HANDBOOK
ON THE EUROPEAN COURT OF HUMAN RIGHTS CASE – LAW FOR 2023

Prepared in co-operation with the Supreme Court of Montenegro

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Table of Contents

INTRODUCTION

This Handbook provides an overview of a selected number of cases in which the European Court of Human Rights (ECtHR) delivered judgments in 2023. It is intended for legal practitioners (including judges, lawyers, and prosecutors) as a practical guide for applying the standards developed in the practice of the European Court of Human Rights. The ultimate goal of the Handbook is to facilitate the application of the rights enshrined in the Convention, as formulated by the Court, at the national level, and to empower legal practitioners to effectively contribute to aligning domestic judicial practices with international human rights standards. To achieve this goal, the selection and systematisation of cases in the Handbook were supported by collaboration with Montenegrin judges and legal experts.

The Handbook is divided into eight thematic sections: part I focuses on cases involving the use of violence in institutions under the control of state authorities, such as prisons and police stations (Section I.A), and in private locations, such as homes (Section I.B); part II addresses cases related to judicial review and procedural safeguards in criminal (Section II.A) and civil proceedings (Section II.B), with two special sections on procedures concerning the rights of

1 The ECHR currently has 46 signatory states: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom.
The Russian Federation has not been a signatory of the ECHR since September 16, 2022. The ECtHR remains competent to handle applications against Russia concerning events and omissions up until that date.
All 27 European Union member states are also signatories of the ECHR; however, the European Union itself is not a signatory of the Convention.

2 The ECHR currently has 46 signatory states: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech

judges (Section II.C) and individual expulsion of foreigners (Section II.D); part III deals with the principle of *nullum crimen sine lege, nullum poena sine lege*; part IV presents cases related to freedom of expression and the right to impart information; part V covers judgments related to freedom of association; part VI includes cases related to non-discrimination; part VII contains cases related to property protection; part VIII presents cases involving human rights and new technologies. In addition to these main sections, the Handbook includes a list of abbreviations and two lists of the described judgments: one is organised by sections, and the other by articles of the European Convention on Human Rights (ECHR). The Handbook also includes excerpts from the ECHR and relevant protocols.

Each case is accompanied by a brief summary of the "message" the Court has sent to the state parties, a short presentation of the facts (Facts) that are key to understanding the Court's legal reasoning, and the main conclusions (Conclusions). References to the Court's own previous case law and other relevant international instruments are also included, allowing readers to deepen their knowledge on the topic. Some cases appear in more than one section, according to the different themes addressed by the Court.

The Handbook was prepared with the support of the project "*Strengthening accountability of the judicial system and enhancing protection of victims' rights in Montenegro*" which aims to assist Montenegrin authorities in improving accountability, professionalism, and independence in the judiciary, as well as fully aligning the national legal and institutional framework and practice with EU standards and those of the ECtHR regarding the victims' rights.

It was developed in cooperation with the Supreme Court of Montenegro, whose priority is the ongoing work to inform Montenegrin judges about the practice of the European Court of Human Rights, thereby contributing to the improvement of public confidence that Montenegrin courts can provide effective protection of citizens' rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms.

Since 2017, the Supreme Court has been a member of the *Network of the Highest Courts*, established at the European Court of Human Rights in Strasbourg, whose main task is the exchange of information between the European Court

and national courts on case law, Convention law, and national law. The Network, which brings together the highest courts of Council of Europe member states, has proven to be a successful platform for daily communication between the European Court and national courts, providing access to the latest decisions and new information from the work and case law of the European Court. The Supreme Court of Montenegro, through a special department, encourages the application of Convention standards by regular courts and works to reduce the number of applications against Montenegro.

The prominent role of the highest court in the national system, recognised at the national level, was also the reason for preparing this Handbook, aimed at further aligning national practice with European standards. Consultants from the Council of Europe, Mr Francesco De Santis, Ms Giulia Ciliberto, and Ms Bojana Franović Kovačević, contributed to the preparation of this Handbook. We recommend using this Handbook as a practical tool in daily practice to improve your understanding of the ECtHR's case law, effectively uphold the fundamental rights and freedoms under the ECHR and promote their protection in Montenegro.

ABBREVIATIONS

App(s).	Application(s)
Art(s)	Article(s)
CCEJ	Consultative Council of European Judges
CEDAW	UN Convention on the Elimination of All Forms of Discrimination against Women
CommEDAW	UN Committee on the Elimination of All Forms of Discrimination against Women
Convention+108	Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data
CPT	European Committee for the Prevention of Torture
ECHR/the Convention	Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights
ECtHR/the Court	European Court of Human Rights
GC	Grand Chamber of the European Court of Human Rights
General Data Protection Regulation, or "GDPR"	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
Istanbul Convention	Council of Europe Convention on preventing and combating violence against women and domestic violence
No(s)	Number(s)
Prot	Protocol to the European Convention on Human Rights
TFEU	Treaty on the Functioning of the European Union

I PROHIBITION OF ALL FORMS OF ILL-TREATMENT

A. IN STATE-CONTROLLED FACILITIES (E.G. PRISONS, POLICE STATIONS)

S.P. and others v. Russia,[1] *Applications Nos. 36463/11 and 10 others, Judgment of 2 May 2023*

National authorities have an obligation to take measures to prevent and protect individuals from inter prisoner violence which amounts to torture or to inhuman or degrading treatment or punishment. Failure to act in this way amounts to a *violation of Art. 3 ECHR (Prohibition of inhuman and degrading treatment) as well as to a violation of Art. 13 ECHR (Right to an effective remedy), taken in conjunction with Art. 3 ECHR*.

FACTS: The applicants were 11 Russian nationals who had either served or were serving their custodial sentences in facilities located in various regions of Russia. Inter-prisoner relations in the Russian penal system are governed by an informal code of conduct (known as "the rules"), under which inmates are divided into four categories: i) the "criminal elite" or "made men", the highest grouping; ii) "collaborators" or "reds", who enforce order alongside the prison officers; iii) "lads", who make up the vast majority of inmates; iv) "outcasts", also called "cocks", "untouchables" or "downgraded". Inmates were categorised as "outcast" on the ground of the offences they committed, including e.g., stealing, being a "snitch", and sex-crime convictions.

The applicants belonged to the category of "outcast" prisoners and were assigned tasks considered by other inmates as too degrading – such as e.g., maintenance of the dump and cleaning toilets in the residence. If they refused

1 *Despite ceasing to be a Member State of the Council of Europe, the ECtHR continues to examine human rights violations in Russia. The facts giving rise to the alleged violations of the Convention occurred prior to 16 September 2022, the date on which the Russian Federation ceased to be a party to the Convention. Thus, the Court had jurisdiction to examine the application (see Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Art. 58 of the European Convention on Human Rights, 22 March 2022).*

to perform such tasks, they could be subject to different forms of retaliation – including violence and sexual violence. Besides performing degrading tasks, they were subject to physical segregation: "outcasts" were forbidden from touching any other prisoners or their possessions and had to stay in separate living quarters and eat at designated places with special cutlery.

These practices were endorsed by prison staff, who were complicit in the informal hierarchy system. The applicants lodged several complaints with different domestic authorities about the treatment, all of which were summarily rejected or dismissed.

HELD: The Court found that (a) the applicants had been subjected to the treatment of which they complained of due to their inferior status within the informal prisoner hierarchy, and (b) that the domestic authorities had been, or ought to have been, aware of this situation and of the applicants' vulnerability.

The Court reiterated that Art. 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour.

The Court found that the situation which the applicants endured for years on account of their placement in the group of "outcast" prisoners has led them to endure mental anxiety and physical suffering that must have exceeded the unavoidable level of suffering inherent in detention (see also Alexandru Marius Radu v. Romania, App. No. 34022/05, 21 July 2009, §48). Therefore, their situation had amounted to inhuman and degrading treatment within the meaning of Art. 3 of the Convention.

The Court reiterated that national authorities have an obligation to take measures to prevent and protect individuals from inter prisoner violence which amounts to torture or to inhuman or degrading treatment or punishment (see also Premininy v. Russia, App. No. 44973/04, 10 February 2011; D.F. v. Latvia, App. No. 11160/07, 29 October 2013). In the case at hand, domestic authorities had, or ought to have knowledge, of the risk which the applicants faced on account of their "outcast" status. It therefore fell to the Government to explain what measures have been taken to address their vulnerability.

However, there was no specific and prompt action by prison staff to prevent, or to protect the applicants from inter-prisoner ill-treatment. In this regard, prison staff did not have a proper policy on risk of victimisation and abuse, or of punishment of inmates committing inter-prisoner violence. Moreover, the

applicants' allegations of ill-treatment were not properly investigated.

Due to the structural nature of the problems stemming from the informal code of conduct, individual measures would not have been adequate to address the issue in a comprehensive and effective way. In addition, any individual complaint in regard to this issue was in all likelihood liable to be rejected.

Therefore, the domestic authorities did nothing to acknowledge the problem, and took no step to protect the applicants from inhuman and degrading treatment associated with their status as "outcast" prisoners. Moreover, there is no effective mechanisms to improve or redress the applicants' individual situation or an action plan for dealing with the issue in a comprehensive and systematic manner.

In light of the above, the Court found a violation of Art. 3 ECHR as well as Art. 13 (in conjunction with Art.3 3) ECHR.

M.B. and Others v. Slovakia (no. 2), Application No. 63962/19, Judgment of 7 February 2023

Where an individual (especially a minor) is kept under the control of police officers in a police station, any recourse to physical violence and verbal abuses constitutes ill-treatment and entails a *violation of Art. 3 ECHR (Prohibition of inhuman and degrading treatment)*.

National authorities have an obligation to investigate the alleged racist motives behind police ill-treatment and to establish whether ethnic hatred or prejudice may have played a role in the events. Failure to act in this way constitutes a *violation of Art. 14 ECHR (Prohibition of discrimination), taken in conjunction with Art. 3 ECHR*.

FACTS: In 2009, the applicants were arrested on suspicion of having assaulted and robbed a 66-year-old woman in Košice. At the time of the events, they were minors: the youngest applicant was ten years of age and the oldest was sixteen years of age.

On their arrival at the police station, all six applicants' identities were checked, they were searched, and their statements were recorded. They were subsequently handed over to an investigator and ultimately released later the same day. While at the police station, they had been threatened with and bitten by

dogs, kicked, beaten and physically and verbally abused by police officers, including comments having to do with, among other things, their Roma ethnicity (e.g., referring to them as a "Gypsy gang"). The media subsequently received and released in the public domain audio-video material depicting the treatment to which the applicants had been subjected at the police station, including being forced to slap and then kiss each other. Criminal proceedings were dismissed following the district court's refusal to admit the audio-video material in evidence. One constitutional complaint was declared inadmissible, and a second one was pending at the time of the submission of the application with the European Court of Human Rights.

HELD: The Court addressed whether Slovakia violated both the procedural and substantive limb of Art. 3 ECHR as well as Art. 14 ECHR in conjunction with Art. 3 ECHR.

On the first aspect, the Court found that Slovakia violated Art. 3 ECHR in its procedural limb because of serious delays in the proceedings (which were still pending at the date of the examination of the case in Strasbourg), procedural errors on the part of the domestic court, and the lack of means to compensate or rectify the manifest lack of promptness.

Among other problems, the Cour highlighted that the proceedings resulted in two judgments (2015 and 2017), which both had to be quashed on account of procedural irregularities which primarily had to do with the court's repeated refusal to admit the audio-video material in evidence, in direct breach of the applicable rules and the appellate court's instructions.

Moreover, the key grounds for the acquittal of the officers related to inconsistencies in the applicants' submissions at different stages of the proceedings. The Court observed that such inconsistencies were exacerbated by the passage of time between the alleged ill-treatment and the investigative measures involving the applicants, with its inevitable effect on human memory (see also R.R. and R.D. v Slovakia, App. No. 20649/18, 1 September 2020). This observation is even more pertinent given that the applicants were minors at the time of the events.

The Court joined the Government's non-exhaustion objection with the merits of the case. It found that the outcome of the applicants' first constitutional complaint (i.e., inadmissibility) was consistent with the pattern of inefficiency in the underlying proceedings. Moreover, a second complaint was pending at the time of the submission of the application before the ECtHR, i.e. more than thirteen years after the police station incident in 2009. In the light of the fore-

going, the ECtHR concluded that complaints before the Constitutional Court were not an "effective" remedy for the purpose of Art. 35(1) of the Convention and the applicants were therefore not under an obligation to wait for the outcome of the second complaint. Ultimately, the Court ECtHR dismissed the Government's objection of non-exhaustion of domestic remedies.

On the second aspect, the Court found that Slovakia violated Art. 3 in its substantive limb because, while in the hands of the police, the applicants were subjected to inhuman and degrading treatment. This treatment took place in the common areas of a police station where the applicants, between ten and sixteen years old at the time, were kept under the authorities' control, in the presence of officers in uniforms. There was no suggestion that the treatment was made necessary by the applicants' conduct. In this regard, the Court reiterated that where an individual is deprived of his or her liberty or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by the person's conduct diminishes human dignity and is in principle an infringement of the right set forth in Art. 3 of the Convention (see Bouyid v. Belgium [GC], App. No. 23380/09, 28 September 2015).

In view of all the circumstances, including the applicants' vulnerability owing to their young age, the treatment in question fell to be regarded as inhuman and degrading for the purposes of Art. 3 ECHR. However, its level of severity and other relevant aspects were not of such as to amount to "torture" within the meaning of the same Article.

On the third point, the Court found that it was not established that racist attitudes played a role in the police ill-treatment. However, Slovakian authorities had plausible information which was sufficient to alert them to the need to carry out an investigation into possible racist overtones in the applicants' ill-treatment. Notwithstanding this information, the national authorities failed to investigate any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events under examination.

Accordingly, the Court found no violation of Art. 14 ECHR, in conjunction with Art. 3 in its substantive limb, but it found a violation of Art. 14 ECHR, in conjunction with Art. 3 in its procedural limb.

B. IN PRIVATE PLACES (HOME)

A.E. v. Bulgaria, Application No. 53891/20, Judgment of 23 May 2023

Violence against women, including domestic violence, may amount to degrading treatment. States must establish a legal framework punishing all forms of domestic violence and providing sufficient safeguards for victims. Failure to act in this way entails a *violation of Art. 3 ECHR (Prohibition of inhuman and degrading treatment)*.

Violence against women, including domestic violence, is a form of discrimination against women, and a State's failure to protect women from such violence breaches their right to equal protection of the law, in *violation of Art. 14 ECHR (Prohibition of discrimination), taken in conjunction with Art. 3 ECHR*.

FACTS: In 2018, the applicant (who was 14 years old) moved in with her boyfriend, who was twenty-three years old. She alleged that he beat her regularly. In September 2019, following one such attack, she was examined in an emergency room. The medical certificate issued at the time indicated that she had suffered traumatic injuries that could have been caused in the manner and at the time she described, resulting in her pain and suffering. Social services notified the prosecution service that a crime had been committed against a minor, describing the above incident (during which she was beaten, kicked and strangled) as well as several earlier attacks, and requested that pre-trial criminal proceedings be opened.

In November 2019, the district prosecutor, after preliminary police checks (including interviews with the applicant, her mother and the alleged offender), decided not to open criminal proceedings. The prosecutor found that only the offence of minor bodily harm had been committed: according to Bulgarian law, such an offence was subject to private prosecution, but prosecutors exercise discretionary power to open criminal proceedings in cases where victims are incapable of defending themselves (because of their vulnerability or dependency on the perpetrator of the crime). The applicant's subsequent appeals were dismissed, on the basis – among other reasons – that there was no evidence that her life had been in danger or even that the applicant had a relationship of an intimate nature with the alleged offender, the former having refused a gynaecological examination during the abovementioned hospitalisation.

HELD: The Court reiterated that the particular vulnerability of victims of domestic violence and the need for active State involvement in their protection

have been emphasised in a number of international instruments as well as in its own case-law (e.g., *Opuz v. Turkey*, App. No. 33401/02, 9 June 2009; *Bevacqua and S. v. Bulgaria*, App. No. 71127/01, 12 June 2008; *Hajduová v. Slovakia*, App. No. 2660/03, 30 November 2010).

There is a consensus in the relevant international material that comprehensive legal and other measures are necessary to provide victims of domestic violence with effective protection and safeguards (Kurt v. Austria [GC], App. No. 62903/15, 15 June 2021).

Among the international and European law materials on gender-based violence against women, the Court recalled: the CEDAW; Recommendation Rec(2002)5 on the protection of women against violence, adopted by the Committee of Ministers of the Council of Europe; and the Istanbul Convention (the latter was not ratified by Bulgaria).

The Court found that the treatment suffered by the applicant was sufficiently serious to qualify as "degrading" within the meaning of Art. 3 of the Convention: she was 15 years old at the time, she was in a state of physical and emotional vulnerability, she was dependent on her alleged aggressor and, in the circumstances, she was likely to have experienced serious intimidation and distress in addition to the pain and suffering recorded in the medical certificate.

The Court found that Bulgaria violated Art. 3 ECHR: both the domestic legal framework (*a*) and its concrete application (*b*) fell short of the State's positive obligation to put in place an effective system punishing all forms of domestic violence and providing sufficient safeguards for victims.

On the legal framework (*a*), the Court found that the applicable provisions were not fully capable of adequately responding to domestic violence, or to violence inflicted on victims (minors or otherwise) who were not themselves in a position to initiate and pursue judicial proceedings as private prosecutors. This conclusion is based on four reasons.

First, Bulgarian law requires "repeated" or "systemic" instances of domestic violence before the State can step in (i.e., no fewer than three violent acts). In the applicant's case it was held that only a single act of violence had been committed against her. Requiring repeated instances of violent behaviour for the State to intervene did not sit well with the authorities' obligation to respond immediately to allegations of domestic violence and to demonstrate special diligence in that context.

Secondly, Bulgarian law requires the existence of a *de facto* marital relationship as a condition to classify that an ill-treatment occurred "in the context of domestic violence". Under Bulgarian law, a de facto marital situation occurs when both victim and offender are adults who have lived together for more than 2 years. This excludes from public prosecution cases of violence against minors who stay at the alleged offenders' home for a few days (or weeks) at a time, such as the applicant.

Thirdly, if the ill-treatment is not committed "in the context of domestic violence" (as defined under Bulgarian law), a public prosecution could be launched if the injuries suffered by a minor reach a certain degree of gravity. This situation – observed the Court – is incompatible with the State's obligation to deter and combat violence against children.

Fourthly and last, in certain cases, the law leaves the conducting of an official criminal investigation and proceedings entirely at the prosecutor's discretion, which may result in the non-prosecution of acts of violence against minors if the prosecutor decides not to open criminal proceedings.

On the practical application of the legal framework in the case at hand (*b*), the Court noted that, in order to establish whether "repeated" or "systemic" instances of violence had taken place, prosecutors had to carry out an investigation. Social services gave the prosecution service notice of the attacks on September 2019 (accompanied by a medical report) and of previous violences. The Court considered that those allegations required an appropriate official response, including certain investigative steps (e.g., following up on the allegations, questioning the applicant in a special protected facility by specially trained professionals out of the suspected perpetrator's sight, questioning her friends and looking into the alleged offender's criminal history). The preliminary inquiry did not take such steps and the prosecutor refused to open criminal proceedings because of – *inter alia* – the applicants' refusal to undergo a gynaecological examination. The Court considered this request to be inadequate, insensitive to and disrespectful of her dignity, considering that she had complained of physical, not sexual, violence.

In light of the above, Bulgaria violated Art. 3 of the Convention.

The Court also found a violation of the prohibition of discrimination (Art. 14 ECHR), in conjunction with the prohibition of degrading treatment (Art. 3 ECHR): national authorities failed to disprove the applicant's prima facie case of a general institutional passivity in matters related to domestic violence.

To get to this conclusion, the Court recalled that violence against women, including domestic violence, is a form of discrimination against women, and that the State's failure to protect women from such violence breaches their right to equal protection of the law. Once an applicant has shown a difference in treatment, it is for the respondent State to show that that difference was justified (see also *Y and Others v. Bulgaria*, App. No. 9077/18, 22 March 2022, in which the Court summarised the relevant principles concerning the meaning of discrimination in the context of domestic violence, and found Bulgaria in violation of Art. 2 of the Convention, alone and in conjunction with Art. 14, due to the authorities' failure to protect the life of a woman murdered by her husband, despite her several complaints about domestic violence over a nine-month period).

The Court noted that the case at hand was the third one in respect of Bulgaria in which it had found a violation of the Convention, stemming from the authorities' response to acts of domestic violence against women. The applicant had made a *prima facie* case that, by virtue of being a woman victim of domestic violence in Bulgaria, she had been in an unequal position with men. The Government failed to demonstrate any specific policies aimed at protecting victims of domestic violence and punishing offenders, or the effectiveness of such policies.

Luca v. the Republic of Moldova, Application No. 55351/17, Judgment of 17 October 2023

In cases of domestic violence (such as physical, verbal and emotional abuses, as well as harassment), national authorities must assess the risk of its recurrence, protect the victims of domestic violence (e.g., by extending a protection order) and prosecute and punish the perpetrator without undue delay. Failure to act in this way amounts to a *violation of Art. 3 ECHR (Prohibition of inhuman and degrading treatment)*.

Refusal to grant protection orders or to investigate allegations of abuses must not be based on stereotypes about women. Using language which conveys prejudice against women victims of domestic violence amounts to discriminatory treatment, in *violation of Art. 14 ECHR (Prohibition of discrimination), taken in conjunction with Art. 3 ECHR*.

National authorities must undertake a proper assessment of the family situation (including ill-treatment) with a view to identifying measures

that ensure that victims of domestic violence can maintain contact with their children. Failure to act in this way amounts to a *violation of Art. 8 ECHR (Right to respect for family life)*.

FACTS: In 2006, the applicant and her partner had two children and were married in Italy. From 2015, the applicant's husband subjected her to several instances of physical, verbal and emotional abuse, as well as harassment. In August 2016, domestic authorities issued a protection order for the applicant and her children, requesting her husband to refrain from contacting them. Although she complained that he had broken these terms, no investigation was opened.

The national courts rejected her request to extend the protection order, even though the applicant referred to – *inter alia* – his violation of the protection order and the disruption of water supply in her home caused by her husband. The decision was upheld by the appeal court on the ground of lack of evidence.

In November 2016, the applicant was physically assaulted by her husband. The medical report mentioned bruising all over her body and an eight-day hospitalisation period. The applicant repeatedly sought another protection order against her husband, but all her complaints were rejected.

At a later stage, investigations were opened for domestic violence and breach of the protection order. The two sets of criminal proceedings were joined. The applicant's husband was eventually sentenced to two years and three months' imprisonment, suspended for two years, and ordered to pay damages.

In the meantime, while the above-mentioned protection order was still in force, the applicant's children moved in with their father and contacts with her ceased from August 2016. The child-protection authority refused to issue a contact-schedule order based on the children's views. The applicant appealed against this decision and the national court granted her request. Her husband refused to abide by the contact-schedule order. She complained before the national authorities, without success.

The applicant and her husband divorced in March 2022 by a court decision, which rejected her application for custody.

HELD: The Court found that the treatment at the origin of the applicant's complaint attained the threshold of severity required to engage Art. 3 of the Convention.

The domestic authorities were aware, or ought to have been aware, of the violence to which she had been subjected and had an obligation to assess the risk

of its recurrence and to take adequate and sufficient measures for her protection (such as the extension of the protection order). The Court found that the domestic authorities failed to conduct an effective investigation of credible claims of psychological violence and of physical violence (e.g, by not securing evidence on the assault of 2016; rejecting by the applicant's allegations of breach of the protection order), and to ensure the prosecution and punishment of the perpetrator without undue delay (the applicant's husband was not convicted until five years after the events, when he was given a suspended sentence).

The Court observed that that the domestic courts dismissed the applicant's requests for protection partly because at that stage her husband had not been convicted in a final judgment. However, protection orders should be based on the victim's evidence establishing the facts to a standard of proof which is lower than the standard of proof before criminal courts. Moreover, waiting for a criminal conviction before taking relevant protective steps is incompatible with the obligation to act promptly to protect victims of domestic violence. In the case at hand, the conduct of the domestic authorities created a situation of impunity which resulted in the recurrence of acts of violence (see CommEDAW, General Recommendation No. 19, 2017; *Kurt v. Austria* [GC], App. No. 62903/15, 15 June 2021).

Moreover, the Court noted that, according to the national authority's assessment, psychological violence falls outside the scope of domestic violence proceedings. This determination is incompatible with the qualification of mental or psychological violence as a form of gender-based violence (including domestic violence), which often precedes or accompanies physical and sexual violence in intimate relationships (see e.g., CommEDAW, General Recommendation No. 19, 1992; GREVIO, Third General Report on Activities, 2022).

In addition, the domestic court expressed doubts as to the truthfulness of the applicant's allegations of domestic violence, insinuating that she had ulterior motives for her requests for protection (such as revenge). That is a common stereotype in gender-based violence cases (CommEDAW, General Recommendation No. 19).

Considering the above, the Court found that Moldova violated Art. 3 of the Convention due to the domestic authorities' failure to prevent the realisation of a known risk of ill-treatment, to protect the applicant, and to undertake a prompt and effective investigation.

Moreover, the Court found that Moldova violated the prohibition of discrimination (Art. 14 ECHR), in conjunction with the prohibition of inhuman and de-

grading treatment (Art. 3 ECHR), because the domestic authorities failed to act in response to the applicant's allegations based on a prejudice against women in her situation.

In this regard, the Court noted the language employed by the domestic authorities when refusing to grant protection orders or to investigate the applicant's allegations, which were based on stereotypes about women (e.g., by saying that the case was about "family misunderstandings" and that she displayed "overdramatic" elements in her allegations of violence; by stating that she requested protection orders as a "means of revenge" because she was "manifesting dissatisfaction" about the lack of contact with her children). The combination of these factors clearly demonstrated that the authorities condoned the violence, reflecting a discriminatory attitude towards the applicant as a woman. Considering that her husband was sentenced to a criminal conviction on the same facts, it appeared that, at the time of the events, protection measures were rejected because of discriminatory statements and reasons.

Lastly, the Court found that Moldova violated the right to family life because the domestic authorities failed to consider the incidents of domestic violence when determining child contact rights and, consequently, they failed to take prompt measures to support the applicant in maintaining contact with her children.

The applicant was unable to have contact with her children after 22 August 2016, when they started living with their father and refusing to see the applicant.

While children's views must be given due weight, other factors must be considered when making a decision regarding their best interest (see *Pisică v. the Republic of Moldova*, App. No. 23641/17, 29 October 2019). In the case at hand, the domestic authorities failed to perform a proper assessment of the family situation (including the domestic violence suffered by the applicant), and to identify and implement measures to ensure she would be able to maintain contact with her children. It may be futile and harmful to attempt to force a child to conform to a situation which, for whatever reasons, he or she resists. In any case, national authorities have a duty to take steps to restore and facilitate contact between the applicant and her children. This did not happen in the present case.

Considering the above, the Court found that Moldova violated Art. 8 of the Convention due to the domestic authorities' failure to assess the family situation and to take measures to facilitate the applicant in maintaining contact with her children.

II JUDICIAL REVIEW AND PROCEDURAL SAFEGUARDS

A. CRIMINAL PROCEEDINGS

Durdaj and Others v. Albania, Application No. 63543/09 and 3 others, Judgment of 7 November 2023

In a case concerning an explosion at a weapon decommissioning facility which resulted in deaths and grievous bodily injuries, national authorities were required to undertake an adequate investigation into the incident and promptly identify those responsible for it (including Members of the Parliament whose actions are not covered by immunity). Moreover, victims and next of kin must have the opportunity to effectively participate in criminal proceedings (both at the investigation and trial stage). *Failure to take such action amounts to a violation of Art. 2 ECHR (Right to life)*.

FACTS: In March 2007, the government of Albania adopted a decision setting out the procedure for dismantling decommissioned and obsolete weapons, machinery and equipment of the armed forces. The Ministry of Defence issued permits for the export of such decommissioned items for the purpose of selling them for civilian use (such as e.g., for collection purposes). The Military Export-Import Company ("MEICO", a company established under the auspices of the Ministry of Defence) was entrusted with conducting the sale procedure and with entering into respective contracts.

In April, the Gërdec facility was set up by State authorities for the dismantling process. The Gërdec facility was located in a property under the management of MEICO, which subsequently made it available to Albademil Ltd, a limited liability company incorporated in Albania, without a lease contract. MEICO was ordered to enter into a contract with the Southern Ammunition Company (SAC), a US incorporated company, and, among other things, to comply with the contractor's application of standard safety procedures and fire protection measures.

On 15 March 2008, a massive explosion occurred at the Gërdec facility ("the Gërdec incident"). Twenty-six people died and around 300 were either seriously or lightly wounded. The seven-year-old son of the applicants (Applications Nos. 3543/09 and 12720/14) died, and the remaining applicants sustained serious life-threatening injuries. Criminal, administrative and civil proceedings followed.

During the criminal investigation three expert examinations were carried out. The three reports had established the most probable cause of the accident and pointed to several failures relating to the setting up and operation of the Gërdec facility and the lack of adequate security measures (such as, e.g., unsafe procedures and untrained workers using vehicles which had not complied with safety standards). A medical report had also been commissioned concerning the injuries the victims of the incident had sustained. The investigation led to the filing of indictments against thirty persons, including the former Minister of Defence, Mr. F.M. The above-mentioned reports had served as the basis for the indictments and had been used as evidence in the trial against the accused.

The Supreme Court had severed the criminal proceedings against Mr. F.M. from those against the other co-accused, having regard to the different nature of the charges against the latter and the nature of the collusion among them. One of the applicants complained to the Constitutional Court that such disjoinder had prevented her from participating in the criminal proceedings. The Constitutional Court dismissed her complaint, finding that the Supreme Court had acted in accordance with domestic law.

Eventually, in 2009, F.M.'s parliamentary immunity prevented the pursuit of the criminal proceedings against him. Although since 26 October 2012, in the wake of an amendment to the Constitution, parliamentary immunity had not been a bar to the institution or continuation of a criminal investigation in respect of an MP, the Prosecutor had not pursued the reopening of the criminal proceedings against F.M. until May 2021.

HELD: The Court assessed whether the national courts had conducted an effective investigation within the meaning of Art. 2 ECHR (procedural limb), with regard to both the investigation phase (*a*) and the trial phase (*b*), and whether the applicants were able to participate effectively during both stages. In addition, the Court had to review, whether (and to what extent) the domestic courts, in reaching their conclusion, might be deemed to have submitted the case to careful scrutiny, in accordance with the deterrent effect of the judicial system vis-à-vis the prevention of violations of the right to life.

The Court recalled that an effective criminal investigation is necessary to satisfy the procedural obligation imposed by Art. 2 ECHR where – among other circumstances – life was lost or put at risk because of negligence attributable to State officials or bodies on that account goes beyond an error of judgment or careless. In these situations, the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Art. 2 ECHR. In the particular context of dangerous activities, an official criminal investigation is indispensable when lives have been lost because of events occurring under the responsibility of the public authorities (see *Öneryıldız v. Turkey*, App. No. 48939/99, 30 November 2004, on deaths resulting from an accidental explosion at a rubbish tip close to a slum full of rudimentary dwellings built without any authorisation).

As for the investigation phase in the case under examination (*a*), the Court noted that the Prosecutor started the investigation *ex officio* the day of the accident and that three expert reports and one medical report had been issued. The investigation resulted in the filing of indictments against twenty-nine persons, including a former Minister of Defence. Therefore, the investigation was adequate in that it generally succeeded in establishing the circumstances surrounding the incident and identifying those responsible for it (see *Öneryıldız v. Turkey*, quoted above). As regards the effective participation of the applicants, the Court noted that the applicants received a copy of the case file at the end of the investigation, which was concluded within a year from the incident, and that the applicants have not pointed to any particular oversights or omissions on the part of the investigating authorities. Therefore, the investigation was prompt, and the applicants were granted access to the investigation to the extent necessary to safeguard their legitimate interests.

As for the trial phase (*b*), the Court noted that indictments were issued against twenty-nine accused in connection with the Gërdec incident and that they were tried before the Tirana District Court. Twenty-four accused were found guilty. All their convictions specifically referred to causing death and injuries to a number of persons. Thus, their convictions relate to life-endangering acts and to the protection of the right to life within the meaning of Art. 2 ECHR (see *Öneryıldız v. Turkey*, App. No. 48939/99, 30 November 2004, where the Court found a violation of Art. 2 ECHR because the convictions failed to acknowledge the responsibility of State agents for failing to protect the right to life). The prison sentences imposed on the main accused and the time they had spent in prison were not manifestly and disproportionally lenient having regard to the seriousness of the offences committed. Thus, the criminal-law system, as applied in the instant case, had had a sufficiently dissuasive effect capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicants.

As for the applicants' active participation, the Court notes that in 2009 the Supreme Court severed the applicants' civil claim from the criminal proceedings before the Tirana District Court had even begun. From that moment, they were no longer informed of any of the steps taken in the criminal proceedings. Under Albanian law at the time, an injured party who had not lodged a civil claim during the criminal proceedings did not have the right to actively participate in a trial against the accused (e.g., by putting forward evidence, cross-examining witnesses or defendants, or making comments on the evidence collected). Thus, applicants would only have been able to follow the trial as members of the general public (since the hearings were open to the public), but they did not have a real opportunity to participate actively in the trial. In addition, the decisions and judgments adopted during the criminal proceedings were not served on the applicants and they had no right of appeal against them. Thus, during the criminal proceedings, the applicants had no procedural rights.

The possibility of lodging a civil claim for damages could not compensate for the lack of opportunity to participate effectively in the criminal proceedings (including at the trial stage). Such proceedings would not examine the criminal responsibility of the accused. Therefore, the Court found that the applicants had not been afforded an adequate opportunity to participate in the trial against the accused.

The Court also addressed the circumstances accompanying the criminal proceedings against the former Minister of Defence, Mr. FM, which resulted in a nine-year delay in his prosecution. The national prosecuting authorities had provided no convincing explanations. His prosecution had been plagued by significant delays, inertia of the prosecuting authorities and many futile attempts of the applicants to bring him to justice. The criminal proceedings against him for abuse of office (the investigation against him on the other charges having been closed) were still pending, leaving the applicants without a final conclusion as to his responsibility more than fourteen years after the Gërdec incident. The applicants as well as the public had the right to know the truth about the circumstances in which the Gerdec tragedy had taken place, and the exact role the former Minister of Defence had played in it.

Considering the above, the Court found that Albania violated Art. 2 ECHR (procedural limb) due to the lack of the applicants' involvement in the investigation and trial phases of the criminal proceedings of the twenty-nine accused, as well as for the manner in which the national authorities had approached Mr. F.M.'s prosecution.

Radonjić and Romić v. Serbia, Application No. 43674/16, Judgment of 4 April 2023

The decisions ordering pre-trial detention must give relevant and sufficient reasons; with the passing of time, the domestic courts' reasoning must evolve and reflect the developing situation, showing why the initial grounds for pre-trial detention remained valid also at later stages of the proceedings. Failure to act in this way amounts to a *violation of Art. 5(3) ECHR (Reasonableness and length of pre-trial detention)*.

The explicit acknowledgment by the Constitutional Court of a breach of Art. 5 (3) does not constitute a sufficient redress for that violation in the absence of an award for compensation, taking into account that the respondent Government did not prove the existence of another clear and established legal avenue to that effect under domestic law. Therefore, for the purpose of Art. 34 ECHR, the applicants can still be a victim of the *violation of Art. 5 (3) ECHR*.

The review of the lawfulness of a decision ordering or extending a pre-trial detention must not be excessively long. Failure to act in this way amounts to a *violation of Art. 5(4) ECHR (Speediness of review)*.

FACTS: The applicants were two Serbian secret police officers. In 1999, an influential Serbian journalist and newspaper publisher was killed. His murder provoked international outrage and wide condemnation, because one motive for his murder was thought to be his public criticism of Miloševic's policies. In 2013 the Serbian Government set up a commission to investigate murders of journalists. In January 2014, the two applicants were arrested on suspicion of having committed, together with two other suspects, the murder in question. The domestic courts ordered and extended their detention pending trial. The initial grounds for their detention were: the risk of their absconding; the risk of them exerting pressure on witnesses; and the need to preserve public order given the potentially strong reaction in Serbia and abroad if they were released. From June 2014, the courts based their detention only on the nature and gravity of the charges, associated with the possibility of a public disturbance if the applicants were released. In July 2017, the domestic court held that the applicants' detention was no longer necessary and put them under house arrest.

The applicants lodged appeals with the Constitutional Court against the decisions ordering and extending their detention, which gave rise to several rulings. In particular, in a decision adopted in December 2017, the Constitutional

Court held that the applicants' detention had been justified in the period from their arrest in January 2014 up until April 2015. As to the subsequent period (until July 2017, when the applicants had been placed under house arrest), the Constitutional Court found that the competent authorities had not given relevant and sufficient reasons to justify the detention, which was, consequently, in breach of Art. 5(3) ECHR.

In 2019, the applicants were found guilty of aggravated murder and were sentenced to 30 years' and 20 years' imprisonment, respectively. Appeals have been lodged and were still pending as at August 2022.

HELD: As for the excessive length of the applicants' pre-trial detention, since the applicants did not complaint at any stage of their house arrest (despite it amounting to a deprivation of liberty pursuant to Art. 5 ECHR), the Court held that the period to be taken into consideration began in January 2014 (when the applicants were arrested) and ended in July 2017 (when they were put under house arrest). It thus lasted for almost three and a half years. The Court observed that national courts had performed a detailed assessment of all the relevant circumstances, at regular intervals, and had adjusted their reasoning over the passage of time to reflect the developing situation and to verify whether the grounds for detention had remained valid. Nevertheless, the Court agreed with the Constitutional Court that, after April 2015, the competent court had not given relevant and sufficient reasons to justify the applicants' detention on grounds of public order.

Even though the Constitutional Court had expressly acknowledged a breach of the Convention, it did not award any compensation for non-pecuniary damage. In the absence of any other clear and established legal avenue under domestic law, under which an adequate amount of compensation could be claimed, the ECtHR concluded that the applicants did not obtain a sufficient redress at national level and could still be victims of the alleged violation pursuant to Article 34 ECHR.

Considering the above, the Court found that Serbia violated Art. 5(3) due to the pre-trial detention of the applicant from April 2015 to July 2017.

Concerning the excessive length of the proceedings before the Constitutional Court, the Court noted that it lasted more than two years (from May 2015 to January 2018), in the absence of exceptional circumstances (such as a state of emergency) which could justify such prolonged review of issues that were relatively straightforward. Large workload cannot be used as justification for excessively long procedures, because it is for the State to

organise its judicial system in such a way as to enable its courts to comply with the Convention.

Considering the above, the Court found that Serbia violated Art. 5(4) of the Convention due to the failure to guarantee a speedy judicial decision concerning the lawfulness of the applicants' detention.

Demirtaş and Yüksekdağ Şenoğlu v. Türkiye, Applications Nos. 10207/21 and 10209/21, Judgment of 6 June 2023

If an emergency decree allows limitations to the confidentiality of lawyer-client meetings (e.g., by monitoring their meeting or seizing the documents exchanged between them), the national court that order such restriction must comply with the relevant emergency decree and provide adequate justification to restrict the confidentiality of such communication in specific cases. Moreover, the emergency decree must provide adequate safeguards against possible abuses. Failure to act in this way amounts to a *violation of Art. 5(4) ECHR (Effective assistance from a lawyer)*.

FACTS: The applicants were former co-chairs of the HDP, a left-wing pro-Kurdish political party. In 2015, they had been re-elected at the Turkish Grand National Assembly. In November 2016, they were placed in pre-trial detention for terrorism-related offences. After having exhausted domestic remedies, the applicants lodged an application before the Court, which concluded – *inter alia* – that the applicants' pre-trial detention had been contrary to the right to liberty and security (Art. 5 ECHR), freedom of expression (Art.10 ECHR), to the clause governing limitation on use of restrictions on rights (Art. 18 ECHR), and to the right to free elections (Art. 3, Prot. No. 1 ECHR) (see *Selahattin Demirtaş v. Turkey* (No. 2) [GC], App. No. 14305/17, 22 December 2020; *Yüksekdağ Şenoğlu and Others v. Türkiye*, App. Nos. 14332/17 and 12 others, 8 November 2022).

After a few days following the beginning of their detention, the domestic court ordered the following measures: i) audio and video recording of the applicants' meetings with their lawyers; ii) presence of an official during the meetings; and iii) seizure of all documents exchanged between the applicants and their lawyers. The applicants appealed unsuccessfully against this order before Turkish courts, including the Constitutional Court. The contested measures were adopted for a three-month period (until February 2017) under Emergency Legislative Decree No. 676, which was enacted following the attempted coup of July 2016.

HELD: The Court clarified that its task was two-fold, notably it had to ascertain whether: (*a*) in the specific case, the applicants were able to benefit from the effective assistance of their lawyers, an assessment that was primarily based the reasons given in the decisions of the national judicial authorities in order to justify the restrictions placed on the applicants' right to confidentiality of communications with their lawyers; (*b*) the emergency legislation applied in the present case contained sufficient safeguards against abuse.

As for whether the applicants received effective assistance from their lawyers (*a*), the Court noted that the decisions by domestic courts did not comply with Emergency Legislative Decree No. 676 and were couched in stereotypical language. Moreover, the Constitutional Court did not perform an adequate assessment on this point or an individualised examination of the applicants' situation, and it also erroneously stated that the applicants had been convicted of a terrorism-related offence. This was not the case at the material time and, thus, their alleged conviction could not constitute the ground for their pre-trial detention (see also *Selahattin Demirtaş v. Turkey* (No. 2) [GC], App. No. 14305/17, 22 December 2020; *Yüksekdağ Şenoğlu and Others v. Türkiye*, App. Nos. 14332/17 and 12 others, 8 November 2022). The measures in question had an adverse effect on the applicants' appeals against their pre-trial detention: if a detainee cannot have confidential meetings with his lawyer, it is highly likely that he will not feel free to talk to him. In such a case, the legal assistance provided by the lawyer risks losing its practical usefulness.

Considering the above, the Court concluded that Turkey violated Art. 5(4) of the Convention because the applicants were prevented from receiving effective assistance from their lawyers.

As for whether the emergency legislation was accompanied by sufficient safeguards against abuse (*b*), the Court reiterated that confidentiality of detainee-lawyer conversations constitutes a fundamental right which directly affects the right of defence. Accordingly, any derogation from that principle may be authorised only in exceptional cases and must be accompanied by adequate and sufficient safeguards against abuse. The case at hand did not comply with such conditions: first, the scope and manner of the exercise of discretion left to the authorities was in no way defined (to the point that persons in the same situation could be subject to different treatment); secondly, the national legislation was not accompanied by specific safeguards (e.g., it did not specify which authorities were responsible for examining the information obtained as a result of the surveillance, nor its use; and it did not specify procedure for persons concerned to obtain a review of the measures).

Considering the above, the use of surveillance of detainee-lawyer conversations pursuant to national legislation cannot be regarded as being accompanied by adequate safeguards against possible abuse and, thus, Turkey violated Art. 5(4) ECHR.

Lastly, in the instant case there were no exceptional circumstances such as to establish a link between Turkey's derogation under Art. 15 of the Convention (lodged with the Secretary General of the Council of Europe following the attempted coup of 2016), on the one hand, and the applicants' deprivation of liberty, on the other. In any event, even assuming that there were such exceptional circumstances, the national authorities did not provide any detailed evidence capable of justifying the imposition of the measures at issue against the applicants pursuant to Emergency Decree-Law no. 676.

Yılmaz Aydemir v. Türkiye, Application No. 61808/19, Judgment of 23 May 2023

Proceedings reviewing the lawfulness of a post-conviction detention order must comply with the equality of arms and adversarial principles: notably, the person concerned must be notified of the public prosecutor's written observation and must have the possibility to comment on it. Failure to act in this way amounts to a *violation of Art. 5(4) ECHR*.

FACTS: In February 2016, the applicant was charged with an offence relating to drug trafficking. In the same year, the domestic court sentenced him to a twelve-year imprisonment and ordered his immediate detention. The applicant lodged an objection against the detention order by arguing – *inter alia* – that it lacked legal grounds, was disproportionate, and there was no risk that he would abscond, conceal or tamper with evidence. The court dismissed the objection, after receiving the public prosecutor's written opinion which considered that the detention order had been in compliance with the applicable procedure and law. This opinion was not forwarded to the applicant or his lawyer.

The applicant applied before the Constitutional Court contesting both the detention order and the failure to provide him with the prosecutor's opinion. His application was declared inadmissible.

HELD: Art. 5(4) ECHR does not grant the right, as such, to appeal against decisions ordering or extending detention. Nevertheless, a State which sets up a second level of jurisdiction for the examination of applications for release

from detention must in principle afford the detainee the same guarantees on appeal as at first instance. Accordingly, a court examining an appeal against detention must provide guarantees of a judicial procedure. In this connection, the proceedings must be adversarial and must always ensure "equality of arms" between the parties (the prosecutor and the detained person), including offering them the opportunity to have knowledge of and comment on the observations filed by the other party.

In the present case, the Court noted that Turkish law, as confirmed by the case-law of the Constitutional Court, does not distinguish between the pre– and post–conviction periods in terms of the applicability of procedural guarantees in the context of challenges brought against detention. Thus, procedural safeguards must apply when the detainee challenges other matters that are granted to all persons deprived of their liberty, such as the disproportionality of the detention order which was contested by the applicant in the present case. Accordingly, the relevant procedural safeguards under Art.5(4) ECHR were applicable to the facts of the case at hand.

The Court further observed that the content of submissions made by either one of the parties does not have a bearing on the issue at stake, since it is a matter for the detainee, or his or her counsel, to assess whether or not a prosecutor's submission merits a response (see *Stollenwerk v. Germany*, *Stollenwerk v. Germany*, App. No. 8844/12, 7 September 2017, where the Court found by a majority a violation of Art. 5(4) in the context of an appeal against the applicant's detention due to the failure to inform him of the written observations of the prosecution authorities and, thus, to give him the opportunity to comment on them). In the case at hand, the prosecutor's opinion was rather succinct. In any case, the possibility that the opinion weighed in the decision of the competent domestic court cannot be simply excluded, considering that the court made an explicit reference to the opinion and eventually ruled in accordance with it. Moreover, in the case at hand the proceedings relating to the applicant's detention were in fact the first time that the detention was subject to judicial review, the applicant having been at liberty in the pre-trial period (see, a fortiori, *Stollenwerk v. Germany*, quoted above, where the Court found a violation of Art. 5(4) even where there had been eleven prior reviews of the applicant's detention within a reasonably short timespan). Consequently, the applicant could not have known the position of the public prosecutor regarding his detention.

The Court concluded that Turkey violated Art. 5(4) ECHR because the proceedings before the competent domestic court were not truly adversarial and that the lack of opportunity for the applicant to comment on the prosecutor's opinion infringed the principle of equality of arms.

Repeşco and Repeşcu v. the Republic of Moldova, Application No. 39272/15, Judgment of 3 October 2023

If a person submits credible allegations that his/her conviction was based on a statement extracted under duress and, on this basis, requests review of his/her conviction, the national authorities must carry out a rigorous and comprehensive examination of the allegations and that person must have the opportunity to challenge the admissibility of the litigious statements as well as to object to their use. Failure to act in this way amounts to a *violation of Art. 6(1) ECHR (Right to fair trial)*. This is even more pertinent where, in the circumstances of a previous case before the ECtHR, the respondent Government acknowledged that the same person had suffered a breach of his rights guaranteed by Article 3 ECHR on account of, among other things, ill-treatment suffered in police custody.

FACTS: In 2013, the applicants were convicted respectively to fourteen and seven years of imprisonment for aggravated murder and robbery based on incriminating statements that were extracted by the police using unlawful methods. In its judgment, the competent court rejected the applicants' argument that the statements in question had been extracted under duress. It further added that, if their ill-treatment had been subsequently established by a final judicial decision, the applicants would have been entitled to apply for a review of their criminal proceedings to obtain a remission of their sentence.

The applicants filed an application to the Court, complaining about ill-treatment under Art. 3 ECHR. The Government submitted a unilateral declaration, acknowledging that the applicants suffered a breach of their rights guaranteed by Art. 3 and 13 ECHR. Given that the terms of the unilateral declaration were accepted by the applicants, the Court struck the case out of its list pursuant to Article 39 ECHR, holding that the parties reached de facto a friendly settlement (*Adrian Repesco and Constantin Repescu v. the Republic of Moldova*, App. No. 64785/11, decision of 25 November 2014).

Based on the Court's decision, in February 2015 the applicants lodged an application for reopening of their criminal proceedings. In May 2015, the Supreme Court of Justice dismissed this request as ill-founded – *inter alia* – on the following grounds: i) the applicants had not complained in their previous case before the Court of a breach of Art. 6 ECHR, and that no such breach had been recognised by the Government or found by the Court; ii) in its decision, the Court had not used the term "torture", nor had it found that the ill-treatment suffered by the applicants had rendered their criminal trial unfair; and iii) the claimants' statements were not the only decisive evidence in the case.

HELD: The Court recalled that Art. 6(1) ECHR may apply to cases concerning the reopening of criminal proceedings (see *Moreira Ferreira v. Portugal* (no. 2) [GC], App. No. 19867/12, 11 July 2017). Moldovan law allows individuals to obtain a review of a final criminal judgment following a finding of a violation by the Court or following a friendly settlement of a case before the Court, provided that the review is the only possible remedy to serious violations of the Convention. The Court noted that this legal remedy could have been decisive for a criminal charge and that the scrutiny performed by the Supreme Court of Justice concerned the merits of the criminal proceedings brought against the applicants, resulting in their conviction. Therefore, it concluded Art. 6(1) ECHR applies to the review proceedings in the case at hand.

Turning to the merits of the applicants' complaints, the Court reiterated that the use in criminal proceedings of statements taken in breach of Art. 3 ECHR automatically deprives the proceedings as a whole of their fairness, even if the fact that they were admitted as evidence was not decisive in reaching a guilty verdict.

In the case at hand, in its unilateral statement in the applicants' previous case, the Government acknowledged that the applicants had been subjected to ill-treatment while under police control, during the criminal investigation against them, with the purpose of extracting confessions. Their statements were used by the domestic courts as evidence against them. During the review proceedings, the Supreme Court failed to perform a rigorous and comprehensive examination of the applicants' claims that their statements had been obtained under duress contrary to Art. 3 ECHR, despite advancing convincing arguments based on the Government's declaration and the Court's decision. Moreover, the applicants did not have an effective opportunity to challenge the admissibility of those statements and to object to their use.

Furthermore, the Court pointed out that applicants are entitled to expect national authorities, including domestic courts, to draw in good faith the consequences of a unilateral declaration by the Government acknowledging a violation of Art. 3 ECHR and leading to a decision by the Court which took note of it. In the case at hand, the Supreme Court of Justice displayed excessive formalism and did not draw the appropriate conclusions from the Government's unilateral declaration on the violation of Art. 3 of the Convention.

In light of the above, the Court concluded that Moldova violated Art. 6(1) ECHR due to the domestic court's failure to re-open the applicants' criminal proceedings despite their credible allegations that the statements, used against them as evidence, had been extracted by ill-treatment contrary to Art. 3 ECHR, as confirmed by the unilateral declaration of the Government and the Court's decision on their previous case.

Yüksel Yalçınkaya v. Turky, Application No. 15669/20, Judgment of 26 September 2023

If a conviction is based decisively on electronic evidence (namely, raw data on the use of a messaging application) the court's decision not to disclose the evidence to the defence must be supported by adequate reasons. Moreover, in the event that domestic law does not set forth specific procedural safeguards designed to ensure the integrity of electronic evidence until the handover to the judicial authorities, domestic courts must assess the reliability of such electronic evidence. Failure to act in this way amounts to a *violation of Art. 6(1) ECHR (Right to a fair trial)*.

FACTS: Since 2014, Turkish authorities has considered the "Fetullahist Terror Organisation/Parallel State Structure" (FETÖ/PDY) as a structure "threatening public peace and security" and, subsequently, as an armed terrorist organisation. In early 2016, the national intelligence service engaged in intelligence-gathering activities in relation to the FETÖ/PDY by accessing the main server of the encrypted messaging application "ByLock", located in Lithuania, on the assumption that this application was being used exclusively by the members of that organisation for internal communication.

During the night of 15 to 16 July 2016, an attempted coup tool place in Turkey. The authorities considered that the FETÖ/PDY was behind the operations. Between 20 and 21 July, the Government declared the state of emergency, which was notified to the Secretary General of the Council of Europe pursuant to Art. 15 ECHR. During the state of emergency, the Government passed several legislative decrees. In the meantime, in December 2016, thousands of investigations were commenced based on the collected data, with suspected users of the "ByLock" application being charged with membership of the FETÖ/PDY. The state of emergency was lifted on 18 July 2018.

The applicant was a teacher at a public school at the material time. After the Turkish authorities identified him as a user of "ByLock", he was suspended from the civil service, arrested and put under pre-trial detention on account of his suspected affiliation with the FETÖ/PDY, in application of Turkish emergency decrees. In January 2017, he was charged with membership of the armed terrorist organisation on the basis of the following evidence: being identified as a user of "ByLock"; suspected movements on his bank account; his former membership of a trade union declared as belonging, affiliated, or linked to the FETÖ/PDY; his dismissal from public service; and an anonymous call stating that he was a member of the FETÖ/PDY. During the criminal proceedings, the applicant complained – *inter alia* – that the collection of "ByLock" data was contrary to domestic law.

The applicant was convicted of the offence of membership of an armed terroristic organisation. His conviction was based decisively on his use of "ByLock", whilst the remaining evidence included in the indictment bill served only as a source of corroboration.

HELD: In the Court's view, the issue was whether the proceedings as a whole were fair, including the collection and disclosure of evidence and whether the applicant was given the opportunity to challenge the evidence and to oppose its use, since the right to a fair trial under Art. 6(1) ECHR presupposes adversarial proceedings and equality of arms. Disclosure of evidence is not an absolute right, as there may be a variety of reasons which can require the withholding of evidence from the defence, including concerns over national security.

Electronic evidence has become ubiquitous in criminal trials (due to the increased digitalisation of all aspects of life) and differs in many respects from traditional forms of evidence (including its collection and reliability). The Court stressed that domestic jurisdictions cannot use such evidence in a manner that undermines the basic tenets of fair trial, including when national proceedings concern serious criminal offences (such as those related to the fight against terrorism or other organised crime).

In the case at hand, the applicants' conviction rested decisively on the finding that he had used "ByLock", the remaining evidence serving only as a source of corroboration.

As for the quality of the evidence, the Court had not sufficient elements to impugn the accuracy of the "ByLock" data (at least to the extent that they established the applicant's use of the application), although the circumstances in which the data was retrieved did *prima facie* raise doubts as to their "quality" in the absence of specific procedural safeguards geared to ensuring their integrity until the handover to the judicial authorities.

As for the applicants' ability to challenge the relevant evidence, the domestic courts did not provide reasons for the impugned non-disclosure of the relevant raw data to the applicant, nor did they respond to the numerous arguments raised by the applicant regarding the reliability of the "ByLock" evidence.

The Court considered that, in principle, the inability of the defence to have direct access to the evidence and to test its integrity and reliability first-hand places a greater onus on the domestic courts to subject those issues to the strictest scrutiny. Furthermore, the requirement of "fair balance" between the parties would have required the applicant to be able to comment on the full

extent of the decrypted material concerning him (including the nature and content of his activity over "ByLock"). This would have constituted an important step in preserving his defence rights, especially due to the preponderant weight of the "ByLock" evidence in grounding his conviction. In addition, the prejudice sustained by the defence on the basis of the foregoing shortcomings was compounded by the deficiencies in the domestic courts' reasoning vis-à-vis the "ByLock" evidence: in particular, the courts had not sufficiently explained how it was ascertained that "ByLock" was not, and could not have been, used by anyone who was not a "member" of the FETÖ/PDY (considering, e.g., that the application could have been downloaded from publicly available application stores or sites until early 2016). Therefore, the Court found that the prejudice to the applicant's defence had not been counterbalanced by adequate procedural safeguards. Moreover, the domestic courts' failure to address the applicant's arguments raised well-founded concerns relating to the duty to provide reasons justifying their decisions.

Considering the above, the Court found that Turkey had violated Art. 6(1) ECHR due to the domestic courts' failure to put in place appropriate safeguards to enable the applicant to challenge the relevant evidence effectively, to address the salient issues lying at the core of the case, and to provide adequate reasons.

In relation to Art. 15 ECHR, the Court further noted that the limitations on the applicant's fair trial rights could not be treated as having been strictly required by the exigencies of the situation.

The applicant also complained that Turkey violated Art. 7 ECHR and Art. 11 ECHR – on this point, *see Section III, V and VIII*.

Plechlo v. Slovakia, Application No. 18593/19, Judgment of 26 October 2023

There must exist a legal framework which provides adequate and effective safeguards against abuse in cases of the tapping of telephone calls in the context of criminal investigations which affect random people (i.e., people not directly involved in the criminal investigation and not directly targeted by the warrant permitting telephone tapping) – *Violation of Art. 8 ECHR (Right to private life)*.

FACTS: In 2006, Slovakian courts issued a warrant for the tapping of telephone calls in the context of an investigation (the 2006 investigation) into a suspi-

cion of corruption within the National Property Fund (the NPF). The applicant (a top-ranking official of the NPF) was not the target of the operation, which affected him only because he was in contact with the person who was targeted by it. The intercept material was retained by the police and included in the case file of a separate investigation that was opened in 2012, following anonymous records posted on Internet claiming to originate from a surveillance operation performed by Slovak secret services in 2005-2006 (the "Gorilla operation"). The 2012 investigation concerned the NPF. The applicant was not directly concerned.

Based on the information obtained from operation Gorilla, in 2016 another investigation was opened on mismanagement of assets and suspicious high-level corruption in the NPF. The applicant was one of the primary suspects. Some of the intercept material was included in the file and the applicant was charged. The applicant died in 2022 and his next of kin acted on his behalf.

HELD: The applicant's telephone conversations in issue fell within the ambit of his right to respect for his private life and correspondence under Art. 8 ECHR, and that the recording, storage and retention of the intercept material constituted an interference with that right.

The Court recalled that, for an interference to be in accordance with Art. 8 ECHR, it must be provided by law and, in the context of secret surveillance, must be accompanied by adequate and effective guarantees (see *Dragojević v. Croatia*, App. No. 68955/11, 15 January 2015). The fact that the applicant had been unable to access the warrant of telephone tapping had restricted the applicant's means of challenging its implementation. This implementation resulted in the creation of the intercept material. Moreover, there is no mechanism to safeguard the rights of persons randomly affected by warrants of telephone tapping. In fact, the national law on warrants of telephone tapping only provides protection for the rights of people directly affected by similar warrants.

Considering the above, the Court found that Slovakia violated Art. 8 ECHR, because the interference with the applicant's right to respect for his private life and correspondence was not in accordance with the law for the purpose of Art. 8(2) ECHR, since it was not accompanied by adequate and effective guarantees against abuse.

B. CIVIL PROCEEDINGS

Ben Amamou v. Italy, Application No. 49058/20, Judgment of 29 June 2023

When a domestic court introduces a new legal ground as the decisive reason for rejecting an appeal (e.g., in the ruling dismissing the application), the domestic court must inform the person of this newly considered basis so as to give him/her the opportunity to present arguments and challenge them, in accordance with the adversarial principle. Failure to act in this way amounts to a *violation of Art. 6(1) ECHR (Equality of arms and adversarial principle)*.

FACTS: The applicant is a Tunisian national who lived in Italy. In 2010, the driver of the vehicle carrying the applicant swerved suddenly to avoid colliding with a vehicle which remained unidentified. As a result, the applicant sustained bodily injuries assessed at a severity level of 85% and a permanent reduction in his capacity to work.

The applicant brought proceedings for compensation against the insurer of the vehicle in which he had been travelling. He sought compensation as a "mere passenger". In April 2015, the competent court dismissed his claim, finding that one of the "two conditions" laid down in domestic law, namely that "at least two vehicles [be involved] and [that] both vehicles be insured", had not been satisfied since the accident had been caused by a vehicle which had remained unidentified.

The applicant submitted a complaint to the Court of Cassation by invoking the applicability of the domestic law to cases of car accidents in which one of the vehicles involved, independently of a collision, is uninsured or not identified. In 2019, the Court of Cassation dismissed the applicant's appeal by stating that, in cases such as that of the applicant, the injured person must contact exclusively the company designated by the Guarantee Fund for Victims of Traffic Accidents.[2] Moreover, the Court of Cassation observed that the "mere passenger" could directly act against the insurer of his carrier only if it is possible to establish (or to presume) the shared responsibility of the driver of the vehicle in which the "mere passenger" was traveling – a condition that was not met in the case at hand.

2 The Fund was set up by law to pay compensation for damages resulting from road accidents caused- inter alia - by unidentified vehicles and uninsured vehicle. The investigation and settlement of claims are carried out by insurance companies.

HELD: The Court recalled that the concept of a fair hearing in Art. 6 ECHR also includes the right to adversarial proceedings. The decisive factor is therefore whether one of the parties was "taken by surprise". The principle of adversarial proceedings requires that courts should not base their decisions on elements of fact or law which have not been discussed during the proceedings and which give the dispute an outcome which not even a diligent party would have been able to anticipate (see *Vegotex International S.A. v. Belgium* [GC], App. No. 49812/09, 3 November 2022).

The issue before the Court was whether the possible omission by the Court of Cassation to inform the applicant of its intention to raise the ground in question of its own motion was in breach of the adversarial principle. To address this issue, the Court assessed whether: (*a*) the reason in question already appeared in the proceedings; (*b*) the reason raised *ex officio* could be controversial; (*c*) its impact on the outcome of the case and on the issues at stake was negligible.

On the first element (*a*), the ECtHR found that the ground in question had not already appeared in the proceedings in clear terms. Besides, even assuming that shared responsibility was somehow invoked in the proceedings, the Court of Cassation had the duty to inform the parties of the new interpretation of the domestic law, given that it had changed during the proceedings and, thus, the applicant was not supposed to be aware of this new interpretation.

Regarding the second element (*b*), the Court considered that the ground raised ex officio by the Court of Cassation was new and controversial, as it was still the subject of doctrinal divergent opinion and jurisprudential conflict, which persisted following the Court of Cassation's judgment on the applicant's case.

With reference to the third element (*c*), the absence of shared responsibility determined the outcome of the case and was decisive for the rejection of the applicant's appeal. Moreover, the issues at stake were not negligible, the applicant having not been compensated despite the serious injury suffered by him and its consequences. In this regard, after the Court of Cassation's judgment, the applicant could no longer rely on the guarantee fund for victims of traffic accidents since the relevant action had become time barred.

Considering the above, the Court concluded that Italy violated Art. 6(1) ECHR due to the Court of Cassation's failure to inform the applicant (and the other parties) on the *ex officio* substitution of grounds, considering that the applicant was "caught by surprise" and had no opportunity to present his arguments on a question that was decisive for the outcome of the proceedings. Thus, he did benefit from the right to a fair trial due to the breach of the adversarial principle.

Alif Ahmadov and Others v. Azerbaijan, Application No. 22619/14, Judgment of 4 May 2023

In the case of an unauthorised house built in violation of construction rules and located in a State-owned zone, the national authorities must assess the proportionality of the eviction and demolition orders by considering the specific circumstances of the persons concerned (e.g., the risk of becoming homeless). Failure to act in this way amounts to a *violation of Art. 8 ECHR (Respect for home)*.

FACTS: The applicants are an Azerian family (spouses and children). In 1977, the first applicant allegedly bought a house by another individual; however, there was no sale and purchase contract in respect of the house. In July 1963, the competent national authorities had issued a technical passport reporting information on the house (e.g., address, habitable surface) to the former owner. The relevant part of the technical passport contained a note "no documents" as to the house owner.

In June 1981 and July 1982 plans of the house were added to the technical passport. According to the first applicant, he had applied to his employer asking to be included in the list for housing in 1982 and 1992, under a housing scheme developed for oil workers – such as the applicant. His application was rejected following visits made by the local authorities to his home. The first applicant has not provided copies of the relevant documents. In 2011 and 2017, the applicants signed the contracts for provision of water and gas.

In 2012, Azneft (a subsidiary of the State oil company) claimed the land on which the applicant's house was located by contesting that it had been unlawfully built on State owned land allocated to Azneft and in the protection zone of an oil well. In the same year, the domestic court held that the land in question was in Azneft's possession, that there was no evidence confirming the applicants' rights over it and on the house. Therefore, the court ordered the applicants' eviction from the house and its demolition at their expense. Again in 2012, the competent authority issued a certificate to the first applicant. Among other information, the certificate stated that the house was an unauthorised construction, and that the first applicant had been registered there since 1979, while the remaining applicants had been registered there since 1984.

By 2018, the house had not yet been demolished and the applicants continued to live there.

HELD: The Court reiterated that the concept of "home" within the meaning of Art. 8 of the Convention is not limited to premises which are lawfully occupied, or which have been lawfully established. Whether or not particular premises constitute a "home" depends on the factual circumstances, namely the existence of sufficient and continuous links with a specific place. Since the loss of one's home is the most extreme form of interference with the right to respect for the home, any person at risk in this regard should be able to have the proportionality of the measure determined by an independent tribunal, even when it comes to unauthorised constructions (see *Ahmadova v. Azerbaijan*. App. No. 9437/12, 18 November 2021).

In the case at hand, the applicants were registered at the house in question in 1979 (the first applicant) and 1984 (the remaining applicants) and have lived there ever since. Therefore, the house was their home within the meaning of Art. 8 ECHR. To the Court's understanding, the eviction order had not yet been enforced. However, it was upheld by a final court decision and became enforceable. Thus, there has been an interference with the applicants' right to respect for their home.

The Court assessed whether the interference met the requirements of Art. 8(2) ECHR, notably whether it was lawful, pursued one of the legitimate aims thereby listed, and was proportionate. The applicants were not afforded a procedure enabling them to obtain an adequate review of the proportionality of the interference, in the light of their personal circumstances – i.e., the risk of becoming homeless. Notably, the Court observed that, while ordering the demolition of the house and the applicants' eviction, the domestic courts focused exclusively on the fact that it was an unauthorised construction built on State-owned land – i.e., the domestic courts failed to weight up the competing interests of the applicants, which they argued in their appeals. There were no other remedies or procedure that the applicants could have invoked to obtain a proper examination of the proportionality of the interference.

Considering the above, the Court found that Azerbaijan would violate Art. 8 of the Convention if the eviction order were to be enforced without performing a proportionality review of the interference in light of the applicants' personal circumstances.

The applicants also argued a violation of Art. 1, Prot. No. 1 ECHR – on this point *see Section VII*.

Advisory opinion on the procedural status and rights of biological parent in proceedings for the adoption of an adult, Request No. P16-2022-001, 13 April 2023

Legal proceedings concerning the grant of adoption of an adult child may be regarded as affecting a biological parent's private life. State parties have the obligation to grant the opportunity to be heard to biological parents, and the arguments made must be taken into account. Having regard to the wide margin of appreciation, States have no obligation to grant the status of parties (or the right to appeal) to biological parents.

Art. 6 ECHR (Right to fair trial – civil limb) and Art. 8 ECHR (Right to respect for private and family life).

BACKGROUND OF THE REQUEST: The request arose out of proceedings under Finland's Adoption Act concerning the adoption of an adult. In 2018, a woman, B, lodged an application before the District Court for the adoption of her nephew, C, born in 1993.

The aunt and the nephew had been living together since C was three years of age and until 2016, when he moved out to live independently. In 1997, B was appointed as C's supplementary custodian at the request of A, his biological mother. A had remained involved in C's upbringing and they still had contact; his relationship with his four siblings – A's other children – was relatively tight. She objected to the adoption arguing that she had continued in her maternal role until her son had come of age and, thus, the statutory prerequisites for adoption were not satisfied. She was heard by the District Court, on its own initiative as a witness. That court granted the adoption, finding that the statutory conditions for the adoption of an adult were met.

A's appeal was rejected as inadmissible without consideration of the merits. Notably, it ruled that under Finland's Adoption Act a parent of an adult was not a party to a matter concerning adoption and had no right of appeal against a decision concerning the adoption. Moreover, the Court of Appeal also referred to Art. 8 ECHR, and to the interpretation of "family life", as not applying to a relationship between a parent and an adult child unless there are additional factors of dependence other than normal emotional ties. That was not the case between A and C.

A then applied to the Supreme Court for leave to appeal against that decision. The Supreme Court requested an Advisory Opinion on the following ques-

tions: (*i*) should the ECHR be interpreted in such a way that legal proceedings concerning the granting of an adoption of an adult child in general, and especially in the circumstances of the case at hand, are covered by the protection of a biological parent referred to in Art. 8 ECHR?; (*ii*) If the answer to the question asked above is affirmative, should Arts. 6 and 8 ECHR be interpreted in such a way that a biological parent of an adult child should in all cases, or especially in the circumstances of this case, be heard in legal proceedings concerning the granting of adoption?; and (*iii*) If the answer to the questions asked above is affirmative, should Arts. 6 and 8 ECHR be interpreted in such a way that a biological parent should be given the status of a party in the matter, and that the biological parent should have the right to have the decision concerning the granting of adoption reviewed by a higher tribunal by means of appeal?

HELD: As for the first question, the Court excluded that the "family life" aspect under Art. 8 ECHR was applicable to the matter, whilst it determined that Art. 8 ECHR under its "private life" aspect was applicable to legal proceedings concerning the grant of adoption of an adult child. In the case at hand, under Finland's law, the adult adoptee was deemed the child of the adoptive parents and not of the former parents. Therefore, the biological parent's identity was at stake, given the effect of the discontinuation of the legal parental relationship with the adult child in relation to the biological parent. However, these proceedings also concerned the private life of the adopter and the adult adoptee. Thus, while the biological parent was entitled to due respect for his or her personal autonomy, as a core element of private life, that had to be understood as being delimited by the personal autonomy and private life of the adopter and adult adoptee, also protected under Art. 8 ECHR.

As for the second and third questions vis-à-vis Art. 8 ECHR, the Court concluded that the biological parent must be given the opportunity to be heard and the arguments made must be considered by the decider to the extent relevant. However, having regard to the wide margin of appreciation to which the State was entitled in the regulation of the procedure for adult adoption, respect for Art. 8 ECHR did not require that a biological parent be granted the status of a party or the right to appeal the granting of the adoption.

This conclusion is supported by the analysis of the practice among the States of the Council of Europe, according to which it is common for the biological parents to have the right to be heard by the court in adult adoption proceedings. In the case at hand, although it was not provided under Finland's Adoption Act, the District Court had heard the biological mother in person, and it expressly considered her arguments in its assessment.

As for the second and third questions vis-à-vis Art. 6 ECHR in its civil limb, the Court observed that the biological mother in the case pending at domestic level is effectively asserting a "right" for a biological parent to participate in the adult adoption proceedings. However, substantive grounds for adult adoption laid down in Finland's Adoption Act appear to be essentially factual and concern the assessment of the adopter-adoptee relationship. Thus, there is no scope for consideration of the interests of any other party (including the biological mother) and the right claimed by the biological mother does not exist, even on arguable grounds, in domestic law. It is, however, for the requesting court to determine whether, with reference to domestic law and the facts of the pending dispute, that is the case.

In conclusion, in light of the above, the Court found that: (*i*) legal proceedings concerning the grant of adoption of an adult child may be regarded as affecting a biological parent's private life under Article 8 of the Convention; (*ii*) under Art. 8 ECHR, a parent must be given the opportunity to be heard and the arguments made must be taken into account by the decider to the extent relevant; (*iii*) having regard to the wide margin of appreciation to which the State is entitled in the matter, Art. 8 ECHR does not require that a biological parent be granted the status of a party or the right to appeal the granting of the adoption. Moreover, the Court found that, if the requesting court determines that the right claimed by the biological mother does not exist, even on arguable grounds, in domestic law, it would follow that Art. 6 ECHR in its civil limb is not applicable to the proceedings for the adoption of an adult.

C. SPECIAL FOCUS: PROCEEDINGS INVOLVING THE RIGHTS OF JUDGES

Pająk and Others v. Poland, Applications Nos. 25226/18 and 3 others, Judgment of 24 October 2023

If the executive has the power to issue unilateral decisions on early termination of a judge's term, the person concerned must have access to an independent and impartial court to review such unilateral decisions. The lack of judicial means to challenge similar unilateral decisions constitutes an arbitrary and irregular interference in the sphere of independence and irremovability of judges, entailing a *violation of Art. 6(1) ECHR (Right of access to a court)*.

FACTS: In 2017 and 2018, a series of legislative amendments lowered the retirement age for judges from 67 to 60 for women, and to 65 for men, and had

made the continuation of a judge's duties after reaching retirement age conditional upon authorisation by the Minister of Justice and by the National Council of the Judiciary ("the NCJ").

At the relevant time, the applicants, who were judges, had all reached the age of 60. Wishing to continue in their posts until the age of 70, they requested authorisation to do so. Three applicants also attached medical certificates attesting that their state of health permitted them to sit; the fourth applicant refused to submit such medical certificate on the grounds that male judges were not required to do so in similar circumstances and that such an obligation was therefore discriminatory. The Minister of Justice rejected all their requests. One of the applicants lodged a request with the NCJ, without success. The same applicant challenged the Minister's decision before the Supreme Court arguing – *inter alia* – that the legislation in question was discriminatory on ground of sex and age. The Supreme Court declared her application inadmissible.

HELD: The Court had to assess: (*a*) whether Art. 6(1) ECHR was applicable to the case; (*b*) whether Poland violated such provision.

As for the first issue (*a*), there is a presumption that Art. 6 applies to ordinary labour disputes (e.g., those on salaries, allowances or similar entitlements) concerning public service (*Vilho Eskelinen and others v. Finland* [GC], App. No 63235/00, 19 April 2007). This presumption applies to disputes regarding judges: although the judiciary is not part of the ordinary civil service, it is considered part of public service in the broad sense (*Baka v. Hungary* [GC], App. No. 20261/12, 23 June 2016).

In the case at hand, the Court concluded that the applicants had a "civil right" within the meaning of Art. 6(1) ECHR because – *inter alia* –the disputes underpinning the case constitute examples of ordinary labour disputes. The Court considered that judges must be able to enjoy protection against the arbitrariness of the legislative and executive powers, and that only a control of the legality of the disputed measure, carried out by an independent judicial body, can ensure the effectiveness of a such protection. Access to a court must be guaranteed, as a general principle, when the cessation of the functions of judge results from the adoption of new rules (see also e.g., Committee of Ministers, Recommendation CM/Rec(2010)12 on the independence, efficiency and responsibilities of judges, 2012; CCEJ, Magna Carta of European Judges, 2010). In light of the above, Art. 6(1) ECHR is applicable to the case at hand and the applicants had the right to have their case examined by "a court", within the meaning of this provision.

As for the second point (*b*), the Court found that the applicants' right to access to a Court had been illegitimately restricted. The Court analysed the regime governing the decisions adopted by the Minister of Justice and the NCJ. As for the former, the Court observed that the relevant legislation in force at the material time did not specify whether the ministerial decision was subject to appeal, and that at the material time there existed no internal practice which would have allowed the applicants to have access to a court – as shown by applicants' unsuccessful attempts (see also Court of Justice of the European Union, *Commission v Poland*, Case C-619/18, 24 June 2019).

With regard to the decisions of the NCJ, the Court noted that it was unclear whether the applicants could have lodged an appeal against this decision before the Supreme Court, that, in any event, did not meet the conditions of "an independent and impartial tribunal established by law" under Art. 6(1) ECHR and, thus, cannot be considered as a "court" within the meaning of that provision.

In light of the above, the Court concluded that Poland interfered with the applicants' right to access to a court under Art. 6(1) ECHR.

The Court addressed whether such interference was legitimate, notably whether it pursued a legitimate aim and was proportionate. Whilst the Court did not contest the aim allegedly pursued by the Government (namely, improving the efficiency of the judicial system), it considered that the applicants compulsory retirement had failed to meet any fundamental requirements of procedural fairness – such as e.g., brief and formulaic line of reasoning and the lack of independence (see also Venice Commission, Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, December 2017).

The ministerial and the NCJ's decisions constituted arbitrary and irregular interference in the sphere of independence and irremovability of judges by the representative of the executive authority and the body subordinate to it. Moreover, the national legal framework failed to protect the applicants from such illegitimate interference. Lastly, the Government failed to provide serious reasons to justify the exceptional absence of judicial review of a unilateral decision concerning the early termination of judges' terms by the representative of the executive and the body subordinated to it.

Considering the above, the Court found that Poland violated Art. 6(1) of the Convention because it had impaired the applicants' right of access to a court in its very essence.

The applicants also argued a violation of Art. 14 ECHR in conjunction with Art. 8 ECHR – on this point, *see Section VI*.

Ovcharenko and Kolos v. Ukraine, Application Nos. 27276/15 and 33692/15, Judgment of 12 January 2023

The Parliament's decision to dismiss Constitutional judges for "breach of oath" interfered with their right to private life (e.g., pecuniary losses and negative consequences for their reputation). To be legitimate, it must be based on foreseeable legal grounds, including a clear interpretation of "breach of oath" under national law, alongside a clear definition of the scope of the application of functional immunity of judges. Failure to respect such conditions amounts to a *violation of Art. 8 ECHR (Right to respect for private life)*.

National courts must provide adequate reasons supporting the compatibility of the Parliament's decision to dismiss Constitutional judges for "breach of oath" with constitutional guarantees of judicial independence. Failure to provide adequate reasons amounts to a *violation of Art. 6(1) ECHR (Right of access to a court, Right to a reasoned judgment)*.

FACTS: In 2006, the applicants were appointed as judges of the Constitutional Court. In 2010, Mr Yanukovych became the President of Ukraine. In the same year, the applicants participated in a judgment which restored a previous version of the Constitution, substantially resulting in an increase of the powers of the President of Ukraine. Following the 2014 mass protests (known as the Ukrainian Revolution of Dignity) and the ousting of Mr Yanukovych, the Ukraine's political system underwent a series of changes.

In February 2014, the Parliament adopted a resolution for the dismissal, for "breach of oath", of the judges of the Constitutional Court who had been appointed under Parliament's quota, including the applicants. Notably, according to the Parliament, the judges of the Constitutional Court who had adopted the 2010 judgment had failed in their obligation to ensure the supremacy of the Constitution and to protect the constitutional system and citizens' constitutional rights, and that those failings had not been compatible with the judicial oath and the honest and rigorous performance of duties by a judge of the Constitutional Court.

In March of the same year, the applicants submitted statements of resignation, wishing to terminate their duties on a voluntary basis rather than by way of

sanction applied by Parliament. They also unsuccessfully challenged the relevant parliamentary resolution before the domestic courts. The Supreme Court held, notably, that, by the impugned 2010 judgment, the Constitutional Court had amended the Constitution, while the power to do so was vested in Parliament; it had thus breached the fundamental principles of democracy, separation of powers and legitimacy of the acting institutions of State power.

HELD: On the issue under Art. 8 ECHR, the Court considered that the applicants' dismissal did have a serious impact on their inner circle, given the ensuing pecuniary losses, and on their reputation, given that the grounds for the dismissal – "breach of oath" – directly concerned their personal integrity and professional competence. Thus, the impugned measure affected the applicants' private life to a very significant degree, therefore falling within the scope of Art. 8 ECHR and that their dismissal constituted an interference with the right protected under this provision.

The Court determined that such interference was unjustified, as it was unlawful on the grounds of lack of foreseeability (see also *Oleksandr Volkov v. Ukraine*, App. No. 21722/11, 9 January 2013, on the matter of dismissal of judges for "breach of oath"). The decision to dismiss the applicants for "breach of oath" was based on very general legal grounds that, unless circumscribed by other applicable provisions and case-law, allowed a wide discretion to the domestic authorities. Moreover, Ukraine's law establishes functional immunity for Constitutional Court judges by stating that they would not be held legally liable for the results of their votes in that court. However, in the case at hand, the applicants were dismissed precisely for the results of their votes expressed in the 2010 judgment. In addition, international standards and the comparative law survey showed a clear trend towards common understanding that the grounds for sanctioning Constitutional Court judges must be particularly strict and narrow to avoid hindering judicial independence (see e.g., Venice Commission, Amicus Curiae brief on the criminal liability of Constitutional Court judges, Opinion 967/2019, 22 November 2019).

In any case, the 2010 judgment concerned a complex legal issue which had been a matter of serious debate inside and outside Ukraine: in this context, the Parliament had to apply particular caution and provide solid arguments if it considered that the applicants' votes in the adoption of the 2010 judgment constituted a "breach of oath". Lastly, it had not been shown that Parliament had to act in extreme urgency as regards the dismissal of constitutional judges (including the applicants) for "breach of oath".

Considering the above, the Court found that Ukraine violated Art. 8 ECHR due to the lack of clarity on the question what constitutes "breach of oath" and the

absence of detailed reasons with regard to the dismissal of the applicant. These elements led to a situation of legal uncertainty, which is at odds with the requirement of foreseeability and thus, of lawfulness for the purpose of legitimate limitations on the right to private life.

On the issue under Art. 6(1) ECHR, the Court noted that that case concerned the accountability of two judges before a political body which exercised conclusive decision-making power. In that context, the subsequent review by a judicial body that provided the guarantees of Article 6 (1) ECHR was of crucial significance for assessing the compatibility of the domestic proceedings with that provision. In the case at stake, the domestic courts failed to perform such assessment. Notably, domestic courts did not provide a detailed response to the question of whether the applicants' dismissal was compatible with the constitutional guarantees of judicial independence, including the question of functional immunity.

In light of the above, the Court found that Ukraine violated Art. 6(1) ECHR since the judgments issued by national courts were not sufficiently reasoned.

Sarısu Pehlivan v. Türkiye, Application No. 63029/19, Judgment of 6 June 2023

Disciplinary sanctions against judges who express their opinion on constitutional reforms (e.g, in a newspaper interview) affecting the judiciary constitute an interference with their freedom of expression. National authorities cannot impose such disciplinary sanctions when judges act in their capacity of secretary-general of a judges' trade union, if their statements highlight the importance of preserving the independence of the judiciary, and if there are no procedural guarantees to challenge the disciplinary sanctions. To do so would amount to a *violation of Art. 10 ECHR (Freedom of expression)*.

See infra, Section IV.

D. SPECIAL FOCUS: INDIVIDUAL EXPULSIONS OF ALIENS

Poklikayew v. Poland, Application No. 1103/16, Judgment of 22 June 2023

If a lawfully residing alien challenges an expulsion order based on national security grounds which are not disclosed to him/her, the expulsion order cannot be based on general reasons (e.g., collaboration with secret services of a foreign country). Moreover, the national authorities must ensure that the alien enjoys the effective assistance by a lawyer (e.g., by providing the alien with a list of lawyers who have the security clearance to access non-disclosed documents in his/her case-file). Failure to act accordingly amounts to a *violation of Art. 1, Prot. No. 7 ECHR (Procedural safeguards relating to expulsion of aliens)*.

FACTS: The applicant was a Belarusian national who moved to Poland in 2006, where he obtained a permanent residence permit in view of his Polish origins. He settled there, found a job and bought an apartment. In January 2012, the Polish intelligence asked for the applicant's expulsion on national security grounds. Polish authorities contended that he had been cooperating with the Belarusian secret services since 2000 and in that capacity had carried out assignments on Polish territory. The applicant was notified of the beginning of proceedings for revocation of his permanent residence permit and for expulsion. In February, the Polish authorities classified certain documents in the file as secret. In March, his residency permit was revoked and a decision on his expulsion was issued. The applicant was expelled a few days after, and he received a five-year entry ban in the Schengen area.

In April, he lodged an appeal and his lawyer unsuccessfully requested access to the classified part of the case file. All subsequent decisions upheld the expulsion order on grounds of national security. Notably, one of these decisions also found that the applicant could have participated in the proceedings, as he had been notified of them and had been given an opportunity to present arguments and evidence. Moreover, he had consulted the case file in February 2012 (a fact on which the applicant disagreed) and had obtained information about the nature of the allegations made against him.

HELD: The Court recalled the general principles on the expulsion of aliens under Art. 1, Prot. No. 7 (*Muhammad and Muhammad v. Romania* [GC], App. No. 80982/12, 15 October 2020). Notably, the alien must be informed of the relevant factual elements and be given access to the documents and information

of the case file. Even in the event of limitations of the right under Art. 1, Prot. No. 7, the Court must assess whether such limitations had been found to be fully justified by the competent independent authority, and whether the difficulties resulting from those limitations for the alien concerned were sufficiently compensated for by counterbalancing factors, so as to avoid impairing the essence of the procedural guarantees under Art. 1, Prot. No. 7.

In the case at hand, the decision to classify certain documents as secret and the impossibility for the applicant and his lawyer to access them constitute a significant limitation of the right under Art. 1, Prot. No. 7. Moreover, the parties disagreed as to whether the applicant had consulted the case file in February 2012.

The Court assessed whether counterbalancing factors were in place to effectively mitigate those limitations. First, the applicant was notified about the beginning of the relevant proceedings, but his conduct was described in very general terms (collaboration with the Belarusian secret services) without any mention of the specific activities which he had allegedly undertaken which could threaten national security.

Second, the applicant's immediate expulsion had an impact on his ability to effectively participate in the proceedings, also taking into account the refusal to grant his lawyer access to the documents in the case file on the ground that the lawyer lacked the required security clearance. Additionally, the applicant was not provided with any further information on how to access the documents in the file or a list of the names of lawyers who held the relevant security clearance. Therefore, the applicant's legal representation was not sufficiently effective to be able to counterbalance, in a significant manner, the limitations affecting the applicant in the exercise of his procedural rights.

Third, even if the expulsion order was subject to judicial review, this did not suffice to counterbalance the limitations that the applicant sustained in the exercise of his procedural rights. This was due to the scarce and unspecific information available to the applicants in those judicial proceedings, alongside the very general reasons for the domestic courts' conclusions.

Considering the above, the Court found that Poland violated Art. 1, Prot. No. 7, since the limitations imposed on the applicant's enjoyment of his rights were not counterbalanced in the domestic proceedings such as to preserve their very essence.

III NULLUM CRIMEN SINE LEGE, NULLA POENA SINE LEGE

Yüksel Yalçınkaya v. Türkiye, Application No. 15669/20, Judgment of 26 September 2023

Domestic courts cannot convict a person for the offence of membership of an unlawful organisation (e.g., a terrorist group) on the sole basis of electronic evidence (namely, raw data on the use of a messaging application). National courts must always establish the necessary intent (mental link, subjective constituent element) in an individualised manner. Failure to act in this way amounts to a *violation of Art. 7 ECHR. (Nullum crimen sine lege, nulla poena sine lege)*.

FACTS: Since 2014, Turkish authorities has considered the "Fetullahist Terror Organisation/Parallel State Structure" (FETÖ/PDY) as a structure "threatening public peace and security" and, subsequently, as an armed terrorist organisation. In early 2016, the national intelligence service engaged in intelligence-gathering activities in relation to the FETÖ/PDY by accessing the main server of the encrypted messaging application "ByLock", located in Lithuania, on the assumption that this application was being used exclusively by the members of that organisation for internal communication.

During the night of 15 to 16 July 2016, an attempted coup tool place in Turkey. The authorities considered that the FETÖ/PDY was behind the operations. Between 20 and 21 July, the Government declared the state of emergency, which was notified to the Secretary General of the Council of Europe pursuant to Art. 15 ECHR.

In this context, the applicant was indicted and, later, convicted of the offence of membership of an armed terroristic organisation (*i.e.* the FETÖ/PDY). His conviction was based decisively on his use of the encrypted messaging application "ByLock", whilst the remaining evidence included in the indictment bill served only as a source of corroboration.

For further information, see Section II.A.

HELD: The Court recalled that no derogation to Art. 7 ECHR is permissible under Art. 15 EHCR. This provision, which prohibits the retroactive application of criminal law to the disadvantage of an accused, embodies the principle *nullum crimen, nulla poena sine lege* and the principle that criminal law must not be extensively construed to the detriment of an accused. As a consequence, according to the requirements of accessibility and foreseeability, an offence must be clearly defined in law, as interpreted by domestic courts.

The Court considered that the offence of which the applicant was convicted is codified and defined under Turkish law, in keeping with the principle of legality under Art. 7 ECHR. Furthermore, the Court recalled that it is not sufficient for the purposes of Art. 7 ECHR that an offence was set out clearly in domestic law. A failure on the part of the domestic courts to comply with the relevant law, or an unreasonable interpretation and application thereof in a particular case, could entail a violation of that provision.

In the case at hand, the applicant's conviction stemmed from his alleged use of "ByLock". All the constituent elements of the relevant offence (including the mental link) had been considered to be manifested through that alleged use, irrespective of the content of the messages exchanged or the identity of the persons with whom the exchanges were made. The Court acknowledged that "ByLock" was not just any ordinary commercial messaging application and that its use could *prima facie* suggest some kind of connection with the FETÖ/PDY. However, the act that is penalised under domestic law is not mere connection, but membership of an armed terrorist organisation, to the extent that such membership is established on the basis of the constituent (objective and subjective) elements set out in law. The applicants' conviction was based on his alleged use of "ByLock", which was taken as sufficient to establish the requisite mental link, without duly establishing the existence of all the requirements of membership of an armed terrorist organisation (including the necessary intent) in an individualised manner. The finding by the domestic courts that the mere use of "ByLock" denoted membership of an armed terrorist organisation attached strict liability to its use, notwithstanding the specific intent required under domestic law. Such approach was, thus, incompatible with the principle of legality and foreseeability, and with the right of individuals not to be punished without having established an element of personal liability.

In any case, the Court emphasised that the fundamental safeguards enshrined in Art. 7 ECHR cannot be applied less stringently when it comes to the prosecution and punishment of terrorist offences, even when allegedly committed

in circumstances which threatened the life of the nation within the meaning of Art. 15 of the Convention.

Considering the above, the Court found that Turkey had violated Art. 7 ECHR due to expansive and unforeseeable interpretation of the law by the domestic court, which had the effect of setting aside the mental element the offence, thereby departing from the requirements clearly laid down in domestic law.

The applicant also complained that Turkey violated Art. 6(1) ECHR (Right to fair trial) and Art. 11 ECHR (Right to freedom of assembly) – on these points, see Sections II.A, V and VIII.

IV FREEDOM OF EXPRESSION AND THE RIGHT TO IMPART INFORMATION

Macate v. Lithuania [GC], Application No. 61435/19, Judgment of 23 January 2023

Children's fairy-tale books depicting same-sex relationships are a means to express one's opinion and to impart information. Domestic authorities (including courts) cannot suspend the distribution of such books and/or label them as harmful to children under 14 years old if these decisions are based solely on the ground of sexual orientation (and not because, e.g., the information in the books is too sexually explicit). To do so would amount to a *violation of Art. 10 ECHR (Freedom of expression)*.

FACTS: The applicant was an openly lesbian children's author. In December 2013, the Lithuanian University of Educational Sciences published one of her books, with partial funding from the Ministry of Culture. The book, which was aimed at nine/ten-year olds, contained adaptation of traditional fairy tales. Two of the six fairy tales in the book had story lines about relationships and marriages between persons of the same sex. In March 2014, the Ministry of Culture was forwarded a complaint alleging that the book was "encouraging perversions". The Ministry asked the competent authority to assess whether the book might be harmful to children. Around the same time, following a letter sent by eight members of the Lithuanian Parliament, the University suspended the distribution of the book. In April, the assessment concluded that the two contested fairy tales did not comply with a national provision stating the any information which "expresses contempt for family values" or "encourages a different concept of marriage and creation of family than the one enshrined in the Constitution or the Civil Code" is considered as having a negative effect on minors. The authority recommended that the book be labelled with a warning that it might be harmful to children under 14 years of age. In 2015, distribution was resumed, with the book bearing the warning label.

The applicant lodged civil proceedings against the University, arguing that depiction of same-sex relationships could not be considered harmful for children of any age. The Lithuanian courts dismissed her claim, finding that the book could cause harm to children, certain passages were too sexually explicit, and the way in which the fairy tales depicted a new family model raised the question of whether the applicant herself had sought to discriminate against those who held values different from her own.

This was the first case in which the European Court of Human Rights had assessed restrictions on literature about same-sex relationships written specifically for children. The Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber.

HELD: The Court found that the impugned measures amounted to an interference with the exercise by the applicant of her freedom of expression, protected under Art. 10 ECHR. First, her books had been recalled from shops, thus reducing availability to readers. Second, the warning labels were likely to dissuade a significant number of parents and guardians from allowing children under the age of 14 to read the book. Therefore, the labelling on the book affected the applicant's ability to freely impart her ideas. Third, the labels affected the applicant's reputation as an established children's author and were liable to discourage her and other authors from publishing similar literature.

The Court addressed whether the interference was legitimate under Art. 10(2) ECHR. First, it concluded that the limitation was lawful, as it had a legal basis in domestic law.

As for the aim, the Government submitted that the purpose was protecting children from too sexually explicit information and from content which "promoted" same-sex relationships. The Court rejected the Government's position. First, it could not see how certain passages (notably, a princess and a shoemaker's daughter sleeping in one another's arms after their wedding) depicted carnal love too openly for children, as concluded by domestic courts. Second, national tribunals did not provide adequate reasons to justify that the fairy tales had been "encouraging" or "promoting" some types of relationships at the expense of others, or that they meant to "insult", "degrade" or "belittle" different-sex relationships, as argued by the Government. On the contrary, the applicant's book sought to encourage respect for and acceptance of various marginalised social groups. Moreover, the Court found that the legislative history of the national provisions underpinning the contested measures, alongside the examples of its application, revealed that the underlying legislative aim was to restrict children access to information that presented same-sex relationships as being essentially equivalent to different-sex relationships.

The Court considered such aim as illegitimate for the purpose of Art. 10(2) ECHR. First, the Court recalled that differences based on sexual orientation require "particularly convincing and weighty reasons" by way of justification. Moreover, as confirmed by several international bodies, there was no scientific evidence or sociological data at its disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children. In addition, the laws of a significant number of Council of Europe member States either explicitly include teaching about same-sex relationships in the school curriculum or contain provisions on ensuring respect for diversity and prohibition of discrimination on the grounds of sexual orientation in teaching. In light of the foregoing, the Court found that the contested measures restricted children's access to information about same-sex relationships solely based on sexual orientation. Measures of this kind demonstrate that the authorities prefer some types of relationships (different-sex relationships) over others (same-sex relationships), thereby contributing to the continuing stigmatisation of the latter. Therefore, such restrictions, are incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.

In light of the above, the Court found that Lithuania violated Art. 10 ECHR because the contested measures had not pursued any legitimate aims for the purposes of that provision.

Radio Broadcasting Company B92 AD v. Serbia, Application No. 67369/16, Judgment of 5 September 2023

Payment of damages and removal of an online article, ordered against a company that owned a television channel and an Internet portal, constitute an interference with the right to impart information and to the freedom of press. National courts must assess all the relevant facts before imposing such sanctions, including the source of the information, whether the information contributed to a debate of general interest, the language used in the contested article, and whether the company tried to contact the interested persons to invite them to give a statement on the allegations thereby reported. Failure to do so amounts to a *violation of Art. 10 ECHR (Freedom of expression)*.

FACTS: The applicant, Radio Broadcasting Company B92 AD, owns a television channel and an Internet portal. In November 2011, the evening news reported about an ongoing controversy over the procurement of AH1N1 flu vaccines in

2009. Notably, the company reported that twelve names, including Z.P., an assistant health minister at the time, had disappeared from a police list of suspects of abuse of office in relation to the controversy, allegedly because of political pressure. In the following days, similar news slots were broadcast, and articles were published on the company's Internet portal. The reporting was based on a note from police officers, who handed it over to the company journalists. During the reporting, the journalists tried to contact interested persons (including Z.P.).

Following the company's refusal to publish a denial, in April 2012, Z.P. instituted civil proceedings against the company. The domestic courts found that the company broadcasts and online articles had damaged Z.P.'s honour and reputation, and ordered it to pay damage and costs, alongside removing the contested article from the Internet portal and publishing the judgment against it. In 2016, the Constitutional Court concluded that the judgments in question interfered with the company's freedom of expression, but that the interference had been necessary for the protection of the claimant's rights and reputation and that the remedial measures were proportionate.

Held: The final civil judgment given against the applicant company amounted to an "interference by [a] public authority" with its right to freedom of expression. The interference was provided by law and pursued the legitimate interest of protecting the reputation or rights of others, in accordance with Art. 10(2) ECHR.

In the assessment of the proportionality of the limitation, the Court focused on several aspects. First, it found that the information in question contributed to a debate of general interest. Second, it held that the person concerned was a public figure and, as such, should have shown a greater degree of tolerance given that the information in question related to alleged irregularities in her work and not to her private life. Third, the means used by the applicant to obtain a copy of the document in question fell within the scope of the freedom of investigation inherent in the practice by journalists of their profession, as the note was handed over by two police officers (and its veracity had never been contested) and the domestic courts did not contest that, by publishing the information, the company violated the law on confidentiality or had undermined the proper administration of justice.

Fourth, the Court highlighted the distinction between statements of fact and value judgments: the existence of the former can be demonstrated, whereas the truth of the latter is not susceptible to proof. The domestic courts considered the disputed allegations to be statements of fact and as such susceptible to proof. However, the Court considered that the allegation on the political pressure exercised to delete Z.P.'s name was a value judgment, thus not susceptible to proof. This conclusion is based on the language used in the company's reporting of this

allegation (e.g., it spoke of "a reason to suspect" and "the police's list of suspects"), which were accurate and without exaggeration. Moreover, in the context of the investigation, the company contacted – among others – Z.P. to invite him to give a statement. In light of the foregoing, the applicant could not be criticised for having failed to take further steps to ascertain the truth of the disputed allegations, as it acted in good faith and with the diligence expected of a responsible journalist reporting on a matter of public interest. Lastly, the Court found that the sanction could have a dissuasive effect on the exercise of the applicant's right to freedom of expression.

Furthermore, the Court highlighted that the domestic courts did not adequately apply standards which were in conformity with the principles embodied in Art. 10 ECHR, and have not based themselves on an acceptable assessment of the relevant facts, because they had failed: i) to examine the elements of the case that were necessary for the assessment of the applicant's compliance with its duties and responsibilities under Art. 10 ECHR; and ii) to give relevant and sufficient reasons to justify the interference.

In light of the above, the Court found that Serbia violated Art. 10 ECHR because the interference with the applicant's right was not proportionate to the aim pursued.

Sarısu Pehlivan v. Türkiye, Application No. 63029/19, Judgment of 6 June 2023

Disciplinary sanctions against judges who express their opinion on constitutional reforms (e.g, in a newspaper interview) affecting the judiciary constitute an interference with their freedom of expression. National authorities cannot impose such disciplinary sanctions when judges act in their capacity of secretary-general of a judges' trade union, if their statements highlight the importance of preserving the independence of the judiciary, and if there are no procedural guarantees to challenge the disciplinary sanctions. To do so would amount to a *violation of Art. 10 ECHR (Freedom of expression)*.

FACTS: The applicant was a Turkish born national who, at the relevant time, was a judge and was also secretary-general of a judges' trade union, an organisation founded in 2016 and aimed at promoting the rule of law and upholding the independence and impartiality of the judiciary. In January 2017, the Turkish Constitution was amended. Notably, significant changes to the or-

ganisation of the judiciary were introduced. In February 2017, a national daily newspaper published an interview with the applicant, in its print edition and on its website, concerning the constitutional reform of the judiciary.

A few days later, the High Council of Judges and Prosecutors forwarded a letter of complaint concerning the interview to an inspector for examination. In June 2017, in line with the inspector's recommendation, the Council of Judges and Prosecutors (CJP), as it became known after the entry into force of the constitutional amendments in April 2017, issued an authorisation to investigate in respect of the applicant. In September 2018, the CJP issued a reprimand to the applicant and, subsequently, decided to reduce the penalty and imposed a deduction of two days' salary. In 2019, the CJP rejected the applicant's requests for review, which was based in particular on the freedom of association and expression enjoyed by judges.

HELD: The applicant's complaint under Art. 10 ECHR raises questions of general importance, and in particular whether a member of the judiciary who represents his or her colleagues may rely on the right to freedom of expression to criticise publicly constitutional amendments, which have judicial and political implications, and under what conditions the sanctions imposed in response to such an act may be regarded as necessary in a democratic society.

In the case at hand, the imposition of a disciplinary sanction interfered with the right to freedom of expression of the applicant. The interference had a legal basis in domestic law, thus it was "prescribed by law", and the measure pursued the legitimate aim of guaranteeing the authority and impartiality of the judiciary. In the assessment of whether the measure was "necessary in a democratic society", the Court considered two elements.

First, it noted that, when she had made the statements at issue, the applicant had been a judge and the secretary-general of a judges' trade union, and that she had been interviewed in this latter capacity. Accordingly, in view of the role of that trade union and of the applicant therein, she had the right and duty to express an opinion on questions concerning the functioning of the justice system (see also e.g., CCEJ, Opinion 25 on the freedom of expression of judges, 2 December 2022).

Second, the Court considered the content of the applicant's comment. Her statements had concerned the impact of the constitutional reform on the independence of the judiciary vis-à-vis the executive, and had highlighted – *inter alia* – the importance of preserving that independence (for similar concerns, see also Venice Commission, Turkey - Opinion on the amendments to the Constitution adopt-

ed by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, March 2017, CDL-AD(2017)005-e). Therefore, her remarks had formed part of a debate on matters of public interest and warranted a high level of protection under Art. 10 ECHR. In this connection, the Court recognised that the political implications of the applicant's statements were not sufficient in themselves to justify restricting her freedom of expression as secretary-general of the judges' trade union in an area affecting the essence of her profession. Moreover, even if the sanction imposed on the applicant could be regarded as relatively mild, its imposition had a chilling effect on the applicants and on other members of the judiciary.

As to the procedural aspect, none of the decisions adopted by the CJP revealed that the applicant's right to freedom of expression was weighted against her duty of discretion and restraint as a judge, nor had such decisions specified which specific passages or expressions in the disputed interview were considered prejudicial to the prestige of the judiciary and politically biased. Therefore, the Court considered that the national authorities had not provided sufficient reasons to justify the impugned sanction. Lastly, any judge who is the subject of disciplinary proceedings is entitled to safeguards against arbitrariness, and notably an opportunity to have the measure in question scrutinised by an independent and impartial body competent to censure any abuse by the authorities. This had not been the situation at hand, because the CJP had acted as both the prosecuting authority and the final decision-making authority in a case concerning statements' commenting on its own composition, functioning, independence and impartiality. Moreover, the applicant had not had any judicial remedy in respect of the measure taken against her by the CJP.

In light of the above, the Court found that Turkey violated Art. 10 ECHR, because the disciplinary sanction imposed on the applicant had not been necessary in a democratic society.

Hurbain v. Belgium [GC], Application No. 57292/16, Judgment of 4 July 2023

The press has an important role in the creation and maintenance of archives, including online archives, gathering articles lawfully published in a print format years earlier. Requests for alteration of e-version articles constitutes an interference with press freedom. As a consequence, national authorities must strike a fair balance between the freedom to impart information (including the continued online availability of information on

criminal proceedings), on the one hand, and the right to be forgotten online (linked to the protection of personal reputation), on the other. National authorities (including courts) may order the alteration of e-version articles (e.g., their anonymisation) if it is strictly necessary for the protection of the concurring right to be forgotten online; in such exceptional cases, there will be no *violation of Art. 10 ECHR (Freedom of expression)*.

FACTS: The applicant, a Belgian national, was a publisher of the daily newspaper *Le Soir*, one of Belgium's leading French-language daily newspapers. In a 1994 print edition, an article reported on a car accident that had caused the death of two people and injured three others. It mentioned the full name of the driver, who served his sentence and was rehabilitated in 2006. In 2008, the newspaper uploaded on its website an electronic, open-access version of its archives dating back to 1989 (including the above mentioned article).

In 2010, the driver requested *Le Soir* to remove or anonymise the e-version of the article. The request mentioned that he was a doctor and that the article appeared among the results when his name was entered in several search engines. The request was refused, but the journal stated that it had given notice to the managing director of Google Belgium to delist the article. These steps produced no response. In 2012, the driver instituted civil proceedings against the applicant seeking an order for the anonymisation of the article. The domestic courts allowed the driver's claim. The domestic courts also addressed the relationship between the right to be forgotten, under Art. 8 ECHR, and the freedom of expression of the press, under Art. 10 ECHR.

In a Chamber judgment of 22 June 2021, the Court concluded that Belgium did not violate Art. 10 ECHR. Following a request by the applicant, the panel of the Grand Chamber accepted the referral of the case.

HELD: The civil judgment against the applicant ordering him to anonymise the impugned article, on grounds of the "right to be forgotten", amounted to interference with his right to freedom of expression. The contested judgments by Belgian Court had a foreseeable legal basis and pursued a legitimate aim, namely the protection of the reputation or rights of others (in this instance, the driver's right to respect for his private life). Therefore, the issue before the Court was whether the interference was "necessary in a democratic society", within the meaning of Art. 10(2) ECHR.

The Court highlighted that the case concerned the e-version of an article, thus it related solely to the continued availability of the information on the Internet rather than its original printed version.

The Court observed that, under Art. 10 ECHR, the press has – *inter alia* – the role of maintaining archives, including online ones (see e.g., General Data Protection Regulation, "GDPR"; Council of Europe Protocol incorporating a modernised version of the Convention+108). Since the role of archives is to ensure the continued availability of information that was published lawfully at a certain point in time, they must, as a general rule, remain authentic, reliable and complete. The national authorities must be particularly vigilant in examining requests, grounded on respect for private life, for removal or alteration of the e-version of an archived article.

The Court observed that the reasoning of the national courts in the case at hand focused on the driver's "right to be forgotten", which is linked to an individual's interest in obtaining the erasure or alteration of, or the limitation of access to, past information that affects the way in which the person is currently perceived by public opinion. There is also a risk of other three harmful effects: first, the aggregation of information may lead to the creation of a profile of the person concerned; secondly, if the information is not placed in context, this may entail that an individual receives a fragmented and distorted picture of the reality; third, irrespective of the actual frequency of searches linked to a particular name, the person in question may feel a constant threat and the resulting fear of being unexpectedly confronted with his or her past again at any time. Against this backdrop, the issue before the Court was whether (and to what extent) Art. 8 ECHR affords protection against these negative effects. In this regard, the right to be forgotten does not have an autonomous nature but is linked to the right for respect for reputation.

More specifically, the Court addressed whether the judgments of Belgian Court had struck a fair balance between the right to be forgotten online, under Art. 8 ECHR, and the right to freedom of expression, under Art. 10 ECHR. The Court recalled that it had developed an extensive body of case law on this matter in relation to applications concerning initial publication. However, the case at hand concerned the e-version of an article. Therefore, the Court had to adjust the criteria to resolve a conflict between the respective rights to the specific context of the case.

As for the nature of the archived information, Belgian courts correctly qualified the facts reported in the article as of a judicial nature. The facts reported on the car accident do not fall into the category of offences whose significance, owing to their seriousness, is unaltered by the passage of time. Moreover, those events were not the subject of any media coverage and did not attract widespread publicity (either at the time of the events nor where the article was uploaded online).

The Court also observed that the passage of a significant length of time has an impact on the question whether a person should have a "right to be forgotten". In the case at hand, the Belgian court of appeal considered that sixteen years

had elapsed between the initial publication of the article and the first request for anonymisation and, in all, some twenty years had passed by the time of delivery of its judgment. Thus, the applicant, who had been rehabilitated in 2006, had a legitimate interest, after all that time, in seeking to be allowed to reintegrate into society without being permanently reminded of his past.

As for the contemporary interest of the information, the Belgian Courts found that twenty years after events that were not topical and clearly not of historical significance, the identity of a person who was not a public figure did not add to the public interest of the article, which merely made a statistical contribution to a public debate on road safety.

As regards a person's public profile and his/her conduct since the event, the Court recalled that the fact of staying out of the media spotlight might weigh in favour of protecting a person's reputation. In the case at hand, Belgian courts correctly underlined that the applicant was an individual who was unknown to the public and had not sought the limelight.

Moreover, it is important to assess the consequences of the continued availability of the judicial information for the person's reintegration into society by also considering other factors (e.g., whether he/she had been rehabilitated). In the case at hand, the Belgian Court correctly pointed out that the presence of the article in the online archives had been liable to stigmatise the applicant, who was a doctor, and to seriously damage his reputation in the eyes of his patients and colleagues in particular and prevent him from reintegrating into society normally.

Concerning the degree of accessibility of the information, Belgian courts correctly noted that the article was accessible without restrictions and free of charge since being placed online. The continued presence of the article in question in the archives undoubtedly caused harm to the applicant.

In relation to the impact of the measure on freedom of the press, due to the importance of the integrity of digital press archives, national court should give preference to the measure that was both best suited to the legitimate aim pursued by that person and least restrictive of the press freedom. In the case at hand, Belgian courts had considered this twofold objective and had held that the most appropriate means was to anonymise the article on the newspaper's website. The Court noted that the original, non-anonymised, and printed version of the article was still available and could be consulted by any person who was interested, thus fulfilling its inherent role as an archive record. Moreover, it recalled that anonymisation is less detrimental to freedom of expression than the removal of an entire article. In the case at hand, it concerned only the name of the driver.

Lastly, with regard to the possible chilling effect on freedom of the press, the Court considered that for a publisher to anonymise an article may in principle fall within the "duties and responsibilities" of the press, within the meaning of Art. 10 ECHR, and the limits which may be imposed on it. In the case at hand, the anonymisation order had no real impact on the performance by the newspaper of its journalistic tasks.

In light of the above, the Court found that Belgium did not violate Art. 10 ECHR, because its national courts had acted within their margin of appreciation and had struck a fair balance: the interference with the right to press freedom (Art. 10 ECHR) had been limited to what had been strictly necessary for the protection of the concurring right to be forgotten online (Art. 8 ECHR). Therefore, the interference was necessary and proportionate for the purpose of Art. 10(2) ECHR.

Sanchez v. France [GC], Application No 45581/15, Judgment of 15 May 2023

When politicians decide to use a publicly accessible social media account (such as a Facebook "wall") for political purposes (e.g., an election campaign), they bare duties and responsibilities, including preventing and blocking "hate speech" by third parties – especially if the politician was made aware of the hateful remarks. The politician's criminal conviction constitutes an interference with his freedom to impart information. However, if the language of the third-party's comments clearly incites hatred and violence against a person on account of his or her religion, such interference may be considered legitimate taking into account the penalty (e.g. a lenient fine) and the other consequences faced by the politician – *No violation of Art. 10 ECHR (Freedom of expression).*

FACTS: At the time of the events, the applicant was mayor of a town and was standing for election to Parliament for the Front National (FN) party and had had professional expertise in matters of online communication strategy. In October 2011, the applicant posted a message about his political opponents on his publicly accessible Facebook "wall", which he ran personally. Two persons added several comments under his post. In the same month, the partner of the applicant's political opponent became aware of those comments, which she deemed as "racist". She went directly to the shop run by S.B. (one of the commentators), who immediately deleted the contested comment. The political opponent's partner also requested the public prosecutor to lodge a criminal complaint against the applicant and the two commentators. The day after, the

applicant posted a message on his "wall" inviting the users to be careful on the content of their comments; nevertheless, he did not intervene in relation to the comments already posted.

In 2013, the applicant and the abovementioned commentators were convicted of incitement to hatred or violence against a group or individual (in particular, the opponent's partner) on account of their origin or the fact of belonging or not belonging to a specific ethnic group, nation, race or religion. In particular, the rulings found that the comments clearly defined the group concerned, namely persons of Muslim faith, and that associating the Muslim community with crime and insecurity was likely to arouse a strong feeling of rejection or hostility towards that group. The applicant was found guilty as principal offender. He had set up an online service for communication (the Facebook "wall") and made it open to the public, so he had assumed responsibility for the content of the offending comments posted. Moreover, his status as a politician required him to be even more vigilant. In the case at hand, he had failed to act promptly to stop the dissemination of such offending comments. The two commentators were found guilty as accomplices.

The applicants and the two commentators were ordered to pay a fine of EUR 4,000 each (later reduced by the court of appeal to EUR 3,000). The applicant and one of the commentators were also ordered, jointly, to pay the sum of EUR 1,000 to the opponent's partner in compensation for her non-pecuniary damage (that the court of appeal requalified as costs).

HELD: The applicant's criminal conviction constituted an interference with his right to freedom of expression, as guaranteed by Article 10 ECHR.

The interference was "prescribed by law", since the domestic legal basis of his conviction was sufficiently precise on matters of shared liability. Notably, the relevant domestic legal basis, as interpreted by national courts, defines "producer" as a person who had taken the initiative of creating an electronic communication service for the exchange of opinions on pre-defined topics – as the applicant's Facebook "wall" in the case at hand. The French Court had never applied the relevant domestic provisions to the question of the liability of a Facebook account holder (in the specific case, a politician during an election campaign) for remarks posted on his or her "wall" (particularly in a political and electoral context) had never been addressed. Still, the novelty of the legal questions was not in itself incompatible with the requirements of accessibility and foreseeability of the law, and the domestic courts' interpretation was not arbitrary or manifestly unreasonable.

The applicant's conviction pursued the legitimate aims of protecting the reputation or the rights of others, and the prevention of disorder and crime.

The Court assessed whether the interference was "necessary in a democratic society". It recalled that there is little scope under Art. 10(2) ECHR for restrictions on freedom of expression in the field of political speech. Nevertheless, freedom of political debate may be limited to penalise or even prevent all forms of expression that propagate, encourage, promote or justify hatred based on intolerance, provided that preventive and repressive measures are proportionate to the legitimate aim pursued. In the case at hand, the Court had to assess the proportionality of the limitation imposed on the applicant's right.

First, the Court considered the nature of the comments, the political context and the applicant's specific liability in respect of comments posted by third parties. As for the nature of the comments, the Court noted that there is no universal definition of "hate speech", therefore examination of the content of the disputed comments was necessary, particularly in the light of the domestic courts' decisions. The Court observed that the impact of racist and xenophobic discourse becomes greater and more harmful in the election context, in particular where the political and social climate, at the local level is troubled – as in the case at stake. In light of the above, the contested comments amount to hate speech.

In relation to the political context and the applicant's specific liability in respect of comments posted by third parties, the Court highlighted that the specific features of the case prompted an approach based on "duties and responsibilities", within the meaning of Art. 10(2) ECHR of political figures when they decide to use social media for political purposes. Producers and users of social media platforms are subject to a shared-liability regime which allows for a graduated attribution of liability according to the specific situation at stake. French law was consistent with such a view. Moreover, the language used in the comments at issue clearly incited hatred and violence against a person on account of his or her religion and this cannot be disguised or minimised by the election context or by a wish to discuss local difficulties.

In addition, the Court observed that a further issue concerned the steps that the applicant ought to have – or could have – reasonably taken in his capacity as "producer" as defined by domestic law. First, the applicant had chosen to make his Facebook "wall" publicly accessible. The applicant had been aware of the potentially serious consequences of his decision in view of the local and election-related tensions at the time (also considering his expertise in the digital field). Moreover, even if the applicant had requested the other us-

ers to ensure that their comments remained lawful, he had not deleted the contested remarks. In connection to this, the Court noted that the applicant had been convicted for failing to proceed with the prompt deletion of all the unlawful comments in question – i.e., not on account of the remarks made by the two authors taken in isolation. Furthermore, the domestic courts had issued reasoned decisions and had proceeded with a reasonable assessment of whether the applicant had been aware of the unlawful comments posted on his Facebook "wall". In the case at hand, only about fifteen comments had appeared in response to his post. Accordingly, no question arose as to the difficulties caused by potentially excessive traffic on a politician's account and the resources required to ensure its effective monitoring.

Furthermore, the Court noted that the acts of which the applicant stood accused were both distinct from those committed by the authors of the unlawful comments and governed by a different regime of liability, one that was related to the specific and autonomous status of "producer". Accordingly, the applicant was not prosecuted instead of the authors of the comments, who themselves were also convicted and sentenced.

Lastly, the Court acknowledged that a criminal conviction may have a chilling effect for users of social media platforms. However, the applicant was only sentenced to a EUR 4,000 fine, later reduced to EUR 3,000, together with the payment of EUR 1,000 to the civil party. There were no other consequences for the applicant's enjoyment of his right of freedom of expression on social media or in the political arena.

In light of the above, the Court found that France did not violate Art. 10 ECHR, since the criminal conviction was an interference "necessary in a democratic society": the decisions of the domestic courts were based on relevant and sufficient reasons, both as to the liability attributed to the applicant, in his capacity as a politician, for the unlawful comments posted in the run-up to an election on his Facebook "wall" by third parties, who themselves were identified and prosecuted as accomplices, and as to his criminal conviction.

Glukhin v. Russia [GC],[3] Application No. 11519/20, Judgment of 4 July 2023

Domestic courts must not permit the arrest or impose administrative sanctions (e.g., a fine) on a peaceful solo demonstrator for failing to submit prior notification of his demonstration, without providing relevant or sufficient reasons to justify the conviction. Acting in this way amounts to a *violation of Art. 10 ECHR (Freedom of expression)*.

FACTS: In August 2019, the applicant travelled on the Moscow underground with a life-size cardboard figure of Kotov, a protestor whose case had caused a public outcry and had attracted widespread attention in the media, holding a banner that said: "You must be f**king kidding me. I'm Konstantin Kotov. I'm facing up to five years [in prison] under [Article] 212.1 for peaceful protests". During routine monitoring of the Internet, the police discovered photographs and a video of the applicant's demonstration uploaded on a public Telegram channel. According to the applicant, police had used facial-recognition technology to identify him from screenshots of the Telegram channel, collected footage from the surveillance cameras installed in Moscow underground and, several days later, used live facial-recognition technology to locate and arrest him while he was travelling in the underground.

He was convicted in administrative-offence proceedings for failure to notify the authorities of his solo demonstration using a "quickly (de)assembled object", as requested by domestic law. He was fined 20,000 Russian roubles (RUB – about 283 EUR). The screenshots of the Telegram channel and of the video-recordings were used as evidence against him. After the entry into force of a decree on transport security, between 2017 and 2022, more than 220,000 cameras were installed in Moscow, including in the underground. All cameras were equipped with live facial-recognition technology.

HELD: The Court held that the applicant's escorting to the police station, administrative arrest and conviction for an administrative offence constituted an interference with his right to freedom of expression on a matter of public interest. The Court determined whether such limitation complied with the requirements under Art. 10(2) ECHR. As regards the "prescribed by law" criterion, the

3 *Despite ceasing to be a party of the Council of Europe, the ECtHR continues to examine human rights violation in Russia. The facts giving rise to the alleged violations of the Convention occurred prior to 16 September 2022, the date on which the Russian Federation ceased to be a party to the Convention. Thus, the Court had jurisdiction to examine the application (see Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Art. 58 of the European Convention on Human Rights, 22 March 2022).*

Court observed that the national provision did not satisfy the foreseeability criterion. Even assuming that it met such condition and that it pursued the legitimate aims of preventing disorder and protecting the rights and freedom of others, the interference was not "necessary in a democratic society". In particular, his solo demonstration had indisputably been peaceful and non-disruptive to ordinary life (or other activities), nor was it claimed that his actions had jeopardised public order or transport safety. In fact, the offence of which he had been convicted had consisted merely of a failure to notify the authorities. Nevertheless, the domestic courts did not consider these elements. Thus, the domestic courts had failed to adduce relevant or sufficient reasons to justify the interference with the applicant's right to freedom of expression.

In light of the above, the Court found that Russia violated Art. 10 ECHR, because the interference in the applicant's right to freedom of expression was unjustified.

The applicant also complained that Russia violated Art. 8 ECHR (Right to private life) – on this point, see Section VIII.

V FREEDOM OF ASSOCIATION

Yüksel Yalçınkaya v. Türkiye, Application No. 15669/20, Judgment of 26 September 2023

Membership of a lawfully established trade union and to an association represent an exercise of a person's freedom of association. Domestic courts cannot consider these memberships as evidence to corroborate a person's membership of an armed terrorist organisation and, consequently, to convict that person – *violation of Art.11 ECHR (Freedom of association)*.

FACTS: Since 2014, Turkish authorities has considered the "Fetullahist Terror Organisation/Parallel State Structure" (FETÖ/PDY) as a structure "threatening public peace and security" and, subsequently, as an armed terrorist organisation. In early 2016, the national intelligence service engaged in intelligence gathering activities in relation to the FETÖ/PDY by accessing the main server of the encrypted messaging application "ByLock", located in Lithuania, on the assumption that this application was being used exclusively by the members of that organisation for internal communication.

During the night of 15 to 16 July 2016, an attempted coup tool place in Turkey. The authorities considered that the FETÖ/PDY was behind the operations. Between 20 and 21 July, the Government declared the state of emergency, which was notified to the Secretary General of the Council of Europe pursuant to Art. 15 ECHR.

In this context, the applicant was indicted of membership of the armed terrorist organisation member of the (the FETÖ/PDY, in the view of Turkish authorities) on the basis of the following evidence: being identified as a user of "ByLock", an encrypted messaging application; suspected movements on his bank account; his former membership of a trade union declared as belonging, affiliated, or linked to the FETÖ/PDY; his dismissal from public service; and an anonymous call stating that he was a member of the FETÖ/PDY.

Later, he was convicted of the offence of membership of an armed terroristic organisation. This conviction was based decisively on his use of "ByLock", whilst the remaining evidence included in the indictment bill served only as a source of corroboration.

For further information, see Section II.A.

HELD: From the outset, the ECtHR observed that the applicant's conviction for membership of an armed terrorist organisation was based to a decisive extent on his alleged use of "ByLock". Nevertheless, the memberships to a trade union and another organisation represented the exercise by the applicant of his right to freedom of association, protected by Article 11 ECHR. Thus, the fact that this was used, even to a limited extent, to convict him, warrants examination of this complaint by the Court.

In the case at hand, the judicial authorities' reliance on the applicant's membership of a trade union and an association constituted an interference with his rights under Article 11 ECHR. Such interference was illegitimate as it was not prescribed by law within the meaning of Art. 11(2) ECHR. The domestic courts overly extended, in an unforeseeable manner, the scope of the national provision establishing the criminal offence of membership of an armed terrorist organisation: according to the domestic courts, the applicants' membership of a trade union and an association (both operating lawfully at the material time) was considered as evidence corroborating his membership of the FETÖ/PDY. Therefore, national courts did not afford the requisite minimum protection against arbitrary interference.

The Court excluded that the interference with the applicant's right to freedom of association was justified taking into account the Government's derogation under Art. 15 ECHR. In this regard, the Government did not provide explanations as to whether the specific use made by the domestic courts of the applicant's membership of the trade union and association in question had been strictly required by the exigencies of the situation giving rise to the state of emergency.

In light of the above, the Court concluded that Turkey violated Art. 11 ECHR since the Government had failed to show that the interference with the applicant's rights could be regarded as being strictly required by the exigencies of the situation under Article 15.

The applicant also complained that Turkey violated Art. 6(1) ECHR (Right to fair trial) and Art. 7 ECHR (*Nullum crimen sine lege, nulla poena sine lege*) – see Sections II.A and III.

VI NON-DISCRIMINATION

Pająk and Others v. Poland, Applications Nos. 25226/18 and 3 others, Judgment of 24 October 2023[4].

National authorities cannot mandate the retirement of female judges five years earlier than male judges in the same situation, since the profession is intellectual in nature and biological differences between men and women, or any potential considerations as to the role of women in society, are immaterial to the aptitude of either sex to engage in professions of that nature. Moreover, enforcing early retirement on female judges has serious negative repercussions on their financial stability, career progression, prospects for personal and professional growth, and their professional and social standing – *Violation of Art. 14 (taken in conjunction with Art. 8) ECHR (Prohibition of discrimination on ground of sex and gender vis-à-vis the right to respect for private life)*.

FACTS: In 2017 and 2018, a series of legislative amendments lowered the retirement age for judges from 67 to 60 for women, and to 65 for men, and had made the continuation of a judge's duties after reaching retirement age conditional upon authorisation by the Minister of Justice and by the National Council of the Judiciary ("the NCJ").

At the relevant time, the applicants, who were judges, had all reached the age of 60. Wishing to continue in their posts until the age of 70, they requested authorisation to do so. Three applicants also attached medical certificates attesting that their state of health permitted them to sit; the fourth applicant refused to submit such medical certificate on the grounds that male judges were not required to do so in similar circumstances and that such an obligation was therefore discriminatory. The Minister of Justice rejected all their requests. One of the applicants lodged a request with the NCJ, without success. The same applicant challenged the Minister's decision before the Supreme Court arguing – *inter alia* – that the legislation in question was discriminatory on the grounds of sex and age. The Supreme Court declared her application inadmissible.

4 See also Section IV.

HELD: The Court noted that cases concerning labour disputes fall under Art. 8 ECHR in its "private life" aspect when the loss of a job has a serious negative impact on private life (see *Denisov v. Ukraine* [GC], App. No 76639/11, 25 September 2018). In the case at hand, the Court determined that the contested measures had a serious negative impact on the applicants' private life as a result of: i) the loss of earnings; ii) the consequences for their careers and prospect for personal and professional development; iii) the consequences for their professional and social reputation (e.g., due to the lack of opportunity for them to find employment in retirement), alongside the deep feeling of frustration due to the impossibility to attain satisfactory professional fulfilment.

The Court noted that the contested national legislation clearly introduced an unjustified difference in treatment, on the ground of sex, as to the retirement age of judges, i.e., members of the same profession. The applicants' professions had been intellectual in nature and biological differences between men and women, and any potential considerations as to the role of women in society, were immaterial to the aptitude of either sex to engage in professions of that nature; nor did the Government submit any evidence in this regard. Moreover, it is particularly worrying that only female judges were required to prove by means of a medical certificate that they were still intellectually fit to sit. The Court found that the difference in treatment between female judges and male judges could not be objectively and reasonably justified with regard to Art. 14 ECHR.

As a result of the combination of the national legislation and the ministerial and NCJ's decisions, the applicants' working life had ceased five years earlier than that of male judges in similar situations; this situation also resulted in the applicants' sustaining loss of earnings compared to male judges. These factors demonstrated that the applicants suffered a discriminatory treatment compared to male judges, which had a serious impact on their private life within the meaning of Art. 8 ECHR.

In light of the above, the Court found that Poland violated Art. 14 ECHR, in conjunction with Art. 8 ECHR, due to the unjustified discrimination that the applicants suffered compared to male judges in relation to their private life.

The applicants also complained that Poland violated Art. 6 ECHR (Right of access to a court) – on this point, see Section II.C.

VII PROTECTION OF PROPERTY

S.C. Zorina International S.R.L. v. Romania, Application No. 15553/15, Judgment of 27 June 2023

Imposing sanctions for offences related to tax evasion constitute an interference with the right to property. Such interference is legitimate if it is provided by national law, it pursues the aim of combating tax evasion (including when it represents a recurring problem at national level), it is accompanied by fair judicial review proceedings before domestic courts, and if the sanction is proportionate to the seriousness of the offence (e.g., a temporary suspension of the business activities). In these circumstances there is *No violation of Art. 1, Protocol No 1 (Protection of property)*.

FACTS: The applicant, S.C. Zorina International S.R.L., is a company based in Romania. In March 2013, following an inspection, the tax authority reported that the company had failed to issue receipts for an amount of RON 179 (approximately EUR 40), and that no explanation for that failure had been provided by the company's representative, who was present during the inspection. The company was fined RON 8,000 (approximately EUR 1,900) and the sum of RON 179 (approximately EUR 40) was confiscated; moreover, the company's activities were suspended for a three-month period.

HELD: The interference with the applicant's property rights fell within the measures for "the control of the use of property", and specifically, in respect of the fine, measures "to secure the payment of taxes or other contributions or penalties", within the scope of Art. 1, Prot. No. 1 ECHR.

The cumulative sanctions imposed on the applicant were prescribed by law and pursued the legitimate aim of combating tax evasion and improving financial responsibility among traders. In the determination of whether the sanctions were proportionate, the Court recalled that States have a wide margin of appreciation in tax matters. The offence committed by the applicant represented part of a recurring problem at national level, which, as established by the national courts, prevented the proper and efficient functioning of the

economy. The sanctions imposed on the applicant were related to Romania's fiscal policy, which attempted to encourage more discipline and responsibility in the field of business and accounting. Moreover, the applicant had recourse to fair judicial review proceedings. The domestic courts upheld the sanctions by deeming them proportionate to such aim. Their assessment fall within the domestic courts' margin of appreciation. Moreover, the impact of the suspension of the applicant's activity was temporary in nature, and the company never filed for bankruptcy and managed to stay operational, even if in more difficult circumstances.

In light of the above, the Court found that Romania had not violated Art. 1, Prot. No. 1 ECHR, because the national authorities struck a fair balance between the general interest, on the one hand, and respect for the applicant company's right of property, on the other – i.e., the interference with the applicant's right to property was proportionate to the aim pursued.

Yordanov and Others v. Bulgaria, Applications Nos. 265/17 and 26473/18, Judgment of 26 September 2023

If national law mandates the forfeiture of "unlawfully acquired" assets (i.e., assets for which no lawful origin is established), domestic courts must demonstrate a clear connection between the offence (whether criminal or administrative) that generated the funds used to purchase the assets and the assets targeted for forfeiture. Failure to act in this way amounts to a *violation of Art. 1, Protocol No 1, ECHR (Protection of property)*.

FACTS: In 2012, Bulgaria adopted the Forfeiture of Unlawfully Acquired Assets Act (2012 Act), which provided for the forfeiture of "unlawful" assets (i.e., assets for which no lawful origin is established). Forfeiture proceedings were detached from any criminal proceedings and their outcome: forfeiture proceedings open if the defendant engages in unspecified criminal or unlawful activities. The 2012 Act repealed the 2005 Forfeiture of Proceeds of Crime Act (the 2005 Act), which was affected by several deficiencies (see *Todorov and Others v. Bulgaria*, Applications Nos. 50705/11 and 6 others, Judgment of 13 July 2021). The 2005 Act provided for the forfeiture of proceeds of crime following a conviction by a court of law and, according to the case-law of national courts, a causal link between the offence committed and the assets to be forfeited.

The applicants are three Bulgarian nationals (two of them living in Bulgaria, the other living in Belgium) and a company, whose registered office is in Bulgaria. All the applicants were convicted for tax-related offences, such as evading the payment of income tax and using forged documents. The Bulgarian courts ordered the forfeiture of assets owned by the applicants. The orders were adopted under the 2012 Act and concluded that all the assets subject to the forfeiture application had been unlawfully acquired (i.e., the applicants failed to prove the lawful origin of that money). The link between the offence committed and the assets to be forfeited was not established: according to the Bulgarian courts such a link was not required under the 2012 Act, since this piece of legislation was concerned with all unlawfully acquired assets and not necessarily with proceeds of crime. After the end of the forfeiture proceedings, some of the forfeited assets were put up for public sale and sold to third parties. No part of the sums of money due has been collected from the applicants.

HELD: The forfeiture of the applicants' assets had amounted to an interference with their rights under Art. 1, Prot. No. 1 ECHR. The interference had a basis in domestic law (the 2012 Act) and pursued a legitimate aim in the public interest, i.e. to prevent the illicit acquisition of property through criminal or administrative offences.

In performing the assessment of the proportionality of the interference, the Court found that the 2012 Act retained a significant number of the deficiencies affecting the 2005 Act, including its very wide scope of application (e.g., a broad list of offences which could trigger forfeiture proceedings) and its retroactive application (the 2012 Act applies to offences committed years before its entry into force, as occurred with regards to one of the applications). These shortcomings rendered the task of proving the lawful income source or origin of any assets difficult for the applicants.

Moreover, considering the similarities between the 2005 Act and the 2012 Act, the Court adopted an approach similar to that established in its previous case-law (*Todorov and Others v. Bulgaria*, quoted above). In particular, the Court reiterated that a forfeiture under the 2012 Act would have been in compliance with Art. 1, Prot. 1 ECHR only if the national courts could demonstrate a clear connection between the offence (whether criminal or administrative) that generated the funds used to purchase the assets and the assets targeted for forfeiture. This link was the essential counterbalance to the deficiencies of the 2012 Act and the State's advantage in the forfeiture proceedings. In the case at hand, the Bulgarian courts did not establish the existence of a link between the (administrative or criminal) offences and the assets in questions. Therefore,

the required standards of protection were not satisfied and the interference with the applicants' rights was disproportionate.

In light of the above, the Court found that Bulgaria violated Art. 1, Prot. 1 ECHR, because the domestic courts failed to establish a link between the (administrative or criminal) offences and the assets subject to forfeiture, thus disproportionately limiting the right to property.

Alif Ahmadov and Others v. Azerbaijan, Application No. 22619/14, Judgment of 4 May 2023

In the case of an unauthorised house built in violation of construction rules, located in a State-owned zone, where the person concerned has no documentation proving the purchase of the dwelling, that person has no legitimate expectations of acquiring ownership rights. Moreover, if a person wishes to challenge the imposition to bare the expenses of the demolition of the dwelling, that person must contest either the lawfulness or proportionality of the order.

FACTS: The applicants are an Azerian family. In 1977, the first applicant allegedly bought a house by another individual; however, there was no sale and purchase contract in respect of the house. In July 1963, the competent national authorities had issued a technical passport reporting information on the house (e.g., address, habitable surface) to the former owner. The relevant part of the technical passport contained a note "no documents" as to the house owner.

In June 1981 and July 1982 plans of the house were added to the technical passport. According to the first applicant, he had applied to his employer asking to be included in the list for housing in 1982 and 1992, under a housing scheme developed for oil workers – such as the applicant. His application was rejected following visits made by the local authorities to his home. The first applicant has not provided copies of the relevant documents. In 2011 and 2017, the applicants signed the contracts for provision of water and gas.

In 2012, Azneft (a subsidiary of the State oil company) claimed the land on which the applicant's house was located by contesting that it had been unlawfully built on State owned land allocated to Azneft and in the protection zone of an oil well. In the same year, the domestic court held that the land in question was in Azneft's possession, that there was no evidence confirming

the applicants' rights over it and on the house. Therefore, the court ordered the applicants' eviction from the house and its demolition at their expense. Again in 2012, the competent authority issued a certificate to the first applicant. Among other information, the certificate stated that the house was an unauthorised construction and that the first applicant had been registered there since 1979, while the remaining applicants had been registered there since 1984.

For further information, see also Section II.B.

HELD: The Court reiterated that an applicant may allege a violation of Art. 1, Prot. No. 1 ECHR only in so far as the contested decision related to his or her "possessions" within the meaning of that provision. This concept also covers assets in respect of which the applicant can argue that he or she has at least a reasonable and "legitimate expectation" of obtaining effective enjoyment of a property right. An "expectation" is "legitimate" if it is based on either a legislative provision or a legal act which has a bearing on the property interest in question. In each case, the issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Art. 1, Prot. No. 1 ECHR.

In the case at hand, according to the applicants, the house was bought from another individual. There are, however, no documents relating to the purchase of the house. The Court found no cogent elements to question the conclusions reached by the domestic courts in regard to the house being built without any relevant authorisation or permit, and its location within the protection zone of the oil well. Moreover, there is no relevant provisions of domestic law which allow the applicants to obtain ownership rights in respect of the house, as the rules invoked by the applicants do not apply to their case. Therefore, they could not have had any legitimate expectation based on domestic law for the purpose of establishing "possession" under Art. 1, Prot. No. 1 ECHR.

Furthermore, the circumstances of the case, considered as a whole, could not be regarded as having conferred on the applicants the title to a substantive interest protected by Art. 1, Prot. No. 1 ECHR. First, it could not be established that the applicants paid any taxes on the house in question. As to the provision of utility services, it appeared that the first contracts for provision of water and gas had been signed in 2011. Moreover, the absence of any reaction from the State over a certain period of time should not have been understood as meaning that proceedings for the demolition of the house could not be brought against them. Lastly, the duration of the possession of the house alone is not enough to lead to the conclusion that the applicants' proprietary interest

amounted to a "possession" within the meaning of Art. 1, Prot. No. 1. In any case, the improvements made by the applicants to the house could not alter the Court's findings because – among other reasons – the applicants acted without a construction permit or authorisation and should have known that by making improvements to it they were investing in immovable property that did not belong to them.

In light of the above, this part of the application was incompatible ratione materiae with Art. 1, Prot. No. 1 ECHR and, thus, had to be declared inadmissible under Art. 35 ECHR.

With regard to the order which requires the applicants to demolish the house in question at their own expense, the Court found that the obligation imposed on the applicants constituted an interference with their property rights and that, therefore, Art. 1, Prot. No. 1 ECHR was applicable in respect of that part of the demolition order. However, the applicants did not sufficiently substantiate that there was an issue of lawfulness or proportionality of such interference.

In light of the above, this part of the application was manifestly ill-funded and was declared inadmissible under Art. 35 ECHR.

The applicants also claimed the violation of Art. 8 ECHR – on this point see Section II.B.

VIII NEW TECHNOLOGIES

Wieder and Guarnieri v. the United Kingdom, Applications Nos. 64371/16 and 64407/16, Judgment of 12 September 2023

If the interception of communications of people living abroad is performed by national intelligence agencies acting within the State's territory, then that State is exercising its *jurisdiction under Art. 1 ECHR as regards the interception process.*

Interception of communications constitutes an interference with the right to private life. If the bulk interception regime is affected by fundamental deficiencies (e.g., the lack of an authorisation from an independent authority), the interference amounts to a *violation of Art. 8 ECHR (Right to private life)*.

FACTS: The applicants were a US and Italian national, respectively. The former was an IT professional and an independent researcher who has worked with data and news organisations; the latter was a privacy and security researcher and has researched and published extensively on privacy and surveillance, including with *Der Spiegel* and *The Intercept*. As a result of their work and contracts, the applicants suspected that their communications might have been intercepted, extracted, filtered, stored, analysed and disseminated by the UK intelligence agencies pursuant to the national regime. Both applicants were based outside the British territory.

HELD: The Court had not had the opportunity to consider the question of jurisdiction under Art. 1 ECHR in the context of a complaint concerning an interference with an applicant's electronic communications, where the sender or receiver of communications is outside the territory of the respondent State. In *Big Brother Watch and Others* ([GC], Applications Nos. 58170/13 and 2 others, 25 May 2021), the Court considered that the principal interference with Art. 8 ECHR was the searching, examination and use of the intercepted communications. These stages of the interception process were carried out by the national intelligence agencies acting within United Kingdom territory. Under UK law, the interference with the privacy of communications clearly took place where

those communications were intercepted, searched, examined and used and the resulting injury to the privacy rights of the sender and/or recipient would also take place there.

In light of the above, the Court considered that the interference with the applicants' rights under Art. 8 ECHR took place within the United Kingdom and therefore fell within its territorial jurisdiction for the purpose of Art. 1 ECHR.

As for the applicants' right to privacy, the Court found that the United Kingdom violated Art. 8 ECHR for the reasons identified in the *Big Brothers Watch* case, namely: i) the absence of independent authorisation; ii) the failure to include the categories of selectors in the application for a warrant; and iii) and the failure to subject selectors linked to an individual to prior internal authorisation.

L.B. v. Hungary [GC], Application No. 36345/16, Judgment of 9 March 2023

The imposition of a statutory obligation to publish the data of tax debtors (including their name and home address) on the tax authority's website constitutes an interference with the tax debtor's right to private life. Even if this interference pursued legitimate aims (e.g., protecting the economic well-being of the State), national authorities must always perform an individualised proportionality assessment of the repercussions on the taxpayer's reputation – *violation of Art. 8 ECHR (Right to private life)*.

FACTS: The applicant was a Hungarian national. The Hungarian tax provision requires the tax authority to publish the personal data of taxpayers (including name and home address) whose arrears exceeded 10 million Hungarian forints (HUF – approximately 26,000 EUR) on a list of tax defaulters on its website. In 2006, "major tax debtors" (i.e., those whose tax debts exceeded HUF 10 million over a period of more than 180 days) were included in the publication scheme. The amendment was considered necessary to "whiten the economy", based on the consideration that unpaid tax debts were not only a matter of arrears, as it could also have been the result of conduct in breach of tax payment obligations.

Following a tax inspection in 2013, the competent authority found that the applicant had tax arrears amounting to HUF 227,985,686 (approximately EUR 625,000). He was fined HUF 170,883,486 (approximately EUR 490,000) with interest. In 2014 and 2016 respectively, the tax authority published the applicant's personal details

(including his name and home) on the online lists of tax defaulters and of "major tax debtors". In 2016, an online media outlet produced an interactive map of tax debtors shown with red dots, which indicated the applicant's name and home address, thus making the data available to all readers. His data was removed from the list of "major tax debtors" when his tax arrears became time-barred in 2019.

The Court had not previously been called on to consider whether, and to what extent, the imposition of a statutory obligation to publish taxpayers' data, including their home address, is compatible with Art. 8 ECHR.

HELD: It could not be excluded that disclosure of the applicant's identity and home address on the list might have had certain negative repercussions. Considering the above, the publication of the applicant's personal data entailed an interference with his right to respect for his private life within the meaning of Art. 8 ECHR.

The interference was lawful and pursued legitimate aims (i.e., the economic well-being of the country and the protection of the rights and freedoms of others), in line with Art. 8(2) ECHR. However, the Court found that the publication of the applicant's personal data was not necessary in a democratic society. In this regard, the Court, as a preliminary issue, noted that the disputed publication was not the subject of an individual decision by the tax authority, but fell within the systematic publication scheme set up by the legislature. A State can adopt general measures which apply to pre-defined situations regardless of the individual facts of each case (including schemes for the publication of data of tax debtors), provided that it acts consistently with the Convention and does not exceed its wide margin of appreciation. Nevertheless, such discretion is not unlimited. Therefore, the Court must be satisfied that the competent domestic authorities performed a proper balancing exercise between the competing interests.

In the case at hand, the national authorities did not weigh-up the competing individual and public interests, nor did they conduct an individualised proportionality assessment. Even if the publication of the relevant list corresponded to a legitimate public interest, the legislative history of the 2006 amendment did not disclose any assessment of the likely effects on taxpayer behaviour of the publication schemes that already existed since 2003. Moreover, it did not contain any reflection as to how the publication of the tax debtor's home address was necessary to achieve a deterrent effect. Furthermore, there was no consideration of the potential reach of the tax authority's website, which was accessible worldwide by anyone with unrestricted access to internet. Therefore, it appeared that data protection considerations featured little, if at all, in the preparation of the 2006 amendment, despite the growing body of binding national and EU data

protection requirements applicable in domestic law (see e.g., Convention+108; Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data; General Data Protection Regulation, "GDPR").

In light of the above, the Court found that Hungary violated Art. 8 ECHR ("private life" aspect), since the reasons underpinning the systematic publication of taxpayer data (including their home addresses) did not show that the interference complained of was "necessary in a democratic society" and that the authorities of the respondent State struck a fair balance between the competing interests at stake.

Glukhin v. Russia [GC],[5] Application No. 11519/20, Judgment of 4 July 2023

The use of highly intrusive facial recognition technology in administrative offence proceedings (including the processing of the applicant's biometric data to identify, locate, arrest and convict him) constitutes a serious interference with the right to private life. National authorities must adopt detailed rules governing the scope and application of such measures (i.e., by avoiding widely formulated legal provisions) and provide safeguards against the risk of abuse and arbitrariness, especially in cases of minor offences (such as the failure to notify in advance of a peaceful solo demonstration). Failure to act in this way amounts to a *violation of Art. 8 ECHR (Respect for private life)*.

FACTS: In August 2019, the applicant travelled on the Moscow underground with a life-size cardboard figure of Kotov, a protestor whose case had caused a public outcry and had attracted widespread attention in the media, holding a banner that said: "You must be f**king kidding me. I'm Konstantin Kotov. I'm facing up to five years [in prison] under [Article] 212.1 for peaceful protests".

During routine monitoring of the Internet, the police discovered photographs and a video of the applicant's demonstration uploaded on a public Telegram channel. According to the applicant, police had used facial-recognition tech-

5 *Despite ceasing to be a party of the Council of Europe, the ECtHR continues to examine the human rights violation in Russia. The facts giving rise to the alleged violations of the Convention occurred prior to 16 September 2022, the date on which the Russian Federation ceased to be a party to the Convention. Thus, the Court had jurisdiction to examine the application (see Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Art. 58 of the European Convention on Human Rights, 22 March 2022).*

nology to identify him from screenshots of the Telegram channel, collected footage from the surveillance cameras installed in Moscow underground and, several days later, used live facial-recognition technology to locate and arrest him while he was travelling in the underground.

He was convicted in administrative-offence proceedings for failure to notify the authorities of his solo demonstration using a "quickly (de)assembled object", as requested by domestic law. He was fined 20,000 Russian roubles (RUB – about 283 EUR). The screenshots of the Telegram channel and of the video-recordings were used as evidence against him. After the entry into force of a decree on transport security, between 2017 and 2022, more than 220,000 cameras were installed in Moscow, including in the underground. All cameras were equipped with live facial-recognition technology.

HELD: The Court noted that the Government did not comment on the applicant's allegations that the facial recognition technology had been used to identify, locate and arrest him. Moreover, the domestic legislation does not require the police to make a record of their use of facial recognition technology or to give the person concerned access to any such record. In addition, the applicant was identified less than two days after his demonstration, and no explanation was provided for such a speedy outcome. Lastly, the Court takes note of public information available regarding numerous cases involving the use of facial recognition technology to identify participants protest events in Russia. Against this backdrop, and in the circumstances of the case, the Court accepted that facial recognition technology was used and that the processing of the applicant's personal data (including the use of facial recognition technology to identify, locate, arrest and convict him), amounted to an interference with his right to respect for his private life within the meaning of Art. 8 ECHR.

In the determination of whether such limitation complied with the conditions under Art. 8(2) ECHR, the Court observed that the relevant legal provision was widely formulated, and no authoritative interpretation clarified its scope. Thus, it appears that it allows processing of biometric personal data (including with the aid of facial recognition technology) in connection with any judicial proceedings. Moreover, the government did not refer to any procedural safeguards against abuses or arbitrariness in the use of facial recognition technology. These circumstances may raise doubts on the "quality of the law". However, the Court assumed that the interference with the applicant's right pursued a legitimate aim, namely, to prevent crime.

In assessing whether the processing of the applicant's personal data was "necessary in a democratic society", the Court noted that measures adopted by do-

mestic authorities were particularly intrusive in the applicant's right to privacy, especially in so far as live facial recognition technology was concerned. Hence, a high level of justification was required for them to be considered "necessary in a democratic society", also taking into account that the applicant's personal data revealed his political opinion and, therefore, fell in the special categories of sensitive data attracting a heightened level of protection. The Court further noted that the applicant was prosecuted for a minor, administrative offence consisting of holding a solo demonstration without prior notice. Moreover, the use of highly intrusive facial recognition technology to identify and arrest participants of peaceful protest actions could have a chilling effect on the rights to freedom of expression and assembly. In such circumstances, the use of facial recognition technology to identify, locate, arrest and convict the applicant did not correspond to a "pressing social need".

In light of the above, the Court found that Russia violated Art. 8 ECHR, because the processing of the applicant's personal data using facial recognition technology in the framework of administrative offence proceedings could not be regarded as "necessary in a democratic society", but rather is incompatible with the ideals and values of a democratic society governed by the rule of law. The applicant also complained that Russia violated Article 10 ECHR (Freedom of expression) – on this point, see Section IV.

Hurbain v. Belgium [GC], Application No. 57292/16, Judgment of 4 July 2023

The press has a role an important role in the creation and maintenance of archives, including online archives, gathering articles lawfully published in a print format years earlier. Requests for alteration of e-version articles constitutes an interference with press freedom. As a consequence, national authorities must strike a fair balance between the freedom to impart information (including the continued online availability of information on criminal proceedings), on the one hand, and the right to be forgotten online (linked to the protection of personal reputation), on the other. National authorities (including courts) may order the alteration of e-version articles (e.g., their anonymisation) if it is strictly necessary for the protection of the concurring right to be forgotten online; in such exceptional cases, there will be no *violation of Art. 10 ECHR (Freedom of expression)*.

See Section IV.

Sanchez v. France [GC], Application No 45581/15, Judgment of 15 May 2023

When politicians decide to use a publicly accessible social media platform (such as a Facebook "wall") for political purposes (e.g., an election campaign), they have duties and responsibilities, including to prevent and remove "hate speech" by third parties – especially if the politician was made aware of the hateful remarks. The criminal conviction of the politicians constitutes an interference with the politician's freedom to impart information. However, if the language of the third-party's comments clearly incites hatred and violence against a person on account of his or her religion, such interference may be considered legitimate taking into account the penalty (e.g. a lenient fine) and the other consequences faced by the politicians – *No violation of Art. 10 ECHR (Freedom of expression).*

See Section IV.

Yüksel Yalçınkaya v. Türkiye, Application No. 15669/20, Judgment of 26 September 2023

If a conviction is based to a decisive extent on electronic evidence (namely, raw data the use of a messaging application) the court's decision not to disclose the evidence with the defence must be supported by adequate reasons. Moreover, in the event that domestic law does not set forth specific procedural safeguards aimed at ensuring the integrity of electronic evidence until the handover to the judicial authorities, domestic courts must thoroughly address the arguments regarding the reliability of such electronic evidence. Failure to act in this way amounts to a *violation of Art. 6(1) ECHR (Right to a fair trial).*

See Section II.A.

Domestic courts cannot convict a person for the offence of membership of an unlawful organisation (e.g., a terrorist group) solely based on electronic evidence (namely, raw data on the use of a messaging application). National courts must always establish the necessary intent (mental link, subjective constituent element) in an individualised manner. Failure to act in this way amounts to a *violation of Art. 7 ECHR. (Nullum crimen sine lege, nulla poena sine lege).*

See Section III.

Memberships of a lawfully established trade union and to an association represent an exercise of a person's freedom of association. Domestic courts cannot consider these memberships as evidence corroborating a person's membership of an armed terrorist organisation and, consequently, to convict that person – *violation of Art.11 ECHR (Freedom of association).*

See Section V.

LIST OF JUDGMENTS PER SECTION

LIST OF JUDGMENTS BY ECHR ARTICLE

TEXT OF THE ECHR
(supplemented by Protocols Nos. 1, 7 and 16)

Extracts

The Governments signatory hereto, being members of the Council of Europe, Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,

Have agreed as follows:

ARTICLE 1
Obligation to respect Human Rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I RIGHTS AND FREEDOMS

ARTICLE 2
Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 3
Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 4
Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term "forced or compulsory labour" shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.

ARTICLE 5
Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

ARTICLE 6
Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7
No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8
Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9
Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10
Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11
Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

ARTICLE 12
Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

ARTICLE 13
Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been

committed by persons acting in an official capacity.

ARTICLE 14
Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

ARTICLE 15
Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

ARTICLE 16
Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

ARTICLE 17
Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

ARTICLE 18
Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

SECTION II

EUROPEAN COURT OF HUMAN RIGHTS

ARTICLE 19
Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

[…]

ARTICLE 26
Single-judge formation, Committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.

2. […]
3. […]
[…]

ARTICLE 30
Relinquishment of jurisdiction to the Grand Chamber

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber.

ARTICLE 31
Powers of the Grand Chamber
The Grand Chamber shall

(a) determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43;

(b) decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46, paragraph 4; and

(c) consider requests for advisory opinions submitted under Article 47.

ARTICLE 32
Jurisdiction of the Court

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

[…]

ARTICLE 42
Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

ARTICLE 43
Referral to the Grand Chamber

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.

3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

ARTICLE 44
Final judgments

1. The judgment of the Grand Chamber shall be final.

2. The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or

(b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or

(c) when the panel of the Grand Chamber rejects the request to refer under Article 43.

3. The final judgment shall be published.

[…]

ARTICLE 46
Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the committee.

4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party

and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

[…]

SECTION III

MISCELLANEOUS PROVISIONS
[…]

ARTICLE 53
Safeguard for existing human rights

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.

[…]

Protocol

to the Convention for the Protection of Human Rights and Fundamental Freedoms

Paris, 20.III.1952

The Governments signatory hereto, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

ARTICLE 1
Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions.

No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Protocol No. 7

to the Convention for the Protection of Human Rights and Fundamental Freedoms

Strasbourg, 22.XI.1984

The member States of the Council of Europe, signatory hereto,

Being resolved to take further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

ARTICLE 1
Procedural safeguards relating to expulsion of aliens

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

(a) to submit reasons against his expulsion,

(b) to have his case reviewed, and

(c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1.(a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

Protocol No. 16

to the Convention on the Protection of Human Rights and Fundamental Freedoms Strasbourg,

2.X.2013

The member States of the Council of Europe and other High Contracting Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"), signatories hereto,

Having regard to the provisions of the Convention and, in particular, Article 19 establishing the European Court of Human Rights (hereinafter referred to as "the Court");

Considering that the extension of the Court's competence to give advisory opinions will further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity;

Having regard to Opinion No. 285 (2013) adopted by the Parliamentary Assembly of the Council of Europe on 28 June 2013,

Have agreed as follows:

ARTICLE 1

1. Highest courts and tribunals of a High Contracting Party, as specified

in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

2. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.

3. The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case.

ARTICLE 2

1. A panel of five judges of the Grand Chamber shall decide whether to accept the request for an advisory opinion, having regard to Article 1. The panel shall give reasons for any refusal to accept the request.

2. If the panel accepts the request, the Grand Chamber shall deliver the advisory opinion.

3. The panel and the Grand Chamber, as referred to in the preceding paragraphs, shall include ex officio the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.

ARTICLE 3

The Council of Europe Commissioner for Human Rights and the High Contracting Party to which the requesting court or tribunal pertains shall have the right to submit written comments and take part in any hearing. The President of the Court may, in the interest of the proper administration of justice, invite any other High Contracting Party or person also to submit written comments or take part in any hearing.

ARTICLE 4

1. Reasons shall be given for advisory opinions.

2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

3. Advisory opinions shall be communicated to the requesting court or tribunal and to the High Contracting Party to which that court or tribunal pertains.

4. Advisory opinions shall be published.

ARTICLE 5

Advisory opinions shall not be binding.

[…]

ARTICLE 10

Each High Contracting Party to the Convention shall, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by means of a declaration addressed to the Secretary General of the Council of Europe, indicate the courts or tribunals that it designates for the purposes of Article 1, paragraph 1, of this Protocol. This declaration may be modified at any later date and in the same manner.

This publication was prepared in co-operation with the Supreme Court of Montenegro.

ENG

The Member States of the European Union have decided to link together their know-how, resources and destinies. Together, they have built a zone of stability, democracy and sustainable development whilst maintaining cultural diversity, tolerance and individual freedoms. The European Union is committed to sharing its achievements and its values with countries and peoples beyond its borders.

www.europa.eu

The Council of Europe is the continent's leading human rights organisation. It comprises 46 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

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