarded as serving the best interests of the child while ruling out any serious risk for her. Moreover, the competent authorities had taken the appropriate steps to ensure the child's safety in the event of her return to Thailand. The decision-making process had thus met the requirements of Article 8 of the Convention.

Principal facts

The applicants, S.N. and M.B.N., are both Swiss nationals. S.N., born in 1971, was married to F.B., a French national, with whom she had a daughter (M.B.N.) in 2012. In 2013 the family moved to Thailand where S.N. owned a villa with two separate flats. In 2014 the couple decided to separate and agreed that the child would have three consecutive days of alternate residence with each parent.

In 2016, while on holiday in Switzerland, S.N. filed a request for marital settlement measures. The following month she reported suspicions of sexual abuse by the father to the Child Protection Service. She subsequently withdrew her request for marital settlement measures and returned to Thailand, where the couple agreed to alternate residence arrangements for their daughter.

In 2017 S.N. filed for divorce in Thailand and requested that parental authority and custody of the child be awarded to her. Subsequently, fearing the outcome of the proceedings, she left Thailand for Switzerland at the end of April 2018 with M.B.N.

In 2018 S.N. filed for divorce in Switzerland and requested parental authority and custody of her daughter.

In the same year the father submitted a request to the Federal Office of Justice in Bern for the return of his daughter. S.N. then filed a complaint with the Vaud cantonal police for indecent assault allegedly committed by the child's father in Thailand. She then sought an order to suspend the father's personal relations with the child and to ban him from living near or contacting her and their daughter.

In 2019 the Cantonal Court ordered the child's return to Thailand and set a deadline of 20 August 2019 for voluntary compliance. S.N. appealed against this judgment, but the Federal Court found that the Cantonal Court had assessed the possibility of a return to Thailand in a comprehensive and concrete manner and on a current basis, and thus that the child could reasonably be required to return accompanied by her mother. The applicants currently reside in Switzerland.

Complaints, procedure and composition of the Court

Mother and child alleged that there had been a violation of Article 8 (right to respect for private and family life) of the Convention. They claimed in particular that the Swiss courts had not effectively examined whether there would be a serious risk for the child on her return.

The application was lodged with the European Court of Human Rights on 3 March 2020.

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

Georges **Ravarani** (Luxembourg), *President*,

Dmitry **Dedov** (Russia),

María **Elósegui** (Spain),

Darian **Pavli** (Albania),

Anja **Seibert-Fohr** (Germany),

Peeter **Roosma** (Estonia),

Andreas **Zünd** (Switzerland),

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

Decision of the Court

Article 8

The Court observed that the Federal Court's order for the child's return had constituted an interference with the applicants' right to respect for their family life. That interference was provided for by the Hague Convention, which was incorporated into the Swiss legal order, and pursued the legitimate aim of protecting the rights and freedoms of the child and her father.

As to whether the interference was necessary in a democratic society, the Court had to ascertain whether the domestic courts had carried out a balanced and reasonable assessment of each party's interests, constantly having in mind the best solution for the abducted child. In that connection it noted as follows.

The child's best interest and in particular the exclusion of any "serious risk"

The Court found that the implications that a return to Thailand might have for M.B.N. had been comprehensively examined by the Swiss courts, with regard both to the child's safety and to the mother's financial situation.

It observed in particular that at no point in the domestic proceedings had it been envisaged by the competent authorities that the child would have to return alone. The mother had always said she would accompany her daughter in the event of her return. The Cantonal Court had taken the view that the mother's ties in Switzerland had not become so strong that she could not be expected to return to Thailand. Furthermore, the courts had found, without any arbitrariness on their part, that S.N.'s financial situation would allow her to take care of her child and that she need not fear prosecution by the Thai authorities. The Cantonal Court had held three hearings of the parties, including the child, and of various professionals, addressing whether the child would be exposed to a serious risk in the event of her return. It had also appointed a guardian to defend the child's best interests and to represent her, in particular, before the Federal Court.

Lastly, Switzerland's central authority for international child abductions had forwarded to its Thai counterpart certain questions from the child's father with a view to a re-examination of the case. In May 2019 the International Department of the Thai Attorney General's Office had clarified that in the event of the child's return it would have the power and obligation to ensure the child's safety or the exercise of her rights by guaranteeing access to the Public Prosecutor's Office, a lawyer or legal advice. It had also stated that S.N. would be able to exercise her parental rights and that she would not face conviction in the

event of her return, since under domestic law this was a civil case, not a criminal one, and that she would be able to look after M.B.N. The Court had no reason to doubt the veracity of this information or the good faith of the Thai authorities.

The Swiss authorities had also taken reasonable steps to ensure the safety of the child in Thailand with a view to enforcing the return order, including in determining the father's exercise of his contact rights.

The Court concluded that the decision-making process had pursued the best interests of the child and had ruled out any serious risk to the child within the meaning of Article 13 of the Hague Convention.

Consideration of the child's views

The Court reiterated that a child who was capable of forming his or her own views had the right to express them and to have due weight given to those views in any judicial and administrative proceedings affecting him or her. However, it also pointed out that, for the purposes of applying the Hague Convention, while the views of children had to be taken into account, any opposition on their part did not necessarily preclude their return.

In the present case the Federal Court had concluded that Article 13 of the Hague Convention had not been breached since the child, then aged seven, did not appear to have attained a sufficient degree of maturity to be able to distinguish between living in Thailand and living with or near her father. In any event the child had apparently refused any return whatsoever in an adamant manner.

The Court also noted that the child had been duly heard and observed by several professionals in hearings before the Cantonal Court. The child had not been able to understand that the proceedings did not concern the question of custody or parental authority, but only sought to restore the situation that had existed prior to her unlawful removal.

The Court therefore took the view that there was nothing arbitrary or unreasonable in the Federal Court's findings or the Government's observations.

The child's integration in Switzerland

Under Article 12 of the Hague Convention, the competent authority was obliged to order the return of the child even where the proceedings had been commenced more than one year after the date of the wrongful removal or retention, unless it was demonstrated that the child had become settled in his or her new environment. In the present case, S.N. had left Thailand at the end of April 2018 to settle in Switzerland with her child. The child's father had filed a complaint with the Cantonal Court four months later on 23 August 2018. Article 12 of the Hague Convention could not therefore serve as a basis for the applicants to argue in favour of M.B.N.'s retention on the basis of her integration in Switzerland.

General conclusions

In the Court's view, it could not be said that the domestic courts had ordered the child's return automatically or mechanically. On the contrary, in proceedings which had been adversarial, fair and included hearings, the Swiss courts had based their judgments on the relevant facts of the case and had taken due account of all the parties' arguments. They had also given detailed decisions which they regarded as serving the best interests of the child while ruling out any serious risk for her.

Moreover, the competent authorities had taken the appropriate steps to ensure the child's safety in the event of her return to Thailand. The decision-making process had thus met the requirements of Article 8 of the Convention and the interference with the applicants' right to respect for their family life had been necessary in a democratic society. There had therefore been no violation of Article 8.

The judgment is available only in French.

33. **ECHR, *Sassi and Benchellali v. France*, nos. 10917/15 and 10941/15, Chamber judgment of 25 November 2021 (Article 6 § 1, right to a fair trial – no violation)**: The case concerned the fairness of the criminal proceedings in France against the applicants, who had been held at the Guantánamo Bay US naval base before being repatriated. They alleged that statements they had made during that period of detention had subsequently been used for the purposes of the criminal proceedings against them in France and relied upon by the courts in convicting them.

ECHR 359 (2021)
25.11.2021

Press release issued by the Registrar of the Court

In today's **Chamber** judgment in the case of Sassi and Benchellali v. France (application nos. 10917/15 and 10941/15) the European Court of Human Rights held, unanimously, that there had been:

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

The case concerned the fairness of the criminal proceedings in France against the applicants, who had been held at the Guantánamo Bay US naval base before being repatriated. They alleged that statements they had made during that period of detention had subsequently been used for the purposes of the criminal proceedings against them in France and relied upon by the courts in convicting them.

During their detention from January 2002 onwards at Guantánamo Bay, in the US base located on the south-east coast of Cuba, the applicants, who are French nationals, were visited on three occasions by agents in the context of a "tripartite mission", made up of a representative of the Ministry of Foreign Affairs, a representative of the External Security Agency (DGSE) and a representative of the intelligence unit of the Domestic Intelligence Agency (DST). In July 2004 the US authorities authorised the applicants' repatriation to France. They were arrested on arrival in France and taken into police custody on 27 July 2004.

In order to assess the merits of the claim of a violation of Article 6 of the Convention, the Court reviewed the fairness of the French criminal proceedings as a whole.

It first confirmed the assessment of the domestic courts, considering that the tripartite missions to Guantánamo Bay had been purely administrative in nature and unrelated to the parallel judicial proceedings in France. On the basis of the case file, the Court found that the purpose of the missions had been to identify detainees and gather intelligence, not to collect evidence of a suspected criminal offence.

The Court further noted, specifically with regard to the conduct of the proceedings in France, that the applicants had been interviewed 13 times while in police custody, answering the investigators' questions with considerable detail about their background and motives. There was nothing in the file to show that the officers of the DST's judicial unit responsible for interviewing the applicants while in police custody had been aware of the content of the intelligence collected at Guantánamo Bay by their colleagues from the intelligence unit of that agency. Subsequently, assisted by their lawyers, the applicants were questioned ten and eight times respectively by the investigating judge. Throughout the proceedings, they were able to put forward their arguments, submit their requests and exercise the remedies available to them under French law.

The Court also noted that, while statements made by the applicants during their detention at Guantánamo Bay were included in the case file before the trial court, they had been admitted in evidence following a preliminary ruling granting their request for the declassification of the relevant documents so that they could be open to debate between the parties. In view of all the documents in the file, the Court noted that the domestic courts, in lengthy reasoned decisions, had relied on other incriminating evidence to find the applicants guilty, relying mainly on information gathered elsewhere, as well as on the detailed statements made by the applicants while they were in police custody and during the judicial investigation. In particular, the Criminal Court, whose reasoning was later upheld by the Court of Appeal, had relied on evidence that was unrelated to any statements made by the applicants at Guantánamo Bay, with the exception of a single reference to a memo from the DST's intelligence unit.

Observing, lastly, that any statements taken during the three tripartite missions to Guantánamo Bay had not been used a basis for the criminal proceedings against the applicants or relied upon by the courts in convicting them, the Court found that, in the circumstances of the case, the proceedings against each of the applicants had been fair overall and there had been no violation of Article 6 of the Convention.

Principal facts

The applicants, Nizar Sassi and Mourad Benchellali, are French nationals who were born in 1979 and 1981 and live in Saint Fons and Vénissieux.

Following the attacks of 11 September 2001, when they were in Afghanistan, a country to which they had travelled secretly in order to fight alongside the Taliban, Mr Sassi and Mr Benchellali attempted to flee. They were arrested by the Pakistani authorities at the Pakistan-Afghanistan border and handed over to the US forces. In January 2002 they were transferred to Guantánamo Bay, the location of a US naval base on the south-east coast of Cuba.

In January 2002 the French Domestic Intelligence Agency (DST) reported that the US Central Intelligence Agency (CIA) had informed it that six individuals, including the applicants, who were likely to be members of al-Qaeda and were being held by the CIA, had claimed they were French nationals. In the light of this information the French authorities sought to send a delegation to the area to confirm the identity of the individuals concerned. The Ministry of Foreign Affairs set up a "tripartite mission" composed of a representative of that Ministry, a representative of the External Security Agency (DGSE) and a representative of the DST's intelligence unit.

The first "tripartite mission" visited the Guantánamo base from 26 to 29 January 2002. Its members met with Mr Mourad Benchellali and obtained confirmation of the information already in the possession of the French agencies. On 19 February 2002 the French authorities were informed of the arrival of Mr Nizar Sassi at Guantánamo Bay.

A second "tripartite mission" was present at Guantánamo Bay from 26 to 31 March 2002, for the purpose of meeting with the applicants and obtaining additional information on Mr Benchellali. A third tripartite mission took place from 17 to 24 January 2004.

Diplomatic negotiations were undertaken to secure the return of Mr Sassi and Mr Benchellali to France.

On 27 July 2004 the US authorities authorised their repatriation to France. Upon their arrival, the applicants were arrested by the DST (judicial unit) and taken into police custody. Questioned individually in thirteen different interviews, they gave lengthy answers about all the acts of which they stood accused.

On 31 July 2004 Mr Sassi and Mr Benchellali were placed under judicial investigation, charged with the possession and use of false administrative documents in relation to a terrorist undertaking and with conspiracy to commit acts of terrorism. They were immediately remanded in custody.

During the judicial investigation, Mr Sassi and Mr Benchellali were questioned ten and eight times respectively by the investigating judge, in the presence of their lawyers.

On 23 September 2004 counsel for the applicants asked the investigating judge to seek the production by the DST of all written, audio-visual and audio material from the hearings conducted at Guantánamo, all notes and reports drawn up on that occasion, and the names of the agents who had conducted the interviews. They also requested the hearing of two DST officials who had participated in the judicial investigation.

In decisions of 22 October 2004 the investigating judge decided not to grant these requests. The Investigation Division of the Paris Court of Appeal upheld those decisions.

On 28 January 2005 Mr Sassi and Mr Benchellali requested the exclusion of the procedural acts carried out prior to their first appearance before the investigating judge, as well as the annulment of their placement under judicial investigation. According to them, all of the elements that had served as the basis for the charges had come from the questioning conducted by the DST (intelligence unit) agents at Guantánamo, outside any legal framework. In a judgment handed down on 4 October 2005, the

Investigation Division of the Paris Court of Appeal rejected their request, concluding that there was no reason to annul any procedural act or document in the case file. On 9 and 12 January 2006 the applicants were released and placed under judicial supervision, a measure that was lifted by the Criminal Court on 12 July 2006.

In a decision of 18 January 2006 the Criminal Division of the Court of Cassation dismissed the applicants' appeal against the decision of 4 October 2005.

In a decision of 24 April 2006 Mr Sassi and Mr Benchellali were committed to stand trial in the Paris Criminal Court for having, between June and December 2001, participated in a group or conspiracy set up for the preparation of an act of terrorism, as established by one or more criminal acts, and for having fraudulently held a passport that they knew to be falsified.

In a preliminary ruling of 27 September 2006 the Criminal Court sought additional information. Various documents from the Ministries of the Interior, Defence and Foreign Affairs were declassified, sent to the Criminal Court and then admitted in evidence.

The case was examined on the merits by the Paris Criminal Court on 3, 5, 10, 11 and 12 December 2007.

On 19 December 2007 the Criminal Court sentenced the applicants to four years' imprisonment, three of which were suspended, taking account of the length of their pre-trial detention in France and the psycho-traumatic syndrome from which they were suffering as a result of their confinement at Guantánamo Bay. On the merits, the court gave a judgment with lengthy reasoning, based on evidence other than the statements taken at Guantánamo Bay during the "tripartite missions", except for one reference to a DST memo.

Mr Sassi and Mr Benchellali appealed against that judgment. In their pleadings their lawyers alleged that their clients had been manipulated by the agents of the DST (intelligence unit) at Guantánamo Bay, since they had been interviewed without any counsel being present and had been in a difficult situation at the time.

On 24 February 2009 the Paris Court of Appeal took the view that documents before it, which were accessible and open to debate between the parties, had enabled it sufficiently to establish the conditions in which the applicants had been interviewed at Guantánamo Bay. As to the alleged lack of the fairness of the trial, the Court of Appeal found that the DST had not acted fairly in the administration of evidence, thus invalidating the proceedings. The Principal Public Prosecutor of the Paris Court of Appeal appealed on points of law. In the Court of Cassation the Advocate General submitted that the judgment of the Court of Appeal should be quashed, taking the view that the hearings conducted at Guantánamo had merely been administrative in nature and that, as a result, they were not capable of invalidating the proceedings. In a judgment of 17 February 2010 the Court of Cassation quashed the Court of Appeal's judgment and referred it back to that court for examination by a different bench.

In a judgment of 18 March 2011 the Paris Court of Appeal, ruling in those circumstances, upheld the applicants' conviction. It found that "the trial court [had] rightly declared that the DST's activities had not constituted a breach of defence rights on grounds of unfairness and had not rendered the proceedings unfair".

Mr Sassi and Mr Benchellali appealed on points of law but in a judgment of 3 September 2014 the Court of Cassation dismissed their appeal.

Complaints, procedure and composition of the Court

Relying on Article 6 (right to a fair trial), the applicants complained that there had been several breaches of their right to a fair trial and of their defence rights. They argued that the conditions in which they had been questioned and had their statements taken at Guantánamo Bay breached Article 6 and that the use of those statements had undermined the fairness of the criminal proceedings in France.

The application was lodged with the European Court of Human Rights on 27 February 2015.

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

Síofra **O'Leary** (Ireland), *President*,

Mārtiņš **Mits** (Latvia),

Stéphanie **Mourou-Vikström** (Monaco),

Jovan **Ilievski** (North Macedonia),

Lado **Chanturia** (Georgia),

Arnfinn **Bårdsen** (Norway),

Mattias **Guyomar** (France),

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

Decision of the Court

Article 6

The Court noted that the three above-mentioned "tripartite missions" to Guantánamo Bay, in January 2002, March 2002 and January 2004, had pursued a number of aims, none of which could lead to the conclusion that a "criminal charge", for the purposes of Article 6 of the Convention, had been laid against the applicants by the agents conducting the missions. Whilst a judicial investigation had been opened in parallel, the missions to Guantánamo Bay had been purely administrative in nature and had been unrelated to the judicial proceedings. Their aim had been to identify the individuals detained there and to gather intelligence, not to collect evidence of any criminal offence that had been committed. In the light of the duly reasoned decisions of the Criminal Court and the Paris Court of Appeal, the Court took the view that, in the context of the tripartite missions to Guantánamo Bay, which were unrelated to the judicial proceedings in France, the applicants had not had a "criminal charge", within the meaning of Article 6 § 1 of the Convention, laid against them by those conducting the missions.

As to the proceedings in France, the Court observed that the applicants had complained of a violation of Article 3 of the Convention on account of the conditions in which they had been questioned by the agents of the DST (intelligence unit) at Guantánamo Bay. The Court declared this complaint – as regards the French agents – inadmissible by a decision of 4 April 2018. The Court nevertheless had to ascertain, under Article 6 of the Convention, whether, and if so to what extent,the French judges had taken into consideration the allegations that the applicants had been illtreated, even though such treatment had allegedly been inflicted outside the forum State, and whether there had been any repercussions for the fairness of the proceedings. In doing so the Court had to consider the overall fairness of the criminal proceedings.

The Court noted that it was not in dispute between the parties that, at least from the time the applicants were taken into police custody on 27 July 2004, the date of their arrival in France, the applicants had been charged with a criminal offence, thus triggering the protection of Article 6 of the Convention. On 27 September 2006 the Criminal Court had ordered the gathering of additional information and this had led not only to a number of interviews but also to the declassification of various documents concerning the tripartite missions to Guantánamo Bay, emanating from the Ministries of the Interior, Defence and Foreign Affairs. Those documents had been added to the case file and were open to debate between the parties. The Court had to assess the use which had been made of the relevant statements during the criminal proceedings, both during the judicial investigation and at the trial.

The Court referred back to its finding that, at the time of their interviews by the tripartite missions at Guantánamo Bay, the applicants had not been "charged", within the meaning of Article 6 § 1 of the Convention, by the agents who had questioned them. The proceedings brought by the French authorities against the applicants had been based on evidence which had not come from the interviews at Guantánamo Bay. Furthermore, the Court noted that the statements had been brought to the knowledge

of the domestic courts and added to the case file in order to determine whether and to what extent they had contributed to the applicants' conviction and whether the potential breach of defence rights had been subsequently remedied.

The Court first observed that as soon as the applicants had arrived in France they had been arrested by the DST's judicial unit and taken into police custody. It was not in dispute that the interviews in France had been carried out by different agents from those who had taken part in the tripartite missions to Guantánamo Bay. In addition, it had not been established by any evidence in the file that the agents of the DST's judicial unit responsible for the interviews in police custody had been aware of the content of the intelligence collected by their colleagues at Guantánamo Bay. Moreover, the applicants had been interviewed 13 times while in police custody and they had answered the investigators' questions by providing significant detail about their journey, their training in Afghanistan, and their motives.

Secondly, the Court noted that the applicants, assisted by counsel, had subsequently been interviewed by the investigating judge, ten and eight times respectively. Throughout the proceedings they had been able to put forward their arguments, submit requests and use any remedies open to them, whether during the judicial investigation or before the courts hearing their case on the merits. They had obtained, in particular, a preliminary judgment of 27 September 2006 ordering the gathering of additional information. In particular, the applicants had been given access to the documents that had been added to the case file after declassification, with the effective possibility of discussing the content of those documents, assisted by counsel, in compliance with the principle of adversarial proceedings, as attested by all the relevant court decisions.

Lastly, while the disputed documents had been used in the proceedings on the merits, it could be seen that the Criminal Court judgment and that of the Court of Appeal which heard the case after remittal by the Court of Cassation had almost exclusively been based on other evidence of the applicants' guilt. The courts had mainly relied on the information which had already been in the hands of the intelligence services, together with the detailed statements made by the applicants while in police custody and during the judicial investigation. The Court noted the finding of the Criminal Court that the actions taken by the DST unit responsible for gathering intelligence at Guantánamo Bay had not produced anything new. The Criminal Court, whose reasons had subsequently been upheld by the Court of Appeal, had been based on evidence that was independent of the statements made by the applicants at Guantánamo Bay in the context of the tripartite missions, with the exception of a single reference to a memo from the DST's intelligence unit.

Thus, after deciding to rule on the case of the two applicants in a single decision, the trial court had, in turn, examined their motives, their possession and use of a falsified passport, their journey via London and their awareness of being involved in a terrorist activity, and their training at the al-Farouk camp in the region of Kandahar in Afghanistan, relying very extensively on the numerous extracts from the applicants' statements made exclusively after their return to France, namely during police custody, before the investigating judge and at the trial. The court had taken into consideration the information in the file concerning the family of Mr Benchellali, pointing out that he had been living permanently in an environment of radical Islamism, referring to judgments handed down against his father, an imam who advocated jihad and collected money to fund voluntary combatants, and judgments against his mother and two brothers, showing that they were keyplayers in a network of logistical support for volunteers wishing to fight in Afghanistan and Chechnya. The trial court had also observed, in particular, that the members of this family had been involved in the preparation of terrorist acts by an Islamist group that had been intercepted in Romainville and La Courneuve in 2002.

The Court noted that, in the statement of reasons relating to the acts with which the applicants had been charged, the judgment contained only one reference to information obtained in the context of a mission to Guantánamo Bay, namely a memo dated 5 April 2002 listing the content of the training at the al-Farouk camp, covering the handling of individual weapons, combat tactics, topography and the study of explosives.

Observing, in conclusion, that the statements taken during the three tripartite missions to Guantánamo Bay had not been used as a basis for the criminal proceedings against the applicants or relied upon by the courts in convicting them, the Court found that, in the circumstances of the case, the criminal proceedings against each of the applicants had been fair overall.

Accordingly there had been no violation of Article 6 § 1 of the Convention.

Separate opinions

Judge Bårdsen expressed a concurring opinion, which is annexed to the judgment.

The judgment is available only in French.

34. **ECHR, *Jallow v. Norway*, no. 36516/19, Chamber judgment of 02 December 2021 (Article 6, right to a fair hearing – no violation; Article 8, right to respect for family life – inadmissible)**: The case concerned proceedings in which the applicant, a Gambian national living in Gambia, lodged an application to be granted parental responsibility for his child, living in Norway, following the child's mother's death. In particular, he had to attend a court hearing in the proceedings via Skype as he was not granted a visa to enter Norway for reasons of immigration control.

ECHR 368 (2021)
02.12.2021

Press release issued by the Registrar of the Court

In today's **Chamber** judgment in the case of **Jallow v. Norway** (application no. 36516/19) the European Court of Human Rights held, unanimously, that there had been:

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

The applicant, Ebrima Pa Jallow, is a Gambian national who lives in Gambia. The case concerned proceedings in which he lodged an application to be granted parental responsibility for his child, living in Norway, following the child's mother's death. In particular, he had to attend a court hearing in the proceedings via Skype as he was not granted a visa to enter Norway for reasons of immigration control.

Relying on Article 6 (right to a fair hearing), Mr Jallow alleged that the proceedings were unfair, mainly because he was not allowed to appear in person. The Court found in particular that Mr Jallow had been assisted by his lawyer who was present at the hearing at all times and, even though it was technically more complicated than if he had been in the same room, he had been given plenty of opportunities to present his case both during the case-preparation and at the hearing itself.

The Court **rejected as inadmissible** Mr Jallow's complaint that the refusal to give him parental responsibility violated his right to respect for his family life under **Article 8 (right to respect for family life)** of the Convention. The reasons provided by the High Court were both relevant and sufficient and there were no indications to suggest that the domestic authorities had not pursued the best interests of the child or had failed to strike a fair balance between the competing interests in the case.

Principal facts

The applicant, Ebrima Pa Jallow, is a Gambian national who was born in 1972 and lives in Gambia.

Mr Jallow had a son, T,. with his wife in Gambia in 1999. After he and his wife divorced about four years later, she remarried and moved to live with her new husband in Norway. T. lived with his grandmother in Gambia before joining them in Norway in 2007. When his ex-wife visited Gambia for three weeks in 2010, she and Mr Jallow conceived another child. Born in Norway in 2011, the child, G., lived there with his mother and brother. Mr Jallow met G. in 2015, when he was on a two-week holiday with his mother in Gambia, and possibly one time before that.

G.'s mother, who had sole parental responsibility for him, died in June 2017. His maternal aunt, who lived in England, and his father both applied for parental responsibility, with his father applying for a Schengen visa to travel to Norway for the court hearing. His visa application was rejected, with the decision being upheld on appeal. Unlike Mr Jallow, G.'s aunt was present at the court hearing.

The City Court dismissed both applications for parental responsibility, finding that in both cases there was a risk that G. would not be adequately cared for. In their assessment, it was noted that G. hardly knew his father, who had never been to Norway, and that his father wanted G. to move to Gambia. In the meantime, G. had been placed in a foster home.

Both G.'s father and aunt appealed. His father applied again for a Schengen visa to attend the joint hearing and, when it was rejected, appealed against that decision. The High Court, considering that participating by Skype would not be an optimal solution, wrote a letter to the Directorate of Immigration, confirming

that he was a party to a case before it, and that it was important for the equality of arms between the parties that he be present throughout the two-day hearing. The Immigration Appeals Board decided that the risk of him not returning to his home country after the hearing was too high for a visa to be granted.

The High Court subsequently refused a request from Mr Jallow to reschedule the appeal hearing or to split his hearing from the aunt's, finding that, although following the proceedings via Skype was not a perfect solution, it was acceptable in the circumstances. It was in G's best interests for the matter to be settled as soon as possible, and Mr Jallow's counsel would be present to protect his interests during the appeal proceedings.

During the proceedings, it was clarified that Mr Jallow was not applying for custody of his child but for parental responsibility.

The High Court dismissed the appeals, concluding that it was not in G.'s best interests for either his aunt or his father to have parental responsibility for him. What seemed important, however, was that Mr Jallow become a part of G.'s life in due course, in a beneficial way for his son. The geographical and cultural gulf between G.'s father and his care provider in Norway would make shared responsibilities difficult. Mr Jallow was not well-enough acquainted with his son to participate in the decisions pertaining to parental responsibility in a manner that would be in G.'s best interests.

In April 2019, the Supreme Court's Appeals Committee refused Mr Jallow leave to appeal the High Court's judgment.

Complaints, procedure and composition of the Court

Relying on Article 6 (right to a fair hearing), the applicant complained that the proceedings were unfair, mainly because he was not allowed to appear in person. He alleged among other things that he was put at a significant disadvantage vis-à-vis the child's aunt, who had also applied for parental responsibility of the child and who was able to be present in person.

In addition, Mr Jallow complained that the refusal to give him parental responsibility violated his right to respect for his family life under Article 8 of the Convention. He submitted that his not having been granted parental responsibility for G. had led to a severing of the ties between them.

The application was lodged with the European Court of Human Rights on 1 July 2019.

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

Síofra **O'Leary** (Ireland), *President*,

Mārtiņš **Mits** (Latvia),

Stéphanie **Mourou-Vikström** (Monaco),

Lətif **Hüseynov** (Azerbaijan),

Jovan **Ilievski** (North Macedonia),

Lado **Chanturia** (Georgia),

Arnfinn **Bårdsen (**Norway),

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

Decision of the Court

Article 6

The question before the Court was not whether a visa should have been granted in order to secure Mr Jallow a fair hearing, but whether the hearing was fair, given that he was not allowed to enter Norway in order to be physically present.

The Court noted that the case before the High Court was limited to deciding on parental responsibility only, not custody of the child. The High Court had first considered that giving evidence by video-link would not be the optimal solution. However, after it had become clear that Mr Jallow would not be allowed entry into Norway, the High Court had felt that it was acceptable to proceed with the scheduled hearing with his being present by Skype, and with his lawyer physically present at the hearing to represent him. It had felt that settling the matter quickly was in the best interests of the child, as more than a year had already passed since the City Court had delivered its judgment. In practice the High Court had had the choice between postponing the case for an indefinite period with no solution in view, or to facilitate his attendance through video-link.

Although Mr Jallow disagreed with the case going ahead without him being physically present, he did not – via his counsel – complain of specific problems during the hearing itself. Even though some connectivity issues were noted in the court records, they generally showed that his representative had had no objections to the hearing proceeding. Moreover, she had not complained that Mr Jallow was unable to communicate confidentially with her during the hearing.

The Court found that Mr Jallow had been assisted by his lawyer present at the hearing at all times and, even though it was technically more complicated at times than if he had been in the same room, he had been given plenty of opportunities to present his case both during the casepreparation and at the hearing itself.

Accordingly, the Court did not find that there was any indication that the hearing was unfair, and concluded that there had been no violation of Article 6 of the Convention.

Article 8

The Court noted that Mr Jallow's relationship with his son consisted principally of his having met G. on the occasion of a two-week holiday in Gambia when he was aged four and which had taken place two years before his mother died and four years before the domestic court decisions. The connection between father and son being very limited, the High Court had felt that Mr Jallow was insufficiently qualified to take on parental responsibility for G. in a way that would be in the child's best interests. Nevertheless, it had recommended that contact be established between the two.

In the Court's assessment, the reasons provided by the High Court were both relevant and sufficient and there were no indications to suggest that the domestic authorities had not pursued the best interests of the child or had failed to strike a fair balance between the competing interests in the case.

Therefore, the Court considered that the complaint under Article 8 was ill-founded and had to be rejected.

The judgment is available only in English.

35. **ECHR, *Savran v. Denmark*, no. 57467/15, Grand Chamber judgment of 7 December 2021 (Article 3, prohibition on inhuman and degrading treatment – no violation; Article 8 (right to respect for private life - violation)**: The case concerned a mentally ill Turkish national who had been resident in Denmark for most of his life. He was deported in 2015 following a 2008 expulsion order given for violent crimes he had committed in the 2000s.

ECHR 379 (2021)
07.12.2021

Press release issued by the Registrar of the Court

The case of Savran v. Denmark (application no. 57467/15) concerned a Turkish national who had been resident in Denmark for most of his life. He was deported in 2015 following a 2008 expulsion order given for violent crimes he had committed in the 2000s.

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

by a majority of 16 votes to 1, **no violation of Article 3 (prohibition on inhuman and degrading treatment)** of the European Convention on Human Rights. It held that it had not been shown that the applicant would suffer a "serious, rapid and irreversible decline in his state of health resulting in intense suffering" as the risk posed by a reduction in treatment applied mainly to others, and that therefore his deportation did not engage the protections of that Article.

The Court also found, by a majority of 11 votes to 6, **a violation of Article 8 (right to respect for private life)**. It found in particular that the domestic authorities had failed to examine the applicant's individual situation adequately, and the effective permanent re-entry ban had been disproportionate.

Principal facts

The applicant, Arıf Savran, is a Turkish national who was born in 1985 and lives in Kütükuşağı (Turkey).

In 1991, when he was six years old, the applicant lawfully entered Denmark to live with his father.

After being convicted of aggravated assault committed with other people, which had led to the victim's death, the applicant was in 2008 placed in the secure unit of a residential institution for the severely mentally impaired for an indefinite period. His expulsion with a permanent re-entry ban was ordered.

In January 2012 the applicant's guardian ad litem asked that the prosecution review his sentence and the prosecution brought the case before the City Court in December 2013. On the basis of medical reports, Immigration Service opinions and statements by the applicant, the City Court in October 2014 changed Mr Savran's sentence to treatment in a psychiatric department. It also held that despite the severity of his crime it would be inappropriate to enforce the expulsion order.

In particular, the medical experts stressed the need for continued treatment and follow-up in order to ensure his recovery, while the applicant highlighted that all his family were in Denmark, that he could not speak Turkish, only some Kurdish, and that he was worried about the availability of the necessary treatment in Turkey.

Following an appeal by the prosecution, the High Court overturned the City Court's judgment in January 2015. It cited in its conclusion information on access to medicines in Turkey in the European Commission's MedCOI medical database and a report from the Foreign Ministry, finding that Mr Savran would be able to continue his treatment in Turkey. It also emphasised the nature and gravity of the crime.

Mr Savran was refused leave to appeal to the Supreme Court in May 2015.

In 2015 he was deported to Turkey. He alleges that he leads an isolated life there, with inadequate medical care.

Complaints, procedure and composition of the Court

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

The application was lodged with the European Court of Human Rights on 16 November 2015. The Court delivered its judgment on 1 October 2019, finding by 4 votes to 3 that there had been a violation of Article 3 of the Convention and that there was no need to examine the applicant's complaint under Article 8 of the Convention. On 12 December 2019 the Danish Government requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 27 January 2020 the panel of the Grand Chamber accepted that request. A hearing was held by video conference in the Human Rights Building, Strasbourg on 24 June 2020.

Third-party comments were received from the Netherlands, French, German, Norwegian, Russian, Swiss and United Kingdom Governments, from Amnesty International, a non-governmental organisation, and from the Centre for Research and Studies on Fundamental Rights of Paris Nanterre University (CREDOF).

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

Robert **Spano** (Iceland), *President*,

Jon Fridrik **Kjølbro** (Denmark),

Ksenija **Turković** (Croatia),

Síofra **O'Leary** (Ireland),

Yonko **Grozev** (Bulgaria),

Dmitry **Dedov** (Russia),

Egidijus **Kūris** (Lithuania),

Branko **Lubarda** (Serbia),

Armen **Harutyunyan** (Armenia),

Gabriele **Kucsko-Stadlmayer** (Austria),

Pere **Pastor Vilanova** (Andorra),

Alena **Poláčková** (Slovakia),

Georgios A. **Serghides** (Cyprus),

Tim **Eicke** (the United Kingdom),

Ivana **Jelić** (Montenegro),

Lorraine **Schembri Orland** (Malta),

Anja **Seibert-Fohr** (Germany),

and also Søren **Prebensen**, *Deputy Grand Chamber Registrar*.

Decision of the Court

Article 3

The Court reiterated that the prohibition on inhuman and degrading treatment was fundamental to a democratic society. Such treatment had to be sufficiently severe, however, if it were to fall within the scope of that Article.

The Court furthermore reiterated that States had a right to control entry to and residence in their territories, subject to the limits of Article 3 set out in its case-law. As regards the expulsion of seriously ill aliens, the Court reaffirmed the principles established in the Paposhvili v. Belgium case, including the "threshold" test that had to be met for Article 3 to come into play. Whilst further reaffirming that the said "threshold" should remain high, it also considered that the standard in question was sufficiently flexible to be applied in all situations involving the removal of a seriously ill person, irrespective of the nature of the illness. It observed that the Chamber had not examined the current case from that standpoint.

On the facts, the Court considered that it had not been demonstrated that the applicant's expulsion to Turkey had exposed him to a "serious, rapid and irreversible decline in his state of health resulting in intense suffering", let alone to a "significant reduction in life expectancy". Indeed, the risk posed by the reduction in treatment seemed to apply mainly to others rather than to the applicant himself. As a result, expulsion had not exposed him to a risk sufficient to engage Article 3.

There had accordingly been no violation of that Article.

Article 8

The Court reiterated that, in conformity with its normal practice, it would re-examine all aspects of the original application, including the parts under Article 8 which the Chamber had not found inadmissible.

It noted that the applicant had arrived in Denmark at the age of six and had been issued with a residence permit. It noted the applicant's family relationships in Denmark, and his arguments that he had been dependent on them, because of his condition, a dependence which, in his view, had constituted "family life". That had been interrupted by his expulsion. It was however unconvinced that there was sufficient evidence of dependence, and his background did not indicate a consistent family relationship. It thus considered that the interference with the applicant's life should be examined as a question of "private" rather than "family" life. Given this, the Court found that the applicant's removal from the State had been an interference with his private life. That interference had been in accordance with the law and had pursued the legitimate aim of preventing disorder and crime.

Turning to the question of the necessity of the removal, the Court reiterated the criteria in its caselaw, in particular Maslov v. Austria. Applying those to the case at hand, the Court found that the applicant was more vulnerable than the average person to be expelled, and that the state of his health had had to be taken into account as one of the balancing factors. It further accepted that the medical aspects of the case had been thoroughly considered by the domestic courts.

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

initially the applicant's aggressive behavioural patterns had persisted, he had made progress during those years. It also noted his ties to Denmark and limited ties with Turkey. Lastly, the Court found, in line with its previous judgments, that the effective permanent re-entry ban imposed on the applicant had been disproportionate.

Overall, the domestic authorities had failed to take account of the individual circumstances of the applicant and to balance the issues at stake. There had thus been a violation of his right to respect for private life.

Just satisfaction (Article 41)

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

Separate opinions

Judge Jelić expressed a concurring opinion. Judges Serghides expressed a partly concurring and partly dissenting opinion. Judges Kjølbro, Dedov, Lubarda, Harutyunyan, Kucsko-Stadlmayer and Poláčková expressed a joint partly dissenting opinion. Those opinions are annexed to the judgment.

The judgment is available in English and French.

36. **ECHR, *Zaklan v. Croatia*, no. 57239/13, Chamber judgment of 16 December 2021 (Article 1 of Protocol No. 1, protection of property – violation):** The case concerned attempts by the applicant to recover foreign currency seized by the Yugoslav authorities in 1991 in Croatia when that State had still been part of Yugoslavia.

ECHR 396 (2021)
16.12.2021

In today's **Chamber** judgment in the case of Zaklan v. Croatia (application no. 57239/13) the European Court of Human Rights held, unanimously, that there had been:

a **violation of Article 1 of Protocol No. 1 (protection of property)** to the European Convention on Human Rights.

The case concerned attempts by the applicant to recover foreign currency seized by the Yugoslav authorities in 1991 in Croatia when that State had still been part of Yugoslavia.

The Court found in particular that the 27-year wait while administrative proceedings against the applicant for taking foreign currency across State borders had been stayed too long, and had prevented him from gaining satisfaction in both Croatia and Serbia. The weight overall had fallen disproportionately on the applicant.

Principal facts

The applicant, Đorđe Zaklan, is a Croatian national who was born in 1944 and lives in Pakrac (Croatia).

In 1991 the customs authorities of the former Yugoslavia (SFRY) seized 4,350 Deutschmarks and 100 US dollars from Mr Zaklan as he tried to bring it into Hungary from the then Yugoslav republic of Croatia in contravention of the law.

Minor-offence proceedings were initiated against Mr Zaklan by the federal authorities of the SFRY. When Croatia declared independence on 8 October 1991 it took over all such proceedings, and on 13 November 1992 stayed them until the completion of the succession process following the dissolution of the SFRY.

On 2 June 2004 the Agreement on Succession Issues between the successor States to the SFRY entered into force.

In 2007 Mr Zaklan wrote to the State Attorney's Office, asking for the return of the money. It replied that the money was in the account of the former federal authorities in Belgrade and suggested to the applicant to seek the return of money from the Serbian authorities.

The applicant then brought proceedings before the Croatian civil courts but his case was dismissed. The courts reasoned that that the succession process had not been completed because cases such as his were not regulated by the Succession Agreement, that the administrative-offence proceedings thus remained stayed and that it was therefore premature to seek the return of the money via the courts.

A subsequent constitutional complaint by the applicant was dismissed in 2013.

Complaints, procedure and composition of the Court

Relying on Articles 1 of Protocol No. 1 to the Convention (protection of property), the applicant complained of the refusal of the court to order the return of the money that had been seized from him.

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

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

Péter **Paczolay** (Hungary), *President*,

Ksenija **Turković** (Croatia),

Krzysztof **Wojtyczek** (Poland),

Alena **Poláčková** (Slovakia),

Gilberto **Felici** (San Marino),

Erik **Wennerström** (Sweden),

Raffaele **Sabato** (Italy),

and also Liv **Tigerstedt**, *Deputy Section Registrar*.

Decision of the Court

The applicant argued that the administrative proceedings against him had been taken over by Croatia. The proceedings had been stayed for more than 27 years and the administrative offence he had been charged with had become time-barred. It was therefore the responsibility of Croatia, not Serbia, to return the funds seized from him, regardless of the fact that the money was not located in Croatia.

The Court noted that Croatia had taken over the administrative proceedings against the applicant and that the prolonged stay of proceedings imposed by Croatian legislation had prevented him from recovering the money both from the Croatian and from the Serbian authorities. It therefore concluded that the situation the applicant complained of was attributable to the Croatian authorities and thus the application was admissible. It emphasised that Serbia was not a party to the proceedings, and this decision was without prejudice to that State's responsibility in the case.

Concerning the substantive issue, the Court held that the money belonged to the applicant and had been seized only temporarily. The Court was satisfied that it had been lawfully seized and that the delay in returning it had had the legitimate aim of protecting the public purse.

However, the Court held that the applicant had been made to wait too long. The stayed proceedings had also prevented him from seeking the return of the money from the Serbian authorities, which could not be said to have been protecting the Croatian State's financial interests. The Court concluded that the applicant had been made to bear a disproportionate burden in this case, leading to a violation of Article 1 of Protocol No. 1.

Just satisfaction (Article 41)

The Court held that Croatia was to pay the applicant 1,327 euros (EUR) in respect of non-pecuniary damage and EUR 4,365 in respect of costs and expenses.

The judgment is available only in English.