PRESENTATION

The year 2020 will be remembered as the anniversary year of the European Convention on Human Rights, opened for signature in Rome on 4 November 1950. Accordingly, and taking into account the restrictions imposed by the COVID-19 pandemic, a number of events were organised to mark this significant anniversary. One important conference – "The European Convention on Human Rights at 70 – Milestones and major achievements" – was organised in September in cooperation with the Greek chairmanship of the Committee of Ministers. Leading figures from the judicial world took part in the event in Strasbourg and also by videolink. The President of the Court also participated in a special 70th anniversary signing of the Convention in Athens.

The year 2020 also marked the end of the Interlaken reform process initiated ten years previously. This political process had introduced a cycle of structural reforms to the Convention system which considerably helped in reducing the Court's backlog of cases. Hence, while the number of pending cases before the Court was 160,000 in 2011, this figure was reduced to 61,500 by 2020.

In 2020 the European Court of Human Rights, like many courts around the world, was forced to adapt its working practices to respond to the global pandemic. Over the course of the year, more than 37,000 applications were decided by the Court, representing a decrease of only 3% compared with 2019. Moreover, the number of applications that ended in a judgment either by the Grand Chamber or a Chamber actually increased from 426 in 2019 to 519 in 2020. This was made possible by the dedication of the judges and staff of the Court, who showed exceptional commitment to the task in hand. The Court also deployed innovative technological solutions to enable all our various services to function. The most notable change was undoubtedly the holding of Grand Chamber hearings by video-conference which the outside world was able to follow online. Six such online hearings were held during the year.

However, the year 2020 was not only a matter of statistics. The following chapter summarises the most important developments in the Court's case-law during the year.

In particular in 2020 the Grand Chamber addressed many novel legal issues, such as trafficking and exploitation of women for the purposes of prostitution (*S.M. v. Croatia*); the principle of a tribunal established by law in connection with the irregularities in a judicial appointment (*Guðmundur Andri Ástráðsson v. Iceland*); the applicability of Article 4 of Protocol No. 4 to the immediate and forcible return of aliens from a land border (*N.D. and N.T. v Spain*); and whether visa applications submitted to embassies and consulates bring the applicants under that country's "territorial" jurisdiction (*M.N. and Others v Belgium*).

Lastly, dialogue with national courts was maintained, and the Court's Superior Courts Network continued to grow in 2020.

I am delighted that the three regional human rights courts continue their cooperation with this second annual case-law review, which I am confident will be of the utmost use to legal scholars and practitioners alike.

Marialena Tsirli

Registrar of the European Court
of Human Rights

SUMMARY

In 2020 the Grand Chamber delivered ten judgments and two decisions and its second advisory opinion under Protocol No. 16 to the Convention. Under Article 1, the Grand Chamber looked at the case of foreign nationals who apply for a visa at an embassy or consulate abroad (*M.N. and Others v. Belgium*).

The Grand Chamber clarified its case-law concerning the notion of "another procedure of international investigation or settlement" within the meaning of Article 35 § 2 (b) of the Convention (*Selahattin Demirtaş (no. 2)*).

In *S.M. v. Croatia* the Grand Chamber analysed for the first time the applicability of Article 4 specifically to the trafficking and exploitation of women for prostitution, and it ruled on the scope of the State's obligations in such matters.

In cases concerning Article 6 § 1, the Grand Chamber clarified in particular the scope and meaning of the "tribunal established by law" concept (*Guðmundur Andri Ástráðsson*) and of a "criminal charge" in accordance with the Engel criteria (*Gestur Jónsson and Ragnar Halldór Hall*); it also recognised the connection between the scope of "criminal" in Article 6 and that of the same adjective in Article 7 of the Convention (ibid.).

In its second advisory opinion under Protocol No. 16, this time in response to a request from the Armenian Constitutional Court, the Court clarified the significance of such opinions (*Advisory opinion*, request no. P16-2019-001).

In its *Magyar Kétfarkú Kutya Párt* judgment, the Grand Chamber examined under Article 10 the question of the foreseeability of a law on freedom of expression for political parties in the context of an election or referendum.

Under Article 3 of Protocol No. 1, it defined the scope of the "adequate and sufficient safeguards" required for the effective examination of electoral disputes (*Mugemangango*). It also clarified in that context the notion of national "authority" within the meaning of Article 13 of the Convention.

In *Selahattin Demirtaş (no. 2)* it ruled on the lifting of the immunity of an opposition member of parliament and his prolonged pre-trial detention related to his political speeches, under Articles 5, 10 and 18 of the Convention and Article 3 of Protocol No. 1.

N.D. and N.T. v. Spain concerned the immediate and forcible return of aliens from a land border, following an attempt by a large number of them to cross it in an unauthorised manner by taking advantage of their large numbers; the Grand Chamber found that their removal had been compatible with Article 4 of Protocol No. 4 taken separately and in conjunction with Article 13 of the Convention.

Under Article 1 of Protocol No. 7 it ruled on the expulsion of lawfully resident aliens on national-security grounds, based on classified information that had not been disclosed to them (*Muhammad and Muhammad*).

This year the Court has seen the further development of its case-law in other judgments, including on its jurisdiction to hear (and the admissibility of) complaints in the contexts of the transfer of a convicted prisoner from one member State to another to serve the rest of his sentence (*Makuchyan and Minasyan*).

Concerning the various Convention rights and freedoms, the Court has developed a number of new and important principles under Article 2 concerning the transfer of prisoners from one State to another (*Makuchyan and Minasyan*).

Under Article 3, the Court has addressed the conditions of access to drinking water in Roma camps (*Hudorovič and Others*), and the poor living conditions of adult asylum-seekers who were deprived of decent accommodation (*N.H. and Others v. France*). On the issue of domestic violence, the case-law has been extended to cyberbullying (*Buturugă*) and has established the State's obligations to protect children from ill-treatment by their parents (*Association Innocence en Danger and Association Enfance et Partage*). In *M.K. and Others v. Poland*, the Court examined the situation of applicants who, having arrived at a border crossing, were not allowed to apply for asylum and were returned to the third State from which they had come, with a risk of chain *refoulement* to their country of origin; the Court also emphasised the obligations of the respondent State following the indication of an interim measure under Rule 39. For the first time the Court found that that an expulsion would carry a risk of a violation of Article 3 on account of ill-treatment on grounds of sexual orientation to which a homosexual applicant would be exposed in his country of origin (*B and C v. Switzerland*).

Under Article 5 § 1 (f), the Court ruled on the specific situation of an applicant who had been granted refugee status in one EU State, and had then been detained in a different State pending the examination of an extradition request from his country of origin (*Shiksaitov*).

Other cases of jurisprudential interest have been examined under Article 6 concerning the use of police entrapment in securing a criminal conviction (*Akbay and Others*). For the first time the Court examined the admission in evidence, in criminal proceedings, of statements that had been forcibly obtained from individuals by means of ill-treatment, without the participation or approval of State agents (*Ćwik*).

Regarding Article 8 of the Convention, it addressed, for the first time, the issue of cyberbullying as an aspect of violence against women (*Buturugă*) and access to drinking water in a Roma camp (*Hudorovič and Others*).

The Court ruled on the right to freedom of expression of a defendant in criminal proceedings (*Miljević*), and on the right to an effective remedy under Article 13 of the Convention (*M.K. and Others v. Poland*, *Beizaras and Levickas*, and *Association Innocence en Danger and Association Enfance et Partage*).

It also examined the failure by a State to enforce a prison sentence handed down in another State for a racially motivated hate crime (*Makuchyan and Minasyan*). It emphasised the need for a criminal-law response to verbal aggression and direct physical threats driven by homophobia (*Beizaras and Levickas*).

In *M.K. and Others v. Poland*, the Court ruled on Article 4 of Protocol No. 4 in relation to asylum-seekers.

The Court has also, in a number of cases, taken account of the interactions between the Convention and international law or international and European organisations (for example, *M.N. and Others v. Belgium*, *Mugemangango*) and in the contexts of human trafficking (*S.M. v. Croatia*), migrants and asylum-seekers (*N.D. and N.T. v. Spain*, *N.H. and Others v. France*), domestic violence (*Association Innocence en Danger and Association Enfance et Partage*), and the transfer of convicted prisoners to another State (*Makuchyan and Minasyan*[1]).

The Court has referred in particular to the work of the UNHCR (*B and C v. Switzerland*, *Shiksaitov*) and the International Labour Organization (*S.M. v. Croatia*), and the Grand Chamber has reiterated the principle of the harmonious interpretation of the Convention and other international law instruments (*S.M. v. Croatia*).

It is also noteworthy that this year the Court has developed its case-law on the positive obligations of member States under the Convention, especially in the area of violence against women (*Buturugă*), and incitement to hatred and violence (*Beizaras and Levickas*), the protection of children from ill-treatment by their parents (*Association Innocence en Danger and Association Enfance et Partage*) and protection from ill-treatment at the hands of individuals (*Ćwik*), forced prostitution (*S.M. v. Croatia*) and access to drinking water (*Hudorovič and Others*).

Lastly, the Court once again ruled on the extent of the margin of appreciation to be afforded to States Parties to the Convention (*Mugemangango, Hudorovič and Others*, *Miljević*, *Association Innocence en Danger and Association Enfance et Partage*).

1. *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, 26 May 2020. See also under Article 2 (Right to life – Obligation to protect life) below.

JURISDICTION AND ADMISSIBILITY

JURISDICTION OF STATES (ARTICLE 1)

The *M.N. and Others v. Belgium*[1] decision concerned whether a State's ruling on a visa application and an applicant's challenge against that refusal in the State's courts can create a jurisdictional link.

The applicants, a Syrian couple and their two minor children, travelled to Beirut where they submitted short-term visa requests to the Belgian embassy in Beirut to allow them to travel to Belgium to apply for asylum because of the conflict in Aleppo. Their requests were processed and refused by the Aliens Office in Belgium and, after being notified by the Belgian embassy of those decisions, the applicants lodged unsuccessful appeals before the Belgian courts.

This Grand Chamber found that the respondent State was not exercising jurisdiction extraterritorially by processing the visa applications and that the applicants' appeals had not created a jurisdictional link.

(i) The first question to be examined was whether, in processing the visa applications, the State effectively exercised authority or control over the applicants, particularly through the acts or omissions of its diplomatic or consular agents posted abroad. The Court's analysis was informed by a number of factors: the applicants had never been within the national territory of Belgium; they had no pre-existing family or private-life ties with that State; and it had not been alleged before the Court that a jurisdictional link arose from any control exercised by the Belgian authorities in Syrian or Lebanese territories. In addition, the Court found it irrelevant who (whether the Belgian authorities in the national territory or diplomatic agents abroad) was responsible for taking the visa decisions and it thus attached no significance to the fact that the diplomatic agents in this case fulfilled merely a "letter box" role. It was, however, crucial that, when comparing the present case and the case-law of the European Commission on Human Rights on the acts and omissions of diplomatic agents (*X. v. Germany*[2]; *X. v. the United Kingdom*[3]; *S. v. Germany*[4]; and *M. v. Denmark*[5]), the Court found that none of the connecting links which characterised those cases was present in the present one. In particular, the applicants were not Belgian nationals seeking to benefit from the protection of their embassy. In addition, at no time had diplomatic agents exercised *de facto* control over the applicants, who had freely chosen to present themselves at the Belgian embassy in Beirut, rather than approaching any other embassy, to submit their visa applications. They had then been free to leave the premises of the Belgian embassy without any hindrance.

Furthermore, having regard to the Court's case-law concerning situations in which the officials of a State operating outside its territory, through control over buildings, aircraft or ships in which individuals were held,

1. *M.N. and Others v. Belgium* (dec.) [GC], no. 3599/18, 5 May 2020.

2. *X. v. Germany*, no. 1611/62, Commission decision of 25 September 1965, Yearbook 8, p. 158.

3. *X. v. the United Kingdom*, no. 7547/76, Commission decision of 15 December 1977, Decisions and Reports 12, p. 73.

4. *S. v. Germany*, no. 10686/83, Commission decision of 5 October 1984, Decisions and Reports 40, p. 291.

5. *M. v. Denmark*, no. 17392/90, Commission decision of 14 October 1992, Decisions and Reports 73, p. 193.

exercised power and physical control over those persons (*Issa and Others v. Turkey*[6]; *Al-Saadoon and Mufdhi v. the United Kingdom*[7]; *Medvedyev and Others v. France*[8]; *Hirsi Jamaa and Others v. Italy*[9]; and *Hassan v. the United Kingdom*[10]), the administrative control exercised by the Belgian State over the premises of its embassies was not sufficient to bring every person who entered those premises within its jurisdiction. Finally, the present context was considered to be fundamentally different from the numerous expulsion cases in which the applicants were, in theory, on the territory of the State concerned – or at its border – and thus clearly fell within its jurisdiction. No exercise of extraterritorial jurisdiction could therefore be established on this ground in the present case.

Secondly, the Court found that the applicants could not create, unilaterally, an extraterritorial jurisdictional link between them and Belgium merely by challenging the visa decisions before the Belgian courts. The Grand Chamber considered the applicants' submission to have no basis in the case-law of the Court.

Such an obligation would, however, be created were the State's ruling on an immigration application to be sufficient to bring the individual making the application under its jurisdiction: the individual could create a jurisdictional link by submitting an application and thus give rise, in certain scenarios, to an obligation under Article 3 which would not otherwise exist. Such an extension of the scope of the Convention would also have the effect of negating the well-established principle of public international law according to which the States Parties, subject to their treaty obligations, have the right to control the entry, residence and expulsion of aliens (*Ilias and Ahmed v. Hungary*[11]).

(ii) Finally, the Grand Chamber nevertheless clarified that the above conclusion did not prejudice the endeavours made by the States to facilitate access to asylum procedures through their embassies and/or consular representations (see, for example, *N.D. and N.T. v. Spain*[12], where the Court examined under Article 4 of Protocol No. 4 whether the possibility for the applicants in that case to claim international protection in Spanish embassies and consulates was genuinely and effectively accessible to them).

ADMISSIBILITY (ARTICLE 35)

MATTER ALREADY SUBMITTED TO ANOTHER INTERNATIONAL BODY (ARTICLE 35 § 2 (B))

The judgment in *Selahattin Demirtaş v. Turkey (no. 2)*[13] is noteworthy because the Court further developed the criteria for determining whether a procedure before a given international body is similar to the Convention mechanism within the meaning of Article 35 § 2 (b) of the Convention.

In particular, the Court rejected the Government's argument that a complaint lodged with a particular Committee on behalf of the applicant amounted to a procedure of international investigation or settlement within the meaning of Article 35 § 2 (b) of the Convention. In so doing, the Court developed the criteria that an international body must satisfy in order to be regarded as "another procedure of international investigation or settlement" within the meaning of that provision. The requirement of judicial or quasi-judicial proceedings similar to the Convention mechanism means that the examination must be clearly defined in scope and limited to certain rights based on a legal instrument whereby the relevant body is authorised to determine the State's responsibility and to afford legal redress capable of putting an end to the alleged violation. It must also afford institutional and procedural safeguards, such as independence, impartiality and an adversarial procedure.

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6. *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004.
7. *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, ECHR 2010.
8. *Medvedyev and Others v. France* [GC], no. 3394/03, ECHR 2010.
9. *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012.
10. *Hassan v. the United Kingdom* [GC], no. 29750/09, ECHR 2014.
11. *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, § 125, 21 November 2019.
12. *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15, § 222, 3 October 2017.
13. *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020. See also under Article 10 (Freedom of expression), Article 3 of Protocol No. 1 (Right to free elections – Free expression of the opinion of the people) and Article 18 (Restrictions not prescribed by the Convention) below.

RIGHT TO LIFE (ARTICLE 2)

OBLIGATION TO PROTECT LIFE

Makuchyan and Minasyan v. Azerbaijan and Hungary[14] concerned the threshold for State responsibility for an act otherwise not attributable to a State, and Contracting States' duties in the context of the transfer of sentenced persons. It also concerned the discriminatory nature of the failure to enforce a prison sentence imposed abroad for an ethnically biased crime.

While taking part in a NATO-sponsored course in Budapest, an Azerbaijani officer (R.S.) murdered an Armenian officer (the second applicant's nephew) and threatened to kill another Armenian soldier, the first applicant. R.S. was sentenced to life imprisonment in Hungary. Having served eight years of his sentence there, he was transferred to Azerbaijan under the *Council of Europe Convention on the Transfer of Sentenced Persons*[15]. On his return to Azerbaijan he was released, pardoned and promoted at a public ceremony. He was also paid salary arrears for the time he had spent in prison, and given the use of a flat. Comments, approving of R.S.'s conduct and his pardon, were made by various high-ranking Azerbaijani officials.

The applicants complained under Article 2 of the Convention, taken alone and in conjunction with Article 14. The Court found that the manifest "approval" and "endorsement" by Azerbaijan of the crimes committed by a member of its armed forces in a private capacity did not engage that State's responsibility under the substantive limb of Article 2 of the Convention. However, Azerbaijan's unjustified failure to enforce the prison sentence imposed in Hungary, coupled with the "hero's welcome" and various benefits given to R.S. without any legal basis, was considered to be incompatible with its procedural obligation under Article 2 and, in addition, to constitute ethnically motivated discrimination within the meaning of Article 14 in conjunction with the procedural limb of Article 2. The Court found no violation of the procedural limb of Article 2 as regards Hungary, noting that it had followed the Transfer Convention procedure to the letter to ensure R.S. completed his sentence in Azerbaijan.

The Court has developed in this judgment certain novel and important principles concerning the threshold for State responsibility for an act otherwise not attributable to a State, and Contracting States' duties in the context of the transfer of sentenced persons.

(i) The first question the Court considered was whether Azerbaijan could be held responsible for the crimes in question and thus of a substantive violation of Article 2 of the Convention. The Court attached crucial importance to the fact that R.S. was not acting in the exercise of his official duties or on the orders of his superiors. It also rejected the applicants' argument based on Article 11 of the *UN Draft Articles on the Responsibility of States of*

14. *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, 26 May 2020. See also under Article 14 in conjunction with Article 2 (Prohibition of discrimination) below.

15. Convention on the Transfer of Sentenced Persons, ETS 112.

Internationally Wrongful Acts[16] The Court noted that Article 11 set a very high threshold for State responsibility in this context, a threshold not limited to the mere "approval" and "endorsement" of the relevant act, but one which required that two cumulative conditions be fulfilled: clear and unequivocal "acknowledgement" and "adoption" of the act in issue as having been perpetrated by the State itself. Although the measures taken by the Azerbaijani government manifestly demonstrated its "approval" and "endorsement" of R.S.'s criminal acts, it had not been convincingly demonstrated (on the basis of the very stringent standards under international law) that the State of Azerbaijan had "clearly and unequivocally" "acknowledged" and "adopted" R.S.'s acts "as its own", thus directly and categorically assuming, as such, responsibility for the actual killing of one victim and the attempted murder of another. Those measures could rather be interpreted as having the purpose of publicly addressing and remedying R.S.'s adverse personal, professional and financial situation, which the authorities had perceived, unjustifiably in the Court's view, as being the consequence of the allegedly flawed criminal proceedings in Hungary.

(ii) The case also gave the Court the opportunity to apply its case-law on the issue of jurisdiction (Article 1) and compatibility *ratione loci* of an Article 2 complaint (procedural limb) against a home State (Azerbaijan), where a convicted prisoner is transferred from a sentencing State to the home State with the aim of continuing his or her sentence in the home State. The Court emphasised that the enforcement of a sentence imposed in the context of the right to life had to be regarded as an integral part of a State's procedural obligation under Article 2. Regardless of where the crimes had been committed, and since Azerbaijan had agreed to and assumed the obligations under the Transfer Convention to continue the enforcement of R.S.'s prison sentence, it was bound to do so in compliance with its procedural obligations under Article 2. There were therefore "special features" that triggered the existence of Azerbaijan's jurisdictional link to the procedural obligation under Article 2 (*Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*[17], and *Güzelyurtlu and Others v. Cyprus and Turkey*[18]). The acts of Azerbaijan, which had in effect granted R.S. impunity for a very serious ethnically biased crime without any convincing reason, were not compatible with its obligation under Article 2 to effectively deter the commission of offences against the lives of individuals.

(iii) The judgment is also noteworthy for the manner in which the Court examined the question of whether the State's failure to enforce a prison sentence imposed abroad for an ethnic hate crime amounted to a discriminatory difference in treatment within the meaning of Article 14 in conjunction with the procedural limb of Article 2 and, in particular, for the manner in which the Court distributed the burden of proof in this respect (*Nachova and Others v. Bulgaria*[19]). In view of the special features of the case (R.S.'s promotion, the award of several benefits without any legal basis, his glorification as a hero by a number of high-ranking officials, as well as the creation of a special page on the website of the President in appreciation of R.S.), the applicants were considered to have put forward sufficiently strong, clear and concordant inferences as to make a convincing prima facie case that the measures in issue had been racially motivated. Given the difficulty for the applicants to prove such bias beyond reasonable doubt, the Court, in the particular circumstances of the case, reversed the burden of proof so that it became incumbent on Azerbaijan to disprove the arguable allegation of discrimination, which it had failed to do.

16. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd Session (2001), UN Doc. A/56/10.

17. *Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*, no. 2319/14, 13 October 2016.

18. *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, 29 January 2019.

19. *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 157, ECHR 2005-VII.

PROHIBITION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT AND PUNISHMENT (ARTICLE 3)

INHUMAN OR DEGRADING TREATMENT

Hudorovič and Others v. Slovenia[20] concerned the conditions of access to safe drinking water. The applicants belonged to Roma communities residing in two illegal and unserviced settlements. They complained that the authorities had not taken sufficient measures to provide them with access to safe drinking water and sanitation.

It is of interest that the Court stated that it did not exclude the applicability of Article 3 in such a context (*O'Rourke v. the United Kingdom*[21], and *Budina v. Russia*[22]). However, the positive measures undertaken by the domestic authorities had provided the applicants with the opportunity to access safe drinking water, and the way in which they had access and whether they had actually accessed it was irrelevant. Accordingly, even assuming that the alleged suffering had reached the minimum threshold and that Article 3 was applicable, the Court found no violation of this provision.

DEGRADING TREATMENT

N.H. and Others v. France[23] concerned the impossibility for adult asylum-seekers to benefit from reception conditions provided for by domestic and EU law.

The applicants, including four young adult men in good health, arrived in France independently of each other in 2013 and 2014 and sought asylum. Relying on Article 3, the applicants complained, *inter alia*, that they had been unable to benefit from the reception conditions foreseen by domestic law and that they had been forced to live on the street in inhuman and degrading conditions for several months.

The Court found a breach of Article 3 in respect of three of the applicants, considering that the situation of a fourth did not meet the threshold for the applicability of that provision.

The judgment is noteworthy as it is only the second time – after the judgment in *M.S.S. v. Belgium and Greece*[24], and later follow-up cases against Greece – that the Court has found a breach of Article 3 in respect of the living conditions of adult asylum-seekers with no specific vulnerabilities who were, because of the acts or omissions of the authorities, unable to access accommodation or decent living conditions or to provide for their essential needs. While noting that the events in the present case unfolded during a progressive increase in asylum applications in France, the Court observed that they had not taken place during a humanitarian emergency caused by a major migration crisis.

(i) The Court noted that those seeking asylum are considered to be a "particularly underprivileged and vulnerable population group in need of special protection", there being a broad consensus in that regard at an international and European level (ibid., § 251). The question was therefore whether, given the inherent vulnerability of asylum-seekers, the situation of the present applicants (young, single, in good health and without children) could be considered one of "extreme material poverty" raising an issue under Article 3 of the Convention.

(ii) In this respect, the Court noted that the applicants were not allowed to work during the asylum procedure and were fully dependent on the authorities for accommodation and material living conditions. They had been forced to live on the streets for months, with no resources or access to sanitary facilities, without any means of providing for their essential needs, in fear of assault from third parties and of expulsion (prior to obtaining a document certifying their status as asylum-seekers, as far as their fear of expulsion was concerned). The applicants, who had on rare occasions benefited from emergency accommodation, could not be reproached for not soliciting the emergency accommodation shelters more often: given the insufficient capacities of those shelters and the applicants' profile they would have been refused, priority being given to asylum-seekers

20. *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, 10 March 2020. See also under Article 8 (Positive obligations) below.

21. *O'Rourke v. the United Kingdom* (dec.), no. 39022/97, 26 June 2001.

22. *Budina v. Russia* (dec.), no. 45603/05, 18 June 2009.

23. *N.H. and Others v. France*, nos. 28820/13 and 2 others, 2 July 2020.

24. *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 235-64, ECHR 2011.

who had a particular vulnerability (such as age, health or family situation). Accordingly, the Court found that three of the applicants had been placed in a situation contrary to Article 3 given the living conditions they had experienced, combined with the absence of an adequate response by the authorities whom they had repeatedly alerted to their situation, and since the domestic courts had systematically denied them the means at the disposal of the competent authorities because they were single adult men in good health. No violation of Article 3 was found as regards a fourth applicant: even though he had also lived in a tent for months, he had received documents certifying his asylum-seeker status and financial assistance within a comparatively shorter period of time.

POSITIVE OBLIGATIONS

Buturugă v. Romania[25] is noteworthy in that the Court, for the first time, addressed the phenomenon of cyberbullying as an aspect of violence against women. It held in this connection that the State had failed to comply with its positive obligations under Articles 3 and 8 of the Convention.

The *Association Innocence en Danger and Association Enfance et Partage v. France*[26] judgment concerned the failure by the State to take necessary and appropriate measures to protect a child from ill-treatment by her parents leading to her death.

An eight-year-old child, M., was subjected to repeated barbaric acts by her parents, leading to her death in August 2009. Following her death it transpired that the parents' domination over the child had been such as to prevent the reality of the abuse from being revealed. The authorities had nevertheless already been warned in June 2008, in a report from a head teacher, that teachers had noticed wounds on M.'s body and face. Following a police investigation, the public prosecutor's office had discontinued the case in October 2008. The applicants, two child-protection associations, brought civil proceedings against the State for a series of failings and negligence. Their case was dismissed.

In the Convention proceedings, the applicant associations complained, mainly under the substantive limb of Articles 2 and 3 of the Convention, of the French authorities' failure to fulfil their positive obligations to protect the child from parental abuse.

The Court found that there had been a violation of Article 3, as the domestic system had failed to protect M. from the severe abuse to which she had been subjected by her parents.

(i) The interest of the judgment lies, firstly, in the Court's characterisation of the facts of the case as falling under Article 3 and Article 13 in conjunction with Article 3, even though the victim died from her treatment. The Court took the view that the subject matter of the dispute lay in the question whether the domestic authorities should have been aware of the ill-treatment and should have protected her from the abuse which led to her death.

(ii) Secondly, the Court reiterated its case-law on the State's positive obligation under Article 3 to take specific measures in order to protect children or other vulnerable persons from criminal abuse perpetrated by third parties. It emphasised in this connection the need to secure rights that were practical and effective, and the need for the authorities' response to be adapted to the situation in order to fulfil that obligation, as explained in *Opuz v. Turkey*[27].

In the present case, while recognising the difficulties faced by the domestic authorities, the Court pointed out the following, in particular: while the public prosecutor's office had reacted immediately (on the very day of the report), the case had only been entrusted to a police investigator thirteen days later; no inquiries had been conducted with the specific aim of shedding light on M.'s family environment (especially in view of the family's frequent relocations) and the teachers who had reported their suspicions had not been interviewed; and, while not mandatory, the participation of a psychologist when M. was examined would have been appropriate. The Court further found that the combination of the total discontinuance of the case (in 2008) and the lack of any mechanism to centralise information had seriously reduced the chances of special

25. *Buturugă v. Romania*, no. 56867/15, 11 February 2020.

26. *Association Innocence en Danger and Association Enfance et Partage v. France*, nos. 15343/15 and 16806/15, 4 June 2020. See also under Article 13 (Right to an effective remedy) below.

27. *Opuz v. Turkey*, no. 33401/02, ECHR 2009.

monitoring of the child and prevented any useful exchange of information between the justice system and the social services. Moreover, while those services had certainly taken some steps (home visits), they had not engaged in any really meaningful action to establish the child's actual condition.

EXPULSION

M.K. and Others v. Poland[28] concerned the refusal of border guards to lodge the applicants' asylum applications, the summary removal of the applicants to a third country, and the risk of *refoulement* to their country of origin.

The applicants were Russian nationals of Chechen origin. In 2017 they went to checkpoints on the Polish-Belarusian border on numerous occasions. They alleged that on each occasion they expressed their wish to lodge asylum applications, claiming to be at risk of ill-treatment in the Russian Federation and indicating to the border guards that they could not remain in Belarus as their visas had expired and that it was in practice impossible for them to obtain international protection there. On each occasion, the applicants were issued with administrative decisions refusing them entry and turned away on the grounds that they were not in possession of documents allowing them entry into Poland and had neither expressed a wish to apply for asylum nor claimed a risk of ill-treatment. The Court granted interim measures under Rule 39 of the Rules of Court, indicating to the Government that the applicants' asylum applications should be lodged and that the authorities should refrain from removing them to Belarus pending their examination. However, the applicants were returned to Belarus. They were also turned away from border checkpoints on later occasions. Eventually, the asylum applications of some of them were lodged by the Polish authorities and they were placed in a reception centre.

The applicants complained under Article 3 of the Convention and Article 4 of Protocol No. 4 (each alone and in conjunction with Article 13), as well as Article 34 of the Convention.

The Court found, *inter alia*, a violation of Article 3 on account of the applicants having been denied access to the asylum procedure and removed to Belarus, a violation of Article 4 of Protocol No. 4, and a violation of Article 13 in conjunction with the aforementioned Articles owing to the absence of a remedy with automatic suspensive effect. It also found that the respondent State had failed to discharge its obligations under Article 34: it had either not complied with the interim measures indicated by the Court at all, or had complied with a significant delay. While the judgment does not develop the Court's case-law, it is noteworthy as it comprehensively examines complaints under several Convention provisions typically arising when individuals, with an arguable claim under Articles 2 or 3 to be at risk if returned to their country of origin, present themselves at a border crossing point to apply for asylum, but are denied that opportunity and removed to the third country from which they arrived, with a risk of *refoulement* to their country of origin.

B and C v. Switzerland[29] concerned the impossibility of requiring a homosexual person to conceal his sexual orientation to avoid ill-treatment upon removal to his country of origin, and the distribution of the burden of proof.

The first applicant, a Gambian national, arrived in Switzerland in 2008 and unsuccessfully applied for asylum. In 2014 he and the second applicant, a Swiss national, registered their same-sex partnership. They lived together until the second applicant's death in 2019. On 12 August 2014 the second applicant lodged a request for family reunification, namely for a residence permit to be granted to the first applicant in view of their registered partnership. That request was denied by the competent authority and the first applicant was ordered to leave the country and to await from abroad the outcome of the appeal proceedings he had initiated. On 2 August 2016 the Court granted his request for interim measures under Rule 39 of the Rules of Court, indicating that the first applicant was not to be deported for the duration of the proceedings before it. The domestic courts then rejected the appeal, finding that the first applicant was not entitled to a residence permit in view of, *inter alia*, his criminal record and the fact that he had not integrated well. As to the alleged risk of ill-treatment contrary to Article 3 in the Gambia, they considered that the first applicant had not shown substantial grounds for believing that he faced such a real risk.

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28. *M.K. and Others v. Poland*, nos. 40503/17 and 2 others, 23 July 2020. See also under Article 4 of Protocol No. 4 (Prohibition of collective expulsion of aliens) below.

29. *B and C v. Switzerland*, nos. 889/19 and 43987/16, 17 November 2020.

The Court found that the domestic courts did not sufficiently assess either the risks of ill-treatment for the first applicant as a homosexual person in the Gambia or the availability of State protection against any ill-treatment by non-State actors. The first applicant's deportation to the Gambia, without a fresh assessment of those aspects, would give rise to a violation of Article 3 of the Convention.

(i) The judgment is noteworthy as it is the first time that the Court has found that a deportation would breach Article 3 of the Convention in view of the risk of ill-treatment in the country of origin on the basis of sexual orientation, even if the present violation is of a procedural nature. The Court

(a) reiterated that a person's sexual orientation formed a fundamental part of his or her identity so that no one could be obliged to conceal his or her sexual orientation in order to avoid persecution (confirming the approach taken in *I.K. v. Switzerland*[30], and in line with the case-law of the Court of Justice of the European Union (CJEU) and the position of the UNHCR);

(b) considered, disagreeing with the domestic authorities' finding to the contrary, that the first applicant's sexual orientation – the veracity of which was not disputed – could be discovered subsequently in the Gambia if he were removed there;

(c) took the view, in line with the approach it took in *I.I.N. v. the Netherlands*[31], that the mere existence of laws criminalising homosexual acts in the country of destination did not render an individual's removal to that country contrary to Article 3 of the Convention: what was decisive was whether there was a real risk that these laws would be applied in practice, which according to the information available was not the case in the Gambia at present; and

(d) observed that the first applicant claimed that he would also face a real risk of ill-treatment at the hands of non-State actors; that recent country information indicated widespread homophobia and discrimination against LGBTI persons; that the Gambian authorities were generally unwilling to provide protection to LGBTI persons; and that the UNHCR was of the view that laws criminalising same-sex relations were normally a sign that State protection of LGBTI individuals was not available.

(ii) The judgment also applied the principles, set out in *J.K. and Others v. Sweden*[32], concerning the distribution of the burden of proof in Article 3 removal cases where the risk of ill-treatment emanates from non-State actors. In such cases, the burden of proof lies with the applicant in respect of his or her personal circumstances (in the present case, his sexual orientation), but it is for the authorities to establish *proprio motu* the general situation in the country of origin, including the availability of State protection against ill-treatment emanating from non-State actors.

PROHIBITION OF SLAVERY AND FORCED LABOUR (ARTICLE 4)

S.M. v. Croatia[33] concerned trafficking and exploitation for the purposes of prostitution.

The applicant lodged a criminal complaint against T.M., a former policeman, alleging that he had physically and psychologically forced her into prostitution. The criminal court acquitted him on the grounds that, although it had been established that he had organised a prostitution ring to which he had recruited the applicant, it had not been established that he had forced her into prostitution. The criminal court found that, since he had only been indicted on charges of forcing others to prostitute themselves, that is, the aggravated offence of organising prostitution, he could not be convicted of the more minor version of the same offence.

The Grand Chamber, noting that the applicant's complaint raised issues of impunity and was essentially of a procedural nature, focused on the domestic authorities' compliance with their procedural obligations and found a breach of Article 4 in this respect.

30. *I.K. v. Switzerland* (dec.), no. 21417/17, § 24, 19 December 2017.

31. *I.I.N. v. the Netherlands* (dec.), no. 2035/04, 9 December 2004.

32. *J.K. and Others v. Sweden* [GC], no. 59166/12, §§ 91-98, 23 August 2016.

33. *S.M. v. Croatia* [GC], no. 60561/14, 25 June 2020.

The issue of human trafficking has already been addressed in several judgments of the Court (for example, *Rantsev v. Cyprus and Russia*[34], and *Chowdury and Others v. Greece*[35]). In the instant case, the Grand Chamber had the opportunity, for the first time, to consider the applicability of Article 4 specifically to the trafficking and exploitation of women for the purposes of prostitution. The judgment is noteworthy because the Court clarified how the concepts of "trafficking in human beings" and "exploitation of prostitution" were incorporated within the material scope of Article 4 and how these two concepts were related to each other. The Court also clarified whether the principles regarding the States' positive, and in particular procedural, obligations in the field of human trafficking were applicable to instances of forced prostitution.

(i) In *Rantsev* (cited above, § 282), the Court had considered it unnecessary to identify whether the impugned treatment amounted to "slavery", "servitude" or "forced or compulsory labour", concluding instead that the *trafficking* itself, within the meaning of the relevant international instruments, fell within the scope of Article 4 of the Convention. On this basis and in keeping with the principle of the harmonious interpretation of the Convention and other instruments of international law, the Grand Chamber clarified in the present judgment that conduct or a situation will only give rise to an issue of human trafficking under Article 4 of the Convention if all three constituent elements of the international definition of human trafficking, as defined in the *Anti-Trafficking Convention*[36] and the *Palermo Protocol*[37], are present:

(1) an action (the recruitment, transportation, transfer, harbouring or receipt of persons);

(2) the means (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person);

(3) an exploitative purpose (including, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs).

As there is a difference between the Palermo Protocol and the Anti-Trafficking Convention as regards the scope of their application, the Grand Chamber followed the approach under the Anti-Trafficking Convention and further clarified that, from the perspective of Article 4, the concept of human trafficking related to all forms of trafficking in human beings, whether national or transnational, and irrespective of whether it was connected with organised crime or not. Lastly, while human trafficking fell within the scope of Article 4, this did not exclude the possibility that, in the particular circumstances of a case, a particular form of conduct related to human trafficking might raise an issue under another provision of the Convention.

(ii) Regarding the "*exploitation of prostitution*", it follows from the Grand Chamber judgment that this concept is not subsumed under that of human trafficking. Having analysed the relevant case-law, the Grand Chamber concluded that the notion of "forced or compulsory labour" under Article 4 aimed to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they were related to the specific human-trafficking context. Any such conduct could have elements qualifying it as "slavery" or "servitude" under Article 4, or could raise an issue under another provision of the Convention. In that context, "force" could encompass the subtle forms of coercive conduct identified in the Court's case-law on Article 4, as well as by the International Labour Organization and in other international materials (for instance, the concept of "a penalty" which "may go as far as physical violence or restraint, but [which] can also take subtler forms, of a psychological nature"). The question whether a particular situation involved all the constituent elements of "human trafficking" and/or gave rise to a separate issue of forced prostitution was, in the Grand Chamber's view, a factual question to be examined in the light of all the relevant circumstances of a case.

(iii) Considering the *scope of the States' positive obligations* in this domain, the Grand Chamber clarified that, given the conceptual proximity of the two phenomena, the relevant principles relating to human trafficking

34. *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010 (extracts).

35. *Chowdury and Others v. Greece*, no. 21884/15, 30 March 2017.

36. Council of Europe Convention on Action against Trafficking in Human Beings, CETS 197.

37. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

were applicable in cases concerning forced prostitution. Turning to the scope of the procedural obligation in particular, the Grand Chamber found no reason to revisit the Court's approach, well established ever since the judgment in *Siliadin v. France* [38], according to which the converging principles of the procedural obligation under Articles 2 and 3 of the Convention informed the specific content of the procedural obligation under Article 4 of the Convention. It further held that those principles were applicable also to instances of forced prostitution. When assessing the State's compliance with its procedural obligation in this context, the Grand Chamber confirmed that it was not concerned with allegations of errors or isolated omissions but only with significant shortcomings, namely those that were capable of undermining the investigation's capability of establishing the circumstances of the case or the person responsible.

Examining the facts of the case against the three constituent elements of human trafficking, the Court pinpointed the applicant's "recruitment" via Facebook, the use of force against her and possible harbouring and debt bondage. Moreover, T.M., a former policeman, had been in a position to abuse her vulnerability. The Court thus found that the applicant had made an arguable claim supported by prima facie evidence that she had been subjected to human trafficking and/or forced prostitution. The Court considered that the domestic procedural response to that claim had suffered from significant flaws, such as the failure to follow obvious lines of inquiry capable of elucidating the true nature of the relationship between both parties and the heavy reliance on the applicant's testimony without taking account of the possible impact of psychological trauma on her ability to consistently and clearly relate the circumstances of her exploitation.

RIGHT TO LIBERTY AND SECURITY (ARTICLE 5) [39]

EXTRADITION/EXPULSION (ARTICLE 5 § 1 (f))

Shiksaitov v. Slovakia [40] concerned the detention in an EU member State of the applicant, who had already been recognised as a refugee in another EU member State, in order to examine the admissibility of his extradition to his country of origin.

The applicant, a Russian national of Chechen origin, was granted asylum (and permanent leave to remain) in Sweden in 2011 on account of his political opinions. In January 2015 he was arrested in Slovakia on the basis of an international arrest warrant which had been issued against him in 2007 by a court in the Chechen Republic on charges of terrorism allegedly committed in Grozny. The Slovak courts examined the admissibility of the request for his extradition to the Russian Federation and he was detained to ensure his presence in those proceedings. On 2 November 2016 the Supreme Court found his extradition to be inadmissible and ordered his immediate release: the applicant had been granted refugee status in Sweden and therefore enjoyed protection as a refugee on Slovak territory.

In the Convention proceedings the applicant complained that his detention in Slovakia had been unlawful because his refugee status precluded his extradition to the Russian Federation. The Court found a violation of, *inter alia*, Article 5 § 1 because the grounds for the applicant's detention had not remained valid for the entire period of detention and because the authorities had failed to conduct the proceedings with due diligence.

The judgment concerns a novel factual matrix – the applicant, who had been recognised as a refugee in one EU member State, was detained in another EU member State in order to examine the admissibility of his extradition to his country of origin, where he claimed to face persecution – and thus the issue of the extraterritorial effect of the granting of asylum. In particular:

(i) The case concerned the extraterritorial effects in Slovakia, from where his extradition was requested, of refugee status granted to the applicant in Sweden. Emphasising the importance of the relevant rules of international law, with which the Convention should in so far as possible be interpreted in harmony, the Court

38. *Siliadin v. France*, no. 73316/01, ECHR 2005-VII.

39. See also, under Article 3 of Protocol No. 1 (Right to free elections – Free expression of the opinion of the people), *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020.

40. *Shiksaitov v. Slovakia*, nos. 56751/16 and 33762/17, 10 December 2020.

relied on *Conclusion No. 12 (XXIX) of the UNHCR's Executive Committee*[41] and considered that the refugee status awarded to the applicant in Sweden could be called into question by Slovakia only in exceptional circumstances, notably if information came to light showing that he fell within the terms of an exclusion provision and was thus not entitled to refugee status. Observing that the Swedish authorities had neither checked Interpol's database during the asylum proceedings nor examined the nature of the criminal charge brought against the applicant in the Russian Federation, the applicability of an exclusion clause had not been examined in the asylum proceedings in Sweden. The Slovak authorities could not therefore be blamed for examining the extradition request, despite the applicant's refugee status in Sweden. Consequently, his detention had not therefore been, *ab initio*, contrary to domestic law or to Article 5 § 1 (f) of the Convention.

The present factual scenario can therefore be contrasted with that in *Eminbeyli v. Russia*[42], where the Court found that the applicant's detention for the purposes of extradition had been arbitrary *from the outset* owing to his refugee status in the country from which extradition had been requested, since domestic law prohibited the extradition of a refugee.

(ii) The applicant's detention had not, however, remained justified under Article 5 § 1 (f) throughout its entire duration (more than one year and nine months). In particular, information about the applicant's refugee status (which constituted the main reason for the Supreme Court's judgment of 2 November 2016), as well as documents relating to his criminal prosecution in Russia (which allowed for an assessment as to the political nature of the alleged crimes) had been available to the Slovak authorities since February 2015. It had not therefore been established that the Slovak authorities had proceeded in an active and diligent manner as required by Article 5 § 1 (f) of the Convention.

41. Conclusion No. 12 (XXIX) Extraterritorial Effect of the Determination of Refugee Status, Executive Committee 29th session, 17 October 1978, UN Doc. A/33/12/Add.1.

42. *Eminbeyli v. Russia*, no. 42443/02, 26 February 2009.

RIGHT TO A FAIR HEARING IN CRIMINAL PROCEEDINGS (ARTICLE 6 § 1)

APPLICABILITY

In its judgment in *Gestur Jónsson and Ragnar Halldór Hall v. Iceland*[43], the Grand Chamber ruled on the applicability of the criminal limb of Article 6 § 1 to a fine, with no statutory upper limit, for the non-attendance of defence counsel at a hearing.

The applicants are lawyers. Despite the District Court rejecting their request to revoke their appointment as defence counsel for defendants in a criminal trial, they decided not to attend the trial and were later convicted, in their absence, of contempt of court and of delaying the proceedings. They were each fined approximately 6,200 euros (EUR). The Supreme Court upheld the fines: the impugned fines were "by nature" a penalty, having regard to the absence in relevant law provisions of an express upper limit on such fines and to the size of the fines imposed in the instant case.

In the Convention proceedings the applicants complained that their trial *in absentia* and the penalty imposed had breached Articles 6 and 7 of the Convention. In October 2018 a Chamber of the Court, attaching weight to the above reasoning of the Supreme Court, found that Article 6 was applicable under its criminal limb but that there had been no violation of either Article 6 or of Article 7 of the Convention. The Grand Chamber disagreed with the Chamber on the question of the applicability of Article 6, considering that the proceedings in issue did not involve the determination of a "criminal charge" within its autonomous meaning and thus rejected the applicants' complaints under Articles 6 and 7 as incompatible *ratione materiae* with the provisions of the Convention.

This judgment is noteworthy in three respects. In the first place, it reviews the application of the *Engel and Others v. the Netherlands*[44] criteria to determine whether contempt-of-court proceedings or proceedings concerning misconduct of legal professionals could be considered "criminal". Secondly, and as to the third Engel criterion (the nature and degree of severity of the penalty the applicants risked incurring), the judgment clarifies that the absence of an upper statutory limit on the amount of the fine is not of itself dispositive of the question of the applicability of Article 6 under its criminal limb and that the Court will have regard to certain other factors (described below). Thirdly, in finding Article 7 inapplicable simply because of the inapplicability of Article 6, the Grand Chamber acknowledged the link between the notion of "criminal" in Article 6 and Article 7 of the Convention.

(i) On the facts, the Court found that the first and second Engel criteria had not been met: it had not been demonstrated that the offence had been classified as "criminal" under domestic law; nor was it clear, despite the seriousness of the breach of professional duties in question, whether the applicants' offence was to be considered criminal or disciplinary in nature.

43. *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* [GC], nos. 68273/14 and 68271/14, 22 December 2020.

44. *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22.

(ii) The third Engel criterion was therefore of key importance for the determination of the applicability of Article 6 of the Convention. When examining the nature and degree of the severity of the penalty, the Court did not consider itself bound by the finding of the Icelandic Supreme Court in this respect, noting, however, that it was open to the Contracting States to adopt a broader interpretation entailing a stronger protection of the rights and freedoms in question. The Court proceeded to distinguish the instant case from the other relevant cases, before finding that Article 6 was not applicable under its criminal limb.

In the first place, in contrast to previous contempt-of-court cases in which Article 6 was found to apply, notably on account of the third criterion (*Kyprianou v. Cyprus*[45], and *Zaicevs v. Latvia*[46]), the kind of misconduct for which the applicants had been held liable was not punishable by imprisonment.

Secondly, the fines in issue could not be converted into a deprivation of liberty in the event of non-payment, unlike in other relevant cases. For example, in *Ravnsborg v. Sweden*[47] and *Putz v. Austria*[48], the existence of such a possibility, subject to certain fair-hearing guarantees, was an important consideration even if not sufficient in those circumstances to attract the application of Article 6 under its criminal head. In *T. v. Austria*[49], it was the punitive nature and the high amount of the penalty at stake (the fine imposed amounting to around EUR 2,000 and the maximum fine being around EUR 30,000), together with the possibility of converting it into a prison term without the guarantee of a hearing, that warranted considering the matter as "criminal".

Thirdly, the fines had not been entered on the applicants' criminal record, as in other cases where Article 6 under its criminal limb was not found to apply (*Ravnsborg* and *Putz*, both cited above, and *Žugić v. Croatia*[50]).

Fourthly, the Court compared the amount of the penalty at stake in the instant case with those in issue in other relevant cases, before concluding that the size of the present fines (EUR 6,200) and the absence of an upper statutory limit on their amount did not suffice for the Court to deem the severity and nature of the sanction as "criminal" within the autonomous sense of Article 6 of the Convention.

(ii) Finally, having noted that the proceedings in question did not involve the determination of a "criminal charge" within the meaning of Article 6, the Grand Chamber went on, for "reasons of consistency in the interpretation of the Convention taken as a whole", to find that the impugned fines could not be considered a "penalty" within the meaning of Article 7 of the Convention either (citing *Kafkaris v. Cyprus*[51]; *Del Río Prada v. Spain*[52]; and *Ilnseher v. Germany*[53]). The complaint under Article 7 was consequently also found to be incompatible *ratione materiae* with the Convention provisions.

FAIRNESS OF THE PROCEEDINGS

The *Akbay and Others v. Germany* [54] judgment concerned persons convicted as a result of incitement by the police to commit offences.

N.A. (the first applicant's husband) and the second and third applicants were convicted of drug offences in the context of a smuggling operation. The domestic courts found that N.A., and indirectly through him the second but not the third applicant, had been incited by State authorities to commit the offences. They therefore considerably reduced N.A.'s and the second applicant's sentences, and also took the State's influence into account as a general mitigating factor when imposing a sentence on the third applicant.

In the Convention proceedings the applicants claimed, in particular, that their right to a fair trial under Article 6 § 1 had been violated as N.A. and the second and third applicants had been convicted of offences following

45. *Kyprianou v. Cyprus* [GC], no. 73797/01, ECHR 2005-XIII.

46. *Zaicevs v. Latvia*, no. 65022/01, 31 July 2007.

47. *Ravnsborg v. Sweden*, 23 March 1994, Series A no. 283-B.

48. *Putz v. Austria*, 22 February 1996, *Reports of Judgments and Decisions* 1996-I.

49. *T. v. Austria*, no. 27783/95, ECHR 2000-XI.

50. *Žugić v. Croatia*, no. 3699/08, 31 May 2011.

51. *Kafkaris v. Cyprus* [GC], no. 21906/04, §§ 137-42, ECHR 2008.

52. *Del Río Prada v. Spain* [GC], no. 42750/09, § 81, ECHR 2013.

53. *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 203, 4 December 2018.

54. *Akbay and Others v. Germany*, nos. 40495/15 and 2 others, 15 October 2020.

entrapment by the police. The Court found a violation of Article 6 § 1 with respect to the first and second applicants' complaints and no violation of that provision in respect of the third applicant.

The judgment is noteworthy because the Court, *inter alia*, set out the Convention test to be applied with respect to indirect police incitement and reaffirmed its methodology for examining entrapment cases. With respect to the issue of indirect entrapment – namely a situation where a person was not directly in contact with the police officers working undercover, but was involved in the offence by an accomplice (in the present case, N.A.) who had been directly incited to commit an offence by the police – on the basis of a detailed analysis of its earlier case-law, the Court set out the following test for its assessment:

(a) whether it was foreseeable for the police that the person directly incited to commit the offence was likely to contact other persons to participate in the offence;

(b) whether that person's activities were also determined by the conduct of the police officers; and

(c) whether the persons involved were considered as accomplices in the offence by the domestic courts (§ 117 of the judgment).

Finally the Court reaffirmed and applied its methodology for the examination of entrapment cases (*Bannikova v. Russia*[55] and *Matanović v. Croatia*[56]). Accordingly, and when faced with a plea of entrapment, the Court will attempt to establish, as a first step, whether there has been such incitement or entrapment (substantive test of incitement). Where, under the substantive test of incitement, on the basis of the available information, the Court can find with a sufficient degree of certainty that the domestic authorities investigated the applicant's activities in an essentially passive manner and did not incite him or her to commit an offence, that would normally be sufficient for the Court to conclude that the subsequent use in the criminal proceedings in respect of the applicant of the evidence obtained by the undercover measure does not raise an issue under Article 6 § 1 of the Convention. If the Court's findings under the substantive test are inconclusive (owing to a lack of information in the file or to the lack of disclosure or contradictions in the parties' interpretations of events) or confirm that the applicant was subjected to incitement, then it will be necessary to proceed, as a second step, to the procedural test of incitement, that is to say, the Court will assess whether the domestic courts have drawn the relevant inferences in accordance with the Convention. This includes, as already found in *Furcht v. Germany*,[57] excluding all evidence obtained as a result of entrapment or applying a procedure with similar consequences (§§ 111-24 of the judgment).

Applying this methodology to the first and second applicants' complaints, the Court agreed with the domestic courts that N.A. (directly) and the second applicant (indirectly) had been subjected to police incitement to commit the offences of which they were later convicted. However, merely reducing sentences – without excluding all the evidence obtained as a result of entrapment or applying a procedure with similar consequences – did not satisfy the requirements of the entrapment test and the Court concluded that there had been a violation of Article 6 § 1 of the Convention. By contrast, on the basis of the evidence available to it, the Court agreed with the domestic courts that the third applicant had not been subjected to entrapment, and there had therefore been no violation of Article 6 § 1 in respect of him.

The admission of statements obtained through ill-treatment by private individuals was the subject of the judgment in *Ćwik v. Poland*[58].

The applicant and K.G. were part of a criminal group involved in drug trafficking. K.G. was abducted and tortured by a rival gang to obtain information and his statements were recorded. The police freed K.G. and seized the recording. Some years later, the applicant was convicted of drug-trafficking offences. The trial court relied, *inter alia*, on the recording of the statements made by K.G. during his ill-treatment at the hands of the gang members.

In the Convention proceedings the applicant complained, under Article 6 § 1, that his trial had been unfair. The Court found a violation of this provision.

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55. *Bannikova v. Russia*, no. 18757/06, §§ 37-65, 4 November 2010.

56. *Matanović v. Croatia*, no. 2742/12, §§ 131-35, 4 April 2017.

57. *Furcht v. Germany*, no. 54648/09, § 64, 23 October 2014.

58. *Ćwik v. Poland*, no. 31454/10, 5 November 2020.

The judgment is noteworthy because the Court examined, for the first time, the admission in evidence in criminal proceedings of statements obtained through ill-treatment inflicted by private individuals, without the involvement or acquiescence of State agents.

The Court's consistent case-law indicates that the use in criminal proceedings of statements obtained from the accused or a witness by any form of treatment in breach of Article 3 automatically renders the criminal proceedings unfair as a whole (see, among many other authorities, *Gäfgen v. Germany*[59]). This is irrespective of whether that treatment is classified as torture or inhuman or degrading treatment, and irrespective of the probative value of the statements and of whether their use was decisive in securing the defendant's conviction (the admissibility of real evidence was not in issue in the present case; see, in that regard, *Gäfgen*, cited above, § 178).

These principles, developed in cases where State agents were involved in obtaining the statements in question, were found by the Court in the present case to be equally applicable to the admission of statements obtained as a result of ill-treatment inflicted by private individuals.

In applying those principles, the Court determined, on the basis of the available material, that the treatment inflicted on K.G. by private individuals had attained the threshold of severity necessary to fall within the scope of Article 3 and to trigger the State's positive obligation under this provision to protect persons from ill-treatment by private individuals. The Court did not find it necessary to determine whether that ill-treatment might be qualified as torture. Having ascertained that the domestic courts had indeed relied on statements made by K.G. during this ill-treatment, the Court found that the admission of the statements in evidence rendered the criminal proceedings as a whole unfair and violated Article 6 § 1 of the Convention.

TRIBUNAL ESTABLISHED BY LAW

Guðmundur Andri Ástráðsson v. Iceland[60] concerned the participation of a judge whose appointment had been vitiated by undue executive discretion, and compliance with the "established by law" requirement.

The Court of Appeal rejected the applicant's appeal against his criminal conviction. He complained that one of the judges on the bench of that court had been appointed in breach of domestic procedures. The Supreme Court acknowledged that the judge's appointment had been irregular in two respects. In the first place, the Minister of Justice had replaced four of the candidates (from the fifteen considered by the Evaluation Committee to be the best qualified) with four others (including the impugned judge who had not made it into the top fifteen) without carrying out an independent evaluation or providing adequate reasons for her decision. Secondly, Parliament had not held a separate vote on each individual candidate, as required by domestic law, but instead voted in favour of the Minister's list *en bloc*. The Supreme Court held, nevertheless, that these irregularities could not be considered to have nullified the appointment and that the applicant had received a fair trial. The Grand Chamber found that there had been a violation of the right to a tribunal "established by law".

This Grand Chamber judgment is noteworthy in two respects. In the first place, it clarified the scope of, and the meaning to be given to, the concept of a "tribunal established by law" and it analysed its relationship with other "institutional requirements" (notably, independence and impartiality). Secondly, it developed a three-step threshold test.

(i) The Grand Chamber analysed how each of the three individual components of the concept of a "tribunal established by law" should be interpreted so as to best reflect its purpose and to ensure that the protection it offers is truly effective. As to a "*tribunal*", in addition to the judicial function and the applicable requirements of independence, impartiality, and so on, it is inherent in its very notion that it be composed of judges selected on the basis of merit through a rigorous process to ensure that the most qualified candidates – both in terms of technical competence and moral integrity – are appointed: the higher the tribunal in the judicial hierarchy, the more demanding the applicable selection criteria should be. As to "*established*", the Grand Chamber noted its purpose which was to protect the judiciary against unlawful external influence, from the executive in particular. In this light, the process of appointing judges necessarily constituted an inherent element of the

59. *Gäfgen v. Germany* [GC], no. 22978/05, §§ 165-66, ECHR 2010.

60. *Guðmundur Andri* Ástráðsson *v. Iceland* [GC], no. 26374/18, 1 December 2020.

requirement that a tribunal be "established by law", with the result that breaches of the law regulating this process may render the participation of the relevant judge in the examination of a case "irregular". The Grand Chamber further clarified that the third component – "*by law*" – also meant "*in accordance with the law*", so that provisions on judicial appointments should be couched in unequivocal terms, to the extent possible, to prevent arbitrary interferences, including by the executive. At the same time, the mere fact that the executive has decisive influence on appointments may not as such be considered problematic. Finally, in view of a very close interrelationship and common purpose shared by the requirements of independence/impartiality and a "tribunal established by law", an examination under the latter must systematically enquire whether the alleged irregularity in a given case was of such gravity as to undermine the fundamental principles of the rule of law and the separation of powers, and to compromise the independence of the court in question.

(ii) On the basis of the above, the Grand Chamber developed the following three cumulative criteria to be applied to assess whether there has been a breach of the right to a "tribunal established by law", in the light of the object and purpose of this concept (namely, to ensure the ability of the judiciary to perform its duties free of undue interference). In the first place, there must, in principle, be a *manifest* breach of domestic law in the sense that it must be objectively and genuinely identifiable. However, the absence of such a breach does not rule out the possibility of a violation, since a procedure that is seemingly in compliance with the rules may nevertheless produce results that are incompatible with the above object and purpose. Secondly, only those breaches that relate to the *fundamental rules* of the procedure for appointing judges (that is, breaches that affect the essence of the right in question) are likely to result in a violation: for example, the appointment of a person as judge who did not fulfil the relevant eligibility criteria or breaches that may otherwise undermine the purpose and effect of the "established by law" requirement. Accordingly, breaches of a purely technical nature fall below the relevant threshold. Thirdly, *the review by domestic courts*, of the legal consequences of a breach of a domestic rule on judicial appointments, must be carried out on the basis of the relevant Convention standards. In particular, a fair and proportionate balance has to be struck to determine whether there was a pressing need, of a substantial and compelling character, justifying the departure from competing principles of legal certainty and irremovability of judges, as relevant, in the particular circumstances of a case. With the passage of time, the preservation of legal certainty would carry increasing weight in the balancing exercise.

(iii) On the facts of the case, the Grand Chamber found that the very essence of the applicant's right to a "tribunal established by law" had been impaired on account of the participation in his trial of a judge whose appointment procedure had been vitiated by a manifest and grave breach of a fundamental domestic rule intended to limit the influence of the executive and strengthen the independence of the judiciary. The first and second criteria were thereby satisfied. In particular in this regard, the Minister of Justice had failed to explain why she had picked one candidate over another. Given the alleged political connections between her and the husband of the impugned judge, her actions were of such a nature as to prompt objectively justified concerns that she had acted out of political motives. Moreover, the Minister was a member of one of the political parties composing the majority in the coalition government, by whose votes alone her proposal had been adopted in Parliament. As to the procedure before Parliament, not only had it failed to demand that the Minister provide objective reasons for her proposals, but Parliament had not complied with the special voting rules, which had undermined its supervisory role as a check against the exercise of undue executive discretion. The applicant's belief that Parliament's decision had been driven primarily by party political considerations might not therefore be considered to be unwarranted. This was sufficient to taint the legitimacy and transparency of the whole appointment procedure. As to the third criterion, the Supreme Court had in turn failed to carry out a Convention-compliant assessment and to strike the right balance between the relevant competing principles, although the impugned irregularities had been established even before the judges at issue had taken office. Nor had it responded to any of the applicant's highly pertinent arguments. The restraint displayed by the Supreme Court in examining the applicant's case had undermined the significant role played by the judiciary in maintaining the checks and balances inherent in the separation of powers. However, the finding of a violation in the present case could not, as such, be taken to impose on the respondent State an obligation to reopen all similar cases that had since become *res judicata*.

OTHER RIGHTS AND FREEDOMS

RIGHT TO RESPECT FOR ONE'S PRIVATE AND FAMILY LIFE, HOME AND CORRESPONDENCE (ARTICLE 8)

POSITIVE OBLIGATIONS

Hudorovič and Others v. Slovenia[61] sets out the criteria for determining the existence of a State's positive obligation under Article 8 to provide access to safe drinking water.

The applicants belonged to Roma communities residing in illegal and unserviced settlements. They complained that they had not been provided with access to basic public utilities, in particular, to safe drinking water and sanitation. The municipal authorities had taken some steps to provide the applicants with the opportunity to access safe drinking water. In one settlement, at least one water tank co-financed by the municipality had been installed and filled with drinking water. In another settlement, the municipality had installed and financed a public water point to which individual connections could be installed. The applicants considered these measures insufficient. The Court found that, even assuming they were applicable, there had been no violation of Articles 8 and 3 of the Convention, taken alone and in conjunction with Article 14.

The judgment is noteworthy in that the Court, for the first time, clarified the conditions which could trigger the applicability of Article 8 with regard to the provision by the State of basic public utilities, in particular, safe drinking water. The Court also developed criteria for determining the existence of a State's positive obligation under this provision and its eventual content.

(i) Relying on the consequence-based approach outlined in *Denisov v. Ukraine*[62], the Court defined as follows the threshold of severity which could bring Article 8 into play in this context: a "persistent and long-standing lack of access to safe drinking water" with "adverse consequences for health and human dignity effectively eroding the core of private life and the enjoyment of a home".

(ii) The existence of any positive obligation in this respect and its eventual content are to be determined by the specific circumstances of the persons affected, by the legal framework, and by the economic and social situation of the State in question. In the Court's view, States must be accorded a wide discretion in such matters, including as regards the concrete steps to ensure everyone has adequate access to water.

– As to the economic and social position in Slovenia, the Court noted that a non-negligible proportion of the Slovenian population living in remote areas did not have access to the public water supply and sewerage systems;

61. *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, 10 March 2020. See also under Article 3 (Inhuman or degrading treatment) above.

62. *Denisov v. Ukraine* [GC], no. 76639/11, 25 September 2018.

- As to the comprehensive regulatory framework in place, the Court considered it reasonable that the State or its local authorities assumed responsibility for the provision of that service while it was left to the owners to install individual house connections at their own expense. Likewise, it appeared reasonable that alternative solutions such as the installation of individual water tanks or systems for harvesting rainwater were proposed in those areas not yet covered by a public water supply system;
- As regards the applicants' specific circumstances, the key consideration for the Court was the fact that they belonged to a socially disadvantaged group which faced greater obstacles than the majority in accessing basic utilities.

In the first place, the Court took note of all the affirmative action measures already taken by the domestic authorities with a view to improving the living conditions of the Roma community, including concrete actions to provide the applicants with the opportunity to access safe drinking water. While not an ideal or permanent solution, these positive steps demonstrated that the authorities had acknowledged the disadvantages suffered by the applicants as members of a vulnerable community and had shown a degree of active engagement with their specific needs.

Secondly, the applicants, who remained in their respective settlements by choice, were not living in a state of extreme poverty. They received social benefits which could have been used towards improving their living conditions by, for instance, installing private water and septic tanks, systems for collecting rainwater or other alternative solutions. In sum, the Court took the view that, while it fell upon the State to address the inequalities in the provision of access to safe drinking water which disadvantaged Roma settlements, this could not be interpreted as including an obligation to bear the entire burden of providing running water to the applicants' homes.

Thirdly, the applicants had not convincingly demonstrated that the State's alleged failure to provide them with access to safe drinking water had resulted in adverse consequences for their health and human dignity, effectively eroding their core rights under Article 8. Even assuming that Article 8 was applicable, and having regard to the State's wide margin of appreciation in such matters, the Court found that the measures adopted by the State in order to ensure access to safe drinking water and sanitation for the applicants had taken account of their vulnerable position and satisfied the requirements of Article 8 of the Convention.

FREEDOM OF EXPRESSION (ARTICLE 10)

FREEDOM OF EXPRESSION

Magyar Kétfarkú Kutya Párt v. Hungary[63] concerned the foreseeability of restrictions on the freedom of expression of political parties in the context of an election or a referendum.

In 2016 a referendum concerning the European Union was held in Hungary. Immediately prior thereto the applicant political party had made available to voters a mobile-phone application which they could use to anonymously upload and share photographs of their ballot papers. Following complaints by a private individual to the National Election Commission (NEC), the applicant party was fined for infringing principles concerning the fairness and secrecy of elections as well as the principle of the "exercise of rights in accordance with their purpose". The *Kúria* upheld the finding of the NEC as regards the latter principle but dismissed its conclusions regarding voting secrecy and the fairness of the referendum. The applicant party's constitutional complaint was declared inadmissible.

The Grand Chamber examined the case from the standpoint of the lawfulness of the measure under Article 10. It found that the legislation setting out the principle concerning the "exercise of rights in accordance with their purpose" was not formulated with sufficient precision to rule out any arbitrariness and enable the applicant party to regulate its conduct accordingly and found a breach of Article 10.

The judgment is noteworthy in that it clarified the extent of the Court's scrutiny of restrictions on the freedom of expression of political parties in an electoral context and, in particular, the level of foreseeability required of the legal basis for such a restriction.

63. *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], no. 201/17, 20 January 2020.

(i) Restrictions on the freedom of expression of political parties in an electoral context must be subjected to rigorous supervision. The same applies, *mutatis mutandis*, in the context of a referendum aimed at identifying the will of the electorate on matters of public concern.

(ii) Such rigorous supervision naturally extends to the assessment of whether the legal basis, relied upon by the authorities to restrict the freedom of expression of a political party, was sufficiently foreseeable to rule out any arbitrariness in its application. As well as protecting democratic political parties from arbitrary interferences by the authorities, rigorous supervision serves to protect democracy itself, since any restriction on freedom of expression in this context without sufficiently foreseeable regulations could harm open political debate, the legitimacy of the voting process, its results and, ultimately, the confidence of citizens in the integrity of democratic institutions and their commitment to the rule of law.

In the present case, the Court noted that the applicant party had been seeking not only to provide a forum for voters to express an opinion, but also to convey a political message on the referendum (the name of the application was "Cast an invalid ballot"). There had therefore been an interference with its freedom of expression in relation to both of these aspects: providing a forum for third-party content and imparting information and ideas.

The salient issue was whether the applicant party – in the absence of a binding provision of domestic legislation explicitly regulating the taking of photographs of ballot papers and the uploading of those photographs in an anonymous manner to a mobile-phone application for dissemination while voting was ongoing – knew or ought to have known, if need be after taking appropriate legal advice, that its conduct would breach the existing electoral procedure law.

The Court observed that the vagueness of the principle of the "exercise of rights in accordance with their purpose" relied on by the authorities had been noted by the Constitutional Court. The relevant legislation did not define what constituted a breach of that principle, it did not establish any criteria for determining which situation constituted a breach and it did not provide any examples. The relevant domestic regulatory framework allowed the restriction of voting-related expressive conduct on a case-by-case basis and therefore conferred a very wide discretion on the electoral bodies and on the domestic courts called upon to interpret and apply it. While the Constitutional Court had restricted the reach of the said principle to voting-related conduct that entailed "negative consequences", it had not been established how the restriction in issue "related to, and addressed, a concrete 'negative consequence', whether potential or actual", particularly since the applicant party had not been found to have infringed the fairness of the referendum or the secrecy of the ballot.

Having regard to the particular importance of the foreseeability of law when it came to restricting the freedom of expression of a political party in the context of an election or a referendum, the Court concluded that the considerable uncertainty about the potential effects of the legal provisions in issue had exceeded what was acceptable under Article 10 § 2 of the Convention.

In *Selahattin Demirtaş v. Turkey (no. 2)*[64], the Court examined the loss of immunity and prolonged pre-trial detention of an opposition member of parliament (MP) as a result of his political speeches.

The applicant was an elected MP and one of the co-chairs of the Peoples' Democratic Party (HDP), a left-wing pro-Kurdish political party. On 20 May 2016 an amendment to the Constitution was adopted whereby parliamentary immunity was lifted in all cases where requests for its lifting had been transmitted to the National Assembly prior to the date of adoption of the amendment. This reform had its origin in clashes in Syria between Daesh and forces with links to the PKK as well as in the serious violence in Turkey in 2014 and 2015 following the breakdown of negotiations aimed at resolving the "Kurdish question". The applicant, who was actively involved through his speeches and statements on these issues, was one of 154 MPs (including 55 HDP members) affected by the constitutional amendment. In November 2016 he was arrested on suspicion of membership of an armed terrorist organisation and of inciting others to commit a criminal offence. Further to an additional investigation (concerning the aforenoted violence), the applicant remains in detention awaiting trial. His parliamentary mandate expired in June 2018.

The Grand Chamber found a violation of Article 10.

64. *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020. See also under Article 35 § 2 (b) (Matter already submitted to another international body) above and Article 3 of Protocol No. 1 (Right to free elections – Free expression of the opinion of the people).

This judgment is noteworthy in that it considered the compatibility of the impugned constitutional amendment with the foreseeability requirement of Article 10 and articulated the impact of a finding of a breach of Article 10 on the examination of a complaint under Article 3 of Protocol No. 1.

In particular:

(i) When a State provides for parliamentary immunity from prosecution/deprivation of liberty, the domestic courts must verify whether the MP concerned is entitled to immunity for the acts of which he or she has been accused. Where charges/pre-trial detention are linked to speech, the domestic courts' task is to determine whether this speech is covered by the principle of "non-liability" of MPs in that regard. In the instant case, the domestic courts failed to comply with this procedural obligation arising under both Article 10 and Article 3 of Protocol No. 1.

(ii) The Court fully subscribed to the finding of the Venice Commission that the impugned unprecedented and one-off constitutional amendment had been aimed expressly at specific statements of MPs, particularly those of the opposition, and that it was thus a "misuse of the constitutional amendment procedure". MPs could not reasonably have expected that such a procedure would be introduced during their term of office. The interference with the freedom of expression had not therefore been foreseeable, in violation of Article 10 of the Convention.

(iii) The Court stressed that the importance of the freedom of expression of MPs (especially of the opposition) is such that, where the detention of an MP is not compatible with Article 10, it will also be considered to breach Article 3 of Protocol No. 1.

In *Miljević v. Croatia* [65] the Court examined a conviction for defamation on account of statements made while defending criminal proceedings, about someone not participating in those proceedings.

During his trial for war crimes, the applicant made statements in his defence, accusing I.P. (who was not participating in the proceedings) of instigating his prosecution, witness tampering and leading a criminal enterprise aiming to have him convicted. The applicant was acquitted of war crimes, but later convicted in criminal defamation proceedings brought against him by I.P. on account of the impugned statements. The Court found a violation of Article 10 of the Convention.

(i) The judgment is noteworthy because it gave the Court the opportunity, for the first time, to balance the right to freedom of expression of an accused in criminal proceedings (Article 10) against the right to respect for reputation (Article 8), in a novel context where the offending statements were made against a third party not having any formal role in the relevant proceedings (compare with previous cases concerning either a lay accused making disparaging statements against judges or prosecutors (for example, *Lešník v. Slovakia* [66], and *Skałka v. Poland* [67]) or a defence lawyer making such statements against judges, prosecutors, witnesses or police officers (for example, *Nikula v. Finland* [68], and *Kyprianou v. Cyprus* [69])).

(ii) The Court observed that Articles 8 and 10 normally enjoy equal protection, so that the outcome of the application should not, in principle, vary according to whether it has been lodged under Article 8 by the person who was the subject of the offending statement or under Article 10 by the author of the statement in question. However, in cases where the right to freedom of expression is to be read in the light of an accused's right to a fair trial under Article 6, the margin of appreciation afforded to the domestic authorities under Article 10 ought to be narrower. Importantly, the Court set out the following principles for balancing the relevant competing rights at stake in this context:

> "In particular, in the Court's view, having regard to an accused's right to freedom of expression and the public interest involved in the proper administration of criminal justice, priority should be given to allowing the accused to speak freely without the fear of being sued in defamation whenever his or her speech concerns the statements

65. *Miljević v. Croatia*, no. 68317/13, 25 June 2020.

66. *Lešník v. Slovakia*, no. 35640/97, ECHR 2003-IV.

67. *Skałka v. Poland*, no. 43425/98, 27 May 2003.

68. *Nikula v. Finland*, no. 31611/96, 21 March 2002.

69. *Kyprianou v. Cyprus* [GC], no. 73797/01, ECHR 2005-XIII.

> and arguments made in connection with his or her defence. On the other hand, the more an accused's statements are extraneous to the case and his or her defence, and include irrelevant or gratuitous attacks on a participant in the proceedings or any third party, the more it becomes legitimate to limit his or her freedom of expression by having regard to the third party's rights under Article 8 of the Convention.
>
> The Court emphasises that an accused's statements and arguments are protected in so far as they do not amount to malicious accusations against a participant in the proceedings or any third party. As it follows from the Court's case-law, the defendant's freedom of expression exists to the extent that he or she does not make statements that intentionally give rise to false suspicions of punishable behaviour concerning a participant to the proceedings or any third party … In practice, when making this assessment, the Court finds it important to examine in particular the seriousness or gravity of the consequences for the person concerned by those statements … The more severe the consequences are, the more solid the factual basis for the statements made must be …

(iii) Applying these principles to the present case, the Court found that the domestic authorities had failed to strike a fair balance between the competing rights at stake for the following reasons.

Considering, in the first place, the *nature and context* of the impugned statements, the Court found that they had had a sufficiently relevant bearing on the applicant's defence during the criminal trial and had therefore deserved a heightened level of protection under the Convention. If the applicant had succeeded in convincing the trial court of his arguments, this would have seriously called into question the credibility and reliability of the witness evidence and the overall nature and background of the prosecution's case. As a matter of principle, the defendant had to have the opportunity to speak freely about his impression concerning possible witness tampering and the improper motivation of the prosecution without the fear of subsequently being sued for defamation. Furthermore, I.P., who was a well-known public figure and activist as regards the prosecution of crimes committed during the war, had entered the public arena on the subject and had therefore in principle been required to display a higher level of tolerance of acceptable criticism than another private individual.

Secondly, the Court was unable to find that the applicant's allegations against I.P. lacked any *factual basis*. I.P. had attended the public hearings in the applicant's case and admitted to having met some of the witnesses, including the witness who had lodged a criminal complaint against the applicant on charges of war crimes. Moreover, I.P. had advised the editors of a television show in their preparation of several reports on the war in Croatia without, however, being involved in the broadcast concerning the applicant. The domestic courts had failed to take these factual elements into account.

Thirdly, the Court examined the *consequences* of the impugned statements for I.P. and found them to be limited. Although the applicant had accused I.P. of witness tampering, which was punishable under domestic law, the competent authorities had never investigated I.P. for that offence. Though excessive, the statements in issue were not malicious accusations. Moreover, there was no conclusive evidence that I.P. had suffered, or could have objectively suffered, any profound or long-lasting health or other consequences.

Fourthly, regarding the *severity of the sanction* imposed, the Court observed that, although the applicant had been ordered to pay the minimum fine possible under domestic law, that sanction had nevertheless amounted to a criminal conviction which, in such a context, could only in exceptional circumstances be accepted as necessary in a democratic society.

RIGHT TO AN EFFECTIVE REMEDY (ARTICLE 13)[70]

In *Beizaras and Levickas v. Lithuania*[71] the Court decided to examine separately the applicants' complaint under Article 13 after finding a violation of Article 14 of the Convention taken in conjunction with Article 8.

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70. See also, under Article 4 of Protocol No. 4 (Prohibition of collective expulsion of aliens), *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, 13 February 2020, and, under Article 3 of Protocol No. 1 (Right to free elections – Stand for election), *Mugemangango v. Belgium* [GC], no. 310/15, 10 July 2020.

71. *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020. See also under Article 35 § 1 (Exhaustion of domestic remedies) above, and Article 14 taken in conjunction with Article 8 below.

The issue to be considered was whether a complaint under Article 13, based on discriminatory attitudes impacting on the effectiveness of remedies in the application of domestic law, gave rise to a separate issue to that already examined under Article 14 of the Convention and which had already given rise to a violation under that Article. In this regard, the Court noted that, in cases involving complaints under Article 13 based on such allegations, the Court had not usually considered it necessary to examine separately the complaints under that provision if a violation of Article 14 taken in conjunction with other Convention provisions had already been found (*Opuz v. Turkey*[72]). However, considering the nature and substance of the violation found in the applicants' case on the basis of Article 14 taken in conjunction with Article 8, the Court considered that a separate examination of the applicants' complaint was warranted, mainly on the following grounds:

- it did not appear that the Supreme Court had had an opportunity to provide greater clarity on the standards to be applied in cases of hate speech of comparable gravity: the manner in which its case-law had been applied did not provide for an effective domestic remedy for complaints about homophobic discrimination;
- the growing level of intolerance against sexual minorities had remained largely unchecked;
- the failure by law-enforcement institutions to acknowledge bias as a motive for such crimes and to adopt an approach adequate to the seriousness of the situation; and
- the authorities' lack of a comprehensive strategy to tackle the issue of homophobic hate speech.

The *Association Innocence en Danger and Association Enfance et Partage v. France*[73] judgment concerned the failure by the State to take necessary and appropriate measures to protect a child from ill-treatment by her parents leading to her death.

In the Convention proceedings, the applicant associations complained under Article 13 that there had been no effective domestic remedy on account of the need to prove "gross negligence" (*faute lourde*) in order for the State to be found liable.

It found that there had been no violation.

The judgment is of interest with regard to the assessment of the margin of appreciation to be afforded to States in fulfilling their obligation under Article 13 (*De Souza Ribeiro v. France*[74], citing *Jabari v. Turkey*[75]), in the light of Article 3. The Court found that the interpretation by the national courts of the minimum threshold of "gross negligence", within the meaning of Article L. 141-1 of the Code of Judicial Organisation, since it could be constituted by a series of more minor acts of negligence resulting in deficiencies in the justice system, thus fell within their margin of appreciation. The Court found that the fact that the applicant associations had not met the conditions laid down by Article L. 141-1 of that Code did not suffice for it to be concluded that the remedy, taken as a whole, was ineffective. The requirement to establish "gross negligence" had not negated the effectiveness of this remedy, which had been available to the applicant associations.

PROHIBITION OF DISCRIMINATION (ARTICLE 14)

ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 2

The judgment in *Makuchyan and Minasyan v. Azerbaijan and Hungary*[76] is interesting for the way in which the Court examined the question whether the failure of the State to enforce a prison sentence imposed abroad for an ethnically biased crime could be considered a discriminatory difference in treatment within the meaning of Article 14 in conjunction with the procedural limb of Article 2.

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72. *Opuz v. Turkey*, no. 33401/02, § 205, ECHR 2009.

73. *Association Innocence en Danger and Association Enfance et Partage v. France*, nos. 15343/15 and 16806/15, 4 June 2020. See also under Article 3 (Positive obligations) above.

74. *De Souza Ribeiro v. France* [GC], no. 22689/07, §§ 77-78, ECHR 2012.

75. *Jabari v. Turkey*, no. 40035/98, § 48, ECHR 2000-VIII.

76. *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, 26 May 2020. See also under Article 2 (Right to life – Obligation to protect life) above.

ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 8

In *Beizaras and Levickas v. Lithuania*[77] the Court emphasised the necessity of a criminal-law response to direct verbal assaults and physical threats based on homophobic attitudes.

The applicants, two young men, posted a photograph of themselves kissing on Facebook. The photograph received hundreds of serious homophobic comments (for example, calls for the applicants to be "castrated", "killed" and "burned"). On the applicants' request, a non-governmental organisation (NGO), of which they were members and which protected the interests of homosexual persons, requested a prosecutor to begin criminal proceedings for incitement to hatred and violence against homosexuals (under Article 170 of the Criminal Code, which established criminal liability for incitement of discrimination on the basis, *inter alia*, of sexual orientation). The prosecutor and the courts refused to prosecute, finding that the applicants' behaviour had been "eccentric" and did not correspond to "traditional family values" in Lithuania and that the comments in issue had not reached a threshold which could be considered criminal. The Court found it established that the applicants had suffered discrimination on the ground of their sexual orientation, in breach of Article 14 taken in conjunction with Article 8. The Court also found a violation of Article 13 since the applicants had been denied an effective domestic remedy in respect of their complaint concerning the breach of their right to their private life, on account of their having been discriminated against because of their sexual orientation.

The judgment is noteworthy in that it clarified whether criminal-law measures are required with respect to direct verbal assaults and physical threats motivated by discriminatory attitudes (*R.B. v. Hungary*[78]; *Király and Dömötör v. Hungary*[79]; and *Alković v. Montenegro*[80]).

The Court stressed that criminal sanctions, including against individuals responsible for the most serious expressions of hatred, inciting others to violence, could be invoked only as an *ultima ratio* measure. This applied equally to hate speech concerning a person's sexual orientation and sexual life. However, the instant case concerned undisguised calls for an attack on the applicants' physical and mental integrity, which required protection by the criminal law. While the Lithuanian Criminal Code did indeed provide for such protection, it had not been granted to the applicants, owing to the authorities' discriminatory attitude which was at the core of their failure to discharge their positive obligation to investigate in an effective manner whether the comments in issue constituted incitement to hatred and violence. The Court rejected the Government's claim that the applicants could have had recourse to other (civil law) remedies when the domestic courts refused to qualify the comments as criminal, considering that, in the circumstances, it would have been manifestly unreasonable to require the applicants to exhaust any other remedies and would have downplayed the seriousness of the comments.

RIGHT TO FREE ELECTIONS (ARTICLE 3 OF PROTOCOL No. 1)

FREE EXPRESSION OF THE OPINION OF THE PEOPLE

In *Selahattin Demirtaş v. Turkey (no. 2)*[81], the Court examined the loss of immunity and prolonged pre-trial detention of an opposition member of parliament (MP) as a result of his political speeches.

The Grand Chamber followed the Chamber's finding of no violation of Article 5 § 4 and of a breach of Article 3 of Protocol No. 1. However, it examined separately the complaint under Article 10, finding a violation of this provision, and it held that there had been violations of Article 5 §§ 1 and 3 on account of the lack of a reasonable suspicion that the applicant had committed an offence. It also considered that the applicant's pre-trial detention had pursued an ulterior motive, that of stifling pluralism and limiting freedom of political

77. *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020. See also under Article 13 (Right to an effective remedy) above.

78. *R.B. v. Hungary*, no. 64602/12, §§ 80 and 84-85, 12 April 2016.

79. *Király and Dömötör v. Hungary*, no. 10851/13, § 76, 17 January 2017.

80. *Alković v. Montenegro*, no. 66895/10, §§ 8, 11, 65 and 69, 5 December 2017.

81. *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020. See also under Article 35 § 2 (b) (Matter already submitted to another international body) and Article 10 (Freedom of expression) above.

debate, in breach of Article 18 of the Convention in conjunction with Article 5. Finally, the Court indicated under Article 46 that Turkey must take all necessary measures to secure the applicant's immediate release.

This Grand Chamber judgment is noteworthy in, *inter alia*, the following respects:

(i) by emphasising the link between parliamentary immunity (and the need for elevated protection of parliamentary speech, especially of the opposition) and the guarantee to sit as an MP once elected, the Court identified a procedural obligation on domestic courts examining charges against MPs;

(ii) the Court considered the compatibility of the impugned constitutional amendment with the foreseeability requirement of Article 10;

(iii) the Court has, for the first time, ruled on a complaint under Article 3 of Protocol No. 1 about the effects of the pre-trial detention of elected MPs on their performance of parliamentary duties. The Court defined the scope of a procedural obligation on domestic courts when ordering an MP's initial and/or continued pre-trial detention and, where such detention is linked to an MP's political speech, the Court articulated the impact of a finding of a breach of Article 10 on the examination of a complaint under Article 3 of Protocol No. 1.

When a State provides for parliamentary immunity from prosecution/deprivation of liberty, the domestic courts must verify whether the MP concerned is entitled to immunity for the acts of which he or she has been accused. Where charges/pre-trial detention are linked to speech, the domestic courts' task is to determine whether this speech is covered by the principle of "non-liability" of MPs in that regard. In the instant case, the domestic courts failed to comply with this procedural obligation arising under both Article 10 and Article 3 of Protocol No. 1.

The Court stressed that the imposition of a measure depriving an MP/candidate in parliamentary elections of liberty does not automatically constitute a violation of Article 3 of Protocol No. 1. However, the procedural obligation under this provision requires the domestic courts to show that, in ordering an MP's initial and/or continued pre-trial detention, they have weighed up all the relevant interests, in particular those safeguarded by this provision. As part of this balancing exercise, they must protect the expression of political opinions by the MP concerned. The importance of the freedom of expression of MPs (especially of the opposition) is such that, where the detention of an MP is not compatible with Article 10, it will also be considered to breach Article 3 of Protocol No. 1. Another important element is whether the charges are directly linked to an MP's political activity. Moreover, a remedy must be offered by which an MP can effectively challenge his or her detention and have his or her complaints examined on the merits. Furthermore, the duration of an MP's pre-trial detention must be as short as possible and the domestic courts should genuinely consider alternative measures to detention and provide reasons if less severe measures are considered insufficient. In this context, whether there was a reasonable suspicion that the applicant had committed an offence, as required by Article 5 § 1, is equally relevant for the purposes of Article 3 of Protocol No. 1. The domestic courts failed to duly consider all of these elements and to effectively take into account the fact that the applicant was not only an MP but also a leader of the opposition, the performance of whose parliamentary duties called for a high level of protection. Although the applicant retained his seat throughout his term of office, it was effectively impossible for him to take part in the activities of the National Assembly. His unjustified pre-trial detention was therefore incompatible with the very essence of his right under Article 3 of Protocol No. 1 to be elected and to sit in Parliament.

STAND FOR ELECTION

The scope of the procedural safeguards for the effective examination of electoral disputes and the impartiality of the decision-making body were examined in *Mugemangango v. Belgium*[82].

Under Belgian electoral law, the legislative assemblies alone are competent to verify any irregularities that may have taken place during elections to the exclusion of the jurisdiction of any external court or body. The applicant stood for election to the parliament of the Walloon Region in 2014 and lost the seat by fourteen votes. He did not ask for the election to be declared void or for fresh elections, but for a re-examination of the ballot papers that had been declared blank, spoilt or disputed (of which there were over 20,000) and for a recount of the votes validly cast in his constituency. Although the Committee on the Examination of

82. *Mugemangango v. Belgium* [GC], no. 310/15, 10 July 2020.

Credentials (of the Walloon Parliament) found his complaint well founded and proposed a recount of the votes, Parliament (which had not yet been constituted at the material time) decided, by a simple majority, not to follow that conclusion and approved all the elected representatives' credentials. The members elected in the applicant's constituency, whose election could have been called into question as a result of the examination of his complaint, also voted on the applicant's complaint. The applicant complained under Article 3 of Protocol No. 1, both alone and in conjunction with Article 13, about the procedure for the examination of his complaint.

The Grand Chamber found violations of both provisions. It was satisfied that the applicant had put forward sufficiently serious and arguable allegations that could have led to a change in the distribution of seats. It found that his grievances had not been dealt with in a procedure offering adequate and sufficient safeguards to prevent arbitrariness and to ensure their effective examination in accordance with the requirements of Article 3 of Protocol No. 1. For the same reasons, the remedy before the Walloon Parliament could not be deemed "effective" within the meaning of Article 13.

The judgment is noteworthy because it clarifies the scope of the procedural safeguards for the effective examination of electoral disputes, particularly as regards the impartiality of a body charged with this task and the necessity of access to a judicial remedy. Moreover, the specific context of the present case, that of a regional parliament having exclusive jurisdiction to rule on the validity of electoral processes, gave the Court an opportunity to clarify the relationship between the above safeguards and the principle of parliamentary autonomy (*Karácsony and Others v. Hungary*[83]).

(i) The Court emphasised that parliamentary autonomy can only be validly exercised in accordance with the rule of law. Procedural safeguards for the effective examination of electoral disputes serve to ensure the observance of the rule of law in this field, and hence the integrity of the election, so that the electorate's confidence and the legitimacy of parliament are guaranteed. In that respect, these safeguards ensure the proper functioning of an effective political democracy and thus represent a preliminary step for any parliamentary autonomy. As to the weight to be attached to parliamentary autonomy in the context of the present case, involving a challenge to the result of the elections, the Court took into account the fact that the Walloon Parliament had examined and rejected the applicant's complaint before its members had been sworn in and their credentials approved. The newly elected parliament had yet to be constituted and, in that regard, the present case differed from disputes that may arise in respect of a full member of parliament after the composition of the legislature has been approved.

(ii) The Court defined the scope of the adequate and sufficient procedural safeguards to prevent arbitrariness required by Article 3 of Protocol No. 1 in order to ensure the effective examination of electoral disputes (*Podkolzina v. Latvia*[84]; *Kovach v. Ukraine*[85]; *Kerimova v. Azerbaijan*[86]; *Davydov and Others v. Russia*[87]; and *Riza and Others v. Bulgaria*[88]). In the first place, the Court clarified the scope of the requirement to provide sufficient guarantees of impartiality of a decision-making body and the importance of appearances in this respect. Such guarantees are intended to ensure that the decision taken is based solely on factual and legal considerations, and not political ones. The examination of a complaint about the result of an election must not become a forum for political struggle between different parties. Given that members of parliament cannot, by definition, be "politically neutral" , in a system where parliament is the sole judge of the election of its members, particular attention must be paid to the guarantees of impartiality laid down in domestic law as regards the procedure for examining challenges to election results. Secondly, the discretion enjoyed by the body concerned must not be excessive: it must be circumscribed with sufficient precision by the provisions of domestic law. Thirdly, the electoral-disputes procedure must guarantee a fair, objective and sufficiently reasoned decision. Complainants must have the opportunity to state their views and to put forward any arguments they consider relevant to the defence of their interests by means of a written procedure or, where appropriate, at a public hearing. In this way, their right to an adversarial procedure is safeguarded. In addition, it must be clear from the public

83. *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, 17 May 2016.

84. *Podkolzina v. Latvia*, no. 46726/99, ECHR 2002-II.

85. *Kovach v. Ukraine*, no. 39424/02, ECHR 2008.

86. *Kerimova v. Azerbaijan*, nos. 17170/04 and 5 others, 3 May 2011.

87. *Davydov and Others v. Russia*, no. 75947/11, 30 May 2017.

88. *Riza and Others v. Bulgaria*, nos. 48555/10 and 48377/10, 13 October 2015.

statement of reasons by the relevant decision-making body that the complainants' arguments have been given a proper assessment and an appropriate response.

On the facts of the present case, and having regard to the standards and recommendations of European and international bodies, the Court found that the Walloon Parliament had not provided sufficient guarantees of impartiality. Domestic law did not provide for the withdrawal of members of parliament who had been elected in the constituency concerned by an electoral complaint and, indeed, in the applicant's case, his direct opponents had taken part in the voting on his complaint, together with all the newly elected members, whose credentials had not yet been approved. Moreover, the rule on voting by simple majority, which had been applied without any adjustment, had failed to avert the risk of a political decision and to protect the applicant – a candidate from a party not represented in the parliament prior to the elections in issue – from a partisan decision. Furthermore, the discretion enjoyed by that body had not been sufficiently circumscribed, given its exclusive jurisdiction in such matters and the lack of domestic provisions on the procedure and criteria for the examination of electoral complaints and the effects of decisions to be taken thereupon. Finally, the applicant had been afforded certain procedural safeguards on an *ad hoc* discretionary basis: however, in the absence of a procedure laid down in domestic law, they were neither accessible nor foreseeable. Moreover, while Parliament had given reasons for its decision, it had not explained why it had not followed the view of its Committee on the Examination of Credentials, which had found the applicant's complaint to be well founded. The Court thus found a breach of Article 3 of Protocol No. 1.

(iii) Under Article 13 of the Convention, the Court indicated that the "authority" referred to in that Article did not necessarily have to be a judicial one in the strict sense: that question fell within the wide margin of appreciation afforded to Contracting States. The Court clarified, however, that a judicial or judicial-type remedy, whether at first instance or following a decision by a non-judicial body, would, in principle, satisfy the above-noted procedural requirements of Article 3 of Protocol No. 1.

PROHIBITION OF COLLECTIVE EXPULSION OF ALIENS (ARTICLE 4 OF PROTOCOL No. 4)

The immediate and forcible return of aliens from a land border, following an attempt by migrants to cross in an unauthorised manner and by taking advantage of the fact that there was a large number of them, was examined in *N.D. and N.T. v. Spain*[89].

In August 2014 a group of several hundred sub-Saharan migrants, including the applicants, attempted to enter Spain by scaling the barriers surrounding the town of Melilla, a Spanish enclave on the North African coast. Having climbed the fences, they were arrested by members of the Civil Guard (*Guardia Civil*), who handcuffed them and returned them to the other side of the border without conducting an identification procedure or providing them with the opportunity to explain their personal situation. The Grand Chamber found no violation of Article 4 of Protocol No. 4 or Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4.

The judgment is noteworthy in two respects. In the first place, it addressed, for the first time, the applicability of Article 4 of Protocol No. 4 to the immediate and forcible return of aliens from a land border. Secondly, it established a two-tier test to assess the extent of protection to be afforded under this provision to persons who cross a land border in an unauthorised manner, deliberately taking advantage of their large numbers and using force.

(i) The Grand Chamber took the view that the protection of the Convention, particularly Article 3, which embraces the prohibition of *refoulement* as defined in the 1951 Refugee Convention[90], cannot be denied or rendered ineffective on the basis of purely formal considerations, for instance on the ground that the relevant persons could not make a valid claim for such protection as they had not crossed the State's border lawfully. It therefore confirmed the interpretation of the term "expulsion" in the generic meaning in current use ("to drive

89. *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, 13 February 2020.

90. 1951 Geneva Convention relating to the Status of Refugees.

away from a place"; see *Khlaifia and Others v. Italy*[91], and *Hirsi Jamaa and Others v. Italy*[92]). It further specified that this term refers to any forcible removal of an alien from a State's territory, irrespective of the lawfulness of the person's stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or asylum-seeker or his or her conduct when crossing the border. It is also of interest that the Grand Chamber confirmed the relevance of the recent judgments in *Hirsi Jamaa and Others* (cited above), *Sharifi and Others v. Italy and Greece*[93] and *Khlaifia and Others* (cited above), concerning applicants who had attempted to enter a State's territory by sea, to the circumstances of the instant case, refusing to adopt a different interpretation of the term "expulsion" in the context of an attempt to cross a national border by land as in the present case. It follows from this case-law that Article 3 of the Convention and Article 4 of Protocol No. 4 have been found to apply to any situation coming within the jurisdiction of a Contracting State, including to situations or points in time where the authorities of the State in question had not yet examined the existence of grounds entitling the persons concerned to claim protection under these provisions. The Grand Chamber concluded that the applicants, who were within Spain's jurisdiction when forcibly removed from its territory by members of the Civil Guard, had been subjected to an "expulsion" within the meaning of Article 4 of Protocol No. 4, which provision was therefore applicable.

(ii) The Grand Chamber then turned to the extent of the protection to be afforded under Article 4 of Protocol No. 4 to applicants, such as those in the present case, whose conduct created "a clearly disruptive situation which is difficult to control and endangers public safety". It decided to apply the principle drawn from the Court's well-established case-law according to which there is no violation of this provision if the lack of an individual expulsion decision can be attributed to the applicant's own conduct (see *Khlaifia and Others*, cited above, § 240; *Hirsi Jamaa and Others*, cited above, § 184; *M.A. v. Cyprus*[94]; *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia*[95]; and *Dritsas and Others v. Italy*[96]). It also developed a two-tier test for the assessment of complaints in this particular context. In the first place, the Court considered it important to take account of whether the respondent State in a particular case has provided genuine and effective access to a means of legal entry, in particular border procedures. Such means should allow all persons who face persecution to submit an application for protection, based in particular on Article 3, under conditions which ensure that the application is processed in a manner consistent with international norms, including the Convention. Secondly, where the respondent State has provided such access but an applicant has not made use of it, the Court will consider, in the context of the case and without prejudice to the application of Articles 2 and 3, whether there were cogent reasons not to do so which were based on objective facts for which the respondent State was responsible. Only the absence of such cogent reasons preventing the use of these procedures could lead to this being regarded as the consequence of the applicants' own conduct, justifying the lack of individual identification.

Significantly, the Grand Chamber emphasised that where appropriate arrangements exist and secure the right to request protection under the Convention, and in particular Article 3, in a genuine and effective manner, the Convention does not prevent States, in the fulfilment of their obligation to control borders, from requiring applications for such protection to be submitted at the existing border crossing points. Consequently, they may refuse entry to their territory to aliens, including potential asylum-seekers, who have failed, without cogent reasons (as specified above), to comply with these arrangements by seeking to cross the border at a different location, especially, as happened in the present case, by taking advantage of the fact that there was a large number of them and using force in the context of an operation that had been planned in advance.

In the instant case, the Grand Chamber was satisfied that Spanish law afforded the applicants several possible means of seeking admission to the national territory, in particular at the Beni Enzar border crossing point. On the facts, it was not persuaded that the applicants had demonstrated the required cogent reasons for not using it, which was sufficient of itself to conclude that there had been no breach of Article 4 of Protocol No. 4.

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91. *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 243, 15 December 2016.

92. *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 174, ECHR 2012.

93. *Sharifi and Others v. Italy and Greece*, no. 16643/09, 21 October 2014.

94. *M.A. v. Cyprus*, no. 41872/10, § 247, ECHR 2013.

95. *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* (dec.), no. 18670/03, ECHR 2005-VIII.

96. *Dritsas and Others v. Italy* (dec.), no. 2344/02, 1 February 2011.

The Grand Chamber also took note of the applicants' unexplained failure to apply to Spanish embassies or consulates in their countries of origin or transit, or in Morocco.

M.K. and Others v. Poland[97] may usefully be compared to that in *N.D. and N.T. v. Spain*[98]. In the present case, the applicants, who had an arguable claim under Article 3, presented themselves at the border checkpoints and tried to enter the respondent State in a legal manner by making use of the procedure to submit an asylum application that should have been available to them under domestic law. Even though they were interviewed individually by the border guards and received individual decisions refusing them entry into Poland, the Court considered that their statements concerning their wish to apply for asylum had been disregarded and that the decisions they were issued did not properly reflect the reasons given by the applicants to justify their fear of persecution. Moreover, the applicants were not allowed to consult lawyers and were even denied access to lawyers who were present at the border checkpoint. The Court concluded that the decisions refusing the present applicants entry to Poland had not been taken with proper regard to their individual situations and were part of a wider policy of refusing to lodge asylum applications from persons presenting themselves at the Polish-Belarusian border and of returning those persons to Belarus.

PROCEDURAL SAFEGUARDS RELATING TO EXPULSION OF ALIENS (ARTICLE 1 OF PROTOCOL No. 7)

The judgment in *Muhammad and Muhammad v. Romania*[99] concerned an expulsion on national-security grounds which was based on classified information that was not disclosed to the applicants.

The applicants, who were Pakistani nationals living in Romania on student visas, were deported on national-security grounds. They did not have access to the classified documents on which that decision was based and neither were they provided with any specific information as to the underlying facts and grounds for deportation.

The Grand Chamber found a breach of Article 1 of Protocol No. 7, concluding that the applicants had suffered a significant limitation of their right to be informed of the factual elements submitted in support of their expulsion and of the content of the relevant documents, a limitation which had not been counterbalanced in the domestic proceedings.

The judgment is noteworthy in three respects. In the first place, it clarifies whether and to what extent the right to be informed of the reasons for expulsion and the right to have access to documents in the case file are protected by Article 1 of Protocol No. 7. Secondly, it clarifies the extent to which limitations of these rights are permissible. Thirdly, the judgment outlines the methodology to be followed in assessing such limitations.

(i) As to the right to be informed of the reasons for expulsion, while the Court had not addressed the necessity of the disclosure of such reasons in previous cases, it had always found fault with a failure to provide any information in this respect to the alien concerned (*Lupsa v. Romania*[100]; *Kaushal and Others v. Bulgaria*[101]; *Baltaji v. Bulgaria*[102]; and *Ljatifi v. the former Yugoslav Republic of Macedonia*[103]). In the present case, the Court clarified that the provision of such information is limited to that which is essential to ensure the effective exercise by the alien of the right, enshrined in Article 1 § 1 (a) of Protocol No. 7, to submit reasons against his or her expulsion, that is, to the *relevant factual elements* which have led the domestic authorities to believe that the alien represents a threat to national security. As to a right of access to documents in the case file (not enshrined as such in the case-law to date), the Court delimited the scope of any such right by requiring that the alien concerned be informed, preferably in writing and in any event in a manner allowing an effective defence, of the *content of the documents and the information in the case file* relied upon by the competent authority when

97. *M.K. and Others v. Poland*, nos. 40503/17 and 2 others, 23 July 2020. See under Article 3 (Prohibition of torture and inhuman or degrading treatment and punishment – Expulsion) above.

98. *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, 13 February 2020.

99. *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020.

100. *Lupsa v. Romania*, no. 10337/04, ECHR 2006-VII.

101. *Kaushal and Others v. Bulgaria*, no. 1537/08, 2 September 2010.

102. *Baltaji v. Bulgaria*, no. 12919/04, 12 July 2011.

103. *Ljatifi v. the former Yugoslav Republic of Macedonia*, no. 19017/16, 17 May 2018.

deciding on his or her expulsion, without prejudice to the possibility of imposing duly justified limitations on such information if necessary.

(ii) The above procedural rights of the alien not being absolute, the Court set a threshold not to be exceeded by any limitations: such restrictions must not negate the procedural protection guaranteed by Article 1 of Protocol No. 7 by impairing the very essence of the safeguards enshrined in it, such as the right of the alien to submit reasons against his or her expulsion and the protection against any arbitrariness.

(iii) While the scope of the alien's procedural rights is of a more limited nature compared to that of the corresponding safeguards under Articles 5 and 6 (*Regner v. the Czech Republic*[104]; *Jasper v. the United Kingdom*[105]; *Schatschaschwili v. Germany*[106]; and *Ibrahim and Others v. the United Kingdom*[107]), the Court drew inspiration from that case-law to develop its methodology for assessing whether limitations of the procedural rights are compatible with Article 1 § 1 of Protocol No. 7. The Court will therefore apply a two-prong test to establish, in the first place, whether the impugned limitations have been found to be duly justified by the competent independent authority in the light of the particular circumstances of the case; and, secondly, whether the resulting difficulties for the alien have been sufficiently compensated for by counterbalancing factors, including by procedural safeguards. Accordingly, the lack of an examination, or an insufficient examination, of the need for the impugned limitations will not automatically entail a violation of Article 1 of Protocol No. 7, but will call for a stricter scrutiny of the counterbalancing factors by the Court: the more cursory the domestic examination, the stricter the Court's scrutiny. Two further guiding principles are relevant: the more the information available to the alien is limited, the more the safeguards will be important; and when the circumstances of a case reveal particularly significant repercussions for the alien's situation, the counterbalancing safeguards must be strengthened accordingly.

(a) As to the first part of the above two-prong test, the Court set out the requirements the domestic assessment of whether the limitation was imposed for "*duly justified reasons*" must satisfy (compare, for example, with the "compelling reasons" required in *Ibrahim and Others*, cited above, and *Beuze v. Belgium*[108], and the "good reasons" required in *Schatschaschwili*, cited above). In the first place, such an assessment should weigh up the relevant competing interests and be surrounded by safeguards against arbitrariness, including the need for the relevant decision to be duly reasoned and for a procedure allowing such reasons to be properly scrutinised, particularly if not disclosed to the alien concerned. Secondly, it should be entrusted to an authority, judicial or not, which is independent from the executive body seeking to impose the limitation. In this regard, weight is to be attached to the scope of the remit of that authority as well as to the powers vested in it: in this latter respect, it should be ascertained whether that authority would be entitled to declassify the relevant documents itself or to ask the competent body to do so.

(b) As to the second part of the above two-prong test, the Court provided a non-exhaustive list of counterbalancing factors:

(i) *relevance of the information disclosed to the alien* – in particular, whether an independent authority, judicial or otherwise, determined what factual information could be disclosed; whether it was provided at a stage of the proceedings when it was still possible to challenge it; and whether it concerned the substance of the accusations (a mere enumeration of the numbers of legal provisions cannot suffice in this respect, not even *a minima*);

(ii) *information as to the conduct of the proceedings and the domestic counterbalancing mechanisms* – whether the required information was provided at least at key stages in the proceedings, especially if aliens are not represented and domestic rules impose a certain expedition;

(iii) *access to representation in the course of the proceedings*, and whether the representative had access to classified documents and was able to communicate with the alien after consulting them;

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104. *Regner v. the Czech Republic* [GC], no. 35289/11, 19 September 2017.

105. *Jasper v. the United Kingdom* [GC], no. 27052/95, 16 February 2000.

106. *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015.

107. *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016.

108. *Beuze v. Belgium* [GC], no. 71409/10, 9 November 2018.

(iv) *involvement of an independent authority in the proceedings to adopt or review the expulsion measure* – in particular, whether it had access to the classified documents; whether it had the power, and duly exercised it, to verify the authenticity, credibility and veracity of those documents and, if need be, to annul or amend the expulsion decision; whether the nature and the degree of the scrutiny applied are apparent, at least summarily, in the reasoning of its decision; whether the applicant was able to effectively challenge before it the allegations against him or her, it being understood that judicial scrutiny, especially by superior courts, will in principle have a greater counterbalancing effect than an administrative one. Article 1 of Protocol No. 7 does not necessarily require that all of these questions be answered cumulatively in the affirmative.

ARTICLE 1 OF PROTOCOL No. 16

In response to the request submitted by the Armenian Constitutional Court under Protocol No. 16[109] to the Convention, the Court delivered its advisory opinion[110] on 29 May 2020. The opinion concerned Article 7 and the use of certain referencing techniques when defining an offence and comparing the criminal provisions in force at the time of the commission of an alleged offence with the subsequently amended provisions. The Court further developed some aspects of its case-law relating to Article 7 of the Convention.

In this its second advisory opinion under Protocol No. 16, the Court, prompted by two specific features of the present request, has further defined the scope of its opinions.

In the first place, since the Court considered the questions to be at least in part broad and general, it reiterated that its opinions must be confined to issues directly connected to the pending domestic proceedings, inferring therefrom the power to reformulate and combine the submitted questions having regard to the specific factual and legal circumstances in issue in the domestic proceedings. It also clarified that the panel's decision to accept the request as a whole could neither deprive the Court of the possibility of employing the full range of the powers conferred upon it, including in relation to the Court's jurisdiction, nor preclude the Court itself from assessing (on the basis of the request, the observations received and all the other material before it) whether each of the submitted questions fulfilled the requirements of Article 1 of Protocol No. 16.

Secondly, a particular feature of the present request was the preliminary nature of the proceedings before the Constitutional Court, so that the relevant facts had not yet been the subject of domestic judicial determination. In accordance with the principle of subsidiarity, the Grand Chamber proceeded on the basis of the facts provided by the Constitutional Court and indicated that its opinion should inform the Constitutional Court's interpretation of domestic law in the light of the Convention; this interpretation should then be applied by the first-instance court to the concrete facts of the case.

109. Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

110. Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law [GC], request no. P16-2019-001, Armenian Constitutional Court, 29 May 2020.

OTHER CONVENTION PROVISIONS

INTER-STATE CASES (ARTICLE 33)

Slovenia v. Croatia[111] concerned the Court's jurisdiction to examine an inter-State application alleging a violation of Convention rights of a legal entity which did not qualify as "non-governmental" for the purposes of Article 34 of the Convention.

The Slovenian Government lodged an inter-State application (Article 33 of the Convention) against the Croatian Government, alleging a series of violations of the Convention rights of Ljubljana Bank, a legal entity nationalised by the Slovenian State after its declaration of independence from the former Yugoslavia and currently controlled by the Succession Fund, a Slovenian government agency. The Grand Chamber decided that Article 33 does not empower the Court to examine inter-State applications aimed at protecting the rights of entities which cannot be regarded as "non-governmental". The Court lacked therefore jurisdiction to take cognisance of the application.

It did so for essentially three reasons. In the first place, the Grand Chamber applied the general principle according to which the Convention must be read as a whole and construed in such a way as to promote internal consistency between its provisions – including the jurisdictional and procedural provisions such as Articles 33 and 34 of the Convention. This implied that the meaning and scope of "non-governmental organisation" had to be the same for the purposes of both of these provisions. Secondly, the Grand Chamber took into account the specific nature of the Convention as a human rights treaty, universally recognised in international law. It observed that even in an inter-State case, it is always the individual who is directly or indirectly harmed and primarily "injured" by a violation of the Convention. In other words, only individuals, groups of individuals and legal entities which qualified as "non-governmental organisations" could be bearers of rights under the Convention, but not a Contracting State or any legal entity belonging to it. Thirdly, the Grand Chamber drew a logical conclusion from the principle defined in the just satisfaction judgment in *Cyprus v. Turkey*[112] according to which any just satisfaction afforded in an inter- State case must always be for the benefit of individual victims and not for the benefit of the State. If therefore the Court found a violation in an inter-State case brought on behalf of a "governmental" organisation, then the eventual beneficiary of any sum awarded under Article 41 would be the applicant State only. In the present case, the Grand Chamber saw no reason to depart from the findings of the Chamber in the decision in *Ljubljanska banka d.d.*[113], according to which the bank did not constitute a "non-governmental organisation" for the purposes of Article 34 of the Convention. Consequently, the applicant Government were not entitled to lodge an inter-State application with a view to protecting its interests.

111. *Slovenia v. Croatia* (dec.) [GC], no. 54155/16, 18 November 2020. See also under Articles 33 and 34 (Applicability – Victim status) above.

112. *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, ECHR 2014.

113 *Ljubljanska banka d.d. v. Croatia* (dec.), no. 29003/07, 12 May 2015.