

Kurdish Human Rights Project

LEGAL REVIEW

Kurdish Human Rights Project

KHRP

Established 1992

(2011) 19 KHRP LR

The Kurdish Human Rights Project

The Kurdish Human Rights Project (KHRP) is a UK registered charity committed to the promotion and protection of the human rights of all persons living within the Kurdish regions. Its innovative and strategic approach to international human rights practice, combined with a long-term and consistent presence in the region, enables it to secure redress for survivors of human rights violations and prevent abuse in the future.

AIMS

- To raise awareness of the human rights situation in the Kurdish regions of Iran, Iraq, Syria, Turkey and the Caucasus;
- To bring an end to the violation of the rights of everybody who lives in the Kurdish regions;
- To promote the protection of the rights of Kurdish people wherever they may live; and
- To eradicate torture both in the Kurdish regions and across the globe.

METHODS

- Monitoring legislation and its application;
- Conducting investigations and producing reports on the human rights situation of Kurds in Iran, Iraq, Syria, Turkey, and in the countries of the former Soviet Union by, amongst other methods, sending trial observers and engaging in fact-finding missions;
- Using such reports to promote awareness of the plight of the Kurds on the part of committees established under human rights treaties to monitor compliance of states;
- Using such reports to promote awareness of the plight of the Kurds on the part of the European Parliament, the Parliamentary Assembly of the Council of Europe, national parliamentary bodies and inter-governmental organisations including the United Nations;
- Liaison with other independent human rights organisations working in the same field and co-operating with lawyers, journalists and others concerned with human rights;
- Assisting individuals with their applications before the European Court of Human Rights; and
- Offering assistance to indigenous human rights groups and lawyers in the form of advice and training seminars on international human rights mechanisms.

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Abbreviations

AKP	Justice and Development Party
BDP	Peace and Democracy Party
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic Social Cultural Rights
CHP	Republican People's Party
CoE	Council of Europe
CPCVWDV	Convention on Preventing and Combating Violence against Women and Domestic Violence
CPT	European Committee for the Prevention of Torture
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRC	UN Human Rights Council
ICC	International Criminal Court
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPAPED	International Convention for the Protection of All Persons from Enforced Disappearance
İHD	Human Rights Association of Turkey
KCK	Kurdish Communities Union
KHRP	Kurdish Human Rights Project
KRG	Kurdish Regional Government
OPCAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
PKK	Kurdistan Workers' Party
Principles	UN Guiding Principles on Business and Human Rights
UNHCR	United Nations High Commissioner for Refugees
YSK	Turkish Supreme Election Board

Relevant Articles of the European Convention on Human Rights

Article 1:	Obligation to respect human rights
Article 2:	Right to life
Article 3:	Prohibition of torture and ill-treatment
Article 4:	Prohibition of slavery and forced labour
Article 5:	Right to liberty and security
Article 6:	Right to fair trial
Article 7:	No punishment without law
Article 8:	Right to respect for private and family life
Article 9:	Freedom of thought, conscience and religion
Article 10:	Freedom of expression
Article 11:	Freedom of assembly and association
Article 12:	Right to marry
Article 13:	Right to an effective remedy
Article 14:	Prohibition of discrimination
Article 35:	Admissibility criteria
Article 38:	Examination of the case and friendly settlement proceedings
Article 41:	Just satisfaction to the injured party in the event of a breach of the Convention
Article 43:	Referral to the Grand Chamber
Article 44:	Final judgments

Protocol No. 1 to the Convention

Article 1:	Protection of property
Article 2:	Right to education

Protocol No. 4 to the Convention

Article 2:	Right to freedom of movement and liberty to choose one's residence
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Protocol No. 6 to the Convention

Article 1:	Abolition of the death penalty
Article 2:	Death penalty in time of war
Article 3:	Prohibition of derogations
Article 4:	Prohibition of reservations

Protocol No. 7 to the Convention

Article 1:	Procedural safeguards relating to expulsion of aliens
Article 2:	Right of appeal in criminal matters
Article 3:	Compensation for wrongful conviction
Article 4:	Right not to be tried or punished twice

Protocol No. 11 to the Convention

Article 19: Establishment of the Court

Article 20: Number of judges

Article 21: Criteria for office

Article 22: Election of judges

Article 23: Terms of office

Protocol No. 12 to the Convention

Article 1: General prohibition of discrimination

Section 1: Legal Developments and News

UN Human Rights Council Appoints Special Rapporteur on the Human Rights Situation in Iran

On 24 March 2011, the UN Human Rights Council (HRC) adopted a resolution creating a Special Rapporteur on the human rights situation in the Islamic Republic of Iran, the first country mandate in respect of Iran in almost a decade.

The resolution, tabled by Sweden and the United States, was passed by 27 votes to seven, with 14 abstentions. At the meeting, the representative of the United States expressed concerns about the human rights record in Iran which had “deteriorated dramatically in the last year” but hoped that the resolution would help to address the problem.

The Iranian representative urged States to vote against the resolution “to avoid politicisation and double standards”. This reaction echoes that of Ramin Mehmanparast, a spokesperson for the Iranian Foreign Ministry, who described the resolution as “politically motivated” and “unjustified”. However, Radio Zamaneh reported on 17 May 2011 that the Head of Iran’s Human Rights Council had no objection to the Special Rapporteur visiting Iran.

As part of its mandate, the Special Rapporteur is required to report to the UN General Assembly and to the HRC. The resolution also calls upon the Government of Iran to cooperate fully with the Special Rapporteur, including providing all necessary information to enable the Special Rapporteur to fulfil her or his duties.

This move is a welcome development in light of the continuing human rights violations in Iran, including the extensive use of force and of the death penalty, arbitrary arrests and detentions, the torture and ill-treatment of children, the severe restrictions on the rights to freedom of expression, association and assembly, and the persecution of ethnic, linguistic and religious minorities. In a context defined by institutionalised disregard for international human rights standards and entrenched patterns of human rights violations, members of ethnic, cultural, linguistic and religious minorities – including Kurds, Arabs, Azeris, Baluch and Baha’is – are especially at risk.

At the same meeting, the HRC extended the mandate of the Independent Expert on Minority Issues for a further period of three years, requesting it to, amongst other things, “promote the implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities” and “take into account the views of non-governmental organizations on matters pertaining to his/her mandate”.

Syrian Government Grants Kurds Citizenship Rights but Violent Crackdown against Civilians Continues

On 7 April 2011, Syrian President, Bashar Al-Assad, issued Decree No.49 granting “foreigners” in the Kurdish region of Hasaka “Syrian Arab nationality”. The decree marks an important step towards political reform in Syria as a 1962 census resulted in the classification of more

than 120,000 Kurds as not having Syrian citizenship, a situation which continues to effect up to 360,000 Kurds today.

The denial of citizenship deprives individuals of a variety of social, economic, legal and political rights. Currently, stateless individuals are precluded from working in certain professions requiring Syrian citizenship (for example, employment by the State), are unable to legally own property in Syria and cannot obtain passports or other relevant travel documentation, preventing them from legally leaving the country.

The extent to which Decree No.49 will be implemented in practice is presently unclear. On 21 April 2011, Support Kurds in Syria reported that a day after the legislation was passed, Kurds were turned away by civil registration officers and told to return in ten days. Fifteen days after the legislation was passed, Kurds were reportedly turned away and asked to return after a month.

The measure is one of a few concessions made by President Assad in response to mass protests calling for an end to his regime. Such concessions include the formation of a new government under the newly appointed Prime Minister and the end to the national state of emergency which had been in place since 1963. However, the sincerity of these concessions is doubtful, as at least 11 ministers from the old government remain in the new cabinet and have passed a law requiring prior State approval for all future demonstrations.

The question mark over the efficacy of these concessions is particularly grave in light of the critical violent crackdown by the Syrian government on pro-democracy protestors which is reported to have claimed over 1,000 lives, with thousands more detained by security forces and thousands living as refugees after being forced to flee Syria. The Independent Expert on Minority Issues, Gay McDougall, emphasised that the rights of all Syrians, including minority groups, must be upheld and that all voices in society must be heard in the reform process. Attempts to mobilise the international community gained pace on 29 April 2011 when the Human Rights Council passed a resolution by 26 votes to 9 to send a mission to Syria to investigate the violent crackdown by Syrian forces on civilians. However, international mobilisation through the UN Security Council has been less successful. A draft Security Council statement condemning Syria's actions was rejected by Security Council Members on 27 April 2011, reportedly due to resistance from Russia, China and Lebanon. Nevertheless, various international NGOs and governments have called on the Security Council to refer Syria to the Prosecutor for the International Criminal Court (ICC), given the reported escalation of violence against civilians, and have placed pressure on Syria by imposing economic sanctions on senior Syrian officials, including President Assad.

International Convention for the Protection of All Persons from Enforced Disappearance Enters into Force

On 23 December 2010, the International Convention for the Protection of All Persons From Enforced Disappearance (ICPAPED) entered into force, providing a blanket prohibition on enforced disappearances and categorising widespread or systemic enforced disappearances as crimes against humanity under international law. "Enforced disappearance" for these purposes

means the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

State Parties to ICPAPED are required to investigate enforced disappearances committed by persons or groups of persons acting without the authorisation, support or acquiescence of the State and to bring those persons to justice. A State Party is also required to take necessary measures to criminalise enforced disappearances under its domestic law.

The ICPAPED establishing a Committee of independent human rights experts, which will review State reports on the measures taken to give effect to their obligations under the Convention, undertake independent inquiries, consider urgent action requests, and (upon appropriate declarations by State Parties) consider complaints from individuals and other States concerning violations of the ICPAPED.

Amongst the 88 current signatories to the ICPAPED are Armenia, Azerbaijan and Iraq, with Armenia and Iraq ratifying the instrument on 24 January 2011 and 23 November 2010 respectively. Neither Iran, Syria nor Turkey had signed the instrument at the time of publication.

The importance of all States giving serious consideration to the prompt adoption of the ICPAPED in order to combat enforced disappearances in their respective countries is underscored by events such as the discovery of further mass graves in western Iraq and in the Kurdish regions of Turkey, containing hundreds of bodies.

The recent findings continue to highlight the urgent need for States and civil society organisations to call on Turkey to fulfil its human rights obligations under international law and to take effective steps to effectively investigate and bring to justice the perpetrators of such crimes. The Iraqi Supreme Court, on the other hand, has already started formally recognising acts of genocide committed by the Ba'ath regime, such as the chemical attack on Halabja which took place in 1988 and the killing of a reported 8000 Barzani tribesmen which took place in 1983. In April 2011, the international congress on communal graves, as organised by the Kurdish Minister of Anfal Martyrs and Victims in conjunction with the KRG's Ministry of Health, commenced in Arbil with the aim of amending the domestic law on unearthing graves in order to cater for the large number of burial sites from the Anfal genocide, which have yet to be uncovered.

Adoption of the Convention on Preventing and Combating Violence against Women and Domestic Violence

On 7 April 2011, the Committee of Ministers of the Council of Europe (CoE) adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence (CPCVWDV). The adoption of this landmark convention is a significant attempt to bring gender-based human rights violations to the forefront of the European agenda and will assist – whether directly or indirectly – in setting human rights standards internationally. As at 26 May 2011, 13 CoE member States, including Turkey, had signed the CPCVWDV.

State Parties to the CPCVWDV have a positive obligation to take necessary legislative or other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere. State Parties are also required to take, without delay, necessary legislative and other measures including: embodying in their national constitutions the principle of equality between women and men; prohibiting discrimination against women, including through the use of sanctions; and abolishing laws and practices which discriminate against women. In particular, Parties must ensure that any person acting on behalf of the State refrains from engaging in acts of violence against women.

Recent State Engagement with UN Treaty-Monitoring Bodies

The first half of 2011 saw the review by the UN of a number of reports by States in the Kurdish regions, in respect of the implementation by such States of their UN human rights treaty obligations.

Armenia's implementation of its obligations relating to the elimination of racial discrimination

In March 2011, the Committee on the Elimination of Racial Discrimination (CERD) published its observations on Armenia's report on implementing the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Whilst the CERD commended Armenia for recent legal changes – including a constitutional ban on discrimination based on factors such as ethnic origin, the introduction of prohibitions on racial discrimination in the Law on Television and Radio and the introduction of aggravated liability/punishment for racially or ethnically motivated crimes – the majority of the report voiced concerns over Armenia's dedication to eliminating racial discrimination.

The CERD highlighted the absence of disaggregated statistics on the composition of the Armenian population and of legislation against organisations which promote racial discrimination. The CERD also referred to the lack of complaints to courts and authorities, this being a significant indicator of a lack of awareness of one's human rights, lack of confidence and understanding of the justice system and inaction on behalf of authorities.

More specifically in respect of the Kurdish and Yezidi communities, the report noted with concern that while Armenia is aware of the conservative customs in these communities which determine relationships between men and women and impede the enjoyment of human rights, the State's programmes and activities have failed to address these issues.

Turkey's implementation of its economic, social and cultural rights obligations

On 3 and 4 May 2011, during its forty-sixth session, the Committee on Economic, Social and Cultural Rights (CESCR) considered Turkey's report on the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It published its concluding observations on 20 May 2011.

The CESCR noted the measures taken by Turkey to improve the enjoyment of such rights, with the establishment of the Parliamentary Commission on Equal Opportunities for Women and

Men, legal amendments to combat violence against women, and the ratification of several core international instruments over the past decade, including eight human rights treaties.

However, the CESCR expressed its concern over Turkey's failure to recognise Kurds, Romas and Arameans as minority groups and called on it to adopt the necessary plans of action to recognise all minorities in its territory and give them full opportunity to enjoy their ICESCR rights and called on Turkey to adopt a general law on non-discrimination in line with the ICESCR.

With regards to gender-based issues, the CESCR noted that men and women continue to be treated unequally in Turkey. It was also "alarmed at the very high incidence of violence against women". It therefore called on Turkey to raise public awareness about gender equality, adopt necessary measures to change prejudices and perception about gender roles, and (in collaboration with civil society organisations) to monitor the enjoyment of ICESCR rights by women by collecting specific data on the results of all its programmes and measures which aim to promote gender equality.

In respect of large-scale infrastructure projects taking place in the Kurdish regions, such as the building of the Ilisu Dam, the CESCR noted its concern about the potential impact of large-scale infrastructure projects on economic, social and cultural rights in the areas concerned, especially with regard to forced evictions, resettlements, displacements, compensation of people affected and environmental and cultural repercussions. The Committee urged Turkey to take a human rights-based approach in such development projects, especially those involving dams, and to undertake a complete review of its legislation and regulations on evictions, resettlement and compensation of the people affected.

Repression of Civil Society Activity and Independence of Human Rights Bodies

In April 2011, the Bill for the Establishment and Supervision of NGOs was dropped from the Iranian Parliament's agenda and sent back for a three-month committee-stage review. However, a number of controversial articles of the Bill which have already been passed by the Iranian parliament will reportedly stand, including those establishing a 'Supreme Committee' and requiring that demonstrations be non-political and have prior approval.

An analysis of the Bill was carried out in November 2010 by Netherlands-based human rights NGO Aresh Sevom, which highlighted the main features of the draft law and noted that the Supreme Committee would be overseen by the Iranian Ministry of Interior and be responsible for the establishment and activities of civil society organisations. Its responsibilities would include: exercising ultimate authority over the boards of directors of NGOs; granting registration permits and dissolving organisations; requiring existing organisations to re-register by means of a more stringent approval process; approving all stages of cooperation with non-governmental projects and international organisations (such as the United Nations); and approving marches and demonstrations.

In 2009, similar amendments were made to the law on NGOs in Azerbaijan, which requires a bilateral agreement between an NGO's country of origin and the Azeri government in order for the NGO to register and operate within the country. The significant effects of this law were

demonstrated in April 2011 when the Azeri Ministry of Justice stopped the operations of the National Democratic Institute and the Human Rights House Network on the basis that they did not fulfil all the registration requirements. According to news site Eurasianet, the Azeri law requires an organisation to state the reasons for its activities in Azerbaijan and show that its operations comply with “the Azerbaijani people’s national and spiritual values”, a term which is not defined. Further, activities believed to disseminate “political and religious propaganda” are also not allowed.

Of similar concern is the Iraqi Supreme Court ruling at the beginning of 2011, in response to a request by Prime Minister Al-Maliki, which brings key agencies under the control of the central government’s cabinet rather than under parliamentary scrutiny. These include the High Commission for Human Rights and Higher Electoral Commission, which gives rise to concerns about the ability of such bodies to operate independently from government influence or control.

UN Special Representative Publishes Guiding Principles on Business and Human Rights

After a six-year consultation period, the UN Secretary-General’s Special Representative for Business and Human Rights, John Ruggie, published the “Guiding Principles on Business and Human Rights” (**Principles**). The aim of these Principles is to set a global standard for judging the risk of business activities in terms of the potential adverse effects on human rights.

The Principles originate from Professor Ruggie’s Protect, Respect and Remedy Framework put forward in 2008, and are divided into the same three key areas which were identified in that framework: the State’s duty to protect human rights; the corporate responsibility to respect human rights; and the need for greater access to remedies by victims of business-related abuse.

The Principles provide guidance for States and businesses on harmonising their practices as well as advice to stakeholders on evaluating business’ respect for human rights. The focus of the guidance is on effective risk management by companies, as demonstrated by Professor Ruggie’s recommendation to incorporate a new ‘human rights due diligence’ requirement into risk-management systems. In addition, a significant part of the publication delivers specific recommendations on non-judicial means of providing remedies to victims.

If applied in practice, the Principles may offer an effective approach to developing the relationship between human rights and businesses around the world, including in the Kurdish regions. For instance, despite the fact that large-scale infrastructure and oil contracts form part of the continued economic development in Northern Iraq, there has been little discussion about the impact these undertakings have on human rights. This is not to say that there has been no dialogue on human rights abuses by businesses in the Kurdish regions. The human rights impact of the Baku-Tbilisi-Ceyhan oil pipeline through north-east Turkey prompted a ruling by the UK government in March 2011 that the BP-led consortium was in breach of OECD Guidelines for Multinational Enterprises. Specifically, the ruling stated that BP had failed to investigate allegations of intimidation by Turkish security forces guarding the pipeline, which had deterred local people from participating in BP’s consultations about the pipeline’s route and compensation

negotiations for loss of land and livelihoods. The Principles may prompt similar investigations into human rights abuses by projects impacting on the human rights of individuals and communities in the Kurdish regions.

Nevertheless, the extent to which the Principles are adopted in practice by States, businesses and civil society in the Kurdish regions and further afield remains to be seen. Some civil society groups, such as Earth Rights International, have criticised the Principles for avoiding the question of corporate legal responsibility, without which it is suggested the Principles may be ignored with impunity. Indeed, the guidance is silent on the legal obligations imposed on companies. The status of recommendations, such as the introduction of a human rights due diligence standard, also remains unclear. Without a concrete outline of corporate responsibilities and obligations under international law, the Principles rest on the willingness of companies to implement the “Protect, Respect and Remedy” framework.

The HRC is expected to discuss the implementation of the Principles in Geneva in June 2011.

Council of Europe’s Committee for Prevention of Torture Publishes Report on Turkey

On 31 March 2011, the European Committee for Prevention of Torture (CPT) published a report on its fifth periodic visit to Turkey. The CPT delegation, which visited Turkey from 4 to 17 June 2009, investigated approximately 40 law enforcement establishments, prisons, and detention facilities for foreigners. The report, which was made public at the request of the Turkish authorities, provides a number of recommendations, comments and requests for information on areas such as the monitoring of detention facilities, conditions of detention and safeguards against ill-treatment by law enforcement agencies.

The report outlines some encouraging findings, such as the continuing downward trend in both the incidence and severity of ill-treatment by law enforcement officials. However, of particular concern to the committee were the numerous allegations of human rights violations emanating from the Kurdish region of Diyarbakır. In this regard, the CPT delegation received numerous complaints of law enforcement agencies using excessive force during arrest, as well as allegations from suspects detained in the Anti-Terror Department at Diyarbakır Police Headquarters that they had been repeatedly deprived of sleep for the purpose of extracting confessions.

In light of its investigations, the CPT has recommended that the relevant Turkish authorities:

- Deliver a statement to all law enforcement officials in the Diyarbakır area, reminding them that they should be respectful of the rights of detainees and that the ill-treatment of such persons will be the subject of severe sanctions
- Put an immediate end to the practice of sleep deprivation
- Remind prosecutorial and judicial authorities in the Diyarbakır area of their obligations to initiate preliminary investigations and take resolute action within their powers when any information indicative of ill-treatment emerges

Other recommendations in the report include: reminding law officials throughout Turkey of their legal obligations regarding the right to notification of custody; taking necessary steps to ensure that detainees can exercise the right of access to a lawyer; fully informing detainees of their fundamental rights from the very outset of their deprivation of liberty; and reminding law enforcement officials of the importance of promptly opening and keeping full and accurate records.

In response, the Turkish government announced in March 2010 that the Turkish Grand National Assembly has passed a new law approving the ratification of the Optional Protocol to the Convention Against Torture (OPCAT). Under the OPCAT, the Subcommittee on Prevention of Torture has a mandate to visit places where persons are deprived of their liberty in the States Parties. Further, States Parties are required under the OPCAT to establish independent National Preventative Mechanisms for the prevention of torture at the domestic level, which also have mandates to inspect places of detention.

Special Rapporteur on Independence of Judges and Lawyers visits Turkey

A first of its kind, this official visit by Special Rapporteur Gabriela Knaul, aims to assess the recent judicial reforms undertaken by the Turkish Government, which have abolished the dual judicial system, in relation to a range of issues in general, but focusing on the independence of judges and lawyers in particular.

Knaul's first observations indicate that, although the reforms are a great improvement, there is still a great concern about impartiality and equality of arms. Her opinion emphasizes that there is a crucial need for a High Council that would be completely independent from the Executive.

The Special Rapporteur also, expressed her concern over the lack of gender integration and women's perspectives in the judiciary in Turkey and in return, the importance of challenging the traditional notions in order to represent more women in the Turkish judiciary.

New ECtHR Rules of Court include new Rule 61 on Pilot Judgment Procedure

The new Rules of Court have come into force on 1 April 2011, and have included Rule 61, which deals with the Pilot Judgment Procedure. The new rule provides a stronger legal basis as it codifies the existing procedure.

The Rule provides that the pilot procedure can be used when facts in application "reveal in the Contracting State concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications."

The Pilot Judgment Procedure aims to help the Court deal more efficiently and quickly with its caseload, resolve structural issues at national level and finally allow a more prompt remedy for Applicants.

New ILO Standards: The Convention Concerning Decent Work for Domestic Workers

June 2011 saw the ILO adopt the Convention Concerning Decent Work for Domestic Workers, which supplements the Recommendations that have been in force since the creation of the ILO 92 years ago.¹

This Convention is a landmark legal instrument aimed to protect the rights and develop the conditions of life of domestic workers, millions of who are migrants. It intends to achieve the former by setting out that domestic workers around the world should essentially, just like other categories of workers, hold basic labour rights such as respect for primary principles and rights at work including, but not limited to: reasonable hours of work, weekly rest of at least 24 consecutive hour and clearly set out terms and conditions of their employment.

Furthermore, this Convention endeavours to have a tremendous impact on gender equality as it recognizes that domestic work, which mainly employs women, is work and that these workers deserve to have access to basic working rights. Recognition is crucial, as many countries still do not consider domestic work as actual work, resulting in millions being denied legal social and labour protection.

Kurdish Parliament Passes Anti-Domestic Violence Law

After many years of campaigning, the Kurdish Government has answered with, what promises to be a tough, Anti-Domestic Violence Law that criminalizes violence against any female member of the family.

The new law has also called upon the establishment of an independent court for domestic violence issues that will be used in cases that require such.

This legal development is very crucial and of grave importance as it also touches upon other important social issues that surround family members, females in particular, including female circumcision, preventing female education, child abuse, non-consensual divorce, female offerings and family related female suicide.

Repercussions for breaching this law are strict indeed; those found guilty of domestic violence will face a hefty fine or jail sentence ranging between \$850 to \$5,275 and six months and three years, respectively². Even those who assist in such crimes, such as medical practitioners, could risk losing their jobs or up to three years of their salaries for carrying out a female circumcision.

1 <http://www.ilo.org/ilc/ILCSessions/100thSession>. Last accessed: 7 December 2011.

2 <http://www.krg.org>. Last accessed: 7 December 2011.

The Council of Europe Commissioner for Human Rights visits Turkey

At the end of his five-day visit to Turkey in April 2011, Thomas Hammarberg - the Council of Europe Commissioner for Human Rights - highlighted deep rooted systematic dysfunctions in the Turkish justice system that are an obstacle to the enjoyment of human rights and fundamental freedoms.

The Commissioner stresses that the Government should pay particular attention to issues such as the impartiality and independence of judges, excessive pre-trial detention and judicial proceedings, which are some of the key issues. The establishment of the assize, which have special powers to deal with cases of organized crime and terrorism, was another one of his major concerns mainly their problematic and questionable practices. These issues are outlined in depth in the Commissioners report that followed his visit³.

The importance and effect of these issues is evident, as the European Court of Human Rights has delivered over 2,200 judgements against Turkey in the last 15 years mainly concerning the Article 6 Right to a fair trial and the Article 5 Right to Liberty and Security.

However, on a more optimistic note, the Commissioner has expressed his trust in the major legislative reforms by authorities that are taking place, which should aim to address these issues effectively to steer the Turkish Justice System in the right direction and overcome these obstacles to Human Rights access.⁴

UN Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

In July 2011, the United Nations published a downloadable document (that can be found on their website www.ohchr.org), which maps out the rights guaranteed to every individual by the Universal Declaration of Human Rights, which was adopted by the UN General Assembly on the 10th of December 1948.

The Document is mostly based on the reports produced and information received in the last eleven years by the two Special Rapporteurs on the situation of human rights defenders, namely, Hina Jilani who has been reporting since 2000 and then taken over by Margaret Sekaggya in 2008.

3 <http://www.coe.int/t/commissioner/> Last accessed: 7 December 2011

4 T. Hammearberg, REPORT, 12 July 2011. <https://wcd.coe.int/ViewDoc.jsp?id=1814085>. Last accessed: 7 December 2011.

The All-Party Parliamentary Group published a Report on the Development of the Kurdistan Region

Following their visit from 31 May to 6 June 2011, the British based All-Party Parliamentary Group (APPG) have published a report – “Kurdistan Update: 20 Years after the Uprising” - on the development of the Kurdistan region in regards to cultural, social human rights, economical and political developments.

The Report, which can be found on the Kurdistan Regional Government’s website (www.krg.org), sheds light on many positive changes that are taking place in Kurdistan such as developments in Women’s Rights, democratic progress and education, to name a few. It furthermore, encourages the UK to play a positive role in promoting and nurturing such constructive developments.

Adoption of New Guidelines for the Implementation of the UN ‘Protect, Respect and Remedy’ Framework

June 2011 saw the Human Rights Council’s unanimous endorsement, by resolution, of the ‘Guiding Principles on Business Human Rights for implementing the UN “Protect, Respect and Remedy” Framework’. The Guidelines, which can be found on the OHCHR website⁵, are a result of six years of extensive research and consultation undertaken by the Special Representative on human rights and transnational corporations and other business enterprises.

The new recommendations outline steps that advise on how States and businesses alike should implement the UN Framework, which expectedly should result in better management of business and human rights challenges. Furthermore, these Guidelines aim to offer an efficient medium of upholding the UN framework’s three main principles and are hence organized in reference to each of them, namely: the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights; and the need for greater access by victims to effective remedies, judicial and non-judicial.

Special Rapporteur on Torture Condemns Solitary Confinement

At the Third General Assembly in October, the Special Rapporteur on Torture urged that Solitary confinement in all its forms should be banished as a measure for punishment of prisoners, except in extreme circumstances and even then should be limited to a maximum of 15 days.

To support this the Special Rapporteur relies on scientific evidence that shows the effect of solitary confinement on the mental state of mind, where it causes lasting mental damage even if for a few days of isolation. These effects could amount to abuse, torture or cruel, inhuman or degrading treatment or punishment for prisoners who are put through solitary confinement.

⁵ http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf Last accessed: 7 December 2011

This is especially problematic to sensitive prisoners who already experience mental disabilities prior to imprisonment.

Since there is no single universal definition for solitary confine Mr. Mendez, the Special Rapporteur, defined it as “any regime where an inmate is held in isolation from others, except guards, for at least 22 hours a day”⁶.

The Special Rapporteur elaborated on what could amount to exceptional circumstances by giving examples such as “the protection of inmates in cases where they are gay, lesbian or bisexual or otherwise threatened by prison gangs”⁷. He also stressed that even when these extreme cases arise, special safeguards should be abided by and even suggested the creation of a set of guiding principles that should be applied.

Throughout his report he referenced many extreme cases in different countries where solitary confinement ranged between months and years without any charge or trial in secret detention centres.

Conclusion of UN Human Rights Council’s 18th Session

High Commissioner Pillay’s opening address to the 18th session of the Human Rights Council highlighted a lot of the main issues including: the food crisis, the threat of a second global recession, the protest movements in the Middle East, North Africa and elsewhere, the Human Rights Council’s investigations of allegations of gross human rights violations in Libya, Syria and Côte d’Ivoire and a renewed call for States to respect human rights in counter terrorism strategies⁸.

The Council’s 18th Session was concluded on the afternoon of 30th September 2011 which marked the end of a very active session that included many developments such as, but not limited to: the adoption of 33 texts, the establishment of a Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the establishment of a new Special Procedure mandate of ‘Independent Expert on the promotion of a democratic and equitable international order’. Amongst other developments and products of the session, which can be found on the OHCHR website⁹, the Council announced the appointment of the members of the Commission of Inquiry to investigate alleged violations of human rights law in Syria.

6 <http://www.un.org/apps/news/story.asp?NewsID=40097>. Last accessed: 7 December 2011

7 <http://www.un.org/apps/news/story.asp?NewsID=40097> Last accessed: 7 December 2011

8 <http://www.ohchr.org/EN/NewsEvents/Pages/18thSessionHRC.aspx> Last accessed: 7 December 2011

9 <http://www2.ohchr.org/english/bodies/hrcouncil/> Last accessed: 7 December 2011

Adoption of the Maastricht Principles on Extra-territorial Obligations of States in the Area of Economic, Social and Cultural Rights

In September 2011 over 40 distinguished human rights and international law experts met at a conference co-convened by Maastricht University and the International Court of Justice, in the Netherlands, and adopted the 'Maastricht Principles on Extraterritorial Obligations of States in economic, social and cultural rights'. The Principles are a product of 5 years of research, consultations and legal analysis¹⁰.

The Principles aim to clarify the scope of extraterritorial international human rights obligations of States beyond their own borders, including among others the right to just and favourable conditions of work, social security, an adequate standard of living, food, housing, water, sanitation, health, education and participation in cultural life¹¹.

UN Special Rapporteur Files First Report on Iran

The U.N. Special Rapporteur for Human Rights in Iran, Ahmed Shaheed, has filed his first report to the General Assembly. First-hand testimonies from individuals and organizations, he wrote, reveal "a pattern of systemic violations of... fundamental human rights."¹²

The violations include serious shortcomings in the administration of justice, including practices amounting to torture, the imposition of the death penalty without proper judicial safeguards; the unequal status of women; the persecution of religious and ethnic minorities, and the erosion of civil and political rights.

The increase in executions in Iran is also highlighted. Secret group executions are carried out with no notification of families of lawyers and public executions continue.

10 OHCHR Bulletin 7, November 2011

11 http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23901 Last accessed: 7 December 2011

12 Voice of America, 'Human Rights Rapporteur in Iran', 28 October 2011, <http://www.voanews.com/policy/editorials/Human-Rights-Rapporteur-On-Iran-132799138.html> Last accessed: 7 December 2011

Section 2: Articles

The opinions expressed in the following Article are those of the author and do not necessarily represent the view of KHRP.

Kristina Touzenis¹

The Justiciability of Economic and Social Rights – A Short Overview

Abstract

The ability of an individual to enforce his or her economic and social rights and to obtain a remedy for a violation before an impartial body is essential in order for such rights to have any real impact in practice. Whilst commentators have put forward various arguments against the justiciability of economic and social rights, this article aims to demonstrate that such objections are largely based on historical context and cannot be maintained today. In presenting her arguments, the author considers the indivisibility of all human rights, analyses State responsibility in respect of human rights, and refers to relevant case law concerning economic and social rights.

INTRODUCTION

In order for rights to have force and real relevance it must be possible for the individual right-holder, the subject of the rights, to have access to some form of remedy. Otherwise rights risk being only empty promises. A key problem related to all human rights is the question of enforcement in line with international standards, particularly in situations involving unwilling States. This paper will not go into the details of general enforcement mechanisms or explore the history of a progressive, albeit in some cases slow, improvement in States' willingness to comply with international obligations, but instead will focus on one much contested aspect of human rights enforcement; namely, the justiciability, or lack of justiciability, of economic and social rights (ESC rights). These rights have often been said to be impossible to render justiciable and thus impossible to enforce. However, this article sets out an examination of the character of these rights, and considers States' obligations and existing case law to show that this is not the case. It also touches on the issues of non-discrimination and non-State actor responsibility to support this assertion.

The ability to bring a case before a tribunal, create precedents and obtain redress is important because courts help to define rights, their meaning and their content. Without court decisions, rights – and laws in general – can easily remain rather abstract. In general, laws are drafted with the purpose of being neither too vague, in which case it would be difficult to apply them

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to concrete situations or they would simply lack substantive content, nor too specific, in which case they may be unable to cover all possible situations they are meant to. Concrete cases serve to give “teeth” and “meat” to legal provisions, enabling courts to interpret them and to fully understand their implications. Judicial definitions arising through case law can then be used in interpreting and creating an operative definition for other relevant cases and can also be invoked before administrative authorities. Further, in the case of international standards, courts are often required (depending on the jurisdiction) to interpret national law in accordance with international obligations to uphold human rights assumed by the State, therefore necessitating judicial interpretation of international human rights obligations.

The term “justiciability” refers to the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred; it means effective access to mechanisms that guarantee recognized rights. The existence of a legal remedy – both in the sense of providing a procedural remedy (effective access to an appropriate court or tribunal) when a violation has occurred, and the process of giving adequate reparation to the victim – are basic and characteristic features of a fully fledged right. In the absence of effective access to justice, the right in question is redundant in practice.²

Indivisibility of human rights

ESC rights are often described as “second generation” rights, following after civil and political rights, but they have in fact been recognized for centuries. For example, both the French and American national rights declarations in the late 18th century included concepts such as “the pursuit of happiness” and “égalité et fraternité”, as well as the rights to form trade unions, to collective bargaining and to safe labour conditions. ESC rights were born, as were civil and political rights, out of a specific historical context – the industrialisation of society, which brought in liberation from feudal rule but also the rise of a need for social protection.

The historical separation of human rights into two distinct sets remains the underlying paradigm of most legal thinking in relation to ESC rights. From this perspective, international law appears as a static, rigid system of watertight legal compartments: even when acknowledging some interrelatedness, the compartments remain the rule nevertheless. The tension between civil and political rights and ESC rights has a long history – a history that more often burdens rather than aids an understanding of their genuine differences. Particularly during the Cold War era, the two sets of rights were considered separate, thus creating a significant and artificial ideological divide between the sets of rights.³ Although this ideological division gradually diminished following the end of the Cold War, the damage done to the implementation and also promotion of the two sets of rights can still be felt. This division of human rights is most starkly represented by the separate International Covenant on Civil and Political Rights (ICCPR) and

2 International Committee of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability* (2008) Human Rights and Rule of Law Series No. 2, p 6, available at <http://www.icj.org/dwn/database/ESCR.pdf> (last visited June 2011).

3 Alston, Philip; Goodman, Ryan; Steiner, Henry J., 2007, “International Human Rights in Context: Law, Politics, Morals”, Oxford University Press, p. 263.

the International Covenant on Economic, Social and Cultural Rights (ICESCR) (both from 1966), which have long provided an opportunity for various commentators to claim that 1) civil and political rights is more important than, or takes priority over, ESC rights, and/or 2) that each set of rights is only relevant in one form of society – with ESC rights being more applicable to the former “Eastern Bloc” of communist states in Eastern and Central Europe and civil and political rights being more relevant for the “Western bloc”.

However, many of the alleged distinctions between the two sets of rights are historical and descriptive rather than inherent and normative. Viewing human rights as two separate sets is highly abstract, artificial, and not at all connected to real life. In reality, human rights are interwoven and each, in its own right, can pose challenges to the legal mind to determine an appropriate remedy in practice.⁴ Today under international law, civil, political, economic, social and cultural rights are said to be indivisible, interrelated and interdependent.

The interdependence principle, apart from its use as a political compromise between advocates of each of the two key Covenants, reflects the fact that the two sets of rights can neither logically nor practically be separated into watertight compartments. The first step in erasing the boundaries is to recognize that there are important interactions between the sets of rights.⁵ Civil and political rights may constitute the condition for, and thus be implicit, in ESC rights, and vice versa.⁶ What has to be understood and underscored is the fact that economic rights are important prerequisites for public and political life and for the full use of freedom rights and political rights. They are seldom claimed solely for their own sake, but as a means for something else. If they are respected, they take away an obstacle on the road to public and political life and to the full use of this set of human rights. Economic rights are important but insufficient; they are part of the package, just as civil rights are important, but insufficient if they stand alone.

Examples of the interdependence are clear in the following:

- a) the right to form trade unions is contained in the ICESCR, while the right to freedom of association is in the ICCPR;
- b) the ICESCR recognizes various “liberties” and “freedoms” in relation to scientific research and creative activity;
- c) while the right to education and the parental liberty to choose a child’s education are dealt with in the ICESCR, the liberty of parents to choose their child’s religious and moral education is recognized in the ICCPR;
- d) the prohibition on discrimination is evident in both covenants;

4 Tinta, M, F.: *Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions* Human Rights Quarterly - Volume 29, Number 2, May 2007, pp. 431-459, p. 431.

5 Freedman, Sandra, 2008, “Human Rights Transformed – positive rights and positive duties”, Oxford University Press, New York, p. 67.

6 Alston, Philip; Goodman, Ryan; Steiner, Henry J., 2007, “*International Human Rights in Context: Law, Politics, Morals*”, Oxford University Press, p. 275.

- e) the right to food and health found in the ICESCR can influence the “classical” right to life protected by the ICCPR;
- f) participation in civil and political life depends on capacities related to economic and social right (education, health, work related rights); and
- g) the Convention on the Rights of the Child, a more recent human rights instrument, includes both sets of rights.

IS THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS POSSIBLE?

Arguments against justiciability

It has taken the international community a considerable time to reach its present level of understanding with regard to the nature and content of civil and political rights. This understanding has been greatly developed through the development of case law – internationally, regionally and nationally. In comparison to these rights, the precise legal meaning and content of ESC rights is less well developed.⁷ In addition to the historical division discussed above, a major problem has been the traditional assumption in some Western societies (and in a lot of Western philosophy) that rights shall be construed as natural rights, focused on securing the freedom of the individual from the State.⁸ This is a very narrow construction which is subject to challenge. In this, there has been a widespread tendency to deem ESC rights as something “other” than civil and political rights and only civil and political rights are perceived as justiciable.

Arguments against the justiciability of ESC rights rely on the assumption that such rights are different in nature from civil and political rights and therefore fall below the justiciable threshold for individual legal enforcement.⁹ The arguments advanced by those questioning the justiciability of ESC rights tend to focus on three main assertions. First, it is maintained that ESC rights are non-justiciable because of their intrinsic nature. That is, as opposed to the negative characteristic of “first generation” civil and political rights, which – some argue – simply require freedom from State interference, ESC rights entail positive duties. They, therefore, require government action rather than government restraint, they call for the distribution of resources and progressive development instead of instant fulfilment and they are vague and open to interpretation rather than fixed and legally definite. Secondly, it is argued that policy-making is the domain of the executive branch of a State, and unelected courts have the effect of constraining (by way of their orders) the executive’s role, in breach of the democratic principle of separation of powers. Finally, it is maintained that courts do not have the institutional competence

7 International Commission of Jurists: The Justiciability of Economic, Social and Cultural Rights: national, regional and international experiences: http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=431216 (last visited March 2011).

8 Symonides, Janusz, 2001, “Human Rights – Concepts and Standards”, UNESCO and Ashgate, p. 101

9 International Commission of Jurists: The Justiciability of Economic, Social and Cultural Rights: national, regional and international experiences: http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=431216 (last visited March 2011).

to deliberate on complex issues and adjudicating claims on resources and budgets inevitably raised by ESC rights.¹⁰ In this regard, some commentators question the capacity of the courts to conduct wide-ranging enquiries and make decisions involving complex issues, perhaps beyond the scope of the particular issue being litigated.

Addressing the arguments

However, as a result of the development of a greater understanding of human rights in practice, and also due to the decline of the polarization of civil and political rights on one side and ESC rights on the other after the end of the Cold War, the assumption that ESC rights are by nature different from civil and political rights has been generally discarded. It is now widely accepted that all human rights result in a combination of both positive and negative responsibilities and entail a certain degree of resource distribution and interpretation. Commentators and academics increasingly reject such an artificial distinction on the grounds that a typical negative right (i.e. freedom of expression) necessitates as much interpretation as a typical positive right (i.e. right to education). Moreover, negative rights can require as much positive action by States as positive rights do. Also, the argument that ESC rights are less precise than political rights may principally rest on their recent history and consequently limited precedents.¹¹

In relation to the right to vote, for example, the State is obliged to allocate significant resources as well as take positive steps in order to ensure that the elections are held periodically, according to democratic standards.¹² Likewise judicial protection, a civil right per se, requires the existence of appropriate judicial machinery which must be organised and financed (including judges and staff). Simply considering this a passive obligation would be wrong, as it would consider the right to life as only an obligation on part of the State to refrain from unlawful killing; States must take active steps to prevent violations of the right to life,¹³ as has been underscored in several cases.¹⁴ For the above stated reasons, although it would be wrong to assert that there are no differences between the two groups of rights, an unsupported distinction between negative and positive rights is inconsistent with a practical understanding of such rights. Ultimately,

10 Aoife, N. et al, CHRJ Working Paper, *"The Justiciability of Social and Economic Rights: An Updated Appraisal"*, p. 1, http://www.srap.ca/publications/porter_the_justiciability_of_social_and_economic_rights.pdf, last accessed 24/06/2011.

11 Christiansen, E, C, (2007), 38 Columbia Human Rights Law Review 321, *"Adjudicating Non-Judiciable Rights: Socio-Economic Rights and the South African Constitutional Court"*, p. 346, <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1141&context=pubs&sei-redir=1#search=Increasingly,+academics+and+commentators+have+recognized+the+invalidity+of+this+positive-negative+distinction>, last accessed 24 June 2011.

12 Aoife, N. et al, CHRJ Working Paper, *"The Justiciability of Social and Economic Rights: An Updated Appraisal"*, p. 2, http://www.srap.ca/publications/porter_the_justiciability_of_social_and_economic_rights.pdf, last accessed 24/06/2011.

13 Tomuschat, Christian, 2008, *"Human Rights Between Idealism and Realism"*, Oxford University Press, p. 46.

14 *Tatete v Switzerland, ECtHR Application No 41874/98, 18 November 1998*, in which an illegal immigrant dying of AIDS feared expulsion to Congo where treatment couldn't be obtained. *Mamatkulov and Abduraulovic vs. Turkey Applications nos. 46827/99 and 46951/99*, in which the applicants feared assassination if repatriated to Uzbekistan and Iran.

the nature of the rights themselves cannot be regarded as a valid ground for rejecting their justiciability.¹⁵

In relation to the principle of the separation of powers, the respective roles of the judiciary, executive and legislature are (in large part) distinct, in order to ensure the independence of the three branches. However, the fact that courts adjudicate ESC rights does – and should not – mean that they take over executive policy-making functions.¹⁶ Instead, consideration by courts of ESC rights in practice represents the *realisation* of such rights, rather than their creation, in line with the courts' role in applying the law.¹⁷ Further, such action facilitates a system of checks and balances necessary in a mature democracy.

Understandably, without a concrete legal basis to do so, judges will often exercise restraint in relation to issuing judgment on matters requiring the design or compliance of public policies or that involve reviewing budgetary plans. The executive, on the other hand, enjoys a much broader margin of discretion concerning issues considered to be beyond the scope of the judiciary.¹⁸ The Constitutional Court of South Africa confronted a challenge to the inclusion of ESC rights in the South African constitution, allegedly breaching the principle of the separation of powers. In this case, the Court said:

*“The second objection was that the inclusion of these rights in the [Constitution] is inconsistent with the separation of powers [...] because the judiciary would have to encroach upon the proper terrain of the legislature and executive. In particular the objectors argued it would result in the courts dictating to the government how the budget should be allocated. It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers”.*¹⁹

15 Christiansen, above no. 11, p. 347. Also, see also Fredman, S.: Human rights transformed – positive rights and positive duties (Oxford University Press, 2008).

16 Social Rights Accountability Project: The Justiciability of Social and Economic Rights: An Updated Appraisal http://www.srap.ca/publications/porter_the_justiciability_of_social_and_economic_rights.pdf (last visited March 2011), p. 3.

17 Verma, Shivani, 2005, “Justiciability of Economic Social and Cultural Rights, Relevant Case Law”, The International Council on Human Rights Policy. The ICHRP commissioned this document as a Working Paper - Geneva 15th March 2005, p 10.

18 Curtis, C., (2008), International Committee of Jurists, “Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability”, Geneva, p. 85, http://www.humanrights.ch/home/upload/pdf/080819_justiziabilit_esc.pdf, last accessed 24 June 2011.

19 Constitutional Court of South Africa, Case CCT 23/96, *Certification of the Constitution of the Republic of South Africa*, September 6, 1996, para. 77.

In terms of institutional capacity, whilst courts may sometimes have to consider complex issues and a large amount of interconnected evidence, the role of courts is, in part, to determine whether State action in making budgetary, resource and policy decisions is reasonable and in line with the State's international human rights obligations. This was confirmed by the Committee on Economic, Social and Cultural Rights (CESCR), which dealt with this objection in its General Comment No. 9, paragraph 10, in which it stated:

"It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters, which have important resource implications. The adoption of a rigid classification of ESCRs, which puts them, by definition, beyond the reach of courts, would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society."²⁰

Similarly, the Constitutional Court of Colombia heard a case where the general failure of State authorities to provide for the vaccination of children was discussed. The Court concluded:

*"The State's obligations in the case of rights protecting negative liberty are generally defined in terms of abstention or non-interference with the individual. Restrictions are only permissible when provided by the law, are proportionate and reasonable, and do not affect the core of these rights. On the other hand, the promotion of substantive equality, including protection of those who suffer discrimination and marginalization, requires positive action, not simply abstention, from the State. In this case, from a constitutional viewpoint, the State's abstention is illegal. "The negligent abstention by the State, its passivity regarding the marginalized and discriminated groups of society, does not meet its duty to put in place an equitable social order – which constitutes the basis for the legitimacy of the Welfare State under the rule of law. It also fails to comply with the constitutional provision proscribing marginalization and discrimination. In these circumstances, the role of the judiciary is not to replace public authorities which are liable for this abstention. It is rather to order the State to fulfil its duties, where it is clear that failure to act violates a fundamental constitutional right."*²¹

Examining the obligations to respect, protect and fulfil in relation to economic, social and cultural rights

There are various levels of obligations on States when it comes to implementing human rights. As with all human rights, States have obligations to respect, protect and fulfil ESC rights, in order to ensure the enjoyment of such rights by individuals under their jurisdiction.

20 CESCR, *General Comment No. 9: Substantive Issues Arising in the Implementation of the ICESCR* (3 December 1998) UN doc. E/C.12/1998/24.

21 Constitutional Court of Colombia, *Decision (Sentencia) SU-225/98*, May 20, 1998, para. 29.

The classification of levels “is based on different assumptions about the relationship between the right-holder, his or her access to the protection afforded by a right, potential threats to that access, and the role of the State.”²²

Therefore, whilst ESC rights have often been seen to represent an obligation on the part of the State to provide only, States must at the primary level, *respect* the ESC rights of individuals (for example, resources owned by the individual, his or her freedom to find a job and the freedom to take the necessary actions and use necessary resources to satisfy his or her own needs, and so on). A violation of this obligation – whether through relevant action or inaction on the part of the State – would imply a direct interference in individuals’ abilities to ensure their own enjoyment of these rights. This issue has been duly recognised by the CESCR, in several of its General Comments. For instance, in the General Comment on The Right to Health, the Committee held that:

*“States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women’s health status and needs.”*²³

The duty to respect requires governments to refrain from interference with people’s enjoyment of their ESC rights, except to the extent that such interference is objectively and subjectively justified and enacted in a proportionate manner, with compensation and/or alternative support as necessary. Courts or other bodies can monitor this duty by considering complaints from individuals and communities, and by assessing proposals and events.²⁴

In *Jaftha v. Schoeman* and *Van Rooyen v. Stoltz*,²⁵ the South African Constitutional Court found a breach of the duty to respect the right of everyone to have access to adequate housing in the provisions of the *Magistrates’ Courts Act* that allowed, without adequate judicial oversight, the sale of a person’s home to make good a judgment debt. Similarly, an Argentine State Supreme Court decided that provisions of the local Administrative Code that granted the State the authority to automatically evict tenants of State-owned housing were unconstitutional, finding that these provisions breached the right to due process and the right to housing and referring to

22 International Committee of Jurists: Courts and the Legal Enforcement of Economic, Social and Cultural Rights, Geneva 2008 p. 42.

23 UN Committee on Economic, Social and Cultural Rights, General Comment no. 14 – Right to Health, Adopted by the Committee in May 2000, para. 34.

24 “*Fact Sheet No. 8. Government Obligation and Domestic Jurisprudence*”, p. 1, http://www.escr-net.org/usr_doc/factsheet8.doc, last accessed 24/06/2001. Also See, for example, *ASK v Bangladesh, Supreme Court of Bangladesh Writ No. 3034 of 1999*, in which the Supreme Court of Bangladesh found that the eviction of slum-dwellers without notice and without any attempt to find alternative accommodation, violated the right to shelter and livelihood.

25 Constitutional Court of South Africa, *Jaftha v. Schoeman; Van Rooyen v. Stoltz*, (2005) 1 BCLR 78 (CC) October 8, 2004.

the link between the right to due process, the right to legally challenge eviction orders and the right to adequate housing²⁶

At a secondary level, States are obliged to *protect* the freedom of action and the use of resources against other, more assertive or aggressive subjects – more powerful economic interests, for instance. Protection against fraud or against unethical behaviour in trade and contractual relations are a part of this obligation. This is the most important function of the State in relation to ESC rights, and is very similar to the protective function of States regarding civil and political rights. The duty to protect requires the State to take appropriate human rights due diligence steps in relation to non-State actors to enable individuals to enjoy their human rights.²⁷ Significant components of the obligation to protect are found in existing laws in most States and are thus clearly justiciable.²⁸

The duty to protect has been addressed in a number of Argentinean cases, in the context of the right to health. For example, in *Etcheverry v. Omint*,²⁹ the Supreme Court found that a refusal by a private health insurance fund to maintain the membership of client with HIV amounted to a breach of the right to health. The plaintiff had been a member of the health plan as part of his employment benefits and attempted to continue the policy privately after becoming unemployed but was refused by the health insurance company. The Supreme Court, following the Attorney General's opinion, stated that private health insurance companies had special duties towards their customers that extended beyond a mere commercial deal and emphasised that health insurance companies carry duties to protect the right to health, as provided for by international human rights treaties.

26 Buenos Aires Supreme Court (Tribunal Superior de Justicia de la Ciudad Autónoma de Buenos Aires), Comisión Municipal de la Vivienda c. Saavedra, Felisa Alicia y Otros s/Desalojo s/Recurso de Inconstitucionalidad Concedido, October 7, 2002, and Comisión Municipal de la Vivienda c. Tambo Ricardo s/desalojo, October 16, 2002.

27 Freedman, S., *“Human Rights Transformed positive rights and positive duties”* (2008) Oxford University Press, New York, p. 73.

28 *ICJ v. Portugal*, *The European Committee on Social Rights 1/1998* found that Portugal had failed to take sufficient steps to regulate child labour under the European Social Charter.

29 Argentine Supreme Court, *Etcheverry, Roberto E. v. Omint Sociedad Anónima y Servicios*, Attorney General's brief of December 17, 1999, and Judgment of the Court of March 13, 2001.

Only at the very last level would the State have an obligation to fulfil ESC rights, which goes beyond a general policy to ensure their progressive implementation³⁰ as circumstances change and resources permit. This would be the case only, for example, in food crises or for those who are marginalised. In such circumstances, courts can play an active role in monitoring States' progress in fully realising ESC rights, through the consideration of complaints about a failure to make reasonable plans, allocate necessary and available resources, and implement and monitor appropriate policies and programs. States may also be required by courts to develop and achieve progressive benchmarks in respect of the fulfilment of such rights.³¹

In a number of US cases based on statutory claims arising from the *Individuals with Disabilities Education Act* (IDEA), the courts found educational authorities to be in breach of duties to fulfil as required by the legislation. In this regard, the court considered that the relevant authorities had not complied with the provision of an individualised educational plan, tailored to meet the specific needs of children with disabilities, which would have facilitated their inclusion in the

30 Under Article 2(1) of the ICESCR, State parties to the ICESCR "undertake to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the [ICESCR] by all appropriate means, including particularly the adoption of legislative measures". The concept of "progressive achievement" has often been misinterpreted and misused. In CESCR General Comment 3, *The Nature of State Parties Obligations* (Article 1, paragraph 1): 12/14/1990, the CESCR has pointed out that, while "[t]he concept of progressive realisation constitutes a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be achieved in a short period of time", the concept must be "read in the light of the overall objective... which is to establish clear obligations for State parties...to move as expeditiously and effectively as possible towards [the realisation of these rights]," (paragraph 9). Progressive achievement refers not only to an increase in resources, but also to an increasingly effective use of resources available. The CESCR then states in paragraph 10 that "...a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant....By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned..... In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations". Further, "while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant" (paragraph 2) and "[t]he means which should be used in order to satisfy the obligation to take steps are stated in Article 2(1) to be "all appropriate means, including particularly the adoption of legislative measures". The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education...legislation may also be an indispensable element for many purposes" (paragraph 3). "Other measures which may also be considered "appropriate"... include, but are not limited to, administrative, financial, educational and social measures" (paragraph 7).

31 "Fact Sheet No. 8. Government Obligation and Domestic Jurisprudence", p. 1, http://www.escr-net.org/usr_doc/factsheet8.doc (last accessed 24 June 2001).

mainstream educational system.³² Similarly, the Supreme Court of Israel stated that the right to education for children with disabilities includes the right to free education not only in respect of special education, but also in integrated educative settings. As a result of this decision, the state was ordered to arrange its budgetary resources to cover the necessary services.³³

As can be seen above, the first two requirements, to respect and to protect, do not necessarily depend primarily on the provision of resources. Therefore, if ESC rights are justiciable, it is not necessary that a given right will be left for the courts to treat as open-ended – instead, what is at issue is a *minimum* standard, which the courts will enforce.³⁴

Litigating economic, social and cultural rights and obtaining remedies

Several conditions have to be fulfilled before international human rights can be considered subjective rights in a national court. If a State's human rights obligations are directly applicable on the national level there is a question of whether the particular right has to be given a specific form and content in domestic legislation; if it needs to be incorporated the question is whether it, as a legal right, depends on that incorporation. With regard to ESC rights, some elements can be made more easily justiciable than others. The aspects that deal with freedom from the State are, at least in Western societies, the elements most easily turned into enforceable legal rights (for example, peaceful possession of property, freedom from forced labour, and so on).³⁵ The principle of non-discrimination is of particular importance and will be considered below.

Examples of ESC rights already taken to courts include:

- Forcible evictions;
- Terminating an employee without cause;
- Deliberate poisoning of a water supply;
- Discrimination in access to medical care, work, housing, education and other services;
- Banning unions;
- Depriving children of adequate food and water;
- Failing to provide any primary level education;
- Failing to provide basic health care facilities;
- Educational institutions in such poor condition that they are a risk to safety; and
- Housing in such poor condition that it is a risk to safety.

32 International Committee of Jurists: Courts and the Legal Enforcement of Economic, Social and Cultural Rights p 49. See, for example, US Federal 3rd Circuit Court, *Oberti v. Board of Education of the Borough of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993), May 28, 1993, and US Federal 9th Circuit Court, *Sacramento City Unified School District v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994), January 24.

33 International Committee of Jurists: Courts and the Legal Enforcement of Economic, Social and Cultural Rights, 2008, p. 50.

34 Connolly, J.: 2001, *Caging the Tiger: Strengthening Socio-Economic rights*, The Ireland Institute, p. 75.

35 Symonides; Janusz, 2001, "Human Rights – Concepts and Standards", UNESCO and Ashgate, p. 122.

The ICCPR affirms the right to life, which has conventionally been interpreted to mean that no person shall be deprived of his or her life in a civil and political sense. According to the Human Rights Committee in adopting a General Comment on this issue, this should now be interpreted expansively to include measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics, noting that “the right to life has been too often narrowly interpreted. The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures”³⁶

The problems Courts have faced adjudicating upon ESC rights have led the CESCR to make the following comments:

“The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate...Any such administrative remedies should be accessible, affordable, timely, and effective...whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.

*In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary presumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions...It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the different branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications.”*³⁷

The CESCR went on to note that many rights set out in the ICESCR, such as the rights of men and women to equal pay for equal work (Art. 7(a)(i)), the right to form trade unions and the right to strike (Art. 8), and the freedom for scientific research and creativity (Art. 15(3)) are capable of immediate implementation.³⁸

Non-discrimination

The principle of non-discrimination plays a big role in making rights justiciable. For every step a State takes in developing ESC rights, it will have to apply these rights equally even when domestic law is restrictive. On the basis of international human rights law, a justiciable legal right can thus emerge for the individual. This has enormous significance and is a useful platform on which ESC rights can be gradually built up at the domestic level.³⁹ The right to primary educa-

36 Human Rights Committee, General Comment No 6 adopted at the Sixteenth Session (1982) on Article 6 of the ICCPR, para 5.

37 Committee on Economic, Social and Cultural Rights, ‘General Comment No. 9: The domestic application of the Covenant’ (3 December 1999) UN doc. E/C.12/1998/24, paras 9 and 10.

38 Committee on Economic, Social and Cultural Rights, ‘General Comment No. 9: The domestic application of the Covenant’ (3 December 1999) UN doc. E/C.12/1998/24, para 10.

39 Symonides; Janusz, 2001, “Human Rights – Concepts and Standards”, UNESCO and Ashgate, p. 122.

tion free of charge is in the process of becoming such a basic right which may be considered a subjective right.⁴⁰

The duty not to discriminate in the enjoyment of rights such as the rights to work, health, education, housing, among others, is a binding obligation under Articles 2.2 and 3 of the ICESCR. Laws and practices that directly or indirectly discriminate against minorities, women, children and other groups are litigated daily before many courts. Often, these cases have important implications for government allocation of resources. Courts and human rights bodies must ensure that positive steps are taken so that marginalized and vulnerable groups have equal access to essential goods and services.⁴¹

As noted by the UN: “[n]on-discrimination is primarily a legal technique employed to counteract unjustified inequality, founded on the notion that a State may not legitimately disadvantage an individual on an arbitrary basis”, with non-discrimination and equality being basic and essential principles relating to the protection of human rights – as supported by the inclusion of such concepts in the major international human rights instruments and by their status as principles of customary international law.⁴²

This is particularly relevant when speaking about justiciability for ESC rights. Once a right is being implemented, for example, basic health care or schooling, it will be a direct violation of this right if it is not granted to all without any discrimination.

In a landmark case before the European Committee on Social Rights, the *International Federation of Human Rights Leagues (FIDH) v. France*,⁴³ FIDH claimed that France had violated the right to medical assistance (Article 13 of Revised European Social Charter) by ending the exemption of illegal immigrants, with very low incomes, from charges for medical and hospital treatment. Further, the FIDH alleged the rights of children to protection (Article 17) were contravened by a 2002 legislative reform that restricted access to medical services for children

40 See e.g. case law from the Inter-American Court of Human Rights, *Case of the Juvenile Re-education Institute v. Paraguay*, Judgment of 2 September 2004, Series C, No. 112; *Case of the Indigenous Community Yakyé Axa v. Paraguay*, Judgment of 17 June 2005, Series C, No. 125; *Case of Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Series C, No. 146. See also *Lake View School District No. 25 of Phillips County, Arkansas et al. v. Governor Mike Huckabee and Others*, 351 Ark. 31 (2002), 21 November 2002 and *Unnikrishnan J.P. v. State of Andhra Pradesh*, paras. 45, 145- Chap. III of Indian Constitution. And also *Right to Education by Coomans, F. “Justiciability of the Right to Education” in “Erasmus Law Review,” Vol. 2, No. 4, pp. 427-443, 2009.*

41 *Brown v. Board of Education*, 347 U.S. 483 (1954) (USA) - The Supreme Court held that educational segregation of Afro-Americans violated the equal protection clause in the Constitution. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (Canada) - The Supreme Court of Canada, after considering cost and budgetary implications, ruled that the right to equality requires that governments provide interpretation services for the deaf and hard of hearing in hospitals and in the provision of health care.

42 United Nations, Economic and Social Council (ECOSOC), Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 52nd Session, The concept and practice of affirmative action, Preliminary report submitted by Mr Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission Resolution 1998/5, UN Doc. E/CN.4/Sub.2/2000/11 (19 June 2000), paras. 42 and 43.

43 Complaint No. 13/2003, European Committee on Social Rights.

of irregular immigrants. The Committee found that France had acted contrary to the rights of children, but not adults. While Charter rights only extend to foreigners who are nationals of other Contracting Parties to the Charter and who are lawfully resident or work regularly within the State, the Committee emphasized that the Charter must be interpreted in a purposive manner, consistent with the principles of individual human dignity and that any restrictions should consequently be read narrowly. Therefore, by majority, the Committee held that any “legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State party, even if they are there illegally, is contrary to the Charter”, although not all the Charter rights may be extended to irregular migrants. On the facts, the Committee by a majority of 9 to 4, found no violation of Article 13 (the right to medical assistance), since irregular immigrants could access some forms of medical assistance after three months of residence, while all foreign nationals could at any time obtain treatment for “emergencies and life threatening conditions”. The Committee found a violation of Article 17 (right of children to protection), even though the affected children had similar access to healthcare as adults, since Article 17 was more expansive than the right to medical assistance.

In response to the decision, the Government of France changed its policy. On 4 May 2005, the Committee of Ministers took note of the Committee’s legal decision and noted information received from the Government. This included a circular, issued on 16 March 2005, which provided that “all care and treatment dispensed to minors resident in France who are not effectively beneficiaries under the State medical assistance scheme is designed to meet the urgency requirement”. The decision is one of many which show how non-discrimination is important in many cases of ESC rights before a tribunal.

Non-state actor responsibility

States are the bearers of obligations under international law. They are the law’s subjects and accordingly take on direct responsibilities and rights. But the concept of international legal personality, and the acknowledgement by the International Court of Justice that the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community,⁴⁴ holds open the possibilities that the categories might be meaningfully reconsidered.⁴⁵

Due to the nature of human rights as being part of a relationship between the State on one hand and individuals on the other, States’ obligations to protect an individual’s human rights from non-State actors’ abuses have a limited nature and are thus effective only in a limited way because a violation may occur in spite of a State’s effort and actions to prevent and punish it. If a State’s domestic law proves unable to protect the victim – which may happen for a variety of reasons as, for instance, a case when the violator is more powerful than the State or has fled to a country with which the State has no extradition agreements – it would be unjust, unfair and contradictory to simply state that international law has nothing to do with non-State ac-

44 *Reparations for Injuries suffered in the service of the United Nations Case, Advisory Opinion* 179, 1949 ICJ Rep 178

45 Alston, Philip, 2005, “The “not-a-cat” syndrome”, in Alston, Philip. (ed.): “Non-State actors and human rights”, Oxford University Press, p. 19.

tors that violate human rights but pertains only to State responsibility.⁴⁶ The CESCR has stated that “while only States are parties the Covenant and thus ultimately accountable for compliance with it, all members of society... have responsibilities regarding the realisation of the right to health.”⁴⁷ This implies that States should provide an environment that facilitates the prevention, investigation, prosecution and punishment of such human rights abuses by non-State actors, and secondly these actors must take into account the human rights dimension of their policies and activities.⁴⁸

It has increasingly been maintained that the recent developments which have favoured the growth of powers on the part of non-State actors and the consequent limits imposed on the powers of States requires a re-examination of the obligations of non-State actors.⁴⁹ It has been argued that non-State actors have obligations because they are holders of duties to promote and protect human rights.⁵⁰ As for the role of private international actors, much has been discussed in recent years. It has been recognised that private international actors, such as transnational corporations, may have significant impact on individuals’ human rights enjoyment. The Maastricht Guidelines state that:

The obligation to protect includes the State’s responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-State actors.⁵¹

Some rights in existing human rights instruments explicitly provide that individuals have duties towards other individuals as well as enjoying rights themselves, such as those of the ICCPR preamble and Article 17 of the European Convention on Human Rights (on abuse of rights). Some human rights mechanisms such as the UN Economic and Social Council (ECOSOC) have stated that international financial institutions should pay greater attention to the protection of the rights to health in their lending policies, credit agreements and structural adjustment programmes and that all members of society including the private business sector have responsibilities in the realisation of the right to food.⁵² The UN High Commissioner for Human

46 Santarelli, N. C.: Non-State Actors’ Human Rights Obligations and Responsibility under International Law at <http://www.reei.org/reei%2015/Carrillo.pdf> (last visited March 2011).

47 CESCR General Comment 14, (2000), para.42.

48 Ssenyonjo, Manisuli, 2008, “The Applicability of International Human Rights Law to Non-State Actors, what relevance to Economic, Social and Cultural Rights”, in *The International Journal of Human Rights*, vol 12.5, p.737.

49 Obokata, Tomoya, 2006, “Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach”, Martinus Nijhoff Publishers, p.128.

50 *Human Rights Principles and Responsibilities for Transnational Corporations and Other Business enterprise*, E/CN.4/Sub.2/2002/WG.2/WP.1, *Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations in its Fourth Session*, E/CN.4/Sub.2/2002/13, *Report of the Special Rapporteur on Human Rights and Human Responsibilities*, E/CN.4/2002/107 and E/CN.4/2003/105.

51 Maastricht Guidelines, Article 18.

52 ECOSOC General Comment 14 and 12.

Rights has stressed responsibilities of non-State actors in relation to poverty,⁵³ and the Special Rapporteur on Sales of Children, Child Prostitution and Child Pornography has stated that international human rights law imposes direct obligations on the private sector.⁵⁴

Such views must be treated with caution though since international human rights law is not, at present, directly enforceable against non-State actors and so they cannot be held directly accountable.⁵⁵ What is true is that there is an increased tendency to hold non-State actors, particularly multinational enterprises, measurable against a human rights law and that, for example, codes of conduct⁵⁶ tend to take into consideration the international human rights standards, even if this does not necessarily mean strict and/or consistent compliance with the latter.

CONCLUSION

Effective respect for, and effective implementation of, any right or duty requires an effective remedy. If a right cannot be taken to some mechanism that can judge upon a case's merits and hold accountable those who should so be held, a right has little real impact even if it may have a long term effect just by being recognised by the international community.

The objections to the justiciability of ESC are for the most part dismissible, especially considering how many parts of each ESC right can be rendered concretely justiciable, and also considering that the State's responsibility is not limited to fulfilling these rights but also to protecting and respecting them.

Many ESC rights have been tried at national and regional courts and many of these courts have also repeatedly underlined the interdependence between the two sets of right – thus also addressing ESC rights indirectly when cases were *prima facie* concerned with civil or political rights issues.

Being able to rely on rights and bringing violations to court is essential for people who have been subject to human rights violations, and the confirmation that ESC rights can be brought to court is one more step towards better implementation and further respect for all human rights.

53 HR/GVA/POVERTY/SEM/2001/4.

54 *Report of the Special Rapporteur on Sales of Children, Child Prostitution and Child Pornography*, E/CN.4/2001/78, para. 52.

55 Obokata, Tomoya, 2006, "Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach", Martinus Nijhoff Publishers, p. 130.

56 See, Reinish, A.: *The Changing International Legal Framework for Dealings with Non-State Actors*, in Alston P.: *Non-State Actors and Human Rights*, p. 38-53.

Section 3: Case Summaries and Commentaries

A. ECHR Admissibility Decisions

Right to Life

Alder v the United Kingdom

(42078/02)

European Court of Human Rights: Admissibility decision dated 14 December 2010

Death in custody – Article 2 (right to life) – Article 3 (prohibition of torture) – Article 14 (prohibition of discrimination)

Facts

Mr Alder, a British national, was left unconscious after being punched in the face outside a nightclub. He sustained several injuries, including a laceration to his upper lip and a missing tooth. He registered 14 out of 15 on the Glasgow Coma Scale and his blood alcohol count was twice the driving limit. However, due to his erratic and verbally abusive behaviour at the hospital, Mr Alder was taken to the police station without treatment and was found unconscious on arrival.

The police officers, believing Mr Alder was feigning unconsciousness, dragged him into the police station, handcuffed him and placed him face downwards on the floor. The custody officer immediately remarked that Mr Alder should be taken to hospital although the officers replied that the hospital would not have him and he was “right as rain”. Mr Alder was later pronounced dead after failed attempts to revive him when he ceased to breathe.

Medical evidence could not establish whether treatment at the hospital would have prevented Mr Alder’s death. The officers in question were not forced to give evidence and no charges were brought against them.

Complaints

The Applicant, the deceased’s younger sister, complained that: (i) the authorities had breached Article 2 in its procedural aspect as the investigation into Mr Alder’s death lacked sufficient independence and promptitude, and was inadequate and ineffective; (ii) the inaction of the police officers violated Article 3 in its substantive and procedural aspects; and (iii) Mr Alder was discriminated on grounds of his race and colour.

Held

Article 2

In light of the deficiencies of the investigation, the Court held that the complaint under Article 2 was admissible.

Article 3

The Court held that both complaints under Article 3 were admissible. The Court stated that the flagrant disregard for Mr Alder's basic human dignity, at the very least, aggravated and exacerbated the speed of his demise. Further, the Court highlighted the structural failings in the police discipline system which led to all charges being dismissed without the officers being required to give evidence.

Article 14

The Court held that the complaint under Article 14 was admissible. The Court highlighted several factual circumstances leading to its decision: the willingness of the officers to believe that Mr Alder was unhurt despite his medical condition; the willingness of the officers to attribute Mr Alder's problems to a bad attitude rather than to any physical injury; the description of Mr Alder as mentally ill; the reluctance of the officers to touch or rouse Mr Alder once at the police station; and the racially charged language and monkey imitations used by the officers.

Commentary

At the merits stage, the Court often declines to examine Article 14 complaints once violations of other rights have been found, so the outcome of this case may offer an example of the Court's commentary on discrimination issues in practice. The case remains pending.

Right to Fair Trial

Ladislav Holub v the Czech Republic

(24880/05)

European Court of Human Rights: Admissibility decision dated 14 December 2010

Sale contract – outstanding debt – proceedings to recover amount – communication of reasons for dismissing claim - right to a fair trial – admissibility - Article 6 (right to fair trial) – Article 35(3)(b) (admissibility, significant disadvantage)

Facts

The Applicant is a national of the Czech Republic. On 3 February 1998, the Applicant entered into a contract for the sale of a property to Mr and Mrs K. The couple did not pay the entire purchase price and intended on settling the debt after the registration of the contract with the land registry. However, on 12 June 1998, the parties withdrew the contract and concluded a new one relating to the same property. The new contract was registered and the couple committed to pay the debt due by 30 April 2000. By 11 May 2001, the couple was still insolvent and so the Applicant initiated proceedings against them for the payment of CZC 700,000.

The District Court of East-Prague dismissed the Applicant's complaint, holding that the debt was related to the first contract and that the Applicant's signature confirmed that he had received the entire purchase price. The Applicant lodged an appeal with the Regional Court

which upheld the judgment of the District Court. The Applicant lodged a constitutional complaint, claiming that the findings of the lower courts were in contradiction with the established facts and the evidences previously gathered. All the courts involved submitted their conclusions to the Supreme Court but did not communicate these to the Applicant. The Supreme Court considered the complaint manifestly unfounded.

Complaints

Relying on Article 6(1), the Applicant complained of the iniquity of the procedures developed by the District and the Regional Courts that had led to an arbitrary assessment of the evidence without any logical basis. Further, he complained that the Supreme Court had not examined the merits of his objections. Finally, he added that the Supreme Court had violated the principle of equality of arms and adversarial proceedings, preventing him from being notified of the conclusions of the other domestic courts.

Held

Article 35(3)(b)

The Court considered the complaint inadmissible under Article 35(3)(b). The question for the Court was whether the evidence had been presented in such a way so as to guarantee a fair hearing. Its task was not to substitute its own assessment of the facts and evidence.

The Court considered that, when the domestic courts communicated their reasons to the Supreme Court, they had not provided any additional reasoning to that already delivered in their judgments. The Supreme Court did not appear to have relied on those submissions in its decisions. It appeared that the Applicant's appeal would have been dismissed in any event, regardless of whether the reasons had been communicated to him. Furthermore, the Applicant did not specify what new arguments it would have raised, had the reasons in fact been communicated. For these reasons, the Court concluded that the Applicant had not suffered a "significant disadvantage" in the exercise of its right to participate properly in the proceedings before the Supreme Court. In particular, the Court noted that the "disadvantage" referred to this and not to the outstanding debt.

Commentary

This decision was the first time the Court had declared a complaint relating to the Czech Republic inadmissible under the new "significant disadvantage" admissibility criterion which came into force on 1 June 2010.

B. Substantive ECHR Judgments

Right to Life

Abuyeva and Others v Russia

(27065/05)

European Court of Human Rights: Judgment dated 2 December 2010

Death of villagers and destruction of property during Russian attack on rebels – Article 2 (right to life) – Article 13 (right to an effective remedy) – Article 14 (prohibition of discrimination) – Article 1 of Protocol No.1 (protection of property)

Facts

The Applicants, 29 Russian nationals, lived in the village of Katyr-Yurt at the material time. On 4 February 2000, the village was captured by a large group of Chechen fighters, prompting Russian military forces to launch an attack on Katyr-Yurt, using weapons such as heavy free-falling aviation bombs and missiles. The Russian military prevented villagers from leaving Katyr-Yurt through a roadblock, forcing them to stay in nearby houses which were shot upon, resulting in injuries to those inside. As a result of the bombardment, 24 of the Applicants' relatives died. Some Applicants also sustained various injuries.

A criminal investigation into the attack was initiated in September 2000, during which the authorities assured the Applicants that the persons responsible for the attack would be identified and that the Applicants would receive compensation. However, in May 2005, the Applicants learned from other villagers that the investigation had been closed in 2002 without them being notified.

Complaints

The Applicants complained: (i) under Article 2 that their right to life and those of their deceased relatives had been violated during the attack and that the criminal investigation into the attack had been ineffective; (ii) under Article 1 of Protocol No.1 that their property had been destroyed by the attack; (iii) under Article 13 that they had been deprived of an effective remedy in respect of the above-mentioned violations; and (iv) under Article 14 that the above-mentioned violations had occurred because of their Chechen ethnic origin and residence in Chechnya.

Held

Articles 2 and 13

Russia relied on the exception under Article 2(2)(a) to justify its actions, namely that it was defending persons from unlawful violence. However, since the military used high intensity shelling and provided no warning to, or safe exit routes for, the residents of Katyr-Yurt, the Court held that the use of force by the military was disproportionate and therefore contrary to

Article 2 of the Convention. In particular, the Court stated that the use of such measures by the military on a village outside wartime and without prior evacuation of civilians was “impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society”.

In addition, the Court found that there had been no effective investigation into the February 2000 attack. The decision that had been taken to strike out the case on the basis of expert military evidence also raised questions of impartiality. The Court therefore held that there had been a violation of the procedural aspect of Article 2 in conjunction with Article 13 of the Convention.

Article 1 of Protocol No.1

The Court noted that the Applicants had taken no steps to bring their deprivation of property complaint to the attention of the investigation and therefore declared this claim inadmissible.

Article 14

The Court found no evidence that the Applicants were treated differently from persons in an analogous situation without objective and reasonable justification. The Court also noted that the Applicants had never raised this complaint before the domestic authorities. Therefore, the complaint under Article 14 was declared inadmissible.

Article 41

The Court awarded the Applicants €2,266 in respect of costs and expenses and a total of €1,720,000 in respect of non-pecuniary damages, the minimum award being €30,000 and the maximum award being €120,000.

Commentary

The Court discussed the application of Article 46, regarding execution of judgments, in detail. It noted that it had previously refrained from giving any specific indications to a government that it should, in response to a finding of a procedural breach of Article 2, hold a new investigation. However, in this case it held that the Committee of Ministers – rather than Russia itself – should consider what steps should be taken by the respondent State by way of compliance, and considered it “inevitable that a new, independent, investigation should take place.” This departure from the Court’s normal approach was based on the finding that Russia had “manifestly disregarded the specific findings of a binding judgment concerning the ineffectiveness of the investigation.” Further, although the Court noted the practical difficulties associated with conducting fresh investigations into historical events, in this case the detail of the existing investigation documents meant that individual omissions could be easily rectified.

Al Skeini and Others v the United Kingdom

(55721/07)

European Court of Human Rights: Grand Chamber Judgment dated 7 July 2011

Iraq War – ECHR Extra Territorial Jurisdiction – United Kingdom occupying power in Iraq – killings of civilians in non-combat situations – effective investigation into killings – Article 1 (obligation to respect human rights) – Article 2 (right to life) – Article 3 (prohibition of torture)

Facts

The Applicants are close relatives of six deceased Iraqi nationals. The Court decided to join the applications together due to the close nature of all of the cases.

The first Applicant is the brother of Hazim Jum'aa Gatteh Al-Skeini (Hazim Al-Skeini), who, while walking home at night, was shot dead by Sergeant A, who along with his squad was patrolling on foot the streets of Al-Majidiyah.

Due to the darkness and the impossibility of ascertaining the position and the identity of the victim, Sergeant A felt that his life was in imminent danger and thus opened fire without giving a warning. However, it was determined the Sergeant A's conduct fell within the Rules of Engagement (RoE) and so no further investigation was ordered.

The second Applicant is the widow of Muhammad Salim, who was shot and fatally wounded by Sergeant C shortly after midnight on 6 November 2003. The victim was at his brother-in-law's home in Basra, when British Soldiers raided the house by breaking down the door and shot him. He was taken to the Czech military hospital, where he died the day after. Based on intelligence information, that afterwards proved to be misleading and false, the operation was reported to the British authorities who applied the RoE considering that Sergeant C had reacted in self-defence against a clear threat to his life.

The third Applicant is the widower of Hannan Mahaibas Sadde Shmailawi, who was shot and fatally wounded on 10 November 2003 at the Institute of Education in Al-Maaqal. The victim was shot during a fire-fight between a British patrol and a number of unknown gunmen that took place at around 8 pm in the street. She was taken to the hospital along with her child but she died. No further investigation was issued by British authorities as the operation was considered falling within the RoE.

The fourth Applicant is the brother of Waleed Sayay Muzban, who was shot and fatally injured on the night of 24 August 2003 by Lance Corporal S in Al-Maaqal. The victim was driving home when he was signalled to stop by a patrol carrying out a check around the perimeter of a Coalition military base (Fort Apache). Being suspicious of the conduct of the victim, who appeared to be shouting into the rear of the vehicle and be reaching for a weapon, Lance Corporal S fired several shots at the minibus. The victim was given first aid and then taken to the Czech military hospital where he died later that day or the following day. An investigation was issued but it was determined that there was no realistic prospect of conviction, as Lance Corporal S acted in self-defence.

The fifth Applicant is the father of Ahmed Jabbar Kareem Ali, who died on 8 May 2003. The victim along with other young boys was arrested by British soldiers the previous day, beaten up and forced into the waters of the Shatt Al-Arab. On 10 May 2003 the Applicant found his son's body in the water. The Applicant was informed that an investigation would be conducted by the Royal Military Police; and in August 2005 he learnt that four soldiers had been charged with manslaughter and that a trial would take place in England. However, the defendants were acquitted because the evidences against them were found inconsistent and unreliable.

The Applicant then brought civil proceedings against the Ministry of Defence for damages in respect of his son's death. The claim was settled without going to hearing, by the payment of £115,000 on 15 December 2008.

The sixth Applicant is the father of Baha Mousa, who died whilst in the custody of the British Army, three days after having been arrested by soldiers on 14 September 2003. The arrest took place at the hotel where the victim used to work as a receptionist and was witnessed directly by the Applicant.

When informed of his son's death and asked to identify the corpse, the Applicant noted that his son's body had clear signs of ill-treatment, that were later on confirmed by the witness statement of a victim's colleague reporting that they were hooded, forced to maintain stress positions, denied food and water and kicked and beaten.

Criminal proceedings were brought against seven soldiers, but they were all acquitted, apart from one who was convicted of inhumane treatment and sentenced to a year's imprisonment and dismissal from the Army. The Applicant brought civil proceedings against the Ministry of Defence, which concluded in July 2008 by the formal and public acknowledgement of liability and the payment of £ 575,000 in compensation.

On 14 May 2008 the Secretary of State for Defence announced that there would be a public inquiry into the death of Baha Mousa, but at the time of adoption of the present judgment, the inquiry had concluded the oral hearings but had not yet delivered its report.

Complaints

The Applicants complained: (i) under Article 1 that the cases concerning their relatives were within the jurisdiction of the UK; (ii) under Article 2 that their relatives were killed through the acts of the British armed forces; and (iii) in the case of the sixth Applicant, the authorities failed to carry out a full and independent investigation into the circumstances violating Article 3.

Held

Article 1

The Court had to decide whether there was a jurisdictional link between the United Kingdom and the Applicants' relatives killed in the course of the military operations and, consequently, if the ECHR was applicable. According to its previous case-law, the Court considered that an extra-territorial act would fall within the State's jurisdiction under the Convention only in exceptional circumstances, like when a State Party exercises public powers on the territory of another State. Following the military intervention in the country, the UK assumed authority

and responsibility for the maintenance of security in South East Iraq, a task that is usually performed by sovereign governments.

Accordingly, the Court found that the cases under examination fell within the jurisdiction of the Convention and that the UK was required to carry out an investigation into their deaths.

Article 2

As a general consideration, the Court held that the procedural obligations under Article 2 continue to apply in difficult security conditions, including in a context of armed conflict.

The Court had to determine whether the conduct of the soldiers involved in the different military operations fell within the Rules of Engagement and if the investigations carried out by the authorities into the incidents under examination were in compliance with the procedural requirements set in Article 2 of the Convention.

The Court noted that the investigation process remained entirely within the military chain of command, preventing the Applicants from having their cases examined by an independent and impartial court.

For this reason, the Court found a violation of the procedural limb of Article 2 of the Convention in respect of the complaints of the first, the second, the third and the fourth Applicant.

In the case of the fifth Applicant, the Court considered that the procedural duty under Article 2 had not been satisfied. Although he received a substantial sum in settlement of his civil claim, together with an admission of liability on behalf of the Army, there had never been a full and independent investigation into the circumstances of his son's death.

Concerning the case of the sixth Applicant, the Court noted that a full, public inquiry is nearing completion into the circumstances of the victim's death. In the light of this inquiry, the Court held that the sixth Applicant accepted that he could not claim to be a victim of any breach of the procedural obligation under Article 2 of the Convention.

Article 41

The first five Applicants each received €17,000 in respect of non-pecuniary damages, for distress caused by the lack of a fully independent investigation into the deaths of their relatives. Furthermore, five Applicants jointly received €50,000 in costs and expenses.

Girard v. France

(22590/04)

European Court of Human Rights: Judgment dated 30 June 2011

Investigation into disappearance – whether procedural violation of right to life – delay with restitution of victim's remains – whether violation of right to respect for private and family life - Article 2 (right to life) - Article 8 (right to respect for private and family life)

Facts

The Applicants had not heard from their daughter (N) since November 1997 and her partner (FA), who had recently sold their clubbing business to a third person (AS). On 8 January 1998, the Applicants filed a search request with the police. However, they proceeded to carry out their own investigations into the fate of their daughter. The Applicants sent several letters to the police and the gendarmerie but received no replies.

The Applicants submitted their findings to the Viry-Châtillon gendarmerie, indicating AS as the person they suspected the most. They revealed irregular activities regarding their daughter's bank account and cheque book. The Viry-Châtillon gendarmerie made some inquiries but on 31 May 1999, the unsuccessful investigation was closed.

Following an attempted murder by AS on 4 January 2011, the Applicants informed the gendarmerie that AS had paid for work in his club using cheques from FA's cheque book. They also reiterated their previous findings regarding the use of their daughter's cheque book. However, the police refused to launch further investigations on the grounds that the individuals in question were adults who were responsible for themselves.

AS was eventually convicted of a series of murders, including that of N, and was sentenced to life imprisonment, which was upheld on appeal. During the trial and appeal, the Applicants requested that forensic samples taken from N's body, which had been exhumed and later re-interred for this purpose, be returned to them. Although their request was granted by a judicial decision on 19 March 2004, the Bordeaux Forensic Medical Institute did not return the remains to the Applicants until 27 July 2004. N's final burial took place on 29 July 2004.

Complaints

The Applicants complained that (i) the inaction by the authorities following the disappearance of their daughter violated Article 2 and (ii) the time taken by the authorities to return their daughter's remains violated Article 8.

Held

Article 2

The Court held that the investigation conducted by the authorities post-November 1998 was not effective and prompt and therefore violated Article 2. The failings of the authorities included the fact that they never questioned AS, despite the fact that he was the only person who purported to provide any news of N and FA and had been using N's cheque book fraudulently.

In reaching its decision, the Court made a distinction between the periods post-November 1998 and pre-November 1998. With regards to the period pre-November 1998, the Court considered that there had been no information to suggest that the disappearance of N, an adult in good health, was in any way abnormal or suspicious. However, from November 1998 onwards, the Applicants had provided the authorities with significant facts which should have been considered, at the very least, abnormal. The authorities were therefore only under an obligation to investigate N's disappearance post-November 1998.

Article 8

The Court found a breach of Article 8. It considered that the Applicants' right to give their daughter's remains a final burial was inherent in their right to respect for their private and family life under Article 8. The four-month period between the court's judgment ordering the immediate return of the remains to the Applicants and the actual return of the remains to the Applicants disproportionately interfered with their right to respect for their private and family life.

Article 41

The Court awarded the Applicants €20,000 in respect of non-pecuniary damages.

Commentary

The Court reiterated in this case that the right to an effective investigation under Article 2 could apply in the event of a disappearance and that there was an obligation to carry out an investigation even prior to the possible discovery of a body.

Giuliani and Gaggio v Italy

(23458/02)

European Court of Human Rights: Grand Chamber Judgment dated 24 March 2011

Activist shot and killed by police at G8 summit – Article 2 (right to life) – Article 3 (prohibition of torture) – Article 6 (right to a fair trial) – Article 13 (right to an effective remedy) – Article 38 (examination of the case)

Facts

The Applicants are, respectively, the father, mother and sister of Carlo Giuliani, who was shot and killed during the demonstrations on the fringes of the G8 summit in Genoa in July 2001.

From 19 to 21 July 2001, there were violent clashes between anti-globalisation activists and law-enforcement officers during the G8 summit. On 20 July 2001 during an authorised demonstration, a group of 50 *carabinieri* withdrew on foot leaving two vehicles exposed, which the demonstrators attacked. One of the *carabinieri* withdrew his firearm, gave a warning and fired two shots outside the vehicle, hitting Mr Giuliani in the face. Further, the driver of the vehicle ran over Mr Giuliani twice while trying to drive away.

An investigation into his death was open immediately by the Italian authorities. The prosecutor eventually determined that the *carabinieri* who fired the gun did so out of self-defence and had no other choice. Therefore, on 5 May 2003, the investigating judge discontinued the proceedings as per the prosecutor's motion.

Complaints

The Applicants complained: (i) under Article 2 that the victim had been killed by the law-enforcement agencies and that the authorities had not safeguarded his life: (ii) that Italy had failed to comply with the procedural obligations set by Article 2: (iii) that they had not benefited

from an investigation in conformity with the requirements set forth in Article 6 and 13 of the Convention.

Held

Article 2

The Court found that the use of lethal force in this case was absolutely necessary based on the violent circumstances surrounding the fatal shot and therefore, by 13 votes to four, that it did not violate Article 2 in its substantive aspect.

Although Article 2(2) does not define instances where it is permitted intentionally to kill an individual, it does describes situations where it is permitted to “use force” which may result in the loss of life as an unintended outcome. The use of force, however, must be no more than “absolutely necessary” and strictly proportionate for the achievement of one of the purposes set out in Article 2(2). Further, the Court reiterated that the circumstances in which the deprivation of life may be justified must be strictly construed.

The Court also held by ten votes to seven that the domestic legislative framework did not violate Article 2 in its substantive aspect. Further, also by ten votes to seven, the Court held that the Italian authorities did not breach Article 2 in its substantive aspect in the planning and organisation of the policing for the demonstration.

With regard to this latter ruling, the Court considered that States must take reasonable and appropriate measures to ensure the peaceful conduct of legal demonstrations and the safety of all citizens but cannot be expected to guarantee this absolutely. As such, States have a wide discretion in the choice of the means to be used. In light of the facts surrounding the case, the Court considered that the Italian authorities did not fail in their obligation to do all that could reasonably be expected of them to provide the level of safeguards required during operations potentially involving the use of lethal force.

Article 3

As the facts fell under Article 2, the Court did not consider it necessary to examine the complaint under Article 3.

Article 6

The Court did not consider it necessary to examine the complaint under Article 6.

Article 13

The Court held that the Applicants had effective remedies under Article 2 and therefore there had been no violation of Article 13.

Article 38

The Court held that there was no violation of Article 38. Even though the Italian Government had provided incomplete information, this did not preclude the Court from examining the case.

Commentary

The wide discretion granted to the State with regards to its planning and organisation of the policing at the demonstration was opposed by seven of the Grand Chamber judges. They argued that a State's positive obligation to protect life under Article 2 had to be considered in the context of the facts of the case. Where a State accepts the responsibility of organising a high-risk international event, there is an implied duty to adopt appropriate measures and strategies to maintain law and order. The authorities could not argue that they were not aware of the possible dangers entailed in an event such as the G8 summit. Therefore, it disagreed with the approach of the majority that Article 2 be interpreted or applied as if the case was an isolated incident occurring in the course of accidental clashes. Rather, they argued that "in the case of mass demonstrations, which are becoming more and more frequent in a globalised world, the obligation to protect the right to life safeguarded by the Convention necessarily take on another dimension".

Gündüz v Turkey

(4611/05)

European Court of Human Rights: Judgment dated 11 January 2011

Suicide of soldier – failure by military authorities to address mental situation – Article 2 (right to life)

Facts

The Applicants are Turkish nationals and are, respectively, the father, mother and sister of soldier, Ibrahim Serkan Gündüz.

Mr Gündüz had a history of mental illness and had been hospitalised for psychiatric reasons at the age of 12. A medical consultation report stated that he was addicted to drugs, self-mutilated with a razor, could not stay alone, should not use weapon and could only stand on guard unarmed and accompanied. On 26 September 2002, he was transferred from military training to a rehabilitation centre and then to a hospital in Van on grounds of having an "antisocial personality and addiction".

On 3 October 2002, however, Mr Gündüz joined the 15th Unit on the Üzümlü border. A consultation paper dated 10 October 2002 stated that he had received training regarding the mined region and was taught how to prevent accidents. Mr Gündüz was not given weapons and his supervisor allegedly remained by his side to prevent him from being alone. However, Mr Gündüz began to disobey orders and various military rules and was the subject of numerous warnings for insubordination. On 8 July 2003, he asked a sub-lieutenant for access to his personal belongings since the end of his military service was approaching. After an argument between the two, Mr Gündüz walked toward the mined area despite the warnings from others and died from an exploding mine.

Complaints

The Applicants complained under Article 2 of the Convention that the military authorities had failed to take into account Mr Gündüz's fragile psychological condition, which they claimed had triggered his suicide.

Held

Article 2

The Court held that Turkey had violated Article 2 of the Convention. In its reasoning, the Court considered whether the military authorities knew, or should have known, that Mr Gündüz had a real and immediate risk of suicide and, if so, whether they had done all that could reasonably be expected from them to prevent this risk. The Court observed that it is necessary to examine the circumstances of this case in light of the positive obligations incumbent upon the military authorities in the three phases which were crucial in protecting Mr Gündüz's life: the qualifying examination for military service; the discovery of various psychological problems; and the incidents that led to his suicide.

The Court found that the negligence of the military authorities caused the events that led to Mr Gündüz's death and that they had failed in monitoring him and his psychological ability to integrate into the army, hence breaching Article 2.

Article 41

The Court awarded the Applicants €24,000 for non-pecuniary damages, and €2,713 for costs and expenses.

Khamzayev and others v Russia

(1503/02)

European Court of Human Rights: Judgment dated 3 May 2011

Russian bombing operation in Chechen Republic - destruction of property in Chechen town – Article 2 (right to life) – Article 8 (right to respect for private and family life) - Article 1 of Protocol No.1 (protection of property)

Facts

The Applicants are three Russian nationals who at the material time owned and lived in a house in the Chechen Republic. In October 1999, the Russian Government authorised the federal military air force to commence a counter-terrorism operation in the Chechen Republic, which included the bombing of strategic military sites, causing the total or partial destruction of the Applicants' properties.

The first Applicant commenced criminal proceedings against the Russian authorities, but his claims were dismissed as the court found that the military operation was conducted by a governmental decree and therefore was therefore lawful. However, the court found that the Applicants had grounds for a civil claim which was then pursued by the first Applicant.

Complaints

The first and second Applicants complained that their property had been destroyed by the Government contrary to Article 1 of Protocol No. 1.

The third Applicant complained: (i) under Article 2 that she had been violated as her life had been put at risk and there was no effective investigation into the incident; and (ii) under Article 8 that the actions of the Russian authorities violated her right to a home.

Held

Article 2

The Court held that the Government had failed in its obligation to protect the third Applicant's right to life under Article 2. The military operation involved bombing with indiscriminate weapons of the residential quarter of the Applicants' town, which was inhabited by civilians. Such bombing was manifestly disproportionate to the achievement of the purpose under Article 2(2)(a) of the Convention (*defence of a person from unlawful violence*), and therefore could not be invoked to justify the Government's actions.

The Court further held that the authorities had failed to carry out a thorough and effective investigation into the circumstances of the military attack in which the third Applicant's life was put at risk. There had therefore been a violation of Article 2 under its procedural limb as well.

Article 8 and Article 1 of Protocol No. 1

The Court considered the claims under Article 8 and Article 1 of Protocol No.1 together and held in favour of the Applicants.

In response to the Government's argument, the Court reiterated that the Suppression of Terrorism Act did not clearly define the scope of the powers given to State agents during counter-terrorism operations and the manner of their exercise so as to afford an individual adequate protection against arbitrariness. The Act also could not replace specific authorisation of interference with an individual's rights under Article 8 and Article 1 of Protocol No. 1. Furthermore, the Act was formulated in vague and general terms and therefore was not a sufficient legal basis for such drastic interference as the destruction of an individual's housing and property.

On that basis, the Court did not consider it necessary to examine whether the interference in question pursued a legitimate aim and was proportionate to that aim.

Article 41

The Court awarded: (i) €14,000 to the second Applicant in respect of pecuniary damages; (ii) €12,000 to the second Applicant for non-pecuniary damages; and (iii) €20,000 to the third Applicant for non-pecuniary damages.

Commentary

At the time of the publishing, a request for referral to the Grand Chamber was pending.

The decision recognised the failure of the Russian authorities to adequately protect the right to life of an ordinary civilian during the above mentioned military operation and to adequately

investigate the events in question. In particular, the decision shows that military forces are under a heavy obligation to adopt due care in their anti-terrorist military operations to ensure the protection of the human rights of ordinary citizens. Finally, the decision is a significant example of the Court's ability to challenge the substantive content and application of wide State powers under anti-terror legislation.

Metin v Turkey
(26773/05)

European Court of Human Rights: Judgment dated 5 July 2011

Military service – psychological problems – suicide – Article 2(right to life) – Article 6 (right to fair trial) – Article 13 (right to an effective remedy)

Facts

The Applicants are Turkish nationals residing in Diyarbakır and parents of Mustafa Metin, the victim, who died in July 2004.

In January 2004 the victim started his military service. Soon afterwards, he was examined by the doctors of the army who found that he used to drink alcohol, take drugs and suffer from hallucinations and psychological problems. Accordingly, he was under medical and psychological monitoring, he was administered antipsychotics, deprived of his personal arm and relieved of some military tasks and assigned to the kitchen. Between March 2004 and July 2004 he was taken several times to the military hospital because of anxiety crisis.

On 15 July 2004 he was found hanging from the ceiling of the kennel.

The corpse was given to the parents of the victim, the Applicants, who found inside the corpse bag their son's civil clothes covered with blood. Soon afterward, they received an anonymous call from a person alleging to be their son's friend claiming that the victims had not committed suicide but had been beaten up to death and then hanged.

However, no medical examination reported signs of violence on the victim's body; therefore the military authorities talked the Applicants out of seeking further investigations in their son's death.

In December 2004 the Applicants lodged a complaint with the military court claiming that their son had been killed and no effective investigation had been carried out. However, their complaints were dismissed.

Complaints

The Applicants complained under Article 2 that their son had not committed suicide but rather had been killed and no effective investigation had been carried out on this account.

Held

Article 2

The Court agreed with the Turkish military authorities about the victim's suicide and thus rejected the Applicant's claim of manslaughter. However, the measures taken in order to monitor the Applicant's son were temporary and palliative and proved not to be effective in preventing him from getting hurt. Accordingly, the military authorities were found responsible of having underestimated the psychological troubles of the victim; therefore they failed to take all the necessary measures to protect him thus raising a case of violation of the substantive limb of Article 2 of the Convention.

On the other hand, the Court did not find any violation of the procedural limb of Article 2 of the Convention. The Court held that the criminal investigation initiated after the victim's death and the proceedings before the military court had accurately and incontrovertibly determined the causes of death, thus excluding any responsibility of the State on this account.

Article 41

The Court awarded the Applicants €18,000 in respect of non-pecuniary damages and €1,000 for costs and expenses.

M.S.S. v Belgium and Greece

(30696/09)

European Court of Human Rights: Grand Chamber Judgment dated 21 January 2011

Asylum seeker – refused asylum in Belgium – transferred to Greece – beaten in custody – forced to live on streets - Article 2 (right to life) - Article 3 (prohibition of torture) - Article 13 (effective remedy)

Facts

The Applicant is an Afghan national who left Kabul in 2008 and entered the EU via Greece. Upon arrival, he was detained for one week and ordered to leave the country. On 10 February 2009, the Applicant entered Belgium where he applied for asylum at the Aliens' Office. Under the Dublin Regulation, the Aliens' Office submitted a request for Greece to take control of the asylum application.

The Applicant was ordered to go back to Greece, even though the Belgian authorities had received a letter from the United Nations High Commissioner for Refugees (UNHCR) recommending the suspension of all transfers to Greece on the basis of unacceptable conditions of reception of asylum seekers in the country.

The Applicant appealed to the Aliens Appeals Board complaining about the ill conditions in the Greek detention centres and alleging that his return to the country would have posed him at risk of being sent back to Afghanistan. However, on 15 June 2009, the Applicant was transferred to Greece where he was immediately placed in a detention building in a small space with

twenty other detainees, was not allowed in the open air, was given little food or water and was only allowed to use the toilets at the guards' discretion.

Upon his release on 18 June 2009, the Applicant was given a card for asylum seekers but was forced to live on the streets as he was given no means of subsistence or accommodation. He sought help from the Ministry of Health and Social Solidarity to help him find a home, but no accommodation was ever offered to him.

Complaints

Greece

The Applicant complained (i) under Article 3 that the conditions of his detention and poor living conditions amounted to inhuman and degrading treatment and (ii) under Article 13 in conjunction with Articles 2 and 3 of the shortcomings in the asylum procedure.

Belgium

The Applicant complained that Belgium had violated (i) Articles 2 and 3 for exposing him to the deficient asylum procedure in Greece without assessing the risk he faced (ii) Article 3 by returning him to Greece and exposing him to the living and detention conditions cited above and (iii) Article 13 in conjunction with Articles 2 and 3 for the lack of an effective remedy against the expulsion order.

Held

On 16 March 2010, a Chamber of the Second Section of the Court, to which the case had been allocated, relinquished jurisdiction in favour of the Grand Chamber.

Greece

Article 3

The Court held that the Applicant's conditions of detention were unacceptable and violated Article 3 of the Convention. In its reasoning, it remarked that taken together the feelings of arbitrariness, inferiority and anxiety and the profound effect the conditions have on a person's dignity, constitute degrading treatment.

With regards to the Applicant's living conditions, through the fault of the authorities, the Applicant was forced to live on the streets in extreme poverty for several months and was uncertain of how long he would be forced to live under those conditions. This also violated Article 3 of the Convention.

Article 13 in conjunction with Article 3

The Court noted that cases concerning the expulsion of asylum seekers must be examined on the merits, the main concern being whether effective guarantees are in place to protect the Applicant from arbitrary *refoulement* to the country from which he or she has fled. The Court found the asylum procedure in Greece to have major shortcomings, including insufficient information for asylum seekers.

Accordingly, it held that there had been a violation of Article 13 in conjunction with Article 3 of the Convention.

Article 2

In light of the above findings, the Court considered it unnecessary to examine the complaint under Article 13 in conjunction with Article 2.

Article 41

The Court awarded the Applicant €1,000 in respect of non-pecuniary damage, and €4,725 euro in respect of costs and expenses.

Belgium

Article 3

The Court found that Belgium's transfer of the Applicant to Greece breached Article 3, as it failed to make sure that the intermediary country's asylum procedure sufficiently guarantees that the asylum seeker will not face the risk of *refoulement* without an evaluation of the risks he faces under Article 3 of the Convention.

The Court also found Belgium in violation of Article 3 for knowingly exposing the Applicant to detention and living conditions that amounted to degrading treatment.

In light of decision above, the Court considered it unnecessary to examine the complaint under Article 2.

Article 13 in conjunction with Article 3

The Court held that Belgium had violated Article 13 in conjunction with Article 3 due to the lack of an effective remedy against the expulsion order. It found that the procedure for applying for a stay of execution under the domestic law was inadequate and that the Applicant was prevented from establishing the arguable nature of his complaint under Article 3 of the Convention.

Article 2

In light of the above, the Court did not consider it necessary to examine the complaint under Article 2.

Article 41

The Court awarded the Applicant €24,900 in respect of non-pecuniary damages, and €4,725 in respect of costs and expenses.

Commentary

The Court acknowledged the heavy burden that is placed on countries that receive migrants and asylum seekers, but stated that this cannot absolve States of their obligations under Article 3 of the Convention. The Court paid significant attention to the Applicant's vulnerability as an asylum seeker and the trauma that he had experienced previously. Taking this factor into

consideration, along with the unacceptable living and detention conditions, the limited amount of time the Applicant was subject to the treatment was not relevant.

Soare and Others v Romania

(24329/02)

European Court of Human Rights: Judgment dated 22 February 2011

Civilian shot in the head by police - police allegation that civilian armed – witnesses deprived of food and water – Article 2 (right to life) – Article 3 (prohibition of torture) – Article 13 (right to an effective remedy) – Article 14 (prohibition of discrimination)

Facts

The Applicants are three Romanian nationals living in Bucharest. In May 2000, the first Applicant, who is of Roma origin, was shot in the head by a police officer after he was apprehended for chasing his former brother-in-law down the street. The second and third Applicants witnessed the incident.

The circumstance of the incident are disputed between the first Applicant and the national authorities, who claimed that the victim had been accidentally hit as the police officer was trying to react against the aggression by firing a warning shot. In the very early hours of the following day, a prosecutor questioned the second and third Applicants at the police station. Both Applicants stated that they were physically and mentally exhausted from spending time at the police station with little food and water. They lodged a complaint regarding these conditions but no action was taken.

The case was transferred to and from several domestic courts and tribunals. Finally, on 23 July 2003, the Public Prosecutor's office at the Bucharest County Court discontinued the proceedings against the police officer, finding that he had acted in self-defence.

Complaints

The first Applicant complained: (i) under Article 2, that the police's use of force had been excessive and had posed his life at risk and no effective investigation had been conducted in this respect; (ii) under Article 3, that the shot fired by the police officer that injured him in the head amounted to an act of torture and no thorough investigation had been carried out on this; (iii) under Article 6(1) and Article 13, that the lack of investigation in the incident had prevented him from initiating proceedings seeking just satisfaction; (iv) under Article 14 in conjunction with Articles 2 and 3, that the risk posed to his like and the ill-treatment he suffered derived from the police's racist and discriminatory attitude towards Roma people; and (v) under Article 34, that his petition rights had been violated as his lawyer was denied the possibility to copy some important documents concerning the proceedings.

The second and third Applicant complained under Article 3 that they had been held for questioning at the police station for several hours without food or water.

Held

Article 2

The Court held that Romania had breached Article 2 of the Convention in both its substantive and procedural aspects.

In its reasoning, the Court found that Romanian legislation on the use of firearms provided an inadequate legal and administrative framework to guarantee the required level of protection “by law” of the right to life. Refusing the Government’s argument about acts of self-defence, the Court found that Romania had breached Article 2 of the Convention in its substantive aspect.

The Court found that the investigation carried out into the incident lacked independence and impartiality. Further, it highlighted the fact that the police officers had not given evidence in the course of the criminal investigation and that there had been an excessive delay in producing the forensic medical report. Finally, the failure to inform the first Applicant or his lawyer of the reasons for the decision to discontinue the proceedings was also unacceptable. Therefore, there was a procedural violation of Article 2 of the Convention.

Article 3

With regards to the first Applicant, in view of its findings under Article 2, the Court did not consider it necessary to examine the first Applicant’s complaint under Article 3.

With regards to the second and third Applicants, the Court found that the conditions in which they had been questioned by the police had caused them feelings of anxiety and inferiority, which breached Article 3 of the Convention.

Article 13 in conjunction with Article 2

The Court noted that it had previously examined allegations of deaths and mistreatment by Romanian state actors and found that the weight attached to the criminal enquiry preceding the civil tribunal was such that all other civil actions, including a request for compensation, would have been illusory and theoretical, because in practice even the most convincing evidence was ruled out. Therefore, the Court found that there had been a violation of Article 2 in conjunction with Article 13 of the Convention.

Article 14 in conjunction with Articles 2 and 3

The Court observed there was an insufficient basis for concluding that the first Applicant’s treatment had been racially motivated. There had therefore been no violation of Article 14 in conjunction with Articles 2 and 3.

Article 34

The Court declared this part of the application inadmissible and rejected it as manifestly ill-founded pursuant to Article 35(4)(4) of the Convention.

Article 41

The Court awarded the first Applicant €90,000 in respect of pecuniary damage and €40,000 in respect of non-pecuniary damage. It also awarded €10,000 to each of the second and third

Applicants in respect of non-pecuniary damage. Finally, the Court awarded €8,291 in respect of costs and expenses.

Prohibition of Torture and Inhuman or Degrading Treatment

Açış v Turkey
(7050/05)

European Court of Human Rights: Judgment dated 1 February 2011

Compulsory military service – clash between PKK and government forces – missing soldier – allegation of soldier being taken hostage – subsequent allegation of soldier joining PKK – application to presume soldier dead refused – Article 3 (prohibition of torture) – Article 6 (right to a fair trial) – Article 13 (right to an effective remedy) – Article 14 (prohibition of discrimination)

Facts

The Applicants are five Turkish nationals and the wife, children and mother, respectively of İzzettin Açış. On 8 June 1992, members of the PKK clashed with the gendarmerie station in the police village of Tünekpınar in Siirt, in south-eastern Turkey, where Mr Açış was undertaking his compulsory military service. During the clashes, Mr Açış was injured and allegedly taken hostage. A military operation was launched aimed at finding the young man and the authorities subsequently opened an investigation. In 2002, the Applicants, who had had no news of their relative, sought a declaration that he was to be presumed dead. Their request was refused, in particular because of a letter from the commanding officer of the Territorial Army stating that Mr Açış had joined the PKK.

Complaints

The Applicants complained that: (i) the information provided by the authorities had been contradictory and defamatory, contrary to Article 3; (ii) the discontinuation of legal proceedings on the basis that the Applicants had been unable to pay their court fees constituted a breach of Article 6 in conjunction with Article 14; and (iii) they were deprived of an effective remedy, contrary to Article 13.

Held

Article 3

The Court held that Turkey was in breach of Article 3 of the Convention. In its reasoning, the Court observed that, despite having admitted that the deceased had been taken hostage by the PKK, the authorities responded to the Applicants in contradictory ways, on one hand stating that the investigation was ongoing and, on the other hand, informing the High Court that Mr Açış had joined the PKK. Therefore, the Court concluded that the Applicants were left in limbo for an extended and continuous period of time. The way the authorities handled their interest in the operation caused them to suffer, which was in itself sufficiently severe so as to fall within the scope of Article 3.

Article 6

The Court found Turkey in breach of Article 6(1) of the Convention. The procedural costs, which the Court estimated at around €680, were an excessive burden on the Applicants, who did not have sufficient income at the time. Further, the Court reiterated the importance of a reasonable justification for the refusal of legal aid. In this case, the Court found that the refusal for legal aid to the Applicants completely deprived them of the opportunity to have their case heard by a court. On that basis, the Court considered that the Applicants' right to access to a court was restricted and that the authorities had not fulfilled their obligations to regulate that right of access in a manner consistent with the requirements of Article 6(1).

Article 13

In the light of the examination of Article 6, the Court deemed it unnecessary to consider the complaint under Article 13 separately.

Article 14

The Court held that there was no violation of Article 14 of the Convention on the basis that it did not find any arbitrariness and discriminatory attitude in the judgment of the domestic court that dismissed the request of compensation. The domestic court had correctly stuck to its previous cases and jurisprudence, where compensation had been granted only to those persons who had obtained a judicial death certificate.

Article 41

The Court awarded the Applicants €23,400 for non-pecuniary damages and €2,000 for costs.

Alboreo v France

(51019/08)

European Court of Human Rights: Judgment dated 20 October 2011.

Voluntary manslaughter and armed robbery – solitary confinement – high risk prisoner – ad hoc security regime – ill-treatment – attempt to escape – Article 3 (prohibition of torture) – Article 6 (right to a fair trial) – Article 8 (right to respect for private and family life) – Article 13 (right to an effective remedy)

Facts

The Applicant is a French national, who, at the time of the submission of the application, was detained at Lannemezan prison.

In January 1999 he was placed in detention, accused of voluntary manslaughter and taking part in the robbery of an armoured vehicle during the course of which a courier was shot. In November 2002 he was found guilty of the offences he had been charged with and sentenced to twenty years' imprisonment, without ineligibility for parole for the first half of the term.

During the period between February 2000 and November 2009, he was labelled 'high risk prisoner' (*détenus particulièrement signalé, DPS*), thereby having a strict security regime imposed

by the administration, which included frequent change of prisons and solitary confinement, which – however – lasted no more than five months in a row.

In April 2003 the Applicant managed to escape but was rearrested and given a further five years' sentence.

Complaints

The Applicant complained: (i) under Article 3 about the detention security regime he was imposed to and that he was subjected to ill-treatment by prison officers as he suffered from broken ribs; (ii) under Article 3 in conjunction with Article 13, that his right to an effective investigation into his allegations had been violated; (iii) under Article 6(3) that he had been deprived of the time necessary for the preparation of his own defence due to the frequent change of prisons; (iv) under Article 8, that the conditions of his detention had violated his right to private and family life; and (v) under Article 13, that no effective remedy was available for him to challenge the security regime he was imposed while in detention.

Held

Article 3

The Court found that there had been a violation of Article 3 of the Convention on account of the Applicant's allegation of ill-treatment, due to the Government's failure to provide any explanation about the incident and the Court's impossibility to establish the precise circumstances of it.

Concerning the measure of solitary confinement, the Court noted that prisoners' exclusion from the rest of the community itself does not amount to a form of inhuman treatment. Additionally, the Applicant could receive visits from his legal representatives and his family, had contacts with the officers and his right to correspondence and access to newspapers, radio and television was preserved. Accordingly, the Court found that there had not been a violation of Article 3 of the Convention on this account.

Finally, the Court concluded that the frequent change of prisons and cells – a measure that had been taken only after the Applicant tried to escape – did not amount to inhuman or degrading treatment as prescribed by Article 3 of the Convention.

Article 3 in conjunction with Article 13

The Court noted that four different investigations had been issued in order to ascertain the truth and identify those responsible for the ill-treatment the Applicant had been subjected to. Accordingly, considering the promptness and the accuracy of said investigations, there had been no violation of Article 3 of the Convention in conjunction with Article 13.

Article 6 and Article 8

The Court found this part of the application manifestly ill-founded and thus rejected it pursuant to Article 35(3)(4) of the Convention.

Article 13 in conjunction with Article 3

The Court found that the Applicant had no effective remedy to challenge the special security regime he was imposed and thus was a victim of Article 13 of the Convention in conjunction with Article 3.

In its ruling, the Court considered that the security measures against the Applicant were issued through an internal order which did not provide for any right to appeal. The legal nature of such measure changed only in September 2007 when the Council of State adopted a decision stating that security orders were to be considered administrative acts, thus, susceptible to appeal.

Article 41

The Court awarded the Applicant €10,000 in respect of non-pecuniary damages.

Cocaign v France

(32010/07)

European Court of Human Rights: Judgement dated 3 November 2011

Psychological problems – acts of physical violent and cannibalism – solitary confinement – Article 3 (prohibition of torture) – Article 6 (right to a fair trial) – Article 13 (right to an effective remedy)

Facts

The Applicant is a French national, who, at the time of the judgment, was held in Fresnes Prison. The Applicant suffered from severe psychological problems, in consequence of which he had been hospitalised several times. In January 2007, he killed a fellow inmate in Rouen Prison by kicking and punching him and stabbing him with scissors, before opening his chest and eating part of his lungs. Thereafter, he was transferred to another prison and placed in solitary confinement.

Two sets of proceedings – disciplinary and criminal – were opened. As a result, he was sentenced to 45 days confinement in a punishment cell for acts of physical violence against a fellow prisoner.

In October 2007, psychiatric experts concluded that the Applicant experienced a total loss of judgment at the time of the events and, consequently, could not be held criminally responsible for the murder and the acts of cannibalism.

In June 2009, the Assize Court sentenced him to thirty years imprisonment, with a minimum term of twenty years. Additionally, it ordered him to undergo medical treatment for eight years.

Complaints

The Applicant complained: (i) under Article 6(1), that the decision to place him in solitary confinement had not been in compliance with the principles of independence and impartiality; (ii) under Article 3, that his placement in solitary confinement for 45 days constituted inhuman

treatment considering his psychological problems; (iii) under Article 3, that holding him in detention amounted to inhuman treatment due to his disease; and (iv) under Article 13, that he had no domestic remedy to resort to for the examination of his case.

Held

Article 6

The Court found Article 6 of the Convention non applicable to disciplinary proceedings within the context of prisons. Accordingly, this part of the application was rejected as manifestly ill-founded in the letter of Article 35(3)(4) of the Convention

Article 3

The Court held that the fact that the Applicant had severe psychological troubles could not represent the sole and exclusive ground to claim that his placement in a punishment cell and the consequent execution of this penalty for 45 days amounted to inhuman or degrading treatment.

Accordingly, the Court found no violation of Article 3 of the Convention in this regard.

In connection with this, the Court noted that the Applicant was constantly being provided adequate medical supervision during his detention; therefore he was not being subjected to such a hardship and distress exceeding the unavoidable level of suffering inherent in detention. Consequently, the Court concluded that there had not been a violation of Article 3 in this regard as well.

Article 13

The Court found that the Applicant was deprived of any effective remedy at the domestic level that he could have resorted to in order for his complaints to be examined. Accordingly, the Court found France in violation of Article 13 of the Convention.

Csüllög v Hungary

(30042/08)

Detention in high security unit – solitary confinement – poor detention conditions – whether constitutes inhuman or degrading treatment – lack of effective remedy – Article 3 (prohibition of torture) – Article 13 (right to an effective remedy)

European Court of Human Rights: Judgment dated 7 June 2011

Facts

The Applicant was convicted of conspiracy to murder and was sentenced to five years' imprisonment. The Government submitted arguments in favour of holding the Applicant in a state security department; it argued that a plan was underway for the Applicant's escape, information which could not be communicated to the Applicant for legal reasons, criminal proceedings were continuing against the Applicant and classified information from the National Bureau of

Investigation, all of which mean that the Applicant should be held in a high security environment.

The Applicant was therefore held with the state security department. He alleged that there was artificial light in his cell, insufficient ventilation, no seat or cover for his toilet and that he suffered full cavity searches daily. He also complained that he was only allowed restricted items in his cell. The prosecution service rejected the Applicant's complaints on the basis that they had no jurisdiction to hear the complaints. After serving his sentence, the Applicant was released on 10 February 2009.

Complaints

The Applicant complained that: (i) his conditions of detention with the state security department amounted to inhuman and degrading treatment, contrary to Article 3; and (ii) there were no effective remedies available to him to challenge his situation, contrary to Article 13 in conjunction with Article 3.

Held

Article 3

The Court held that the Applicant had been subjected to inhuman and degrading treatment in violation of Article 3. It considered that the cumulative effects of the state security regime, which was applied to the Applicant for extended periods of time, and the Applicant's detention conditions, must have caused him suffering which exceeded the unavoidable level inherent in detention.

In its reasoning, the Court emphasised that in light of the likely negative effects of solitary confinement on a detainee's personality, it may only be used as an exceptional and temporary measure. In the Applicant's case, several of the restrictive measures could not reasonably be related to the purported objective of the isolation (namely to counter attempts of escape). The Court found insufficient evidence so as to suggest that the Applicant was a particularly dangerous detainee or that solitary confinement was used because the Applicant was a security risk. Furthermore, the Court noted that no substantive reasons were given by the authorities when solitary confinement was applied or extended. The Court therefore considered that the restrictions on the Applicant were arbitrary, which, when applied to vulnerable individuals like prisoners, inevitably contributed to feeling of subordination, total dependence, powerlessness and humiliation. The authorities did not apply any measures to counter these negative effects.

Article 13

The Court found a violation of Article 13 in conjunction with Article 3. It considered that neither the prosecution service nor the prisoners were in a position to review or challenge the decisions of the prison authorities. The Applicant was therefore deprived of crucial information and did not benefit from the equality of arms.

Article 41

The Court awarded the Applicant €6,000 in respect of non-pecuniary damages and €2,680 in respect of costs and expenses.

Commentary

The decision emphasises that solitary confinement may only be used in narrow, exceptional circumstances. A State Party which uses this method of detention has a continuing obligation to monitor the specific situation of each detainee, and to provide adequate reasons for prolonged solitary confinement, ensuring that its actions remain within the boundaries of the Convention.

Khodorkovskiy v Russia

(5829/04)

European Court of Human Rights: Judgment dated 31 May 2011

Politically motivated trial – conditions of security in the courtroom – Article 3 (prohibition of torture) – Article 5 (right to liberty and security) – Article 18 (limitation on use of restrictions on rights)

Facts

The Applicant is a Russian national who was detained in a penal colony in Krasnokamensk – Chita Region – and at the material time is detained in Moscow in connection with another criminal case pending against him.

Before his arrest in 2003, the Applicant was a businessman and one of the richest persons in Russia, as member of the board and major shareholder of an oil company. In 2002 the Applicant became involved in politics, funding an NGO and allocating significant funds to the Russian opposition parties.

In October 2003, he was apprehended before leaving on a business trip by a group of armed law-enforcement officers instructed by investigators who wanted to interrogate him as a witness. Thereafter he was informed that he was being charged in connection to a number of crimes, concerning his financial activities.

Following the first hearing in October 2003, the Applicant was issued a pre-trial detention order, whose term was not established. Between November and March 2005 the Applicant received several detention orders; the decisions were generally taken in camera without the possibility for the Applicant and his representative to attend or examine with due time the new evidences submitted.

The trial started on 16 June 2004, about 2 years later he was found guilty of the crimes he was charged with and was sentenced to 9 years imprisonment.

Complaints

The Applicant complained that (i) under Article 3 that the conditions in the remand prison where he was detained and those of the courtroom during his trial amounted to inhuman and degrading treatment; (ii) the arrest that led to his detention, the investigation and the trial were contrary to Article 5; (iii) the criminal proceedings against him were politically motivated.

Held

Article 3

The Court considered that exclusively during the third period of detention indicated by the Applicant, which followed his placement to another cell, the conditions worsened significantly as to amount to a grave breach of the principle of prohibition of torture and inhuman treatment.

The same judgment was reached by the Court when examining the conditions the Applicant was subjected to in the courtroom. He was placed inside a metal cage and was exposed in that manner to the public and the media. Considering that there was no evidence of the need of such security precautions or the Applicant's predisposition to violence, the Court found that the arrangements taken in the courtroom were excessive and resulted in the humiliation of the Applicant, who accordingly was a victim of a degrading treatment prohibited by Article 3 of the Convention.

Article 5

The Court examined what happened when the Applicant was apprehended before leaving on a business trip and was brought initially as a witness to the investigator who then accused him of several crimes. With respect to these facts, the Court considered that the conduct of the police officers and of the investigators was contrary to Article 5(1) of the Convention.

Concerning the length of the pre-trial detention, the Court stated that it was reasonable *in abstracto*, but - since the domestic courts had failed on different opportunities to indicate the reasons for the continued detention or to consider measures other than prison - the proceedings extending detention were flawed in many respects and amounted to a violation of Article 5(3) of the Convention.

The Court found several violations of Article 5(4) of the Convention concerning mainly the access to the prosecution files, the conditions in which the Applicant had to communicate with his lawyers and the delayed examination of the detention order on several occasions.

Article 18

As Article 18 does not have an autonomous role in the Convention, the Court decided to examine it in conjunction with Article 5.

The Court stated that the Applicant's case could raise some doubts in terms of political and ideological interferences in the domestic proceedings. However, being the standard of proof of the Court extremely high and severe on this account, the Court could not conclude that the whole domestic legal machinery was politically and ideologically oriented and thus misused against the Applicant and the company where he worked.

Article 41

The Court awarded the Applicant €10,000 in respect of non-pecuniary damages and €14,543 in respect of costs and expenses.

Commentary

The main issue at stake is the allegations of the Applicant against the Russian Government that had allegedly orchestrated the case for political reasons, in order to silence his critical voice and appropriate his financial resources.

Accordingly, the Applicant had submitted a complaint under Article 18 of the Convention, but no violation was found.

However, it should be noticed that: (i) the Court had acknowledged the risk of political interferences with the case, but the Applicant was not able to gather and submit enough evidences to substantiate the complaint; (ii) at the time of publication, the Court had found violation of Article 18 of the Convention just in two cases (*Gusinskiy v Russia* and *Cebotari v Moldova*).

Kozhokar v Russia

(33099/08)

European Court of Human Rights: Judgment dated 16 December 2010

Conditions of detention – HIV positive and hepatitis C – infected Applicant – lack of appropriate medical treatment – overcrowded cells – Article 3 (prohibition of torture) – Article 13 (right to an effective remedy)

Facts

In 2002, the Applicant, a Russian national, started serving a prison sentence for drugs trafficking. The Applicant was held in a succession of cells measuring no more than 81 square metres and holding up to 40 inmates at a time. The Applicant was permitted to take a shower once a week for 40 minutes and had an hour-long daily walk. The Applicant had been HIV-positive since 1999. By October 2006, his disease was at an advanced stage and he was also co-infected with the hepatitis C virus. During his entire period of detention, he was examined by a general physician only four times. He received several consultations by various experts, including a dentist, ophthalmologist, dermatologist and psychiatrist, none of whom were experts in the treatment of HIV or hepatitis C. The Applicant attempted to lodge complaints about these conditions with the Regional Prosecutor and head of the regional penitentiary department. However, the remand centre did not dispatch his complaints.

Complaints

The Applicant complained: (i) under Article 3 about the allegedly inadequate medical treatment he received during his time in custody and of his detention conditions; (ii) relying on Article 3 in conjunction with Article 13, he claimed that no domestic remedy had been available to him in order to improve his detention conditions.

Held

Article 3

The Court analysed the complaint concerning ill-treatment under two different aspects: the conditions of the Applicant's detention and the authorities' failure to comply with the responsibility to ensure adequate medical assistance to the prisoner during his time in custody.

The Court found that the Applicant was given less than three-square metres of personal space and was obliged to live, sleep and use the toilet in the same cell as so many other inmates.

Accordingly, the conditions of severe overcrowding and poor hygiene caused the Applicant a level of hardship and distress, which exceeded the legitimate threshold of suffering inherent in detention, thus amounting to inhuman and degrading treatment contrary to Article 3 of the Convention.

With regard to the provision of medical treatment, the Court noted the Applicant's medical records revealed that the medical examinations taken were insufficiently prompt, coherent and regular. In particular, having regard to the vulnerability of HIV-positive persons to other serious diseases, the lack of expert medical attention to the Applicant's condition was unacceptable and in breach of the State's obligations set forth in Article 3 of the Convention.

Article 13

The Court found Russia in breach of Article 13 of the Convention on account of a lack of an effective and accessible remedy under domestic law to complain about the conditions of detention, rejecting therefore the Government's objections.

Article 41

The Court awarded the Applicant €27,000 in respect of non-pecuniary damages.

Commentary

At the time of publication, a request for referral to the Grand Chamber was pending.

This case confirmed the Court's view that lack of adequate medical facilities is, in itself, capable of breaching Article 3. There was no fixed threshold but each case needed to be considered individually, according to the medical needs of that particular Applicant. As in other very recent cases, the Court made particular reference to the vulnerability of HIV-positive individuals and how this had to be taken into account by authorities if they were to satisfy the requirements of Article 3. It was not sufficient for a government to demonstrate that a particular Applicant had been treated the same as others; what they had to show was that the Applicant's treatment was reasonable according to his particular circumstances.

R.U. v Greece

(2237/08)

European Court of Human Rights: Judgment dated 7 June 2011.

Asylum seeker – inhuman treatment - Article 3 (prohibition of torture) –Article 13 (right to an effective remedy) taken in conjunction with Article 3 – Article 5 (right to liberty and security)

Facts

The Applicant is a Greek national of Kurdish origins, living in Athens. Because of his political activities he was arrested several times by Turkish authorities in between 1985 and 1992. He alleged that he was condemned to 15 years of imprisonment during which he was subjected to torture.

After being released in 2007, he decided to flee Turkey and apply for asylum in Greece for fear of being arrested again. Upon arrival on Greek territory, the Applicant was stopped and then arrested by the national authorities, who found him in possession of false travelling documents. The hearing was arranged for May 2007, but the Applicant was arrested again by the Soufli border police who decided to detain him until his expulsion. He tried to apply for asylum several times, both independently and through his lawyer, but he was generally ignored, due to the fact that he was regarded as 'a threat to public order'.

He was released on 6 July 2007 and to this date he has not been deported yet.

Complaints

The Applicant complained: (i) under Articles 3 and 13, about the conditions of his detention at the Soufli police station, that his return back to Turkey would expose him to torture and inhuman treatment and that no domestic remedy was available to complain about his detention and the decision to deport him; and (ii) under Article 5, that the order of expulsion could not be executed as his application for asylum was still pending.

Held

Article 3

The Court noted that the duration of ill-treatments while in detention is not decisive for the assessment of a possible violation of Article 3, especially given the poor health conditions of the Applicant, who suffers from Wernicke-Korsakoff syndrome.

Considering that he never received any medical treatment, was not allowed to walk in the central court-yard, had no hot water and there were no chairs, no access to radio or television, the linen was very dirty and the phone was outside the place where he was detained, the Court concluded that the conditions of his detention amounted to a severe violation of Article 3 of the Convention.

Article 13 in conjunction with Article 3

Given the fact that the Greek authorities failed in assessing and examining the Applicant's asylum request resulting in a possible arbitrary expulsion to Turkey where the Applicant would be

at risk of further torture and ill-treatments, the Court decided that there has been a violation of Article 13 in conjunction with Article 3.

Article 5

The Court found that, since it had already established that the Applicant's detention was unlawful, it gave rise to a breach of Article 5(1) as well. Moreover, because the Greek judiciary did not provide the Applicant with the possibility to obtain a decision from the national jurisdiction on the legality of his detention, the Court found that there had also been a violation of the Convention under Article 5(4).

Article 41

The Court awarded the Applicant €15,000 in respect of non-pecuniary damages.

Commentary

This case set a precedent in asylum cases. The Court urged Greece to revise its legislation on the matter and comply with international standards.

Sacilik and Others v. Turkey

(43044/05 and 45001/05)

European Court of Human Rights: Judgment dated 5 July 2011

Prison – Large Scale Security Operation – Prison Riots - Beatings – Sexual Assault - Article 3 (prohibition of torture)

Due to the number of applications, the Court decided to join them all. The Court then decided to make a decision on the merits of the applications as well as the admissibility.

Facts

In April 2000, the gendarmes beat a number of remand detainees of Burdur Prison, while they were being escorted from their court hearing to the prison. As consequence of this, they threatened to refuse to attend the following court hearing, unless adequate measures were taken to ensure their safety. The prison authorities and the prosecutors ignored their calls.

The morning of the court hearing a scuffle erupted in the prison, resulting in the detainees' attempt to barricade themselves and the security forces setting fire to the cells door and deploying tear gas and other chemical weapons.

Applicant Şahin Geçit was injured in his right hand and eardrum. Applicants Yunis Aydemir and Cemil Aksu suffered burns in the fire, while Mr Saçılık had his arm torn off from above his elbow. Other inmates were dragged on the floor and beaten; female detainees were sexually assaulted and threatened with rape. Some detainees had life threatening injuries were taken to the hospital, whereas some detainees were not given successful treatment as the soldiers prevented it.

The prison authorities claimed that documents belonging to an illegal organisation and weapons were found in the search carried out at the end of the operation. As a result of the scuffle, ten security force personnel and six prison guards got injured.

Complaints

The Applicants complained that the treatment to which they had been subjected at the hand of the security forces amounted to a violation of Article 3 of the Convention and that no effective investigation had been conducted in the incident.

Held

Article 3

The Court considered that the investigation was carried out without meeting the requirements of an effective investigation within the meaning of the Convention. Owing to the defects identified, the investigation was not capable of establishing the true circumstances surrounding the Applicants' ill-treatment. Thus, the Court considers that the Government failed to discharge its burden of providing a plausible explanation as to how the Applicants suffered their injuries while detained in the prison.

On this basis the court held that there was a violation of Article 3 on all 25 Applicants. With regards to the sexual assault on Mrs Azime Arzu Torun and Mrs Mürüvet Küçük there was no conclusive evidence as such the court held that no separate issue would arise on this ground.

Article 41

In respect of non-pecuniary damages, the Court awarded the Applicants between €30,000 and €20,000.

V.C. v Slovakia

(18968/07)

European Court of Human Rights: Judgment dated 11 August 2011-11-30

Delivery of a baby with Caesarean section – sterilisation – uninformed consent – Roma vulnerable community – Article 3 (prohibition of torture) – Article 8 (right to respect for private and family life) – Article 12 (right to marry) – Article 13 (right to an effective remedy) – Article 14 (prohibition of discrimination)

Facts

The Applicant is a Slovakian national of Roma origin. In August 2000 she was sterilised while hospitalised at the Hospital and Health Care Centre in Prešov, under the management of the Ministry of Health. The procedure was carried out during the delivery of her second child via Caesarean section.

According to the Applicant, after she had been in labour for several hours and was in pain, she was asked by the medical personnel whether she wanted to have more children and, having been warned that her next pregnancy could have been fatal, she decided to sign the delivery

record under the note indicating that she had requested sterilisation, a term she could not understand.

As a result of this intervention, the Applicant suffered serious medical and psychological after-effects from her infertility; additionally, she was ostracised by the Roma community and divorced from her husband in 2009.

Complaints

The Applicant complained: (i) under Article 3 that she had been subjected to inhuman and degrading treatment on account of her sterilisation and that the authorities had failed to carry out a thorough, fair and effective investigation into the circumstances surrounding it; (ii) under Article 8 that her right to respect for her private and family life had been violated as a result of her sterilisation without her full and informed consent; (iii) under Article 12 that the facts of her case violated her right to marry and found a family; (iv) under Article 13 that she had had no effective remedy at her disposal in respect of the complaints about the infringement of her rights; and (v) under Article 14 that she had been discriminated against on account of her Roma origins.

Held

Article 3

The Court noted that the question posed to the Applicant by the medical personnel – whether she wanted more children – did not correspond to a matter of urgency and that the Applicant's consent to sterilisation could not be considered either full or informed, constituting a gross act of disregard to her right to autonomy and choice as a patient.

Considering the feelings of fear, anguish and inferiority the Applicant suffered as a consequence of medical staff's conduct, the Court revealed a violation of the substantive limb of Article 3 of the Convention.

On the other hand, the Court found no violation of Article 3 under its procedural limb, as the Applicant failed to bring criminal complaints against the hospital in addition to the civil ones that, in the Court's view, developed in accordance with the standards prescribed by the law.

Article 8

The Court examined this part of the application with a specific attention to the Applicant's ethnic origin. It noted that the woman had not been provided enough safeguards with regard to her reproductive health and that the authorities had failed to secure to her the effective enjoyment of her right to respect for private and family life. Therefore, the Court concluded that there had been a violation of Article 8 of the Convention.

Article 13

The Court noted that the Applicant was able to have her case reviewed by the civil courts at two levels of jurisdiction, albeit unsuccessfully. She thus had an effective remedy in respect of her complaint about her sterilisation without informed consent. Further, it reiterated that Article 13 cannot be interpreted as requiring a remedy against the state of domestic law. Accordingly, there had not been a violation of the Convention in this respect.

Article 12 and Article 14

Having examined the case in the light of Article 8 and found a violation of the Convention under this provision, the Court considered that no separate issue arose from Article 12 and Article 14 of the Convention.

Article 41

The Court awarded the Applicant €31,000 in respect of non-pecuniary damages and €12,000 for costs and expenses.

Right to Liberty and Security

Al-Jedda v United Kingdom

(27021/08)

European Court of Human Rights: Judgment dated 7 July 2011

Internment of British Applicant in Iraq – whether Applicant’s internment fell under UK’s jurisdiction – whether internment violated right to liberty and security – Article 1 (obligation to respect human rights) – Article 5 (right to liberty and security)

Facts

The Applicant, an Iraqi-born British and Iraqi national, was arrested by US troops during a visit to Iraq. He was suspected of being a member of a terrorist group involved in smuggling weapons and explosive attacks in Iraq. He denied the allegations. The Applicant’s detention in a centre in Basra, which was run by British forces, was periodically reviewed but it was concluded that he remained a threat and should be kept in prison. The Applicant was finally released on 30 December 2007. No criminal charges were brought against him. The House of Lords in the UK upheld a domestic judgment against the Applicant on the basis that UN Security Council Resolution 1546 and successive resolutions authorised British forces to use internment “where necessary for imperative reasons of security in Iraq” and that such binding Security Council decisions superseded all other treaty commitments, including Article 5.

Complaints

The Applicant complained that his internment breached Article 5(1).

Held

Article 1

The Court held that the Applicant fell within the UK’s jurisdiction for the purposes of applying the Convention.

The main question for the Court was whether the Applicant’s detention was attributable to the UK or, as the Government argued, the United Nations. The Court considered that the answer depended on the particular facts of the case and required it to consider the terms of UN Secu-

rity Council resolutions, which laid out the framework for the security regime in Iraq during the period in question.

Adopting the approach above, the Court concluded that the UN Security Council had neither effective control nor ultimate authority and control over the acts and omissions of the troops in the current situation. The Applicant's detention was therefore not attributable to the UN. Rather, the detention facility in question was controlled exclusively by British forces such that the Applicant was under the authority and control of the UK throughout. The decision to hold the Applicant in internment was made by the British officer in command of the detention facility.

Article 5

The Court held that there had been a violation of Article 5(1) as none of the grounds for detention in Article 5(1)(a) to (f) applied. It considered that Security Council resolution 1546 authorised the United Kingdom to take measures to contribute to the maintenance of security and stability in Iraq but neither resolution 1546 nor any other Security Council resolution explicitly or implicitly required the United Kingdom to place an individual considered a security risk into indefinite detention without charge. In these circumstances, in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom's obligations under the UN Charter and its obligations under Article 5(1).

Article 41

The Court awarded the Applicant €25,000 in respect of non-pecuniary damages and €40,000 in respect of costs and expenses.

Commentary

This decision follows that in *Al-Skeini* and confirms the extraterritorial application of the Convention where a State Party exercises effective authority and control over a third State. However, it calls into question the landmark decision of the Court in *Bankovic and Others v. Belgium and Others* and suggests that the Court will consider the extraterritorial application of the Convention on a case by case basis.

Boguslaw Krawczak v Poland

(24205/06)

European Court of Human Rights: Judgment dated 31 May 2011

Drug trafficking – family visits during pre-trial detention – Article 5 (right to liberty and security) – Article 8 (right to respect for private and family life)

Facts

The Applicant is a Polish national currently detained in Czerwony Bór Prison. In January 2005 he was arrested in Poland and charged with trafficking large amounts of drugs from Venezuela. Thereafter he was remanded in custody on suspicion that he could obstruct the proceedings and commit the crime again. The Regional Court endorsed the detention and extended it, specify-

ing that the court was waiting for the translation of some relevant documents. Despite several appeals submitted by the Applicant, no measures other than detention were considered.

In December 2008, the Court of Appeal convicted the Applicant as charged and sentenced him to 10 years' imprisonment. The court of appeal upheld the judgment. The Applicant lodged a cassation appeal and the proceedings before the Supreme Court are currently pending.

Complaints

The Applicant complained: (i) under Article 3, that he had been detained in overcrowded cells and the State had failed to provide him with adequate living conditions throughout his detention; (ii) under Article 5(3), that the length of his pre-trial detention had been excessive; (iii) under Article 6, that the criminal proceedings conducted against him were unfair in that the court had arbitrarily assessed the evidence and refused to release him on probation; and (iv) under Article 6, that throughout his detention there had been disproportionate restrictions on his family visits in prison.

Held

Article 3

The Court considered this part of the application inadmissible, as the Applicant did not exhaust the domestic remedies at his disposal. Accordingly, the Court applied Article 35(1)(4) of the Convention.

Article 5

The Court focused its attention on the Applicant's pre-trial detention running from January 2005 till December 2008.

Though the term of his detention has been extended on several occasions, no sufficient motivations and reasons were given to support these decisions and to substantiate the potential risk of obstructions to the proceedings. Additionally, the claim concerning the complexity of the case does not relieve domestic courts of their obligations under the principle of reasonable length of pre-trial detention as enshrined in Article 5(3) of the Convention.

Accordingly, the Court found Poland in breach of said article.

Article 6

The Court considered the two complaints brought under Article 6: the former, concerning the unlawfulness of the proceedings was rejected for non-exhaustion of domestic remedies pursuant to Article 35(1)(4) of the Convention; the latter, about the refusal of release on probation, was dismissed as manifestly ill-founded according to Article 35(3)(4) of the Convention.

Article 8

The Court maintained that the conditions under which family visits took place, namely the presence of a physical barrier between the Applicant and his family and low frequency of such visits, amounted to an interference with his enjoyment of Article 8 of the Convention.

Accordingly, the Court had to consider if such interference was in compliance with the standards and principles regulating said matter.

With regard to the principle of compliance with the law, the Court found no violation. Then, the Court certified the presence of a legitimate aim orienting the interference, namely the «*prevention of disorder and crime*».

On the contrary, the Court considered that the restrictions on the Applicant's physical contact with his family and their random and arbitrary application went beyond what was necessary in a democratic society. Accordingly, it concluded that there has been a violation of Article 8 of the Convention.

Article 41

The Court awarded the Applicant €2,500 in respect of non-pecuniary damages.

Doğan and Kalın v Turkey

(1651/05)

European Court of Human Rights: Judgment dated 21 December 2010

Detention on suspicion of membership with illegal organisation – Article 5 (right to liberty and security) – Article 6 (right to a fair trial) – Article 13 (right to an effective remedy) – Article 14 (prohibition of discrimination)

Facts

On 24 February 1994, the Applicants were taken into custody in İstanbul on suspicion membership in an illegal organisation. They were subsequently detained pending trial and in June 1994, were finally charged with carrying out activities with the aim of bringing about the secession of part of the national territory. In May 1999, the İstanbul State Security Court convicted the first Applicant and sentenced him to death. It was ordered that the second Applicant's case should be disjoined from the file as his defence had not been submitted to the court.

On 29 February 2000, the Court of Cassation nullified the judgment and remitted the case to the İstanbul State Security Court. On 5 February 2001, the second Applicant's case was joined to the file again and on 21 June 2004, the Applicants were released pending trial. However, State Security Courts were subsequently abolished so the Applicants' case was resumed before the İstanbul Assize Court. By February 2010, proceedings against them remained pending.

Complaints

The Applicants complained: (i) under Article 5 that the length of their pre-trial detention had been excessive; and (ii) under Article 13 that there had been no domestic remedies available to challenge the unlawfulness of their detention.

Held

Article 5

The Court found Turkey in violation of Article 5(3) of the Convention. In its reasoning, the Court noted that the first Applicant's detention period was over nine years and six months and that the second Applicant's detention period was over ten years and three months. The Court had frequently found violations of Article 5(3) in cases disclosing comparable periods of detention and felt that the Government had not put forward any argument to persuade it to otherwise. Having regard to its case-law and the length of detention in the present case, the Court found that the length of the Applicants' pre-trial detention was excessive.

The Court also found Turkey in violation of Article 5(4) of the Convention. The Government had not put forward any arguments which would require the Court to depart from its previous findings in similar cases where it had been concluded that Turkey had failed to show that the remedies provided were actually effective.

Article 6

The Court held that the length of the proceedings was excessive and failed to meet the "reasonable time" requirement under Article 6. The criminal proceedings commenced on 24 February 1994 and were still pending before the first-instance court. They had already lasted over 16 years and eight months.

Article 13

The Court had examined similar issues in previous applications and found violations of Article 13 in respect of the lack of an effective remedy under Turkish law where Applicants could not contest the length of proceedings at issue. The Court found no reason to depart from that conclusion in the present case and therefore found Turkey in violation of Article 13 of the Convention.

Article 14

The Court held that the Applicants had not disclosed evidence of a violation of Article 14 and therefore declared this complaint inadmissible.

Article 41

The Court awarded the Applicant €10,000 each in respect of non-pecuniary damages. Furthermore, the Court considered that an appropriate means for putting an end to the violations would be for Turkey to conclude the criminal proceedings as speedily as possible.

Commentary

Although this case is by no means unique in its facts, it demonstrates the Turkish Government's continued failure to comply with previous Strasbourg decisions. The Court has found Turkey in breach of the Convention for excessive pre-trial detention periods on numerous occasions, as well as for depriving detainees of a means to challenge domestic decisions, yet the Turkish Government has failed to demonstrate that they have taken such judgments seriously or that they intend to address the matter in practical terms.

The Court therefore considers it reasonable to allow such applications on the basis of previous judgments alone where the Government has no new arguments to present, nor any evidence of attempts made to address this issue generally.

Ulu and Others v Turkey

(29545/06, 15306/07, 30671/07, 31267/07, 21014/08 and 62007/08)

European Court of Human Rights: Judgment dated 7 December 2010

Length of pre-trial detention – Article 5 (right to liberty and security) – Article 6 (right to a fair trial) – Article 13 (right to an effective remedy) – Article 1 of Protocol No.12 (general prohibition of discrimination)

Facts

The Applicants are Turkish nationals who were arrested and subsequently detained pending judicial proceedings. They were either released or convicted on various dates in a period of time running from May 1996 to June 2010, except for the Applicant Kamil Yaman (30671/07), who is still in pre-trial detention.

The shortest pre-trial detention period in the present case was more than four years. In the remaining applications, it was over thirteen years. Moreover, the shortest duration of the criminal proceedings in the present case was over nine years.

Complaints

The Court decided to merge these claims as they all focused on the length of pre-trial detention.

All Applicants complained under Articles 5 and 6 that the length of their pre-trial detention had been excessive.

The Applicant in application number 31267/07 complained that: (i) he did not have an effective remedy to challenge the excessive length of the criminal proceedings against him, contrary to Article 13 in conjunction with Article 6 and (ii) he had been discriminated against because he had been held in detention for an excessive length of time, contrary to Article 1 of Protocol 12.

Held

Article 5

In accordance with its established jurisprudence, the Court found Turkey in violation of Article 5 of the Convention. It was not persuaded that the detentions were based on reasonable grounds for suspicion of the Applicants having committed an offence and that their detentions were reviewed periodically by a competent authority in accordance with domestic law.

Article 6

The domestic trial for the Applicant in case 21014/08 was still in progress. The Court therefore determined that his complaint to the Court was premature. The complaint made by the Applicant in case 31267/07 was inadmissible as it was instigated after the six month time period.

With regards to the other Applicants, the Court found Turkey in breach of Article 6. The Court rejected the Government's reasoning that the length of time was reasonable due to the complexity of the cases, the number of the accused and the nature of the offences. Further, the Court noted that it had frequently found violations of the reasonable time requirement under Article 6 in similar previous cases and had no reason not to follow that in this case.

Article 1 of Protocol No.12

The Court considered that as Turkey had not ratified Protocol 12, the Applicant's complaint under Article 1 of Protocol 12 had to be rejected.

Article 41

The Court made awards between €5,000 and €15,600 in respect of the Applicants' non-pecuniary damage, and awards between €500 and €1,500 for costs.

Commentary

Turkey amended its domestic legislation in 2010 to limit pre-trial detention periods to five years for most crimes and ten years for crimes against the State. This case demonstrates that such legislative changes are still drastically insufficient to comply with the Council of Europe's human rights standards. Therefore, further amendments are required by Turkey otherwise length of pre-trial detention cases will continue to be brought before the Court.

Right to Fair Trial

Çelik (Bozkurt) v Turkey

(34388/05)

European Court of Human Rights: Judgment dated 12 April 2011

Dismissal from teaching post due to criminal charges - suspension of criminal proceedings – whether breach of presumption of innocence – Article 6 (right to a fair trial)

Facts

In 2000, the Applicant was dismissed from her post as a primary school teacher after she was charged for being a member of an illegal organisation. In her subsequent court proceedings, the Diyarbakır State Security Court held that the Applicant's activities "remained within the scope of the offence of aiding and abetting the illegal organisation" and was therefore eligible for suspension under new law, Law No. 4616. The Applicant brought a case against the Ministry of Education at the Diyarbakır Administrative Court, which held that her dismissal had been

lawful. The Applicant's appeal of this decision was dismissed. The Applicant was refused other posts in education on account of her alleged crime.

Complaints

The Applicant complained under: (i) Article 6(2) that she was deprived of her right to a fair trial as her dismissal had been decided while the criminal proceedings against her were still pending, contravening her presumption of innocence; (ii) under Article 7 that her dismissal had had no legal basis; and (iii) under Article 9 in conjunction with Article 14 that she had been dismissed on account of her religious beliefs and Kurdish ethnic origin.

Held

Article 6

Turkey was held in breach of Article 6(2) of the Convention. The Court reiterated that the presumption of innocence enshrined in Article 6(2) is infringed even where there is some reasoning to suggest that the court regards the accused as guilty. The Court added that this provision is not merely a procedural safeguard but demands that a representative of the State or a public authority refrains from declaring a person guilty of an offence before their guilt has been established by a "court". For instance, Article 6(2) may be in question where an administrative court makes a statement imputing criminal liability on a claimant. The Court also reiterated that the scope of Article 6(2) is not limited to pending criminal proceedings, but may in certain circumstances extend to judicial decisions taken after the proceedings or acquittal.

As criminal proceedings against the Applicant had been suspended without a formal decision having been made, the Court stated that the Applicant could not be said to have committed the crime of aiding and abetting an illegal organisation. The Court also stated that the language used by the Administrative Court in rejecting the Applicant's case created a "link" between the criminal case and the administrative proceedings, which triggered Article 6(2). Further, the Court observed that the education authorities continued to rely on the decision to suspend the Applicant's criminal proceedings when rejecting her subsequent job applications, which was incompatible with Article 6(2).

Articles 7, 9 and 14

The Court declared the Applicant's complaints under Articles 7, 9 and 14 to be inadmissible.

Article 41

The Court awarded the Applicant €7,200 in respect of non-pecuniary damages.

Eşref Çakmak v Turkey

(3494/05)

European Court of Human Rights: Judgment dated 15 February 2011

Applicant infected with hepatitis B whilst giving blood – compensation sought from State – application for legal aid rendered void for failure to pay procedural costs - Article 6(1) (right to a fair trial)

Facts

The Applicant is a Turkish national. After beginning his compulsory military service, he was infected with hepatitis B whilst giving blood. He claimed compensation from the State alleging that he had contracted the disease through poor hygiene conditions during his military service. The authorities rejected his claim on the grounds that no compensation could be awarded without a prior judicial decision. The Applicant therefore lodged a compensation claim, together with a request for legal aid, with the High Military Administrative Court. In support of his request, he provided a certificate of indigence showing that the payment of all or part of the procedural costs would be detrimental to him or his family's subsistence. Under Turkish law, the decision of whether or not to grant legal aid is final and cannot be appealed. Further, all claimants are required to pay procedural costs when filing their initial statement of claim. A failure to pay those costs renders the application void.

On 8 October 2003, the High Court rejected the Applicant's request for legal aid on the grounds that the statutory conditions were not fulfilled. It requested the Applicant to pay the procedural costs. When the Applicant failed to pay the costs, the High Court declared his action void.

Complaints

The Applicant complained under Article 6(1) that the High Court's refusal to grant him legal aid had deprived him of his right to access to a court and thus also his right to obtain redress for his alleged damages.

Held

Article 6

The Court found Turkey in breach of Article 6(1). In its reasoning, the Court stated that the aim of the Convention was to protect practical and effective rights. In light of that aim and economic data from the relevant period, the procedural costs which the Applicant was required to pay were an excessive burden on him. The documents produced by the Applicant provided sufficient proof of his financial situation. However, the High Court clearly had not taken these into account in its decision. Above all, the High Court had not given any reasons for its decision so it was impossible to ascertain whether there had been an effective and meaningful examination of the Applicant's case.

The rejection of the Applicant's request for legal aid therefore completely deprived him of the possibility of having his case heard by a court.

Article 41

The Court awarded the Applicant €3,000 in respect of non-pecuniary damages and €500 in respect of costs and expenses.

Konstas v. Greece

(53466/07)

European Court of Human Rights: Judgment dated 24 May 2011 and not final.

The “Panteion” case: breach of Dimitros’ right to presumption of innocence - Article 6 (right to a fair trial) – Article 13 (right to an effective remedy)

Facts

The Applicant is a Greek national who lives in Athens. He became a professor at Panteion University in Athens in 1985 and then its Rector from 1990 to 1995. In 1990 he became Minister for the Press and then from 1997 to 1999 he served as Minister Plenipotentiary representing his country at the Council of Europe.

In 1998 the public prosecutor at the Athens Court of Appeal started criminal proceedings against 54 members of the University’s teaching staff, including the Applicant, who was charged with being an accomplice to forgery, misrepresentation and misappropriation of public funds and defrauding the State. In June 2007 the Athens Assize Court sentenced him to 14 years’ imprisonment for misappropriation of public funds, fraud against the State and misrepresentation. He immediately appealed with scarce results.

When the case became of public domain, the Greek Prime Minister, the Deputy Minister of Finance and the Minister of Justice reported before the Parliament the facts in question, harshly criticising the Socialist Party MPs and referring to the Applicant as he had been already convicted of the offences he was charged with, even if the case is still pending before the Athens Court of Appeal.

Complaints

The Applicant complained: (i) under Article 6(2) that the statements made in Parliament by the Prime Minister, the Deputy Minister of Finance and the Minister of Justice, in which he had been portrayed as guilty even though the judicial proceedings in the Court of Appeal had not yet been concluded, had breached his right to be presumed innocent; and (ii) under Article 13 that no effective remedy was available to him in Greece in respect of his complaint.

Held

Article 6

The Court reiterated the principle of the presumption of innocence required that no representative of the State should declare that a person was guilty of a criminal offence before he had been proved guilty according to law. Article 6(2) did not prevent the authorities from referring to a conviction decided at first instance, when the proceedings were still pending on appeal, but it

required that they do so with all the discretion and circumspection necessary if the presumption of innocence was to be respected.

Consequently, the Court found a violation of Article 6(2) of the Convention in respect of the Deputy Minister of Finance and the Minister of Justice statements; whereas the words used by the Prime Minister when referring to the case – namely ‘unprecedented scandal’ – did not give rise to the infringement of the principle of the presumption of innocence.

Article 13

The Court observed that the principle of the presumption of innocence mainly constituted a procedural safeguard, being one of the features of a fair trial under Article 6. An action for damages, as invoked by the Greek Government, could not have provided full redress for the alleged breach of the right to be presumed innocent.

Accordingly, there had thus also been a violation of Article 13 of the Convention.

Article 41

The Court awarded the Applicant €12,000 in respect of non-pecuniary damage and €10,000 for costs and expenses.

Commentary

Contrary to the argument of the Greek Government, the passage of time between the making of those remarks and the future judgment of the Court of Appeal was not a crucial factor in determining whether or not there had been a breach of the right to be presumed innocent. Accepting that argument would lead to an unreasonable conclusion: that the longer the criminal proceedings, the more any disregard of the presumption of innocence at an earlier stage of the same proceedings could be minimised. Moreover, the Court paid particular attention to the fact that the remarks had been made by high ranking politicians and even, in the case of the Minister of Justice, by a person of authority who was supposed, on account of his position, to show particular restraint when commenting on judicial decisions.

Lizaso Azconobieta v Spain

(28834/08)

European Court of Human Rights: Judgment dated 28 June 2011

Terrorist organization ETA – presumption of innocence – Article 6 (right to a fair trial)

Facts

The Applicant is a Spanish national. In June 1994, during a police operation carried out against the ETA, the Applicant was arrested by civil guards and was held incommunicado for five days without being given any motivation for his detention. A couple of days later, the local governor held a press conference and introduced the Applicant as a member of the ETA, responsible for three terrorist attacks. However, he was soon acquitted and released.

Complaints

The Applicant complained that the statements made by the governor at the press conference were against the principle of presumption of innocence.

Held

Article 6

The Court noted that the local governor held the press conference giving details about the Applicant at a time when the investigation in the case was not finished yet. Consequently, his statements had a double effect: on one hand, his words led the audience believe in the responsibility of the Applicant; on the other hand, his conduct could have flawed the investigation and the judgement of the court. Accordingly, the Court found Spain in breach of Article 6(2) of the Convention, enshrining the principle of presumption of innocence.

Article 41

The Court awarded the Applicant €12,000 in respect of non-pecuniary damages and €6,400 for costs and expenses.

Paksas v Lithuania

(34932/04)

European Court of Human Rights: Grand Chamber Judgment dated 6 January 2011

Lithuanian President – convicted of unlawfully granting citizenship to businessman, disclosing State secrets and exerting undue influence over private company for benefit of acquaintances – dismissal of President – amendment of Presidential Election Act to bar president from standing at subsequent election – Article 6 (right to a fair trial) – Article 7 (no punishment without law) – Article 3 of Protocol No.1 (right to free elections) – Article 4 of Protocol No.7 (right not to be tried or punished twice)

Facts

The Applicant is a Lithuanian national. On 5 January 2003, the Applicant was elected President of the Republic of Lithuania. On 6 April 2004, he was removed from office following an impeachment for gross violations of the constitution and breaching his Constitutional oath. The Constitutional Court found that the Applicant had unlawfully and for his own personal ends granted Lithuanian citizenship to a Russian businessman, had disclosed a State secret to the latter by informing him that he was under investigation by the secret services and exploited his own status to exert undue influence over a private company for the benefit of close acquaintances.

In accordance with the Central Electoral Committee's (CEC) view, the Applicant could potentially stand as a candidate in the presidential election called as a result of his impeachment. However, the Lithuanian Parliament, through the reviewing judgment of the Constitutional Court, amended the Presidential Election Act so that anyone removed from office by Parliament following impeachment proceedings was permanently disqualified from being a member.

Criminal proceedings were also launched against the Applicant for disclosing State secrets, but he was eventually acquitted following a ruling by the Supreme Court on 13 December 2005.

Complaints

The Applicant complained that: (i) the Constitutional Court had been biased against him during the two proceedings and had exceeded its powers, contrary to Article 6(1); (ii) his right to be presumed innocent under Article 6(2) had been violated by his permanent disqualification from an elected office; (iii) the permanent disqualification from holding office was not prescribed by law, contrary to Article 7; (iv) the impeachment proceedings followed by criminal proceedings amounted to trying him twice for the same offence, contrary to Article 4(1) of Protocol No. 7; (v) the amendment to the Presidential Election Act was arbitrary and designed to prevent him from holding office in the future, contrary to the right to free elections under Article 3 of Protocol No. 1; and (vi) he lacked an effective remedy, contrary to Article 13 in conjunction with Article 3 of Protocol No.1.

Held

On 1 December 2009, a Chamber of the Second Section of the Court relinquished jurisdiction in favour of the Grand Chamber.

Article 6

The Court held that Articles 6(1) and 6(2) of the Convention were inapplicable to the present case. The Court determined that the proceedings before the Constitutional Court did not concern the determination of the Applicant's civil rights or obligations, nor did they concern a "criminal charge" against him under Article 6(1). As such, the Applicant was not "charged with a criminal offence" within the meaning of Article 6(2) of the Convention.

Article 7

The Court noted that the proceedings did not result in the Applicant being held "guilty of a criminal offence" or receiving a "penalty" within the meaning of Article 7 of the Convention and therefore was inapplicable to this case.

Article 4 of Protocol No. 7

The Court held the Applicant had not been tried or punished in criminal proceedings under Article 4(1) of Protocol No. 7 of the Convention and therefore the provision was inapplicable to this case.

Article 3 of Protocol No. 1

The Court noted that this provision only applies to the election of the legislature and therefore the Applicant's complaint regarding his removal from office and subsequent disqualification from standing for the presidency was incompatible *ratione materiae* and was declared inadmissible.

However, the Court did find a violation of Article 3 of Protocol No. 1 of the Convention in respect to the Applicant's permanent inability to stand for election to Parliament. In its reasoning, the Court reiterated that in determining whether there has been a violation of this provision,

it needed to consider whether the interference was lawful, pursued a legitimate aim and was proportionate.

The Court determined that the interference with the Applicant's right to stand for election was lawful and pursued the legitimate aim of preserving the democratic order. However, the Court concluded that the permanency of the interference was disproportionate. Considering the State's historical background and assuming that it is under continuing evolution, the Court found that the Applicant's disqualification from standing from election carried a "connotation of immutability" that was hard to reconcile with Article 3 of Protocol No. 1 of the Convention.

Article 13 in conjunction with Article 3 of Protocol No. 1

The Court held that this claim was manifestly ill-founded and declared it inadmissible.

Article 41

The Court held that the finding of the violation under Article 3 of Protocol No. 1 was in itself sufficient just satisfaction for the non-pecuniary damage sustained by the Applicant.

Commentary

This case is highly significant as the *permanency* of the disqualification of the former president from Parliament was a disproportionate restriction of the right to free elections under Article 3 of Protocol No. 1. In coming to this decision, the Court emphasised the evolving political and historical climate in State concerned, meaning that the justification for the dismissal may subside over time.

Sabri Güneş v Turkey

(27396/06)

European Court of Human Rights: Judgment dated 24 May 2011.

Former member of the army left permanently invalid after injury during military service complains that his request for additional invalidity compensation was dismissed as being time-barred – Article 2 (right to life) - Article 6 Paragraph 1 (access to the Court) – Article 13 (right to an effective remedy)

Facts

The Applicant, Sabri Güneş, is a Turkish national who lives in İzmir, in Turkey. After suffering physical injury during his military service, he had to undergo many surgeries on his right knee during 2001. He was declared permanently invalid and was awarded compensation for pecuniary and non-pecuniary damage. He then brought a claim to the Ministry of Defence for additional compensation for permanent invalidity. In 2003, after his request was ignored by the administration he brought the case before the High Administrative Military Court, which on July 2004 awarded the Applicant TRY15,000 in respect of pecuniary damage and TRY2,000 in respect of non-pecuniary damage due to his 5% invalidity.

On 29 March 2005 the Plaintiff appealed again to the Court claiming an increased amount of compensation. This was based on the fact that at the time when of his initial request, he was unaware of the extent of his physical damage as received the report on his physical state following the request already being made. On 22 June 2005 the Military Court considered the matter and dismissed it for being time-barred. The Applicant appealed against the decision but his demand was rejected.

Complaints

The Applicant complained: (i) under Article 6 that he was denied his right to an effective remedy, that the Court procedures were too lengthy and unfair due to the absence of any public hearing on the matter before the Military Court; (ii) under Article 2 that the State failed to protect his physical indemnity; and (iii) that the State violated Article 13 for having denied him an effective remedy.

Held

Article 6

The Court noticed that, since in the field of ordinary civil and administrative law the limitation period starts from the date when the final damage evaluation is released, in this case, whilst applying to military administrative law, the time limit was deemed expired without specifying its starting point first. Therefore, the amount requested in regard of damage was hypothetical and needed to be reassessed. For the Court, the Applicant could not possibly present a request within sixty days after the decision of the administration because the damage was estimated later on. Accordingly, it found Turkey in breach of Article 6 of the Convention.

Article 2 in conjunction with Article 13

The Court did not deem necessary to consider the complaint under Article 2 of the Convention because as explained in the assessment of Article 6, Turkish law does provide for the right to appeal as long as it is done within the time limit prescribed by law. The Court did not examine the matter under Article 2 in conjunction with Article 13.

Article 41

The Court awarded the Applicant €10,000 in respect of pecuniary and non-pecuniary damages combined.

Commentary

This case analyses the time-barrier issue. The Applicant made a complaint to the European Court one day past the expiring time prescribed by law during which it is lawful to bring a case to the attention of the Court. This is because the damage was set after the final decision of the administration. Moreover, for the first time, the Court accepted the complaint which was made on a Monday when the expiring date was on a Sunday, therefore a non-working day for the Court.

Right to Respect for Private and Family Life

Geleri v Romania

(33118/05)

European Court of Human Rights: Judgment dated 15 February 2011

Expulsion of alien on grounds of national security – classified reasons for expulsion - Article 8 (right to respect for private and family life) – Article 1 of Protocol No.7 (procedural safeguards relating to the expulsion of aliens)

Facts

The Applicant is a Turkish national who lives in Moldova but was lawfully resident in Romania. He had been granted political asylum in 1998. He married a Romanian national in 2003 and had a daughter with her in 2005. He was also a partner in two commercial companies. However, in an order dated 21 February 2005, the prosecutor at the Bucharest Court of Appeal declared that the Applicant was a *persona non grata* and banned him from entering Romania for ten years on the grounds that sufficient and reliable information indicated that he was engaged in activities posing a threat to national security. On 23 February 2005, the Applicant was notified of this without further explanation and was expelled to Italy on the same day.

On 28 February 2005, the Applicant's lawyer appealed against the expulsion order on the basis that reasons behind the expulsion order had not been provided to the Applicant. The Bucharest Court of Appeal rejected the appeal, stating that the reasons for the decision were classified and that this was in accordance with the Romanian Constitution. In April 2005, the Romanian Office for Refugees withdrew the Applicant's refugee status. The High Court of Cassation and Justice dismissed the Applicant's appeal against this decision.

Complaints

The Applicant complained: (i) under Article 8 that the measures imposed on him were contrary to his right to respect for family life; and (ii) under Article 1 of Protocol No.7 that the procedural safeguards relating to the expulsion of aliens had been infringed.

Held

Article 8

The Court held that Romania had breached Article 8 by expelling the Applicant and prohibiting his return to Romania. In order to comply with the Convention, the expulsion would have had to be within the law, have pursued a legitimate aim and been necessary in a democratic society.

In this case, the Court observed that the "law" in question was primarily required to protect the individual from arbitrary conduct by the authorities by offering him the chance to have the disputed measure examined by an independent and impartial body empowered to examine all the relevant factual and legal issues. However, the Bucharest Court of Appeal examined the Applicant's appeal through a purely formal examination of the expulsion order and provided

no further explanation with regard to the Applicant's alleged offences. The Bucharest Court of Appeal was therefore not in a position to verify whether the Applicant genuinely posed a danger to national security or public order. The measures imposed on the Applicant therefore failed to guarantee him a minimal degree of protection against arbitrary conduct by the authorities. On that basis, the interference in his right to respect for his family and private life had not been in accordance with a "law" that met the requirements of the Convention.

Article 1 of Protocol No. 7

The Court found Romania in breach of Article 1 of Protocol No. 7. It stated that the guarantees under Article 1(2) of Protocol No. 7 were supposed to be offered prior to the expulsion of a foreigner who was lawfully resident in the territory of the respondent State. As the Applicant was lawfully resident in Romania, he could only be expelled "in pursuance of a decision reached in accordance with law" and, in particular, if he had been entitled to "submit reasons against his expulsion" and "to have his case reviewed". The Court reiterated that the Applicant was not provided minimum guarantees against arbitrariness. In addition, the Bucharest Court of Appeal had limited itself to a purely formal examination of his complaints. Further, the Court noted that the authorities had not provided the Applicant with, at the very least, an indication of the offences of which he was suspected and the basis for the conclusion that he posed a threat to national security. On that basis, the Applicant's rights under Article 1 of Protocol No. 7 had been violated.

Article 41

The Court awarded the Applicant €13,000 in respect of pecuniary and non-pecuniary damages and €6,300 in respect of costs and expenses.

Georgel and Georgeta Stoicescu v. Romania

(9718/03)

European Court of Human Rights: Judgment dated 26 July 2011

Protection from wild animal attacks – whether failure to put in place measures to protect Applicant from known stray dogs violated her right to private life and whether failure to allow Applicant's subsequent civil claim to go forward for lack of proper party identification violated her right to a fair trial – Articles 8 & 6

Facts

The Applicant, now deceased, was a Romanian national. In October 2000, the Applicant then aged 71 was attacked and bitten by a pack of stray dogs in front of her home in a residential area in Bucharest. The large number of stray dogs in Romanian cities had been an ongoing issue at this time, so much that it had warranted media attention. The attack left the Applicant with a head injury and fractured thigh bone, for which she had to spend 4 days in the hospital. Upon discharge she was prescribed medical treatment, but she could not afford to pay for it given that both she and her husband were retired with a monthly income equivalent to €80. Her condition deteriorated and by June 2003 she had become immobile, was declared disabled, and as a result granted free medical care.

The Applicant tried on several occasions to bring a civil action for damages, but her case was repeatedly dismissed without any examination of the merits. The cases were also initially delayed on the basis of the Applicant being unable to pay the court fees.

Complaints

The Applicant complained: (i) under Article 8 that she had been attacked by a pack of stray dogs because the local authorities had failed to take adequate measures to control the issue in Bucharest; and (ii) under Article 6 that her two civil actions for damages had been inappropriately dismissed.

Held

Article 8

The Court found that the Romanian authorities had violated Article 8 given their inadequate measures to deal with stray dogs, as well as combined their failure to provide the Applicant with appropriate redress for her injuries.

The Court noted that the right to private life provided by Article 8 includes a person's physical and psychological integrity, and pursuant to Article 8, States had a positive obligation to prevent "breaches of the physical and moral integrity of an individual by other persons when the authorities knew or ought to have known of those breaches."

Article 6

The Court also held that the Romanian authorities had violated the Applicant's right to a fair trial under Article 6 by unfairly dismissing her civil actions against Bucharest's local authorities. The Court reasoned that Article 6 includes a right of access to a court, and for this right to be effective, there must be a clear and practical opportunity to challenge an act that has interfered with his or her rights. In the present case, the Romanian authorities had failed to strike a fair balance between the public interest and the Applicant's rights of access to a court. Consequently, the Applicant could not claim compensation in court for the attack and as a result did not have an effective right of access to a court.

Article 41

The Court awarded the Applicant €9,000 in respect of non-pecuniary damages and €20 in respect of costs and expenses.

Golemanova v Bulgaria

(11369/04)

European Court of Human Rights: Judgment dated 17 February 2011

Refusal of change of name – Article 8 (right to respect for private and family life)

Facts

The Applicant is a Bulgarian national. She claimed that she had been called by the name Maya since her childhood, both within and outside her family. She was officially registered under forename “Donka” and had only discovered this at the age of eleven when she changed schools. In 2001, she lodged a request to change her forename. However, the court rejected her request on the grounds that the relevant domestic law only permitted the changing of a forename if there were “serious reasons”, which the Applicant had failed to give.

The Applicant appealed to the Pleven Regional Court, which dismissed her complaints, finding that the Applicant was known as Maya to only a very narrow circle of her close relatives and therefore did not pass the required threshold. The Supreme Court of Cassation dismissed the Applicant’s further appeal as it took the same view as the Regional Court.

Complaints

The Applicant complained that the refusal to change her forename by the Bulgarian courts constituted a breach to her right to respect for her private and family life under Article 8.

Held

Article 8

The Court held that Bulgaria was not in breach of Article 8. It acknowledged that a person’s forename fell within the sphere of private and family life. The Court determined that national authorities, by refusing to authorise a change of forename, had, however, struck a fair balance between the competing interests of the Applicant and of society as a whole.

Hajduova v Slovakia

(2660/03)

European Court of Human Rights: Judgment dated 30 November 2010

Gender-based domestic violence – order for husband to undergo psychiatric treatment – failure to undergo treatment – Article 5 (right to liberty and security) – Article 8 (right to respect for family or private life)

Facts

The Applicant is a Slovak national. Her husband was arrested in 2001 for attacking the Applicant in public and repeatedly threatening her and others with death threats, causing her minor injuries. The Applicant and her children moved to private housing. Her husband had been convicted of domestic violence four times before this attack. The District Court ordered that

the husband receive psychiatric treatment in hospital. The hospital did not provide him with the requisite treatment and he was released, upon which he resumed his threats on the Applicant and her lawyer. He was arrested again after the Applicant and her lawyer filed a criminal complaint and was again transported to hospital. The Applicant complained to the Constitutional Court that the District Court's judgment was not carried out. It rejected the Applicant's complaint on 2 October 2002.

Complaints

The Applicant complained: (i) under Article 8 that the domestic authorities had failed to fulfil their positive obligations to protect her from her husband; and (ii) under Article 5 that the District Court had failed to comply with its statutory to order that her husband be detained for psychiatric treatment.

Held

Article 8

The Court found Slovakia in breach of Article 8 of the Convention. In its reasoning, the Court considered that given the husband's history of physical abuse and menacing behaviour towards the Applicant, any threats made by him would arouse in the Applicant a well-founded fear that they might be carried out. The Court determined this was enough to affect her psychological integrity and well being so as to give rise to an assessment of the States fulfilment of their positive obligations. The Court could not overlook the domestic authority's inactivity and failure to ensure that he was duly detained for psychiatric treatment, which enabled him to continue to threaten the Applicant and her lawyer.

Lastly, owing to the vulnerability of victims of domestic violence, the Court stressed the need for a greater degree of vigilance and protection in such cases.

Article 5

The Court referred to its 'pertinent jurisprudence' before deciding that there was no valid claim under Article 5, which protected physical liberty and not physical safety.

Article 41

The Court awarded the Applicant €4,000 for non-pecuniary damages and a further €1,000 in costs.

Commentary

This judgment makes it clear that domestic abuse need not be physical in order for the authorities to have a positive obligation to protect victims of domestic abuse via Article 8 of the Convention.

Kiyutin v Russia

(2700/10)

European Court of Human Rights: Judgment dated 10 March 2011

Application for residence permit – refusal on grounds of medical condition – Article 6 (right to a fair trial) - Article 8 (right to respect for private and family life) – Article 13 (right to an effective remedy) - Article 14 (prohibition of discrimination) – Article 15 (derogation in time of emergency)

Facts

In 2002, the Applicant, an Uzbek citizen, moved to live with his brother in the Oryol region of Russia. In 2003, the Applicant married a Russian national and in 2004, they had a daughter together. The Applicant applied for a Russian residence permit for which he was required to undergo a medical examination. His application was refused on the grounds that he was HIV positive.

Complaints

The Applicant complained: (i) under Articles 8, 13, 14 and 15 that the decision to refuse him Russian residency was disproportionate to the legitimate aim of the protection of public health and disrupted his right to live with his family, (ii) under Article 6(1) that the domestic courts did not order nor inform him about his right to a private examination.

Held

Article 14 in conjunction with Article 8

The Court found Russia in breach of Article 14 in conjunction with Article 8. In its reasoning, the Court reiterated that, although Article 8 did not include the right of an individual to settle in a particular country or to obtain a residence permit, a State must still exercise its immigration policies in a manner compatible with a foreign national’s human rights, in particular the right to respect for their private or family life and the right not to be subject to discrimination. Further, the relationship between the Applicant and his Russian spouse, in which their child was born, fell within the concept of “family life and therefore within the ambit of Article 8.

With regards to Article 14, the Court reiterated that discrimination means treating differently, without an objective and reasonable justification, persons in analogous or relevantly similar situations, which – in the present case – refers to foreign for residence permits on account of their family ties in Russia.

To justify its measures, the Government needed to prove that the difference in treatment was objective and reasonable (namely that it pursued a legitimate aim and that there was a reasonable relationship of proportionality between the means employed and the aim), subject to the margin of appreciation.

The Court was not convinced that the Government’s differential treatment could achieve the legitimate aim of protecting public health, as it was particularly concerned about the blank and indiscriminate nature of the measure, which it considered was based on ill-founded assumptions and generalisations regarding the behaviour of people living with HIV.

It therefore held that the Government had overstepped the margin of appreciation in violation of Article 14 in conjunction with Article 8.

Articles 6, 13 and 15

The Court found that the Applicant's other complaints were inadmissible.

Article 41

The Court awarded the Applicant €15,000 in respect of non-pecuniary damages and €350 in respect of costs and expenses.

Commentary

With regards to the phrasing Article 14, the Court found that a distinction made on account of one's medical condition, including HIV status, should be covered by the words "other status" as cited in the article.

In coming to this decision, the Court reiterated that the non-exhaustive list in Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristic or "status" by which persons or groups of persons are distinguishable from one another.

Another element the Court had to take into consideration was the margin of appreciation which is left to State Parties where a broad consensus amongst them cannot be reached, particularly on sensitive issues. In the present case, the Court claimed that the scope of the margin, which varies according to circumstances, subject matter and background, is substantially narrower where a restriction on rights applies to a particularly vulnerable group in society which has suffered discrimination in the past.

Kryvitska and Kryvitskyy v Ukraine (30856/03)

European Court of Human Rights: Judgment dated 2 December 2010

Inherited property – testator psychologically impaired – will annulled – Applicants evicted - Article 8 (right to respect for private and family life) - Article 6 (right to a fair trial) - Article 1 of Protocol No.1 (protection of property)

Facts

The Applicants are a mother and her son, who inherited a flat in the will of Mrs Y.B. However, the first Applicant learned that Mrs Y.B. had drafted two more wills, signing the same flat off to other individuals. The Applicants therefore instituted judicial proceedings seeking to have those two wills annulled on the basis that Mrs Y.B. had been under severe stress resulting from her participation in an ongoing court dispute. On 26 February 2001, a panel of experts found that Mrs Y.B. had suffered from psychiatric disorders, giving rise to intellectual and memory impairment and paranoia. The District Prosecutor therefore sought annulment of all of Mrs Y.B.'s wills, including the one in the first Applicant's favour.

The District Court ruled in favour of the prosecutor and declared the Applicants' appeal inadmissible. The District Tax Administration therefore registered the State's title to flat as an intestate estate. It instituted court proceedings against the Applicants, seeking to annul their tenancy registration and evict them. The second Applicant however lodged a counterclaim that he and his mother had occupied the flat for a considerable period in good faith and on lawful grounds and took care of maintenance fees and renovations. Further he argued that his family had no alternative housing and their eviction would compromise the interests of his two minor children. The District Court ruled in favour of the Tax Administration. The Applicants' appeals were dismissed and the Applicants were evicted.

Complaints

The Applicants complained that: (i) the annulment of their tenancy registration and eviction violated their "right to a home" under Article 8; (ii) the domestic courts had failed to analyse their central arguments, which violated their right to a fair trial under Article 6(1); and (iii) they were deprived of the results of home improvements made by them during their occupancy, which violated their right to protection of property under Article 1 of Protocol No. 1.

Held

Article 8

The Court found Ukraine in breach of Article 8 of the Convention. In its reasoning, the Court reiterated that the loss of one's home is the most extreme form of interference with the right to respect for the home. Therefore, it considered that any interference with this right constitutes a violation of Article 8, unless it pursues one of the legitimate aims set out in Article 8(2). The expression in Article 8(2), "in accordance with the law", does not merely require that the measure should have a basis in domestic law but also refers to the quality of the law in question. In particular, the Court stated that the law must be sufficiently clear in its terms and afford a measure of legal protection against arbitrary application. Furthermore, any interference with an Applicant's right to respect for his or her home must respond to a "pressing social need" and be proportionate to the legitimate aim. In particular, where the lawful right to occupation has come to an end, an individual should be able to have the proportionality of the measure determined by an independent tribunal. Lack of reasoning in a judicial decision may, even where the formal requirements have been complied with, be taken into account among other factors in determining whether the measure complained of struck a fair balance.

The Court noted the need for the domestic courts to balance the interests of the Applicants' family, which included two minor children, against the financial interest of the State in maximising profit from sales of a flat acquired by it as intestate property. The Court concluded that in light of the authorities' failure to provide adequate reasons for dismissing the Applicants' arguments regarding applicability of the law concerning eviction of arbitrary occupants or to assess the proportionality of their eviction, the Applicants were deprived of adequate procedural safeguards in the decision-making process concerning their right to a home.

Article 6

In light of the decision above, the Court did not consider it necessary to examine the complaint under Article 6.

Article 1 of Protocol No. 1 The Applicants never raised this complaint during the domestic proceedings. The Court therefore declared this complaint inadmissible.

Article 41

The Court awarded each of the Applicants €6,000 in respect of non-pecuniary damages.

Commentary

The Court confirmed in this case that even where a Member State restricts access to housing in accordance with domestic law and purportedly in pursuit of a legitimate aim, the domestic courts must assess the proportionality of the measure. All such actions will not necessarily be in compliance with the Convention, and it is essential that the domestic courts conduct a thorough investigation into the effects of the action on all individuals affected, particularly minors. Also, domestic courts need to make it clear from their judgments that they have undertaken this analysis.

Mosley v the United Kingdom

(48009/08)

European Court of Human Rights: Judgment dated 10 May 2011

Media publication of intimate details regarding public figure – successful privacy claim under domestic proceedings – whether Article 8 imposes pre-notification requirement for publication of such details – Article 8 (right to respect for private and family life)

Facts

The Applicant was a British national and former president of the FIA. On 30 March 2008, a British tabloid newspaper published an article entitled “F1 boss has sick Nazi orgy with 5 hookers”, including still photographs taken from video footage secretly recorded by one of the participants in the sexual activities, who had been paid in advance to do so. The article invited readers to view an edited extract of the video and provided a website address. Following a complaint made by the Applicant’s solicitors, the edited footage was voluntarily removed from the website and an undertaking was given that it would not be shown again without 24 hours’ notice. Written notice was subsequently given on 3 April 2008.

The Applicant launched civil proceedings for breach of confidence and invasion of privacy and sought an injunction to prevent the newspaper from showing the video footage online. Although the Applicant did not dispute that the activities had taken place, he contested the “Nazi” characterisation of the activities. Following a series of proceedings before the High Court, the Applicant was awarded £60,000 in damages and recovered approximately £420,000 in costs. A final injunction was also granted against the newspaper.

Complaints

The Applicant complained that the United Kingdom had violated its positive obligations under Article 8, taken alone and taken together with Article 13, by failing to impose a legal duty on the tabloid newspaper to notify him in advance of the proposed story in order to give him the opportunity to seek an interim injunction and prevent its publication.

Held

Article 8

The Court unanimously found no violation of Article 8 for the absence of a pre-notification requirement under UK domestic law. The Court acknowledged that the conduct of the tabloid newspaper was open to severe criticism and recognised that the private lives of those in the public eye had become a highly lucrative commodity for certain sectors of the media. Although such publication benefits from the protection of Article 10 (the right to freedom of expression), such a right is overruled by the requirements of Article 8 where the information in question is of a private and intimate nature and there is no public interest in its publication.

However, the Court emphasised the need to look beyond the specific facts of the case in hand and consider the broader impact of a pre-notification requirement. In particular, it noted the limited scope of the restrictions under Article 10 on the freedom of the press to publish material contributing to matters of general public interest. The Court therefore concluded that having regard to the potential “chilling effect” of a pre-notification requirement, to the highly doubtful effectiveness of such a measure and to the wide margin of appreciation in this area, Article 8 did not require a legally binding pre-notification requirement.

Article 13

The Court considered that the claim under Article 13 was a reformulation of the complaint under Article 8 and was subsidiary to it. The Court therefore considered the Applicant’s claims solely under Article 8.

Commentary

This widely publicised case in the UK has generally been regarded as a victory for press freedom. However, although the Court considered that the UK’s margin of appreciation in this case was a wide one, it should be emphasised that the Court frowned upon the behaviour of the newspaper in question. Despite rejecting the unworkable and risky notion of a blanket pre-notification requirement under Article 8, it maintained that the right to freedom of expression under Article 10 would give way to Article 8 considerations where there is no public interest in the publication of the information in question.

R.R. v Poland

(27617/04)

European Court of Human Rights: Judgment dated 26 May 2011

Access to medical information – whether denial of diagnostic, prenatal testing amounted to inhuman and degrading treatment, as well as a violation of right to privacy – Article 3 (prohibition of torture) – Article 8 (right to respect for private and family life)

Facts

The case was brought by a woman who was repeatedly refused diagnostic care by doctors during her pregnancy. After a routine ultrasound in the 18th week of pregnancy detected foetal irregularities, the Applicant asked for genetic tests to which she was legally entitled in order to confirm any severe malformation. If such malformation was confirmed, it was the woman's wish to have an abortion pursuant to Article 4a of the Polish Protection of the Human Foetus and Conditions Permitting Pregnancy Termination Act, which allows abortion in certain instances, including when the preborn child suffers from an incurable life-threatening ailment. The genetic tests, however, were repeatedly stalled by her doctors over the course of the next 8 weeks. By the time the genetic tests were performed and the results known, the Applicant had missed the 24 week time-limit for any legal abortion. She subsequently gave birth to a baby suffering from Turner syndrome, a chromosomal abnormality affecting girls, whose symptoms are generally a short stature and sterility.

The Applicant subsequently filed a civil case against the doctors and hospitals. The court awarded her relief against her gynaecologist, finding that he violated her rights by disclosing confidential information about her pregnancy to the media. Her remaining claims were dismissed. Although she won an appeal filed in the Supreme Court, her victory was limited and the remedy inadequate, barring her from further appealing the decision.

Complaints

The Applicant complained: (i) under Article 3 that she had been subjected to inhuman and degrading treatment; (ii) under Article 8 that the authorities had failed to provide her with access to genetic tests in the context of the pregnancy uncertainty; and (iii) under Article 13 that she had been deprived of effective domestic remedies.

Held

Article 8

The Court found that Poland violated Article 8 of the Convention enshrining protections on the right to privacy. The Court stated that the Applicant's right to respect for private and family life was violated because she had been denied timely information about her health vis-à-vis that of her foetus and had thus been prevented from deciding whether or not continue a pregnancy. The Court clarified that where, as here, the law permits abortion in certain limited circumstances, timely access to information on one's health condition "is directly relevant for the exercise of personal autonomy."

Moreover, the Court addressed the obligation of states to regulate the practice of conscientious objection to ensure patients have access to health services they are entitled to receive. In the Applicant's case, it was her right to prenatal examinations and in certain circumstances, abortion. The Court noted States have an obligation strike a balance between the exercise of the freedom of conscience of health professionals in the professional context and patients' rights to obtain access to services to which they are entitled".

Article 3

The Court found that Poland violated Article 3 on account of the humiliation and suffering the Applicant endured during her pregnancy. The Court explained that as a result of the procrastination of the genetic tests and the medical community's disregard for the temporal sensitivity of her situation, the Applicant had to endure weeks of uncertainty and emotional anguish concerning her health, the health of her foetus, and the future of her family.

Article 13

The Court did not consider it necessary to examine the Applicant's claim under Article 13, reasoning that in deciding those issues raised by the Applicant under Article 8, it had already addressed the Applicant's complaint about Poland's failure to put in place an adequate legal framework allowing for the determination of disputes related to access to diagnostic services as required for legal abortion.

Article 41

The Court awarded the Applicant €45,000 in respect of non-pecuniary damages.

S.H. and Others v Austria (57813/00)

European Court of Human Rights: Grand Chamber Judgment dated 3 November 2011-11-30

In vitro fertilisation with ova and sperm from the spouses – sensitive ethical issues – State's margin of appreciation – society consensus – Article 8 (right to respect for private and family life) – Article 14 (prohibition of discrimination)

Facts

The Applicants are two Austrian married couples residing in the country.

Suffering from infertility, they wished to use medically assisted procreation techniques, a subject which is regulated by the Austrian Artificial Procreation Act.

According to the law, the *in vitro* fertilisation with the use of ova from a donor – that would allow them to have a child carrying at least the genetic code of one of the parents – is prohibited.

Other techniques, instead, are allowed, like the *in vitro* fertilisation with ova and sperm from the spouses and, in exceptional cases, the donation of sperm introduced in the reproductive organ of the woman.

In May 1998, the Applicants lodged an appeal with the Constitutional Court seeking a review of the relevant provisions of the domestic law which, acknowledging the authorities' interference with the Applicants' right to private life, defined such interference well-founded and justified since it prevented the creation of unusual personal relations and the exploitation of women.

Complaints

The Applicants complained: (i) under Article 8 that the prohibition of the *in vitro* fertilisation with the use of ova from a donor represented a violation of their right to respect for private and family life; and (ii) under Article 14 that the fact that other fertilisation techniques were allowed under the same law constitute a discriminatory treatment.

Held

Article 8

Assuming that there had been an interference with the Applicants' right under Article 8 of the Convention, the Court was called to determine if such interference had been 'necessary in a democratic society' and compatible with the margin of appreciation left to States Parties. The Court considered that when there is no shared view within the Member States – as on sensitive ethical issues like medically assisted procreation – the margin of appreciation afforded to them is wider. Acknowledging the State as the best, but not exclusive, actor to assess if there is consensus within society and to strike a fair balance between competing interests, the Court concluded that Austria had not exceeded the margin of appreciation afforded to it. Therefore there had not been a violation of Article 8 of the Convention.

Article 14

The Court found no separate issue to arise under Article 14 of the Convention.

Commentary

The decision of the Grand Chamber, which reversed the judgment of the First Section, came with some reservations made in regard to the Government's observations.

The Court stressed the fact that it had interpreted and applied the Convention in the light of the circumstances current at that time. Accordingly, it called on Austria, as well as all the States who are part of the Convention, to constantly review their assessment of consensus within domestic societies, particularly on ethical issues, as it is subject to constant evolution due to the dynamic developments in science and in the legal framework that regulates scientific subjects.

Ternovszky v Hungary

(67545/09)

European Court of Human Rights: Judgment dated 14 December 2010

Home birthing – domestic law stating that health professionals run risk of conviction - Article 8 (right to private and family life) – Article 14 (prohibition of discrimination)

Facts

The Applicant is a Hungarian national who lives in Budapest. The Applicant was pregnant and intended to give birth at her home, rather than at a hospital or a birthing home. However, Hungarian domestic law declared that any health professional assisting a home birth runs the risk of conviction. Domestic legislation is otherwise silent on the issue.

Complaints

The Applicant complained under Article 8 in conjunction with Article 14 that while there was no comprehensive legislation on home birthing in force in Hungary, domestic law on the issue effectively dissuaded health professionals from assisting those wishing to have a home birth.

Held

Article 8

The Court found Hungary in breach of Article 8 on the basis that the circumstances of giving birth incontestably form part of one's private life. Hungarian legislation did not prevent the Applicant from giving birth at home. However, health professionals need to assist in home births. Therefore, the legislation dissuades such professionals from providing the requisite assistance.

In its reasoning, the Court noted that any interference with an individual's private life should ensure a proper balance between social interests and the right at stake. In this case, it required a balance between the Applicant's right to choose the environment of her birth against the requirement to regulate for public health and social security reasons. The lack of legal certainty dissuaded many health professionals from assisting in home births, as did the previous prosecutions of those who helped. This resulted in prospective mothers receiving arbitrary assistance. There was no public health reason or evidence warranting restricting home births. The Court did not declare the claim under Article 14 inadmissible but neither did it expressly state that Hungary was in breach of this Article in conjunction with Article 8.

Article 41

The Court awarded the Applicant €1,250 in costs.

Freedom of Thought, Conscience and Religion

Association Les Témoins de Jéhovah v. France

(8916/05)

European Court of Human Rights: Judgment dated 30 June 2011

Supplementary tax demand related to donations made to the association Les Témoins de Jéhovah infringing freedom of religion – Article 9 (freedom of thought, conscience and religion)

Facts

The Applicant, Association Les Témoins de Jéhovah (Association of Jehovah's Witnesses), is a French association with its headquarters in Boulogne-Billancourt (France). The Jehovah's Witnesses movement, which is financed by donations, identifies itself as a Christian religion; however, according to parliamentary report it is classified a sect and thus does not fall within the religious associations benefiting from tax exemption.

On the basis of the information gathered in an audit authorised by the tax authorities, it was given notice to declare the gifts that the Applicant Association had received from 1993 to 1996. The association refused and asked that the tax exemption applicable to gifts and legacies to liturgical associations be applied to it. On the contrary, it was subjected to an automatic taxation procedure.

In May 1998 it was notified of a supplementary tax assessment, but the association stressed that the tax claimed concerned "donations" by 250,000 persons over four years.

In January 1999 the Applicant association submitted an official complaint to the tax authorities, which was dismissed in September 1999. The association brought proceedings before all the levels of judgment provided by the domestic system, but its complaints had been always dismissed.

Complaints

The Applicant complained under Article 9 that the disputed tax proceedings had infringed its freedom of religion.

Held

Article 9

Assuming that there had been interference in the Applicant association's right to freedom of religion, the Court had to ascertain whether such interference was "prescribed by law", and the law in question was formulated with sufficient clarity to be foreseeable, meaning that the citizen had to be able to regulate his or her conduct accordingly.

The Court found that the wording of the law was too vague and unclear in respect of the beneficiaries of the provisions, preventing to know whether they were applicable to legal entities and thus to the Applicant association. Additionally, it noted that, since the taxation of gifts to the Applicant association had depended on the conduct of a tax audit, the application of the tax law

had not been foreseeable. In conclusion, the interference in the Applicant association's right to respect for its freedom of religion had not been "prescribed by law" in violation of Article 9 of the Convention.

Commentary

The Court had already held in several cases that Article 9 protected the free exercise of the Jehovah's Witnesses' right to freedom of religion. With regard to the Applicant association's case, the Court examined firstly whether the disputed supplementary tax assessment had amounted to interference in its right to freedom of religion, and, if so, whether that interference was acceptable in the light of the Convention.). With regard to the concept of the "disclosure" of gifts within the meaning of Article 757, the Court noted that this case was the first in which it had been argued that submission of the required accounting records in the context of a tax audit was the equivalent of "disclosure". Such an interpretation of the Article – which itself gave no detail on the circumstances of "disclosure" – would have been difficult for the association to foresee, in that manual gifts had until then been exempt from any obligation to declare them.

Bayatyan v Armenia

(23459/03)

European Court of Human Rights: Judgment dated 7 July 2011

Jehovah's Witness – compulsory military service – no alternative under domestic law for conscientious objectors – whether domestic measures within State's margin of appreciation – Article 9 (freedom of thought, conscience and religion)

Facts

The Applicant, a Jehovah's Witness, had temporarily moved away from home to avoid compulsory military service. On his return and concerned about imminent criminal proceedings, the Applicant and his defence counsel visited the District Prosecutor's Office on numerous occasions to inquire about his situation. Although the investigator instituted criminal proceedings against the Applicant, the Applicant alleged that he refused to bring charges against him until further investigations had been carried out. The Applicant lodged a complaint to the General Prosecutor's Office, his concern being that he would lose the benefit of an amnesty law which was shortly due to expire.

Despite the Applicant having returned home and visited the investigator on several occasions, in October 2001, the investigator issued five decisions against the Applicant, including bringing a charge of draft evasion against the Applicant, requesting the court to authorise the Applicant's detention on remand and monitoring of his correspondence and suspending proceedings until the Applicant had been found. The District Court authorised the monitoring of the Applicant's correspondence and his detention on remand although neither the Applicant nor his family were notified of these decisions.

The Applicant was arrested in September 2002. Armenia ratified the Convention on 26 April 2002. The Applicant was subsequently convicted but released having served ten and a half months of his sentence.

Complaints

The Applicant complained under Article 9 that his conviction violated his right to freedom of thought, conscience and religion.

Held

The Court found a violation of Article 9. After concluding that Article 9 applied to the Applicant's case, the Court asked whether the interference with the Applicant's rights to freedom of thought, conscience and religion was permitted under Article 9, namely whether it was prescribed by law, pursued one or more of the legitimate aims set out in Article 9(2) and was necessary in a democratic society.

The Court observed that almost all Member States which had had or still had compulsory military service have introduced alternatives in order to cater for conscientious objectors. It therefore considered that a State Party which had not introduced such an alternative had only a limited margin of appreciation and must prove a 'pressing social need' for the measure. It considered that the system in Armenia at the material time made no allowance for conscientious objectors and therefore failed to strike a fair balance between the interests of society as a whole and those of the Applicant. This was particularly the case in light of the 'overwhelming majority' of Member States who had introduced alternative measures for conscientious objectors and of the fact that the Applicant was actually willing to perform an alternative service.

Finally, after reiterating the principles of pluralism, tolerance and broadmindedness as the hallmarks of a 'democratic society', the Court concluded that the measure directly conflicted with the official policy of reform and legislative changes being implemented in Armenia at the time in pursuance of its international commitment. It therefore did not serve a pressing social need.

Commentary

The Court in this case had regard to whether there is a common state practice amongst the Member States in order to decide on the scope of the margin of appreciation which should be granted to the respondent State. As the overwhelming majority of Members had introduced alternative measures for conscientious objectors, a narrow margin of appreciation was afforded to Azerbaijan.

Dimitras and Other v Greece (No.2)

(34207/08; 6365/09)

European Court of Human Rights: Judgment dated 3 November 2011

Taking the oath – solemn declaration before the judge – profession of religious beliefs – Article 6 (right to a fair trial) – Article 8 (right to respect for private and family life) – Article 9 (freedom of thought, conscience and religion) – Article 13 (right to an effective remedy) – Article 14 (prohibition of discrimination)

Facts

The Applicants, Greek nationals, are the legal representatives of the International Helsinki Foundation, a non-governmental organisation working for the protection of human rights.

In that capacity they took part on a number of criminal cases between January and December 2008, since they were requested to appear before the court as witnesses. On those occasions the competent judge asked them to place their right hand on the Bible and take the oath. Being not Orthodox Christians, they had to make a solemn declaration instead. However, since the standard format for the trial minutes contemplated exclusively the option of ‘Orthodox Christian’, they were asked to profess their atheism in order for the minutes to be edited accordingly.

Complaints

The Applicants complained: (i) under Articles 8, 9, 13 and 14 that when taking the oath, they were obliged to reveal their religious beliefs and that there was no domestic remedy by which to have their complaints examined; (ii) under Article 6(1), of the presence of religious symbols in the courtroom.

Held

The Court considered examining the first complaint from the sole standpoints of Article 9 and Article 13 of the Convention.

It found that the obligation to reveal personal religious beliefs when making a solemn declaration - as prescribed by Article 218 and 220 of the Greek Code of Criminal Procedure - constituted an interference with the Applicants’ enjoyment of their freedom of thought, conscience and religion. Said interference, however, could not be justified because disproportionate vis-à-vis the purpose pursued. Accordingly, noting that the Applicant was deprived of any remedy to settle the dispute at a domestic level, the Court found Greece in breach of Article 9 and Article 13 of the Conventions.

Article 6

The Court considered this part of the Applicant manifestly ill-founded and thus rejected it pursuant to Article 35(3)(4) of the Convention.

Article 41

The Court awarded the Applicants €1,500 in respect of costs and expenses.

Jakobski v Poland

(18429/06)

European Court of Human Rights: Judgment dated 7 December 2010

Buddhist prisoner – denial of vegetarian meals in prison - Article 9 (freedom of thought, conscience and religion) - Article 14 (prohibition of discrimination)

Facts

The Applicant is a Polish national who was serving an eight-year prison sentence following his conviction for rape. On several occasions, he requested meat-free meals on account of his religious dietary requirements. On 19 January 2006, the prison dermatologist recommended that the Applicant be placed on a meat-free diet in view of his health problems. For three months, the Applicant was given a “no pork” diet. However, following the advice of a doctor who examined the Applicant, the diet was discontinued. The Applicant objected and threatened to go on a hunger strike.

The Applicant complained to the Director of Goleniów Prison who refused his request without providing any reasons. The Regional Court dismissed the Applicant’s appeal. The Applicant was subsequently transferred to another prison where, once again, he was denied meat-free meals.

Complaints

The Applicant complained that the refusal to provide him with meat-free meals in accordance with his religious views infringed his rights under Article 9. Further, he complained that he was discriminated against since other religious groups in prison were allowed a special diet, contrary to Article 14.

Held

Article 9

The Court found Poland in breach of Article 9 of the Convention. In reaching this conclusion, the Court considered that the Applicant’s decision to adhere to a vegetarian diet could be regarded as motivated or inspired by his religion and was not unreasonable. Consequently, the refusal of the prison authorities to provide him with a vegetarian diet fell within the scope of Article 9 of the Convention. Further, the authorities had failed to strike a fair balance between the interests of the prison authorities and those of the Applicant, namely his right to manifest his religion. It was no defence for the Government to argue that catering to the dietary needs of one prisoner was logistically inconvenient or impracticable. The Court also rejected the Government’s argument that since vegetarianism was only encouraged by Mahayana Buddhists (of which the Applicant was one), the prison did not have to provide him with vegetarian meals. Notably, the Court referred to Recommendation 2006(2) on the European Prison Rules which states that prisoners should be provided with food that takes into account their religion. Moreover, the relative simplicity of the request, the failure of authorities to contact the Mahayana Buddhist society in Poland to enquire about the dietary requirements and the legitimacy of the Applicant’s request also influenced the Court.

Article 14

The Court did not consider necessary to consider the same facts under Article 14, in conjunction with Article 9.

Article 41

The Applicant was awarded €3,000 in non-pecuniary damages and €187 for costs.

Kılıçgedik and Others v Turkey

(4517/04, 4527/04, 4985/04, 4999/04, 5115/04, 5333/04, 5340/04, 5343/04, 6434/04, 10467/04 and 43956/04)

European Court of Human Rights: Judgment dated 14 December 2010

Dissolution of Kurdish political group HADEP – ban on executive members from becoming members of other political parties for period of five years - Article 6 (right to a fair trial) – Article 7 (no punishment without law) - Article 9 (freedom of thought, conscience and religion) – Article 10 (freedom of expression) - Article 11 (freedom of assembly and association) – Article 13 (right to an effective remedy) – Article 14 (prohibition of discrimination)

Facts

The Applicants are Turkish nationals and former executive members of the People's Democracy Party (HADEP) which was established on 11 May 1994. On 29 January 1999, the Chief Prosecutor of the Court of Cassation brought proceedings before the Constitutional Court and demanded that HADEP be dissolved. He argued that HADEP had become a 'centre of illegal activities against the integrity of Turkey'. The Constitutional Court dissolved HADEP on 19 July 2003 on the basis that the Applicants and other members had links with the PKK. The Constitutional Court also banned the Applicants and 18 other HADEP members from becoming founders, members, leaders or auditors of any other political party for a period of five years.

Complaints

The Applicants complained that: (i) the ban prevented them from making use of their political rights and from becoming members of political parties, contrary to Articles 9, 10 and 11; (ii) the ban prevented them from continuing to take part in active politics, which infringed their rights under Article 3 of Protocol No. 1; (iii) proceedings before the Constitutional Court violated, inter alia, their inability to defend themselves, contrary to Article 6; and (iv) the ban violated their rights under Articles 7, 13 and 14 of the Convention.

Held

Article 3 of Protocol No. 1

The Court found Turkey in breach of Article 3 of Protocol No.1. The Court reiterated that although states may subject the right to vote and the right to stand for election to conditions, it must apply a margin appreciation to limit these rights. The State must satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence

and deprive them of their effectiveness, that they pursue a legitimate aim and that the means employed are not disproportionate. The Court analysed its decisions from other similar cases where it held that such bans were too wide to be considered proportionate to its legitimate aims. The Court came to the same decision in this case.

Article 6

After considering its decisions in other similar cases, the Court declared the complaints inadmissible as they were incompatible *ratione materiae* with the provisions of the Convention.

Articles 7, 13 and 14

Having regard to its conclusion in respect of Article 3 of Protocol No. 1, the Court did not consider it necessary to examine the complaints under Articles 7, 13 and 14 separately.

Articles 9, 10 and 11

The Court deemed it appropriate to examine the complaints surrounding Articles 9, 10, and 11 solely from the standpoint of Article 3 of Protocol No. 1.

Article 41

The Court awarded €3,000 jointly to the five Applicants in application 4985/04, €1,500 to the Applicant in application 6434/04 and €1,240 to the Applicant in application 43956/04, in respect of costs.

Savez Crkava “Riječ života” and Others v. Croatia

(7798/08)

European Court of Human Rights: Judgment dated 9 December 2010

Reformist church - refusal of Government to grant certain rights - Article 6 (right to a fair trial) – Article 9 (freedom of thought, conscience and religion) – Article 13 (right to an effective remedy) – Article 14 (prohibition of discrimination) – Article 1 of Protocol No. 12 (general prohibition of discrimination)

Facts

The Applicants are churches of a Reformist denomination based in the Croatian cities of Zagreb and Tenja. On 21 June 2004, the Applicants requested that the Government allow them to provide religious education in public schools and nurseries, provide pastoral care to their members in medical and social-welfare institutions and prisons and perform religious marriages recognised under civil law.

In a letter dated 12 January 2005, the Religious Communities Commission rejected the Applicants' application, stating that they did not satisfy the criteria which religious communities had to meet to be granted these rights. For instance, they had not been present in Croatia since 6 April 1941 and the number of their adherents did not exceed 6,000. It was further stated that their members already have a right to receive pastoral care in medical and social-welfare institutions and in prisons.

The Applicants submitted another request to the Prime Minister directly and received the same response from the Religious Communities Commission. The Applicants then lodged a request for the protection of a constitutionally guaranteed right with the Administrative Court, but this action was declared inadmissible on 12 October 2006. The Applicants lodged a further complaint with the Constitutional Court, which was dismissed, and a petition for a review of the constitutionality and legality of the criteria for establishing an agreement with the Government. The Constitutional Court declared this inadmissible as the relevant legislation was not susceptible to such a review.

Complaints

The Applicants complained that: (i) under Article 14 in conjunction with Article 9 that they had been discriminated against when the Government refused to grant them the rights mentioned above; (ii) under Article 1 of Protocol No. 12 they had been generally discriminated against, and (iii) under Article 6 and 13 that they did not have access to a court remedy and had been denied the opportunity to challenge the decision of the Religious Communities Commission.

Held

Article 14 in conjunction with Article 9

The Court held that Croatia had violated Article 14 in conjunction with Article 9. The Court reiterated that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. However, Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The question for the Court in this case was whether the difference in treatment had “objective and reasonable justification” or, in other words, whether it pursued a “legitimate aim” and whether there was a “reasonable relationship of proportionality” between the means employed and the aim sought to be realised.

The Court observed that the Religious Communities Commission had refused to conclude an agreement on issues of common interest with the Applicants because they did not satisfy historical and numerical criteria. The Government of Croatia nevertheless entered into such an agreement with three other churches which did not meet the numerical criterion. The Government explained that this was because those churches had satisfied the alternative criterion of being “historical religious communities of the European cultural circle”. However, the Government provided no explanation as to why the Applicants’ churches had not also qualified for that status. Therefore, the criteria were not applied on an equal basis to all religious communities.

Articles 6, 9 and 13

The Court held that these complaints were manifestly ill-founded.

Article 1 of Protocol No. 1

The Court held that, having examined the case under Article 14, it was not necessary to separately examine this complaint.

Article 41

The Court awarded each Applicant €9,000 in respect of non-pecuniary damages and to the Applicant jointly €4,570 in respect of costs and expenses.

Freedom of Expression

Altuğ Taner Akçam v Turkey
(27520/07)

European Court of Human Rights: Judgment dated 25 October 2011

Publication of an article criticising the prosecution of a prominent Turkish writer – Article 301 of the Turkish Criminal Code – denigrating campaign – Article 10 (freedom of expression)

Facts

The Applicant is a Turkish and German national residing in Ankara.

He is a professor of history, researching and publishing mainly on the historical events of 1915 concerning Armenia.

In October 2006, he published an editorial opinion criticising the prosecution of Hrant Dink, a prominent Turkish writer, convicted under Article 301 of the Turkish Criminal Code for denigrating what at that time the law defined “Turkishness”. As a consequence of said article, criminal complaints were lodged against the Applicant accused of praising criminal conduct and inciting hatred and hostility amongst people.

However, the complaint was dismissed as the public prosecutor considered that the guarantees enshrined in Article 10 of the European Convention of Human Rights (ECHR) prevailed and, therefore, the Applicant’s opinion, in his capacity as a professor of history, fell within the realm of freedom of expression.

In May 2008, Article 301 of the Turkish Criminal Code was amended and three major changes were introduced: (1) the replacement of the term “Turkishness” with “Turkish nation”; (2) the reduction of the maximum term of imprisonment for those found guilty under Article 301; and (3) the obligation to obtain the authorization from the Ministry of Justice to start any investigation in this regard.

Complaints

The Applicant complained under Article 10 that, despite the amendments to the Turkish Criminal Code, the Government could not guarantee he would not face any further investigation and prosecution on account on his views on the Armenian issue.

Held

Article 10

The Court considered that the measures adopted by the Government, namely the amendments to Article 301 of the Turkish Penal Code, did not seem to provide sufficient safeguards against prejudicial and arbitrary use of the law.

With specific regard to the role of the Ministry of Justice, the Court claimed that the authorisation to proceed should not be left to a member of the Government, since he is an expression of a particular and contingent political will.

In consideration of this and the harassment campaign that had been launched against the Applicant as a consequence of his article, the Court confirmed he be at considerable risk of prosecution on account of his 'unfavourable' opinions on the Armenian issue. Therefore, there had been an interference in his right to freedom of expression which, being not 'prescribed by the law', violated Article 10 of the Convention.

Editorial Board of Pravoye Delo and Shtekel v Ukraine

(33014/05)

European Court of Human Rights: Judgment dated 5 May 2011

Reproduction of defamatory material – whether Applicants could foresee consequences of reproducing letter initially published by an internet newspaper – Article 10 (freedom of expression)

Facts

The Applicants are the editorial board and the editor-in-chief of Ukrainian newspaper *Pravoye Delo*. In September 2003, the newspaper published an anonymous letter downloaded from an online newspaper. The letter contained allegations that members of the Ukraine Security Service had been engaging in unlawful and corrupt activities, and in particular that they had connections with members of organised criminal groups. The newspaper also printed a disclaimer stating that the letter could be false and invited public commentary.

A month later, the president of the Ukraine National Thai Boxing Federation sued the Applicants for defamation, asserting that the letter concerned him. In response, the Applicants asserted that the letter was not about the claimant and that nevertheless they were protected by the Ukrainian Press Act because they had only reproduced and invited for comment material that had initially been published elsewhere in media. The court disagreed, finding that the letter at issue did concern the claimant and was defamatory. The court also found that the internet site from which the letter had been downloaded was not considered printed media subject to the Press Act. The court ordered a retraction, a published apology, and an award of certain money damages. The Applicants' subsequent appeals were rejected.

Complaints

The Applicants complained that the sanctions imposed by the Ukrainian courts violated their right to freedom of expression in contravention of Article 10 of the Convention.

Held

Article 10

The Court found that the Applicants' rights to freedom of expression under Article 10 had been violated. In so deciding, the Court noted that the first and most important requirement of Article 10 of the Convention is that any interference by a public authority with the exercise of the freedom of expression should be lawful. In order to comply with this requirement, interference does not merely have to have a basis in domestic law. The law itself must correspond to certain requirements of "quality". In particular, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Here, the Applicants could not have foreseen the effects that the impugned publication could have caused given the lack of clarity in Ukrainian law regarding journalists' use of online material.

The Court observed the publication at issue was an exact copy of material downloaded from a publicly accessible internet newspaper, and that the Press Act grants journalists immunity from civil liability for verbatim reproduction of material published in the press. The Press Act, however, does not contain any specific provisions on the use of information obtained from the internet or the status of internet-based media as "press." The Court reasoned that although a state's policies governing reproduction of material from printed and online media may differ (given the internet's distinct qualities), by not having any such policies as regards the internet, Ukraine lacks a sufficient legal framework that allows journalists to foresee the consequences of using online information.

Additionally, the Court observed that pursuant to Ukrainian law defamed parties are entitled to demand retraction and compensatory damages. Ukrainian law, however, does not in such cases specifically provide for orders of apology. Moreover, subsequent to the Applicants' appeals, Ukrainian courts had found that imposing an obligation to apologize in defamation cases violated freedom of expression guarantees in the Ukrainian Constitution.

Accordingly, the Court found there had been a violation of Article 10 of the Convention on account of the sanctions imposed on the Applicants for the impugned publication.

Article 41

The Court awarded the Applicant €6,000 in respect of non-pecuniary damages.

Faruk Temel v Turkey

(16853/05)

European Court of Human Rights: Judgment dated 1 February 2011

HADEP – public statement on war in Iraq and Öcalan’s solitary confinement - interrogation without lawyer – criminal conviction – Article 5 (right to liberty and security) - Article 6 (right to a fair trial) - Article 10 (freedom of expression)

Facts

The Applicant is a Turkish national and former president of the provincial youth section of the People’s Democracy Party (HADEP). On 21 January 2003, he read out a statement at a party conference in which he allegedly stated that he had protested against the United States’ intervention in Iraq and Abdullah Öcalan’s solitary confinement. On 23 January 2002, a prosecutor interrogated the Applicant without the presence of his lawyer. The minutes of the interview showed that the Applicant had admitted reading out the statement. On that same day, the Applicant was brought before the Criminal Court of Hakkari, which ordered his detention on the grounds that he had praised the president of the PKK, made propaganda in favour of a terrorist organisation and chanted separatist slogans.

The Applicant’s lawyer denied the allegations and lodged an appeal. During the appeal hearing, the Applicant denied the allegations, claiming that his statement aimed to express the public’s reaction against the war in Iraq. He added that his remarks towards Abdullah Öcalan were out of courtesy and not in support for the PKK. The Court convicted the Applicant. The Court of Cassation upheld the Applicant’s conviction.

Complaints

The Applicant complained: (i) under Article 10 that his conviction and fine violated his right to freedom of expression; (ii) under Article 5 that his pre-trial detention was unlawful and excessively long; and (iii) under Article 6 that he was deprived of his right to a fair trial.

Held

Article 10

The Court found Turkey in breach of Article 10. The Court reiterated that an interference with this right must be prescribed by law, pursues one or more of the legitimate aims listed in Article 10(2) and is necessary in a democratic society for achieving these aims. The Court considered that the statement in question did not encourage violence or an uprising against the authorities and was not intended to be a hate speech. Therefore, it rejected the Government’s argument that it acted in the interests of national security, declared that the Applicant’s criminal conviction was not a social necessity and that the sentence was disproportionate. It added that a democratic State should accept criticism and have some deference in the use of criminal proceedings, especially where there are other ways of responding to unjustified assaults or criticisms from its opponents.

Article 6

The Court found Turkey in breach of Article 6(3)(c) (right to defend oneself in criminal proceedings) in conjunction with the Article 6(1) (right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law). In coming to this conclusion, the Court recalled a previous case in which the absence of legal assistance to a person under police custody constituted a violation of Articles 6(1) and (3). The Court considered that the Government did not provide sufficient facts or arguments that could lead to a different conclusion.

The Court did not consider it necessary to consider other complaints under Article 6.

Article 5

The Court declared this complaint inadmissible.

Article 41

The Court awarded the Applicant €16,000 for non-pecuniary damages.

Fratanolo v Hungary

(29459/10)

European Court of Human Rights: Judgment dated 3 November 2011

Display of a five-pointed red star – totalitarian symbols – participation in public demonstration – Article 10 (freedom of expression)

Facts

The Applicant is a Hungarian national, who at the material time was a member of the Hungarian Workers' Party 2006.

In March 2008, he was convicted of having displayed a 'totalitarian symbol' as a consequence of wearing a five-pointed red star while participating in a demonstration on 1 May 2004 celebrating the country's accession to the European Union and the International Workers' Day.

On appeal in September 2008 the Regional Court reversed the judgment and acquitted the Applicant.

However, the prosecutor lodged an appeal with Court of Appeal which upheld the Applicant's conviction claiming that his act was dangerous to society.

Complaints

The Applicant complained under Article 10 that his conviction amounted to a breach of his right to freedom of expression.

Held

The Court considered that the Applicant's decision to wear a red star in public was to be regarded as his way of expressing his political views, as the display of vestimentary symbols fell within

the scope of Article 10 of the Convention. Additionally, the Court noted that the Government had failed to prove that wearing a red star exclusively means identification with totalitarian ideas. Consequently, the restriction imposed by national authorities could not be considered corresponding to a 'pressing social need', which led the Court concluding that there had been a violation of Article 10 of the Convention.

Article 41

The Court awarded the Applicant €4,000 in respect of non-pecuniary damages and €2,400 for costs and expenses.

Menteş v Turkey (No. 2)

(33347/04)

European Court of Human Rights: Judgment dated 25 January 2011

Member of HADEP – illegal protests – reporting to media – prison sentence – protection of freedom of expression and prevention of terrorism - Article 10 (freedom of expression)

Facts

The Applicant is a Turkish national who lives in the Kurdish region of Diyarbakır in Turkey. At the material time, the Applicant was a member of the People's Democracy Party, HADEP. On 22 July 2000, she was arrested and placed in custody during a demonstration organised by HADEP to challenge the establishment of a Category F prison in Diyarbakır. She was sentenced in the criminal courts to 10 months' imprisonment for having: (i) organised and taken part in an illegal demonstration against Abdullah Öcalan's death sentence; (ii) taken part in demonstrations against Category F prisons; and (iii) spoken to the press about her arrest.

Complaints

The Applicant complained that the prevention of her attempt to read a statement to the press had amounted to a breach of Article 10.

Held

Article 10

The Court concluded that the measures taken against the Applicant amounted to a clear interference with the exercise and enjoyment of her right to freedom of expression enshrined under Article 10(1). In its reasoning, the Court reiterated its role of balancing the right to freedom of expression and the State's margin of appreciation. In doing so, the Court stated that restrictions to the freedom of expression should be established in a "persuading manner". In this case, the measures taken against the Applicant could not be deemed "necessary in a democratic society".

Novaya Gazeta V Voronezhe v Russia

(27570/03)

European Court of Human Rights: Judgment dated 21 December 2010

Criticism of public officials - defamation claim – Article 10 (freedom of expression)

Facts

The Applicant is the Editorial Board of the Novaya Gazeta v Voronezhe newspaper. On 2 April 2002, the newspaper published an article concerning abuses allegedly committed by the mayor of Novovoronezh and other municipal officials. On 8 May 2002, the mayor, two officials and one local businessman lodged an action for defamation against the Applicant, stating that elements of the article were untrue and damaging to their reputation.

During the trial, the Applicant produced ordinary copies of the audit report of the town administration, which had no evidentiary value before the domestic court. After attempting and failing to obtain the original report, the Applicant requested a court injunction requiring the authorities to submit the required evidence. The trial court refused. As a result of the consequent lack of admissible evidence on behalf of the Applicant's claims, the trial court ruled in favour of the plaintiffs, ordering the Applicant to pay damages and publish an apology. On 6 February 2003, the Applicant's appeal was dismissed by the Voronezh Regional Court.

Complaints

The Applicant complained under Article 10 that the Government interfered with its right to freedom of expression and maintained that the interference was not necessary in a democratic society.

Held

Article 10

The Court found Russia in breach of Article 10. The Court stated that the plaintiffs should have shown a greater degree of tolerance towards criticism of their activities given that they were in the public domain. It further noted that the subject matter of the article, the use of public funds, is a topic of general interest which the public were entitled to receive information about. As the allegedly defamatory statements concerned matters of public interest and did not exceed the permissible degree of exaggeration, they should be regarded as value judgments rather than statements of fact. However, the Court acknowledged that value judgments must still maintain sufficient factual basis and held that the audit report issued by a governmental agency could serve as the factual basis for the statements in question as the author did not have access to the originals. The Court further highlighted the failure of trial courts to investigate the veracity of the statements and stated that this amounted to 'overstepping their margin of appreciation'.

Article 41

The Court awarded the Applicant €866 in respect of pecuniary damage.

Otegi Mondragon v Spain

(2034/07)

European Court of Human Rights: Judgment dated 15 March 2011

Basque activist – public comments against the King – Article 10 (freedom of expression) – Article 14 (prohibition of discrimination)

Facts

The Applicant is a Spanish national who lives in the Basque region of Spain. The Applicant was a spokesperson for a left-wing Basque parliamentary group who campaigned for independence. On 21 February 2003, the Central Investigating Judge ordered the search and the closure of the offices of the newspaper *Euskaldunon Egunkaria* on the grounds of alleged ties with the terrorist group, the ETA. Ten people were arrested. The detainees claimed to have suffered ill-treatment during their detention. On 26 February 2003, the King of Spain was invited to the opening ceremony of a power station in the Basque Region. On the same day at a press conference, the Applicant condemned the action against *Euskaldunon Egunkaria* and claimed that the King was ultimately responsible for torturing the detainees from the newspaper as he was the head of the police.

On 7 April 2003, the Public Prosecutor lodged a criminal complaint against the Applicant for a “serious offence against the King”. The Applicant was not convicted by the High Court of the Basque region. However, the Supreme Court sentenced him to one year in prison, suspended his right to vote during that period and order him to pay all costs and expenses of the trial. The Constitutional Court declared the Applicant’s case inadmissible.

Complaints

The Applicant complained: (i) under Article 10 that his right to freedom of expression had been violated by the Supreme Court who sentenced him to one year’s imprisonment for “serious offence against the King”; and (ii) under Article 14 in conjunction with Article 10 that he had been discriminated against on the ground of his political views and his role of spokesperson.

Held

Article 10

The Court held that Spain had breached Article 10.

The question for the Court was whether the interference with the Applicant’s right to freedom of expression fell within the derogations permitted under Article 10(2).

The Court considered that the interference pursued one of the “legitimate aims” set out in Article 10(2), namely “the protection of the reputation or the rights of others”. As far as the principle of necessity was concerned, the Court considered the balance between the right to freedom of expression and the State’s “margin of appreciation”. In light of the Applicant’s role as spokesperson of the parliamentary group and the national interest in the topic debated, the Court considered that the freedom of expression should prevail.

In response to the Applicant's argument about the hyper-protection of the King's honour and dignity, the Court affirmed that such domestic provision was not in accordance with the spirit of the Convention, as the value of a free and pluralist information prevailed vis-à-vis the privileges conferred on the King. Finally, the Court considered that the criticism against a constitutional institution is consistent with the right to freedom of expression and although the Applicant's speech was provocative and aggressive, it was not directed at the honour or private life of the King, but rather to the institutional responsibility of the King in his capacity as Head of State.

Article 14

The Court did not consider it necessary to separately consider the claim under Article 14.

Article 41

The Court awarded the Applicant €20,000 in respect of non-pecuniary damages and €3,000 for costs and expenses.

Pinto Coelho v. Portugal

(28439/08)

European Court of Human Rights: judgment dated 29 June 2011 and not final.

Breach of journalist's right to freedom of expression through automatic application of publication ban – Article 10 (freedom of expression)

Facts

The Applicant, Sofia Pinto Coelho, is a Portuguese national who was born in 1963 and lives in Lisbon. She is a well-known journalist and legal correspondent on the national television channel SIC. On 3 June 1999 the channel broadcast on the 1 o'clock and 8 o'clock news a report produced by the Applicant showing that the former director-general of the criminal investigation department, who had recently been dismissed, had been charged with a breach of *segredo de justiça* (secrecy of judicial proceedings). For several months the press had been reporting that the director-general could have been responsible for leaking information about a case concerning the accounts of a private university and a commercial company.

In her report Ms Pinto Coelho showed viewers a facsimile copy of the indictment and the public prosecutor's document opening the investigation. Criminal proceedings were brought against the Applicant. On 3 October 2006 the court of Oeiras found her guilty of disobedience for publishing "copies of documents in the file of proceedings prior to a first-instance judgment", an act which was prohibited and automatically punishable under Article 88 of the Code of Criminal Procedure as then worded (the *segredo de justiça* rule). Ms Pinto Coelho was sentenced to a fine of EUR 10 per day for 40 days and to the payment of court costs. Her appeals were dismissed on 27 March 2007 by the Lisbon Court of Appeal and on 11 December 2007 by the Constitutional Court.

Complaints

The Applicant complained under Article 10 that her conviction had breached her right to freedom of expression.

Held

Article 10

The Court pointed out that the report in question clearly dealt with a matter of public interest, because the person concerned was the director-general of the judicial police. The public thus had, in Ms Pinto Coelho's case, a right of scrutiny as regards the functioning of the judicial system. The Court then observed that the domestic courts had not balanced the interest of Ms Pinto Coelho's conviction against her right to freedom of expression. Under Portuguese law, as in force at the material time, Ms Pinto Coelho's conviction had been automatic once she had displayed on television facsimiles of documents from proceedings covered by the *segredo de justiça* rule 2. The authorities, moreover, had not stated the reason why the broadcasting of two facsimiles of documents from the file had prejudiced the investigation in progress, or how, as a result, the defendant's right to be presumed innocent had been breached. The Court pointed out that, on the contrary, the fact of displaying facsimile copies of the documents in question during the report had been relevant not only to the subject matter but also to the credibility of the information supplied, providing evidence of its accuracy and authenticity. In conclusion, the Court took the view that Ms Pinto Coelho's conviction had constituted a disproportionate interference in her right to freedom of expression. The automatic nature of the application of the criminal legislation in question had prevented the courts from balancing it against the interests protected by Article 10. There had thus been a violation of Article 10.

Article 41

The Court held that Portugal was to pay the Applicant €4,040.32 in respect of pecuniary damage.

Commentary

The main question that the Court had to address was whether Ms Pinto Coelho's conviction constituted a breach of her right to freedom of expression that could be regarded as "necessary in a democratic society". On that point the Court first reiterated that, while the press had the task of imparting information and ideas on all matters of public interest, it had to be careful not to overstep certain bounds, regarding in particular the protection of the reputation and rights of others, or the need to prevent the disclosure of confidential information. There was nothing to prevent the press from taking part in a discussion on a question pending before the Courts, but in such cases it had to refrain from publishing anything that might prejudice the chances of a person receiving a fair trial or undermine the confidence of the public in the role of the Courts. The Court further noted that a general and absolute ban on the publication of any kind of information was difficult to reconcile with the right to freedom of expression.

Freedom of Assembly and Association

Akgöl and Göl v Turkey

(28495/06; 28516/06)

European Court of Human Rights: Judgement dated 17 May 2011

Remembrance meeting for the killing of a student - use of force by police officers to disperse the crowd - participation in demonstrations - disciplinary sanction and expulsion from university - Article 11 (right to peaceful assembly - Article 6 (right to a fair trial)

Facts

On 3 May 1998 Kenan Mak, a student at the Abant İzzet Baysal University in Bolu was killed in an attack. Thereafter, on 3rd May of every subsequent year students have held a meeting to mark the anniversary of the killing. The Applicants, 2 Turkish nationals were studying at the university when they attended the remembrance meeting taking place at the university's canteen. The students first gathered at the canteen then chanted slogans like 'down with fascism' then started to walk towards the chancellor's Office of the university. The gendarmes present in the vicinity used force and dispersed the students. The Applicants were questioned the same day by gendarme officers.

On 5 July 2002, an indictment with the Court of First Instance was filed and accused the Applicants of breaching Law no 2911 and using force. The Applicants were sentenced to two years and six months imprisonment in May 2003. The Applicants appealed against the judgement and argued that there had been insufficient evidence to warrant their conviction and they had not been given the opportunity to examine the video footage. In October 2007, the Applicants were sentenced to 1 year and 3 months for only breaching law no 2911. The application to the Court of Appeal has been still remaining. On account of Applicant Mr. Akgöl's participation in the demonstration was imposed a disciplinary sanction and expelled him from the university. The decision was enforced and the Applicant's graduation from the university was delayed for one year.

Complaints

The Applicants complained: (i) under Articles 10 and 11 that the gendarmes' intervention in the demonstration had infringed their freedom of thought and expression and their right to peaceful assembly; and (ii) under Article 6 that they had been denied a fair hearing.

Held

Article 11

The Court decided to examine the complaints from the sole standpoint of Article 11 of the Convention.

The Court found that, albeit unauthorised, the protest was peaceful and the demonstrators had not engaged in any acts of violence. In these circumstances, public authorities should show 'a certain degree of tolerance' towards peaceful participants, as – otherwise – the meaning of free-

dom of assembly would be completely jeopardised. However, in the present case, the Applicants were prosecuted and convicted at first instance on account of the mere participation in the protest, that, additionally, lasted only eleven minutes before promptly dispersed. Accordingly, the Court found Turkey in breach of Article 11 of the Convention.

Article 6

The Court noted that the criminal proceedings against the Applicants are still pending before the Court of Cassation. Accordingly, this part of application must be declared inadmissible for non-exhaustion of domestic remedies pursuant to Article 35(1)(4) of the Convention.

Article 41

In respect of non-pecuniary damages, the Court awarded the first Applicant €12,000 and €9,000 to the second Applicant.

HADEP and Demir v Turkey

(28003/03)

European Court of Human Rights: Judgment notified 14 December 2010

Dissolution of political party – HADEP - Articles 6 (right to a fair trial) - Article 9 (freedom of thought, conscience and religion) – Article 10 (freedom of expression) – Article 11 (freedom of assembly and association) – Article 14 (prohibition of discrimination) – Article 1 of Protocol No. 1 (protection of property) – Article 3 of Protocol No. 1 (right to free elections)

Facts

The first Applicant is the Turkish political party, the People's Democracy Party (HADEP). The second Applicant is a Turkish national and former general secretary of HADEP. From 1996 to 1997, some of HADEP's offices and administrators were subject to attack and criminal proceedings were initiated against a number of its members. The Applicants argued that these actions originated from a leaked report of the National Security Council which recommended "the control and pursuit" of HADEP by the State.

On 29 January 1999, the Chief Prosecutor brought proceedings before the Constitutional Court arguing that HADEP had become a "centre of illegal activities against the integrity of Turkey" and should, as a result, be dissolved. On 13 March 2003, the Constitutional Court decided to dissolve HADEP on the basis that it had become a centre of illegal activities, which included assisting the PKK. In addition, the domestic court banned 46 HADEP members and leaders from entering a political party for five years and transferred HADEP's property to the Treasury.

Complaints

The Applicants complained that: (i) Turkey had violated Article 11 by dissolving HADEP; (ii) the decision of the National Security Council and political/military figures had influenced the decision of the Constitutional Court, contrary to Article 6; (iii) contrary to Article 14 in conjunction with Articles 9 and 10, the dissolution order was passed because HADEP was a Kurd-

ish political party; and (iv) the transfer of HADEP's property to the Treasury violated Articles 1 and 3 of Protocol No. 1.

Held

Article 11

The Court held that Turkey had breached Article 11. In assessing the Applicants' complaints under Article 11, it considered whether the interference with the right to freedom of association was prescribed by law, pursued a legitimate aim and was necessary in democratic society. Further, it emphasised that a democracy requires pluralism and, thus, Article 11 and Article 10 were essential to the proper functioning of democracy. As the activities of political parties involve the expression of different views, they were protected by both Articles 10 and 11. Moreover, the Court reinforced its intention to only accept convincing and compelling reasons to justify restrictions on a party's freedom of association, stating that States have only a limited margin of appreciation as regards Article 11(2).

Turning to the questions in hand, the Court found that HADEP's dissolution was prescribed by law, as it was based on the Turkish Constitution. However, the Court hesitated as to whether the dissolution of a political party, in order to maintain the indivisible unity of the State, could be said to have pursued the legitimate aims of preventing disorder, protecting the rights of others, protecting territorial integrity and preserving national identity. Therefore, the Court considered that this question was closely related to the examination of the necessity of the interference.

Combining the two questions, the Court asked itself whether HADEP's dissolution was necessary in a democratic society, or in other words, whether it met a "pressing social need" and was "proportionate to the legitimate aim pursued". The Court observed that HADEP took into account the actions and statements of non-HADEP members, that HADEP's party programme condemned violence and promoted political solutions and that there was no convincing basis for linking HADEP to the PKK. In light of these observations and the fact that the dissolution of a political party should be considered as a "drastic" measure, the Court concluded that HADEP's dissolution could not reasonably be said to have met a pressing social need. Therefore, the interference with the Applicants' freedom of association was not necessary in a democratic society.

Article 6

The Court dismissed this complaint on the basis that it was incompatible *ratione materiae* with Article 6.

Articles 9, 10 and 14

The Court did not consider it necessary to separately examine the complaints under Articles 9, 10 and 14.

Articles 1 and 3 of Protocol No. 1

The Court considered that these complaints concerned the secondary effects of HADEP's dissolution and therefore did not deem it necessary to examine them separately.

Article 41

The Court awarded the second Applicant €24,000 in respect of non-pecuniary damages and €2,200 to the Applicants jointly in respect of costs and expenses.

United Macedonian Organisation Ilinden and others v Bulgaria (No.2)

(34960/04)

European Court of Human Rights: Judgment dated 18 October 2011

Registration of non-profit organisations – Macedonian minority in Bulgaria – freedom of assembly – Article 11(right to freedom of assembly) – Article 6(right to fair trial) – Article 14 (prohibition of discrimination)

Facts

The Applicants are Bulgarian nationals and all members of the managing council of the United Macedonian Organisation Ilinden (UMO Ilinden), a non-profit organisation formed on 20 October 2002 and based in south-west Bulgaria, in the Pirin region historically inhabited by the Macedonian minority.

The following day, the organisation applied for registration to the Blagoevgrad Regional Court, which, however, refused it, alleging that the organisation's aims were illegal as directed against the national sovereignty and the territorial integrity of the country.

The Applicants lodged an appeal with the Sofia Court of Appeal which, in July 2003, upheld the first judgment, stressing that the strong political character of the association was incompatible with the nature and the aims of a non-profit entity.

The Applicants appealed to the Supreme Court of Cassation, but the impugned judgment was upheld in May 2004.

Complaints

The Applicants complained: (i) under Article 11 that the refusal to register the UMO Ilinden was in breach of their right to freedom of assembly; and (ii) under Articles 6(1) and 14 that the registration proceedings were unfair and that the courts examining the registration request were biased, as their decisions were based on ethnic discrimination against the Macedonian minority of the country.

Held

Article 11

The Court revealed an interference with the Applicants' right to freedom of assembly and accordingly its examination was aimed to ascertain if such interference had been 'necessary in a democratic society', pursuant to the standards imposed by the Convention.

The Court analysed the reasons given by the domestic courts to justify the refusal to register the UMO Ilinden and found that the motivations provided were ill-founded and incompatible

with the restrictions set forth in the Convention. The Court addressed specifically the issue of organisations advocating for independence and reiterated that the expression of separatist ideas could not be considered as itself threatening the State's integrity and sovereignty. Further, it challenged the domestic court's argument alleging that the Applicant's association was of political nature, by revealing a certain ambiguity surrounding the meaning of the term 'political' used in the national Constitution in the relevant part regulating the foundation of legal entities.

Accordingly, being the refusal of the registration an excessive and radical measure that had prevented the Applicants' association even from commencing their activities, the Court found Bulgaria in breach of Article 11 of the Convention.

Article 6 and Article 14

The Court considered that no separate issues arise under Article 6 and Article 14, as the same facts had already been examined in the light of the right to freedom of assembly.

Article 41

The Court awarded the Applicants €9,000 in respect of non-pecuniary damages and €1,513.29 for costs and expenses.

Right to Marry

O'Donoghue and Others v the United Kingdom

(34848/07)

European Court of Human Rights: Judgment dated 14 December 2010

Restricting marriage applications for immigrants – right to marry – Article 8 (right to respect for private and family life) – Article 9 (freedom of thought, conscience and religion) – Article 12 (right to marry) and Article 13 (right to an effective remedy) and in conjunction with Articles 14 (prohibition of discrimination)

Facts

The Applicants live in Londonderry in Northern Ireland. The first Applicant has Irish and British nationality. She is married to the second Applicant, who is a Nigerian national. The third Applicant is the child of the first and second Applicant. The fourth Applicant is the first Applicant's child from a previous relationship. Both the third and fourth Applicants have British and Irish nationality. The Applicants are practising Roman Catholics.

In 2005, the UK Home Secretary introduced a "Certificate of Approval Scheme" (CoAS). This first version of the scheme required persons subject to immigration control to either have express entry clearance or a Certificate of Approval, in order for them to marry in the United Kingdom. In order to obtain a Certificate of Approval, an eligible person was required to submit an application and £295 fee. This version of the scheme did not apply to persons seeking to marry in accordance with the rites of the Church of England.

The domestic courts declared that the first version of the scheme was contrary to Articles 12 and 14 of the Convention as it was discriminatory on the grounds of religion and nationality. The scheme was therefore amended so that Applicants who had insufficient leave to enter or remain at the time of applying for a Certificate of Approval could be asked to submit further information to enable the Home Office to satisfy itself that the proposed marriage was genuine. Following a further domestic judgment, a third version of the scheme was introduced whereby applications from individuals who did not have valid leave to enter or remain in the UK were to be treated in line with the guidance for those who had limited but insufficient leave to qualify for a Certificate of Approval. Further, in April 2009, the requirement for an application fee was suspended and later amended so that Applicants who could demonstrate financial hardship were reimbursed.

The first and second Applicants applied for a Certificate of Approval and requested to be exempted from the £295 fee. However, their application was declared invalid as they had not paid the fee. The Applicants obtained the fee from friends and supplied two sworn affidavits. The Applicants were issued with a Certificate of Approval and married on 18 October 2008.

Complaints

The Applicants complained: (i) under Article 12 that the existence of the CoAS and its application to them violated their right to marry; (ii) under Article 14 in conjunction with Article 12 that the CoAS was discriminatory as it did not apply to people who decided to marry in the Church of England; (iii) under Article 9 alone/and in conjunction with Article 14 that the CoAS had been discriminated against as deprived of their right to marry in the Anglican Church; (iv) under Article 8 alone/and in conjunction with Article 14 that the CoAS had disproportionately interfered with their right to respect for private and family life; and (v) under Article 13 that they had been deprived of relevant domestic remedies.

Held

Article 12

The Court found the UK in violation of Article 12. It stated that limitations on the right to marry could be established domestically to protect the solemnity and institution of marriage. In the context of immigration laws, States may be entitled to prevent marriages of convenience, entered into solely for the purpose of securing an immigration advantage.

The Certificate of Approval scheme was not based solely on the genuineness of the proposed marriage. Applicants with “sufficient” leave to remain qualified for the Certificate of Approval. Secondly, the Court considered that there was no justification for imposing a blanket prohibition on the exercise of the right to marry for all persons in a specified category regardless of whether the proposed marriage was one of convenience or not. Thirdly, the Court considered that a fee fixed at a level which a needy Applicant could not afford could impair the right to marry. Many persons subject to immigration control would either be unable to work in the United Kingdom, such as the second Applicant,

or would fall into the lower income bracket. Therefore, the Applicants' right to marry was impaired as, under the second version of the scheme, the second Applicant was not eligible to be issued with a Certificate of Approval and was subsequently hindered by the application fee.

Article 14 in conjunction with Article 12

The Court held that the first version of the scheme was discriminatory on the grounds of religion. The second Applicant was both unwilling (on account of his religious beliefs) and unable (on account of his residence in Northern Ireland) to enter into a marriage of the kind permitted by the scheme. He was initially prohibited from marrying at all in the United Kingdom and, following the amendments to the scheme, was only permitted to marry after submitting an application and paying a sizeable fee.

Article 14 in conjunction with Article 9

The Court declared the complaint under Article 9 inadmissible. However, the Government conceded that the Applicants were subject to a regime which those wishing to marry in the Church of England were not. For those reasons, the Court declared the complaint under Article 14 in conjunction with Article 9 to be admissible and found in favour of the Applicant.

Article 14 in conjunction with Article 8

Having regard to its findings under Article 12, the Court considered that no separate issue arose under Article 8, either read alone or in conjunction with Article 14 of the Convention

Article 13

The Court declared this claim inadmissible and rejected it as manifestly ill-founded in accordance with Article 35(3)(4) of the Convention.

Article 41

The Court awarded the Applicants €8,500 in respect of non-pecuniary damages, £295 in respect of pecuniary damages and €16,000 in respect of costs and expenses.

Protection of Property

Hakan Arı v Turkey

(13331/07)

European Court of Human Rights: Judgment dated 11 January 2011

Private land assigned for specific purpose under government scheme – whether hindered Applicant’s right to protection of property – Article 1 of Protocol No. 1 (protection of property)

Facts

The Applicant is a Turkish national. He owned a nursery measuring approximately 405 square metres but was denied a building permit as the land had already been allocated for the building of a school. The Applicant applied for an annulment of this decision but was rejected on the grounds that the expropriation of the property had been under an urban planning program. On 13 March 2003, the Applicant requested damages for the loss of the use of his property. A committee of experts estimated the value of the land at 16.242 billion TRL which was equivalent to €8915 at that time. The domestic court found in favour of the Applicant and awarded him 16.242 billion TRL in damages. Following an appeal by the authorities, the Court of Cassation quashed this decision and rejected any further appeals by the Applicant.

Complaints

The Applicant complained under Article 1 of Protocol No. 1 that the allocation of his land without compensation had restricted its potential use and therefore breached his right to the enjoyment of his property.

Held

Article 1 of the Protocol No. 1

The Court found Turkey in breach of Article 1 of Protocol No. 1. The fact that the land had been earmarked for the building of a school not only meant that the Applicant was restricted from building on the land but also that there was a restriction on the availability of the property. The Court observed that the Applicant had not been formally deprived of his property because his ownership status had not changed. However, his property rights had lost their essence. The Applicant had not lost access to his land, his control over it or his capacity to sell the land, but the exercise of his right was made more difficult. In the light of this analysis, the Court considered that the case fell within the first sentence of the Article 1 of Protocol No. 1, namely that “every natural or legal person is entitled to the peaceful enjoyment of his possessions”.

The Court then considered whether a fair balance was struck between the general interest of the community and the requirements for safeguarding the fundamental rights of the Applicant. The Court observed that the Applicant was left in complete uncertainty about the future of his property. It found that the land in question was initially going to be expropriated, but did not happen due to the lack of Government finances. It was only then when the municipality

adopted the new urban planning program and the land in question was assigned, despite the fact that the land had not been formally expropriated.

In light of these considerations, the Court concluded that the Applicant suffered an individual and excessive burden which disrupted the balance between the public interest and his individual right to property.

Article 41

The Court awarded the Applicant €12,000 for pecuniary damages, €2,000 for non-pecuniary damages and €1,000 for costs and expenses.

Köse v Turkey

(37616/02)

European Court of Human Rights: Judgment dated 7 December 2010

Expropriation of land – Birecik Dam Construction – compensation and statutory interest – insufficient interest – delay in payment – Article 1 of Protocol No.1 (protection of property)

Facts

The Applicants are Turkish nationals. The Ministry of Energy and Natural Resources expropriated several plots of land belonging to the Applicants for the construction of the Birecik Dam. In 1996, the Applicants commenced proceedings before the Birecik Civil Court for compensation for their respective plots. The Birecik Civil Court of First Instance awarded them compensation plus interest at the statutory rate. The Applicants received the compensation in February and June 1997.

Complaints

The Applicants complained under Article 1 of Protocol No. 1 that they had suffered financial loss due to insufficient interest rates applied on the compensation received and that the authorities had delayed in paying them the relevant amounts.

Held

Article 1 of Protocol No. 1

The Court found Turkey in breach of Article 1 of Protocol No. 1. The Court upheld its decisions in its similar previous cases and found the difference between the amounts due to the Applicants when their properties were expropriated and when they were actually paid caused them to sustain a loss which upset the fair balance that should have been maintained between the protection of the right to property and the demands of the general interest.

Article 41

The Court awarded Mr İbrahim Halil Köse and Ms Zöhre Köse €31,409, jointly, in respect of pecuniary damages; and Mr İbrahim Halil Köse €5,083 in the same respect.

Stummer v Austria

(37452/02)

European Court of Human Rights: Judgment dated 7 July 2011

Prison work – whether exclusion of Applicant from old-age pension system discriminatory – whether prison work constitutes ordinary work required to be done in ordinary course of detention - Article 1 of Protocol No.1 (protection of property) – Article 4 (prohibition of slavery and forced labour) – Article 14 (prohibition of discrimination)

Facts

During his time in prison, the Applicant worked in the prison bakery or kitchen and became a member of the unemployment insurance scheme. The Applicant subsequently filed an application for an early retirement pension with the Workers' Pension Insurance Office (WPIO). The WPIO dismissed the application on the ground that the Applicant had failed to accumulate the required number of insurance months to qualify for an early retirement pension. The Applicant brought an action against the WPIO, arguing that he had been working for twenty-eight years in prison and that the number of months worked during that time should be counted as insurance months for the purpose of assessing his pension rights.

The Applicant's claim was dismissed by the domestic employment tribunal. According to the Supreme Court's established case law, the Applicant's work corresponded to a legal obligation and therefore differed from work performed by employees which was based on an employment contract. Appealing this decision, the Applicant argued, *inter alia*, that the distinction was not objectively justified. The Vienna Court of Appeal, and then the Supreme Court, dismissed the Applicant's appeal.

Complaints

The Applicant complained: (i) under Article 14 in conjunction with Article 1 of Protocol No.1 that the exemption of those engaged in prison work from affiliation to the old-age pension system, depriving him of a pension, was discriminatory and (ii) since he was not affiliated to the old-age pension system for work performed as a prisoner, such work could not be regarded as falling under the terms of Article 4(3)(a), violating Article 4(2).

Held

Article 14 in conjunction with Article 1 of Protocol No. 1

The Court found no violation of Article 14 in conjunction with Article 1 of Protocol No. 1.

In reaching this conclusion, the Court firstly considered the applicability of Article 14 with Article 1 of Protocol No. 1. Reiterating general principles, the Court stated that the applicability of Article 14 does not presuppose a violation of a substantive Convention right but, rather, it was sufficient for the facts of the case to fall within the ambit of one or more of the provisions in question. With regards to Article 1 of Protocol No. 1, the Court reiterated that, instead of creating a right to property, the provision meant that where domestic legislation creates a right to receive benefits, the legislation must be regarded as creating a proprietary interest falling within the ambit of the provision for persons satisfying its requirements. The question for the

Court was therefore would the Applicant have had an enforceable right to receive the benefit in question had it not been for the alleged discriminatory condition of entitlement? The answer was 'yes', as the Court considered that, had the Applicant been affiliated to the old-age pension system for work performed in prison, he would have accumulated the necessary number of insurance months to become entitled to a pension. Therefore the claim fell within the ambit of Article 1 of Protocol No. 1, which in itself was sufficient to render Article 14 applicable.

Applying general principles to the Applicant's case, the Court asked whether the difference in treatment between the affiliation of the Applicant as a working prisoner and ordinary employees with the old-age pension system was justified. The Court accepted the Government's arguments that its aims, namely preserving the economic efficiency and overall consistency of the old-age pension system by excluding persons who have not made meaningful contributions, were legitimate. It also considered that the system of prison work and the social cover associated with it taken as whole was not "manifestly without reasonable foundation". In a context of changing standards, the Court observed that a State Party could not be reproached for having given priority to the unemployment insurance scheme on the basis that that would be the most relevant for the reintegration of prisoners upon their release. Therefore, while Austria was required to keep the issue raised under review, the Court found that Austria had not exceeded its margin of appreciation by not allowing working prisoners to become members of the old-age pension system.

Article 4

The Court found no violation of Article 4 on the basis that the Applicant's work constituted "work required to be done in the ordinary course of detention" under Article 4(3)(a) and therefore was not "forced or compulsory labour" within the meaning of Article 4(2). Although Rule 26.17 of the European Prison Rules provided that "as far as possible, prisoners who work shall be included in national social security systems," there was insufficient consensus amongst the State Parties on the issue of the affiliation of working prisoners to the old-age pension system. Therefore, whilst the provision in the European Prison Rules reflected an evolving trend, it could not be translated into an obligation under Article 4.

The Court did not consider it necessary to consider Article 14 in conjunction with Article 4.

Commentary

This case is an example of the evolving nature of the Convention as a 'living instrument.' Although the Court did not find a breach of Article 1 of Protocol No. 1 in this case *to date*, it maintained that the respondent State was obliged to keep the issue under review. Similarly, in respect of the finding under Article 4, the Court relied upon the standards adopted by State Parties but did not find sufficient evidence of State practice in affiliating prisoners with an old-age pension system. It is therefore possible that the Court would reach a different conclusion on these questions should a similar issue arise in the future.

Right to Education

Antaoliy Ponomaryov and Vitaliy Ponomaryov v Bulgaria
(5335/05)

European Court of Human Rights: Judgment dated 21 June 2011

Right to education – whether school fees imposed on resident aliens are discriminatory – Article 14 (prohibition of discrimination) in conjunction with Article 2 of Protocol No. 1 (right to education)

Facts

The Applicants are brothers who were born in Russian but lived in Bulgaria with their mother who was married to a Bulgarian national. The Applicants attended both primary and secondary school in Bulgaria. In 2005, when the Applicants were in their final and penultimate year of secondary school, they were ordered to pay certain schools fees because they were not permanent Bulgarian residents. The school authorities informed the Applicants that their rights to attend school and receive certificates of completion were contingent on payment of such fees. And, although in practice the Applicants' schools did not prevent them from attending classes, one Applicant's secondary school diploma was withheld for two years after it was due. The Applicants appealed unsuccessfully before the courts.

Complaints

The Applicants complained that they had been discriminated against in contravention of Article 14 in conjunction with Article 2 of Protocol No. 1, because, unlike Bulgarian nationals and or aliens having permanent residence permits, they had been required to pay fees for part of their secondary education.

Held

Article 14

The Court found that with respect to the particular circumstances of the Applicants, Bulgaria had violated Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1. In so deciding, the Court emphasised that its role was not to decide whether States were allowed to charge fees for education, but only whether, once a State had voluntarily decided to provide free education, it could exclude a group of people without justification. The Court recognized that education is an expensive activity but also noted that States must strike a balance between the educational needs of its people with its limited capacity to meet those needs. Moreover, the Court noted the growing importance of secondary education for society as more countries moved towards a "knowledge-based" society.

With respect to the Applicants, the Court noted that both had lawfully living in Bulgaria since childhood; they were fully integrated into Bulgarian society, including being fluent in Bulgarian; the authorities had never seriously intended to deport them; and at the time they had been charged the school fees, they had taken steps to obtain permanent residence permits. The Court

further noted that Bulgarian authorities had failed to take any of the above elements into account when deciding to impose school fees on the Applicants. Consequently, the Court found that there had been a violation of Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1, as there had been no justification for the school fees imposed on the Applicants based on their nationality and immigration status.

Article 41

The Court awarded each Applicant €2,000 in respect of non-pecuniary damage, and €2,000 for costs and expenses.

Lautsi and Others v Italy

(30814/06)

European Court of Human Rights: Grand Chamber judgment dated 18 March 2011

Crucifixes in secular state school - Article 2 of Protocol No.1 (right to education) - Article 9 (freedom of thought conscience and religion) - Article 14 (prohibition of discrimination)

Facts

The first Applicant and her two sons, who were also Applicants, reside in Italy. From 2001 to 2002, her sons attended a state school in which a crucifix was fixed to the wall of each of the school's classrooms. During a meeting of the school's governors, the first Applicant's husband questioned the display of religious symbols in classrooms, particularly crucifixes. However, when the school's governors decided to keep the religious symbols, the first Applicant contested the decision in the Veneto Administrative Court.

On 17 March 2005, her application was dismissed by the Constitutional Court which declared the case constitutionally inadmissible. The first Applicant appealed to the Supreme Administrative Court, which ruled that crucifixes could be displayed in state schools and doing so was compatible with the values of secularism.

Complaints

The Applicants complained: (i) under Article 2 of Protocol No.1 that the display of crucifixes in state schools infringed the right to education; (ii) under Article 9 that the crucifixes infringed their right to freedom of thought, conscience, and religion; and (iii) under Article 14 that the display of crucifixes in state schools discriminated against non-Catholics.

Held

On 3 November 2009, a Chamber of the Second Section unanimously held that there was a violation of Article 2 of Protocol No.1 and Article 9. The Grand Chamber accepted the Government's request for referral.

Article 2 of Protocol No. 1 and Article 9

The Court concluded that the decision of whether crucifixes should be present in state schools was, in principle, a matter which fell within the State's margin of appreciation. The question for the Court was therefore whether the Government had exceeded its margin of appreciation.

According to the Court, the fact that the presence of crucifixes in state schools gave the country's majority religion superior visibility in the school environment was not in itself sufficient to establish a breach of Article 2 of Protocol No. 1. Additionally, it noted that the presence of crucifixes was not associated with compulsory teaching about Christianity and that Italy had taken effective measures to enforce religious pluralism in schools, so that it could not be argued that authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions.

In light of the above considerations, the Court concluded that the authorities acted within the limits of the margin of appreciation, and no violation of either Article 2 of Protocol No.1 or Article 9 of the Convention was revealed.

Article 14

The Court did not consider it necessary to consider the claim under Article 14.

Commentary

This case is extremely significant as it concerns sensitive issues both at the domestic level – namely the relationship between the Catholic Church and the Italian State – and at the European level, namely a State's margin of appreciation. The Court framed the issue in narrow terms; it considered that the case focused on the compatibility of the crucifix with the right of education and freedom of religion, and held that the decision does not concern the compatibility of the crucifix with the principle of secularism as enshrined in Italian law. It could be argued that the relatively limited reasoning of the Court was a missed opportunity in relation to requiring States to take more positive action to provide respect to parents' religious and philosophical convictions, instead relying on a wide margin of appreciation on the part of the respondent State to decide the case.

Freedom of Movement

Pfeifer v Bulgaria

(24733/04)

European Court of Human Rights: Judgment dated 17 February 2011

Extradition order – criminal proceedings – travel ban – Article 8 (right to respect for private and family life – Article 13 (right to an effective remedy) – Article 2 of Protocol No. 4 (freedom of movement)

Facts

The Applicant is a Bulgarian national who lives in Germany. He married a German national and had a daughter with her. In June 1998, the Applicant was arrested on suspicion of having committed a murder in Bulgaria and as subsequently extradited to the country, where he was sentenced to sixteen years' imprisonment for, instead, aggravated robbery. On appeal by the Applicant, the Veliko Tarnovo Court of Appeal quashed the sentence on the basis that breached the 'rule of speciality' under Article 14 of the European Convention on Extradition.

In February 2001, the Applicant was charged with premeditated murder although his charge was subsequently changed to "premeditated murder committed as a repeat offender and in complicity". After contradictory judgments, mostly flawed by clerical errors in wording of the documents, the Applicant was finally sentenced to ten years' imprisonment by the Sofia Court of Appeal and applied a travel ban that prevented him from visiting his family in Germany.

Complaints

The Applicant complained: (i) under Article 2 of Protocol No. 4 that the travel ban imposed on him was disproportionate, restricting his freedom of movement guaranteed; (ii) under Article 8 the travel ban prevented him from maintaining normal contact with his family in Germany which led to his divorce; and (iii) under Article 13 that he did not have effective remedies in respect of his complaint under Article 2 of Protocol No. 4.

Held

Article 2 of Protocol No. 4

The Court found Bulgaria in breach of Article 2 of Protocol No. 4.

Assuming that such measure was 'prescribed by the law' and aimed at the Applicant's trial enforcement, the question facing the Court was therefore whether the ban was necessary in a democratic society to achieve those aims.

The Court stated that Bulgaria was justified in being wary of the Applicant fleeing trial, especially as the Applicant had left Bulgaria for Germany on the day of the offence, changed his last name to that of his wife's and had to be extradited from Germany. However, these reasons lost their force as time went on considering how slow the proceedings were, the disruption to his family life, his inability to provide for them and the fact that he had a young child.

Therefore, the authorities had failed to ensure that any interference with the Applicant's right to leave his country was justified and proportionate throughout its duration in light of the individual circumstances of the case.

Article 8

The Court considered that this complaint was linked to that made under Article 2 of Protocol No. 4 and therefore did not consider it necessary to provide a separate ruling.

Article 13

The question for the Court was whether the domestic courts had examined the Applicant's requests for travel and ensured appeals with sufficient thoroughness and with reference to the factors relevant to the justification of the ban under the Convention. The domestic courts treated as irrelevant or even failed to mention many of the Applicant's arguments that had a direct bearing on the justification for the ban. This approach effectively stripped the remedy of its effectiveness.

In light of the above, the Court held that there had been a violation of Article 13 in respect of the initial travel ban but no violation in respect of the renewed travel ban, as the Applicant failed to appeal against the judgment of the Veliko Tarnovo Court of Appeal.

Article 41

The Applicant was awarded €5,000 in non-pecuniary damages and €2,086.07 in costs.

Just Satisfaction

Minasyan and Semerjyan v. Armenia

(27651/05)

Breach of the right to the protection of property – exercise of equitable principles in calculating pecuniary damages – calculation based on probable value of property at the material time converted to current value to offset inflation - Article 41 (just satisfaction)

European Court of Human Rights: Just satisfaction judgment dated 7 June 2011

Facts

The two Applicants are mother and daughter and live in Los Angeles. The first Applicant bought an apartment in Yerevan which was situated on a plot of land owned by the State. The Applicants argued that the second Applicant had the right of use of the flat, although the Government contested this stating the second Applicant simply had a right to live in it. The Government subsequently adopted several decrees relating to the expropriation of land in Yerevan and related compensation offers. The first Applicant was informed that her flat was situated in an expropriation zone. It appeared that the Applicants refused the resulting compensation offer and financial incentives due to them from the proposed expropriation.

The State brought Court proceedings against the Applicants, seeking to evict them and terminate their rights through the payment of compensation, in order that the building on the land could be demolished. The District Court of Yerevan found in favour of the State, awarding the Applicants compensation. The Applicants' appeal was unsuccessful and the flat was demolished. The Applicants were awarded US\$7,000.

In its judgment of 23 June 2009, the Court found a violation of Article 1 of Protocol No. 1 on the basis that the Applicants had been deprived of their flat on an unlawful basis. The Applicants alleged that the compensation received was inappropriate and did not reflect the market value of the flat.

Held

Article 41

The Court awarded the Applicants jointly: (i) €8,000 in respect of pecuniary damages; (ii) €4,000 in respect of non-pecuniary damages; and (iii) €2,500 in respect of costs and expenses.

With regards to the non-pecuniary damages, adopting equitable principles required by Article 41, the Court considered that the feelings of powerlessness and frustration arising from the unlawful deprivation of the Applicants' possessions caused them non-pecuniary damage which should be compensated appropriately.

In calculating the pecuniary damages, the Court considered that in the particular circumstances of the case, the most appropriate and fair method would be to take the probable value of the flat at the material time, convert it to current value to offset inflation and deduct the sum already awarded at the domestic level. The Court awarded the damages to the Applicants jointly as the domestic Civil Code in force at the material time provided that the right of use enjoyed by the second Applicant was equivalent to a corresponding share in the flat. In reaching its decision on the amount of pecuniary damages due to the Applicants, the Court noted that the Applicant was in fact offered compensation for the expropriation of her flat, namely the market value of the flat at the time (US\$7,000 or approximately €5,265) and a financial incentive (US\$6,720 or approximately €5,055). However, the first Applicant had declined the offer and was subsequently awarded only US\$7,000. Further, the Court concluded that it would have to calculate the pecuniary damages on an equitable basis as it did not have sufficient material at its disposal to determine whether the sum awarded to the first Applicant reflected market value. As the procedure for determining the amount of compensation was unlawful, the Court had to consider the possibility that it may have led to an inadequate award.

The Court rejected the first Applicant's claim for damages for lost income, such as potential lost rent, on the basis that it was of a speculative nature.

Commentary

This case demonstrates the Court's wide discretion in exercising equitable principles to calculate pecuniary damages for expropriated property where it has insufficient material at its disposal to determine whether the sum awarded to the first Applicant in domestic proceedings reflects market value. In this case, the Court considered it "appropriate and fair" to base its calculation on the probable value of the flat at the material time, converting it to current value to offset inflation.

“Over the past decade the BHRC has had great pleasure in working with the KHRP. No organisation has had more impact both in Strasbourg at the European Court of Human Rights, and in Turkey’s political-legal configuration. The BHRC is proud of its close association with the KHRP.”

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“KHRP can count many achievements since its foundation ten years ago, but among these its contribution to the fight against torture and organised violence has been one of the most important. Through its litigation strategies, notably at the European Court of Human Rights, its reports and public advocacy, KHRP has helped expose continuing abuse against both Kurds and others, particularly in Turkey, and to raise hopes that victims and survivors of torture and other state violence may obtain recognition of their ordeal, compensation and justice.”

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Jonathan Sugden, Turkey Researcher

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Can Dunder, Journalist in Turkey

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