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# THE PROHIBITION AGAINST TORTURE, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

*An overview of the jurisprudence of  
the European Court on Human Rights*



# **The Prohibition Against Torture, Inhuman or Degrading Treatment or Punishment**

An overview of the jurisprudence of the  
European Court on Human Rights

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## Introduction

The Fifth Annual Regional Rule of Law Forum for South East Europe – aimed at promoting the implementation of the European Convention on Human Rights, encouraging regional cooperation and assisting the process of EU integration – will be focusing on the critical issue of the prohibition against torture, inhuman or degrading treatment and punishment.

The prohibition against torture must form part of the foundation of any nation claiming to be democratic. Without it, a society cannot be said to uphold the rule of law. The prohibition is a *jus cogens* norm of customary international law. It appears in numerous international treaties and in almost all domestic legal systems worldwide.

In consultation with members of the judiciary throughout the region and in Strasbourg, aspects of Article 3 of particular relevance have been identified. These include the positive, procedural obligation on the State to investigate allegations of prohibited treatment, as well as the substantive obligations on the State in respect of the treatment of persons who are detained; persons who are mentally unwell; those who are involved in the asylum and immigration system; and children.

By providing an analysis of the European Court's jurisprudence and summaries of relevant case-law, we hope that this publication, along with the other resources we are providing to the participants at the Forum, will assist in furthering the understanding of the prohibition against torture – both its substantive and procedural limbs.

It is our desire and objective that all participants at the conclusion of this event, armed with all of the materials and having participated in the lively discussions, will feel better able to navigate the jurisprudence of the European Court, and to overcome the challenges currently facing the implementation of the Convention in the region today.

We wish you all a successful Forum gathering and very much look forward to all our discussions!

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## (1) Introduction: The absolute prohibition.

Article 3 of the European Convention on Human Rights imposes an **absolute and unqualified prohibition** on torture or inhuman or degrading treatment or punishment.

It is difficult to overstate the importance of this prohibition. It is one of the **only** *jus cogens* norms of customary international law, a norm which is widely accepted by the international community as one from which no derogation is permitted. The prohibition appears in numerous international treaties, including: the Universal Declaration of Human Rights; the Rome Statute of the International Criminal Court; the four Geneva Conventions; the International Covenant on Civil and Political Rights; the United Nations Convention Against Torture; and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The prohibition is found in almost **all** domestic legal systems worldwide.

A State cannot seek to justify ill-treatment prohibited by Article 3, regardless of whether it is alleged to: be part of an attempt to save the lives of others; to be for reasons of national security; to be for the prevention of terrorism; or to be for the prevention of organised crime. **No derogations** are permitted during war, or during a state of emergency.<sup>1</sup>

It is clear that Article 3 imposes a **negative, substantive obligation** – that States must not directly engage in prohibited treatment. When taken in conjunction with Article 1 of the Convention,<sup>2</sup> Article 3 also imposes a **positive obligation** – to ensure that individuals within a State's jurisdiction<sup>3</sup> are protected from prohibited treatment. The positive obligations on the State are<sup>4</sup>:

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- 1 *Gäfgen v. Germany*, Grand Chamber judgment of 1 June 2010, no. 22978/05 (included as a summary in this publication); *Chahal v. United Kingdom*, Grand Chamber judgment of 15 November 1996, no. 22414/93.
  - 2 Article 1, ECHR: "**Obligation to respect Human Rights** 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.'"
  - 3 This will usually be limited to acts occurring, and decisions being taken, in the State's own territory. Extra-territorial jurisdiction will be exercised in exceptional circumstances, including: a) where the State performs an act which affects individuals outside its territory; b) where the state exercises effective control over an area outside its own territory; c) where control is being exercised in the territory of another Council of Europe Member States (as to find otherwise would lead to a "vacuum" in protection within the "legal space" of the Convention): *Al-Skeini and Others v. United Kingdom*, Grand Chamber judgment of 7 July 2011, no. 55721/07; *Hassan v. United Kingdom*, Grand Chamber judgment of 16 September 2014, no. 29750/09.
  - 4 *Z and Others v. United Kingdom*, Grand Chamber judgment of 10 May 2001, no. 29392/95 (included as a summary in this publication); *Osman v. United Kingdom*, Grand Chamber judgment of 29 October 1998, no. 23452/94 (key case

- (a) a substantive obligation to take **reasonable measures designed to prevent ill-treatment of which the State knew or ought to have known** (for example, in situations in which the likely perpetrator of the ill-treatment is a private individual, rather than someone exercising functions of the State); and
- (b) a **procedural obligation to conduct an effective official investigation** where the situation discloses arguable ill-treatment (either by State authorities or by private individuals).

As always, the Convention must guarantee rights which are **not theoretical or illusory, but practical and effective**. In the context of Article 3, a particular importance is attached to the obligation to investigate.

## (2) Definitions: Torture and inhuman or degrading treatment or punishment.

The Court has traditionally distinguished torture, inhuman treatment or punishment, and degrading treatment or punishment in the following ways:

- (a) The Court has considered that the distinction between torture and inhuman or degrading treatment derives principally from a difference in the intensity of the suffering inflicted. It was the intention that the Convention should, by the word “torture”, attach a special stigma to deliberate and inhuman treatment causing very serious and cruel suffering.<sup>5</sup>
- (b) Treatment has been held to be “inhuman” because, *inter alia*, it was premeditated, applied for hours at a stretch, and caused either actual bodily injury or intense physical or mental suffering.<sup>6</sup>

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in the context of Article 2 with principles applicable to Article 3); *Dorđević v. Croatia*, judgment of 24 July 2012, no. 41526/10 (included as a summary in this publication); *A and Others v. United Kingdom*, Grand Chamber judgment of 23 September 1998, no. 3455/05 (a defence of “parental chastisement” in a case in which a child was beaten by his stepfather led to consideration of whether the State was failing to protect children from prohibited treatment); *Beganović v. Croatia*, judgment of 25 June 2009, no. 46423/06 (included as a summary in this publication).

<sup>5</sup> *Ireland v. United Kingdom*, judgment of 18 January 1978, no. 5310/71 (included as a summary in this publication).

<sup>6</sup> *Gutsanovi v. Bulgaria*, judgment of 15 October 2013, no. 34529/10 (included as a summary in this publication); *Beganović v. Croatia*, judgment of 25 June 2009, no. 46423/06 (included as a summary in this publication); *Jalloh v. Germany*, Grand Chamber judgment of 11 July 2006, no. 54810/00 (included as a summary in this publication).

- (c) Treatment has been found to be “degrading” where it causes in its victims feelings of fear, anguish and inferiority; if it humiliates or debases an individual in that individual’s own eyes, or in the eyes of another; if it breaks the person’s physical or psychological resistance, or drives the person to act against their will or conscience; or it shows a lack of respect for, and diminishes, human dignity.<sup>7</sup>

However, it is important to note that **treatment falling within any of these categories will lead to a finding of a violation of Article 3.**

Both **physical and mental suffering** are capable of amounting to prohibited treatment. The threat of such treatment, provided it is sufficiently real and immediate, may also violate Article 3.<sup>8</sup>

A **minimum level of severity** is required in order for treatment to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, including the following factors:<sup>9</sup>

- (a) duration of the treatment;
- (b) its physical or mental effects;
- (c) the sex, age and state of health of the victim;
- (d) the purpose for which the treatment was inflicted and the intention or motivation behind it;
- (e) the context, such as an atmosphere of heightened tension and emotions;
- (f) whether it was systematic;
- (g) whether the State could have taken alternative action to achieve a legitimate aim (for example, effecting an arrest).

7 *Stanev v. Bulgaria*, Grand Chamber judgment of 17 January 2012, no. 36760/06; *Svinarenko and Slyadnev v. Russia*, Grand Chamber of 17 July 2014, no. 32541/08; *Labita v. Italy*, Grand Chamber of 5 April 2000, no. 26772/95; *Jalloh v. Germany*, Grand Chamber judgment of 11 July 2006, no. 54810/00 (included as a summary in this publication); *Beganović v. Croatia*, judgment of 25 June 2009, no. 46423/06 (included as a summary in this publication); *Krsmanović v. Serbia*, judgment of 19 December 2017, no. 19796/14 (included as a summary in this publication); *Gutsanovi v. Bulgaria*, judgment of 15 October 2013, no. 34529/10 (included as a summary in this publication).

8 *Gäfgen v. Germany*, Grand Chamber judgment of 1 June 2010, no. 22978/05 (included as a summary in this publication).

9 *Ireland v. United Kingdom*, judgment of 18 January 1978, no. 5310/71 (included as a summary in this publication); *Gäfgen v. Germany*, Grand Chamber judgment of 1 June 2010, no. 22978/05 (included as a summary in this publication).

The focus of the Court is increasingly on whether States are maintaining **acceptable standards of conduct**.<sup>10</sup> The subjective impact on the individual, and the purpose of the treatment, while relevant, will not be determinative.<sup>11</sup>

States should be guided by factual examples of treatment which has been found in the past to violate Article 3. However, a previous finding of non-violation will **not** rule out a finding of violation in the future. The Convention is a **living instrument**. The **increasingly high standard** being required in the area of the protection of human rights inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.<sup>12</sup>

The Court has increasingly been influenced by progressive changes occurring in Contracting States.<sup>13</sup> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)<sup>14</sup> is one organisation that has been influential in promoting a convergence of standards of unacceptable treatment - in circumstances of deprivation of liberty - worldwide.

**Fact-finding** is a task for the domestic courts. While the European Court is not bound by these findings, it will only depart from adopting these findings for cogent reasons.<sup>15</sup> The **characterisation in law** to be applied to those facts, including the question of whether the facts disclose a violation, is for the European Court, and it is not bound by the applicant's characterisation.<sup>16</sup>

The **standard of proof** in assessing whether there has been a violation is that of "beyond reasonable doubt."<sup>17</sup> To make this assessment, the Court will examine all the material before it, assess its relevance, identify gaps in the materials, and consider the relevance of any such gaps.

10 *Fedotov v. Russia*, Grand Chamber judgment of 25 October 2005, no. 5140/02.

11 *V.C. v. Slovakia*, judgment of 8 November 2011, no. 18968/07 (included as a summary in this publication).

12 *Selmouni v. France*, Grand Chamber judgment of 28 July 1999, no. 25803/94.

13 *M.C. v. Bulgaria*, judgment of 4 December 2003, no. 39272/98 (included as a summary in this publication).

14 The CPT is founded on the basis of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987. The CPT is permitted to visit places of detention in States in the Council of Europe, and compile reports about the findings and recommendations to send to the States in question. The members of the CPT are independent and impartial.

15 *Gäfgen v. Germany*, Grand Chamber judgment of 1 June 2010, no. 22978/05 (included as a summary in this publication).

16 *Bălșan v. Romania*, judgment of 23 May 2017, no. 49645/09 (included as a summary in this publication).

17 *Grimailous v. Latvia*, judgment of 25 June 2013, no. 6087/03 (included as a summary in this publication). This will not necessarily mirror similarly worded tests in domestic law.

The Court, where appropriate, can make **inferences** from such facts and omissions and make findings of violation based on those inferences.<sup>18</sup> These are some examples in which adverse inferences can be drawn against a State:

- (a) failure to provide relevant documents or witnesses;<sup>19</sup>
- (b) failure to respond to allegations of violence against a prisoner;<sup>20</sup>
- (c) failure to permit a prisoner from being examined by independent medical experts or his lawyer.<sup>21</sup>

### (3) The Substantive Obligation.

#### (a) Treatment of persons under the control of the State.

Large numbers of cases concerning the ill-treatment of people under the **control** of the State have been considered by the European Court. This includes, but is not limited to, persons who are:

- (a) in the process of being arrested or who have been arrested;
- (b) being interviewed by State detectives, prosecutors, police or security forces;
- (c) being held in detention pending a criminal trial;
- (d) imprisoned following conviction;
- (e) in immigration detention.
- (f) being held in, or cared for in, a medical treatment facility;<sup>22</sup>
- (g) being held, in or cared for, in a State-run children's home or care home.

**Any** recourse to physical force against a person which has not been made strictly necessary by that person's own conduct diminishes dignity. If it reaches the threshold of severity, it is **in principle an infringement** of Article 3.

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18 *Grimailous v. Latvia*, judgment of 25 June 2013, no. 6087/03 (included as a summary in this publication); *Ireland v. United Kingdom*, judgment of 18 January 1978, no. 5310/71 (included as a summary in this publication).

19 *Aydin v. Turkey*, Grand Chamber judgment of 25 September 1997, no. 23178/94.

20 *Karabet and Others v. Ukraine*, judgment of 17 January 2013, no. 38906/07 and 52025/07.

21 *Amirov v. Russia*, judgment of 27 November 2014, no. 51857/13.

22 Persons who are under state control because of the very fact that they have ill health or lack mental capacity, are distinguished from persons who are under State control because they have committed a crime or are suspected of having committed a crime. However, in both cases, the State has obligations under Article 3.

The **requirements of a criminal investigation, and the undeniable difficulties of the fight against crime, do not limit the protection** to be afforded in respect of the physical integrity of individuals protected by Article 3.<sup>23</sup> The time at which an individual is arrested, before formal detention, is a time when the risk of violations occurring is often at its highest. It is at this stage that an individual risks being apprehended by physical force, and questioned. Handcuffs may be applied and strip-searches may be conducted. The methods for apprehension and arrest may fall foul of Article 3. Article 6, the right to a fair trial, will be engaged. **Access to a lawyer is vital** in ensuring breaches do not occur.

Any use of force during arrest must be both **necessary and proportionate**. Examples in which force might be necessary include where there is reason to believe that the person concerned would resist arrest, or abscond, or cause injury or damage, or suppress evidence. Any such use of force must be proportionate. The effect of the manner of the arrest of an individual on nearby family members, including minor children (who were not themselves being arrested) has been found to be degrading treatment, and thus a violation of Article 3.<sup>24</sup>

In respect of criminal investigations and trials, there is an **absolute prohibition on the use of any evidence obtained from torture or inhuman or degrading treatment**.<sup>25</sup> Without such a prohibition, the rights under Article 3 would be rendered nugatory.

In the context of a strip-search, factors such as the genders of both the searcher and the person being searched, the location of the search, and the intrusiveness of the search, will be relevant.<sup>26</sup> For handcuffs and other restraints, the manner of applying the restraint, its duration of application, as well as its necessity, will be evaluated.<sup>27</sup>

The Court recognises that the context of **being held in detention makes an individual particularly vulnerable to the risk of prohibited ill-treatment**. The deprivation of liberty creates an enhanced opportunity for such abuses to arise.<sup>28</sup> Again,

23 *Gutsanovi v. Bulgaria*, judgment of 15 October 2013, no. 34529/10 (included as a summary in this publication); *Hajnal v. Serbia*, judgment of 19 June 2012, no. 36937/06 (included as a summary in this publication).

24 *Gutsanovi v. Bulgaria*, judgment of 15 October 2013, no. 34529/10 (included as a summary in this publication).

25 *Gäfgen v. Germany*, Grand Chamber judgment of 1 June 2010, no. 22978/05 (included as a summary in this publication); *Tomasi v. France*, judgment of 27 August 1992, no. 12850/87.

26 *Valašinas v. Lithuania*, judgment of 24 July 2001, no. 44558/98.

27 *Öcalan v. Turkey*, Grand Chamber judgment of 12 May 2005, no. 46221/99.

28 *Hajnal v. Serbia*, judgment of 19 June 2012, no. 36937/06 (included as a summary in this publication).

access to legal representation provides an essential safeguard. The CPT has stressed that the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is at its greatest. The CPT has noted a particularly high risk in police establishments.<sup>29</sup>

The Grand Chamber recently restated the following principles, which are applicable to cases of deprivation of liberty:<sup>30</sup>

- (a) The manner and method of execution of measures against the individual should not subject him or her to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.
- (b) Given the practical demands of imprisonment, the individual's health and well-being should be adequately secured by, among other things, the provision of requisite medical attention and treatment.
- (c) The absence of an intention to humiliate or debase a detainee is a factor to take into account but does not rule out a finding of a violation.
- (d) The obligations under Article 3 apply regardless of the State's financial or logistical difficulties.

The Court has emphasised the importance of both the CPT's preventive role in monitoring conditions of detention and of the standards it develops in that regard. The Court has reiterated that when deciding cases concerning conditions of detention, it remains attentive to those standards.<sup>31</sup>

Factors to consider when assessing **detention conditions** include: sleeping facilities; sanitation; extremes of temperature; natural light; food and water; pest infestations; susceptibility to disease; availability of exercise; visiting rights; medical care; and overcrowding (below 3 sq. m of floor space per detainee in multi-occupancy accommodation, there is a strong presumption of violation. It may be rebuttable if the duration of this is short, occasional and minor, it is accompanied by sufficient freedom of movement outside the cell, and the detention facility is appropriate with no other aggravating aspects of the conditions)<sup>32</sup>.

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29 6<sup>th</sup> General Report 1996, paragraph 15; 9<sup>th</sup> General Report 1999, paragraph 23.

30 *Muršić v. Croatia*, Grand Chamber judgment of 20 October 2016, no. 7334/13 (included as a summary in this publication); *Wenner v. Germany*, judgment of 1 September 2016, no. 62303/13 (included as a summary in this publication); *Bulatović v. Montenegro*, judgment of 22 July 2014, no. 67320/10 (included as a summary in this publication).

31 *Muršić v. Croatia*, Grand Chamber judgment of 20 October 2016, no. 7334/13 (included as a summary in this publication).

32 *Muršić v. Croatia*, Grand Chamber judgment of 20 October 2016, no. 7334/13 (included as a summary in this publication).

The **duration and cumulative effect of these conditions** will be assessed. The **personal characteristics** of the individual concerned will also be relevant. Individuals with mobility disabilities may especially suffer in inadequate living spaces.<sup>33</sup> For mentally ill persons (whether held in a criminal or purely medical context) the assessment of whether conditions are sufficient **must** take into account their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment. The feeling of inferiority and powerlessness which is typical of persons who suffer from a mental disorder calls for increased vigilance. It is not appropriate, for example, simply to treat prisoners with a psychological condition “the same” as other inmates.<sup>34</sup>

Solitary confinement is not *per se* contrary to Article 3. However, again, the duration and necessity of the confinement, the health of the prisoner, and any other treatment in conjunction, will be relevant. The fact that solitary confinement is asserted to be for the prisoner’s own protection will not necessarily be an exculpatory factor.

The State may have responsibility for ill-treatment committed not only by state officials but also by other prisoners.<sup>35</sup> The scope of the obligation to prevent prohibited conduct by private individuals is addressed below, under section 3(d).

Where the events in question lie wholly or in large part within the exclusive knowledge of State authorities, as is the case for persons within State control or custody, **strong presumptions of fact will arise in respect of injuries occurring during detention**. The burden will be on the State to provide a satisfactory and convincing explanation. Absent such an explanation, the State can be held responsible and in violation.<sup>36</sup>

Record-keeping, in all cases in which individuals are held under State control, is extremely important. **Detailed, regular and accurate monitoring and record keeping** will not only reduce the risk of incidents of violations of Article 3 but enable account to be kept of any changes in health, and any injuries, which will assist the State

33 *Arutyunyan v. Russia*, judgment of 10 January 2012, no. 48977/09.

34 *Dybeku v. Albania*, judgment of 18 December 2007, no. 41153/06.

35 *Rodić and Others v. Bosnia and Herzegovina*, judgment of 27 May 2008, no. 22893/05 (included as a summary in this publication).

36 *Hajnal v. Serbia*, judgment of 19 June 2012, no. 36937/06 (included as a summary in this publication); *Tomasi v. France*, judgment of 27 August 1992, no. 12850/87; *Aksoy v. Turkey*, judgment of 18 December 1996, no. 21987/93; *Selmouni v. France*, Grand Chamber judgment of 28 July 1999, no. 25803/94.

authorities.<sup>37</sup> This is the best way of evidencing the conditions in which an individual was held and enables regular reviews to be conducted. States cannot rely on the absence of recorded injuries to refute claims of prohibited treatment.<sup>38</sup> Nor can a State rely on implausible findings in a poorly conducted investigation.<sup>39</sup>

The CPT has stated the fundamental safeguards granted to a person in police custody would be reinforced, and the work of police officers facilitated, if a **single and comprehensive custody record** were to exist for each person detained, in which could be recorded all aspects of custody and action taken regarding the person including:<sup>40</sup>

- (a) when the individual was deprived of liberty;
- (b) the reasons for any measures taken against the individual;
- (c) when the individual was told of his or her rights, and what he or she was told;
- (d) any signs of physical injury or mental illness;
- (e) the last time a friend, family member, consulate or lawyer visited;
- (f) when the individual was offered food or water;
- (g) when the individual was interrogated;
- (h) when the individual was transferred or released.

Individuals will struggle to provide evidence of institutional failings and failings by State officials. As such, the Court considers that States are **required to produce evidence to rebut arguable complaints**.<sup>41</sup> CPT reports, and the reports of other governmental and non-governmental organisations, on general relevant conditions of detention, are frequently used to support allegations.<sup>42</sup>

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37 *Salman v. Turkey*, Grand Chamber judgment of 27 June 2000, no. 21986/93; *Hilal Mammadov v. Azerbaijan*, judgment of 4 February 2016, no. 81553/12.

38 *Dedouskiy and Others v. Russia*, judgment of 15 May 2008, no. 7178/03.

39 *Virabyan v. Armenia*, judgment of 2 October 2012, no. 40094/05 (the State sought to explain the applicant's injuries, including a lacerated testicle, by reference to a fall).

40 2<sup>nd</sup> General Report, paragraph 40.

41 *Ogica v. Romania*, judgment of 27 May 2010, no. 24708/03.

42 *M.S.S. v. Belgium and Greece*, Grand Chamber judgment of 21 January 2011, no. 30696/09 (included as a summary in this publication).

## (b) Medical assistance to persons under the control of the State.

States **must** protect the physical and mental well-being of persons under their control who are deprived of their liberty, whether that is because of criminal proceedings, or because the individual is simply unwell or lacks capacity. This includes the **provision of adequate medical assistance**. Where States decide to keep a seriously ill person in detention, they should demonstrate special care in guaranteeing conditions that correspond to that person's special needs.

The "adequacy" of medical assistance is difficult to determine. Medical treatment provided in prison facilities must be at a level comparable to that which the State has committed to provide to the population as a whole. This does not mean that every detainee must be guaranteed the same level of medical treatment that is available in the best health establishments outside prison facilities.<sup>43</sup> The Court reserves sufficient flexibility in defining the required standard of health care, deciding it on a case-by-case basis. That standard should be "compatible with human dignity" but take into account "the practical demands of imprisonment".<sup>44</sup>

It is for the Court to determine whether the State has provided **credible and convincing evidence** demonstrating that the applicant's state of health and the appropriate treatment were adequately assessed and evidenced, and that the applicant received adequate medical care in detention.<sup>45</sup>

States must ensure that:<sup>46</sup>

- (a) a comprehensive record is kept concerning the detainee's state of health and his or her treatment while in detention;
- (b) supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at adequately treating the detainee's health problems or preventing aggravation;

<sup>43</sup> *Wenner v. Germany*, judgment of 1 September 2016, no. 62303/13 (included as a summary in this publication); *Groni v. Albania*, judgment of 7 July 2009, no. 25336/04 (included as a summary in this publication).

<sup>44</sup> *Siništaj and Others v. Montenegro*, judgment of 24 November 2015, no. 1451/10 (included as a summary in this publication).

<sup>45</sup> *Wenner v. Germany*, judgment of 1 September 2016, no. 62303/13 (included as a summary in this publication).

<sup>46</sup> *Siništaj and Others v. Montenegro*, judgment of 24 November 2015, no. 1451/10 (included as a summary in this publication); *Wenner v. Germany*, judgment of 1 September 2016, no. 62303/13 (included as a summary in this publication); *Groni v. Albania*, judgment of 7 July 2009, no. 25336/04 (included as a summary in this publication); *Blokhin v. Russia*, Grand Chamber judgment of 23 March 2016, no. 47152/06 (included as a summary in this publication).

- (c) adequate care is provided;
- (d) medical treatment is not denied;
- (e) approval from the prosecutor for treatment is not required;
- (f) diagnosis is prompt and accurate;
- (g) any treatment corresponds with the disease the prisoner was diagnosed with, as prescribed by competent doctors;
- (h) necessary conditions are created so that prescribed treatment can be followed through;
- (i) additional advice from a specialised medical expert is obtained, where needed, in the event of diverging medical opinion.

As with prison conditions, monitoring, record-keeping and review is imperative. Failure to keep proper records will undermine the effect of any monitoring or supervision process. For a person who is, for example, mentally ill and a suicide risk, this can lead to a violation on the basis of defective medical care.<sup>47</sup>

The mere fact that an applicant's state of health deteriorated in prison cannot by itself suffice for the finding of a violation. What needs to be established is whether the State had, in a timely fashion **provided all reasonably available medical care** in a conscientious effort to hinder development of the disease in question.<sup>48</sup>

In respect of **forcible medical interventions for therapeutic purposes**:<sup>49</sup>

- (a) the imposition of medical treatment without the consent of a mentally competent adult patient is an interference capable of violating the right to physical integrity;
- (b) where treatment is aimed at saving the life of the individual, for example, force feeding, there must be shown to be a medical necessity;
- (c) it will be relevant whether the forcible intervention was ordered and administered by doctors, and whether the person concerned was placed under medical supervision;
- (d) the manner of administration must not exceed the minimum level of severity, in particular, account should be taken of whether the person experienced serious physical pain or suffering as a result of the intervention;

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<sup>47</sup> *Keenan v. United Kingdom*, judgment of 3 April 2001, no. 27229/95 (included as a summary in this publication).

<sup>48</sup> *Siništaj and Others v. Montenegro*, judgment of 24 November 2015, no. 1451/10 (included as a summary in this publication).

<sup>49</sup> *V.C. v. Slovakia*, judgment of 8 November 2011, no. 18968/07 (included as a summary in this publication); *Jalloh v. Germany*, Grand Chamber judgment of 11 July 2006, no. 54810/00 (included as a summary in this publication); *Neumerzhitsky v Ukraine*, judgment of 5 April 2005, no. 54825/00.

- (e) the Court will consider whether the intervention resulted in any aggravation of the person's state of health or had long-lasting adverse consequences;
- (f) procedural guarantees for the decision to intervene should exist, and should be complied with.

The Convention does not, in principle, prohibit recourse to a **forcible medical intervention that will assist in the investigation of an offence**. However, any interference with a person's physical integrity carried out with the aim of obtaining evidence must be the subject of rigorous scrutiny. The following factors are of particular importance:<sup>50</sup>

- (a) the extent to which the forcible medical intervention was necessary to obtain the evidence (including, for example, whether other, less intrusive, methods of obtaining the evidence were considered);
- (b) the proportionality of the intervention, in relation to the gravity of the offence alleged or committed;
- (c) the health risks for the suspect;
- (d) the manner in which the procedure was carried out;
- (e) the physical pain and mental suffering it caused;
- (f) the degree of medical supervision provided;
- (g) the effects on the suspect's health;
- (h) in all the circumstances, the intervention must not attain the minimum level of severity that would bring it within the scope of Article 3.

Where a prisoner's state of health requires care in hospital, continued detention, even in a prison hospital, may in itself constitute a violation.<sup>51</sup> The following three elements should be considered:

- (a) the medical condition;
- (b) the adequacy of medical assistance and care that can be provided in detention; and
- (c) the advisability of maintaining the detention measure in view of the state of health of the applicant.

Persons who are detained not because of criminal convictions, but because they are mentally ill, must be placed in **specialised facilities with medical care**. They are in a vulnerable position, and they may be unable to complain about their treatment or

<sup>50</sup> *Jalloh v. Germany*, Grand Chamber judgment of 11 July 2006, no. 54810/00 (included as a summary in this publication).

<sup>51</sup> *Aleksanyan v. Russia*, judgment of 22 December 2008, no. 46468/06.

seek help. They may be at a high risk of suicide, or unconsciously violent. The manner of implementation, necessity, and duration of any restraints used to respond to such violence will be relevant in assessing whether a violation has occurred. Particularly in this context, **punishment of such behaviour will be prohibited**. Treatment must be of a therapeutic quality.

For children, States must always be guided by the child's best interests. If the State is considering depriving a child of his or her liberty, a medical assessment should be made of the child's state of health to determine whether the proposed action is appropriate.<sup>52</sup>

### (c) Push-backs, expulsions, extraditions.

States have the right to control the entry, residence and expulsion of aliens. This may, however, give rise to an issue under Article 3 where **substantial grounds have been shown for believing that the person concerned, if expelled, would face a real risk of being subjected to ill-treatment**. In such a case, Article 3 prohibits expulsion. Given that the prohibition is absolute, the conduct of applicants, however undesirable or dangerous, cannot be taken into account. All domestic procedures for asylum applications, rejections, and appeals must also apply standards that ensure that the Article 3 prohibition is respected.

Situations in which this may arise are:

- (a) refusal of entry at a border;
- (b) refusal of asylum applications;
- (c) refusal of visas;
- (d) deportation following criminal convictions;
- (e) extra-judicial transfers of persons from one State to another, for the purposes of detention and interrogation outside the normal legal system;
- (f) the extraditing of a person accused of committing a crime, or convicted of having committed a crime, to another State for criminal proceedings or sentencing;
- (g) collective expulsions from the territory or at its borders *may* engage Article 3 and are prohibited under Article 4, Protocol No. 4;
- (h) "push-backs" of people from a State (for example, by State authorities rejecting individuals at their borders, or sending them to borders, instead of processing their claims for protection);

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<sup>52</sup> *Blokhin v. Russia*, Grand Chamber judgment of 23 March 2016, no. 47152/06 (included as a summary in this publication).

- (i) situations of “chain-*refoulement*” (asylum seekers being returned to a third country, from which they are then onward returned, perhaps several times, to face a risk of prohibited ill-treatment).

The basic principles are as follows:<sup>53</sup>

- (a) The assessment of the existence of a real risk must be **rigorous**. The applicants should adduce evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3. Where such evidence is adduced, it is for the State to dispel any doubts about it.
- (b) The Court will evaluate all material placed before it or, if necessary, material obtained *proprio motu*. It will do so particularly when an applicant or third party provides reasoned grounds which cast doubt on the accuracy of information relied on by the State.<sup>54</sup> The assessment by the State must be adequate and sufficiently supported by domestic materials such as national country reports, as well as materials originating from other reliable and objective sources such as other Contracting or non-Contracting States, agencies of the UN, and reputable non-governmental organisations.
- (c) If an applicant has not yet been expelled when the European Court examines the case, the relevant time of assessment will be the time proceedings before the European Court are taking place. A full and *ex nunc* assessment is called for as the situation in a country of destination may change in the course of time. While the historical position is of interest (as it may illuminate the current situation and its likely evolution), it is the present conditions which are decisive. Hence it is also necessary to consider information that has emerged after the final decision by domestic authorities.

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<sup>53</sup> *El-Masri v. The Former Yugoslav Republic of Macedonia*, Grand Chamber judgment of 13 December 2012, no. 39630/09 (included as a summary in this publication); *Al-Husin v. Bosnia and Herzegovina*, judgment of 7 February 2012, no. 3727/08 (included as a summary in this publication); *Al-Hanchi v. Bosnia and Herzegovina*, judgment of 15 November 2011, no. 48205/09 (included as a summary in this publication); *Abdolkhani and Karimnia v. Turkey*, judgment of 22 September 2009, no. 30471/08.

<sup>54</sup> Under Article 36 of the Convention, the Court can invite any person concerned who is not the applicant to submit written comments or take part in hearings.

- (d) If an expulsion has already occurred, the existence of the risk must be assessed primarily *ex tunc* with reference to those facts which were known, deemed to be known or ought to have been known to the State at the time of that deportation. The Court will also have regard to information which comes to light subsequent to the extradition or deportation.

The Court recognises that diplomatic notes are a standard means for States expelling individuals (common examples have been where an individual has been convicted of terror offences), or extraditing individuals, to gain assurances that the receiving State will not engage in prohibited treatment against that individual. In each case, the Court will assess the quality of the assurance to determine whether it can be relied on (or, where an individual has already been expelled or extradited, should have been relied on). The Court will consider whether the receiving State has a long history of respect for democracy, human rights and the rule of law, as well as whether there is a history of compliance with assurances.<sup>55</sup>

Situations involving the **removal of a seriously ill person** can also engage Article 3. States are not obliged to alleviate disparities in health provision with receiving States. The focus is on whether the State is committing an act which would result in an individual being exposed to the risk of treatment prohibited by Article 3.

This means a violation can be found when substantial grounds can be shown for believing that a person is at imminent risk of dying if removed, or if not at imminent risk of dying would face a real risk of being exposed to serious, rapid, irreversible decline in their state of health, resulting in intense suffering or significant reduction in life expectancy, because of absence of appropriate treatment in the receiving country or lack of access to such treatment.<sup>56</sup>

The following principles will be relevant in cases of the removal of a seriously ill person:<sup>57</sup>

- (a) The primary responsibility for implementing the Convention is on national authorities, who are required to examine the applicant's fears and assess risks

55 *Rapo v. Albania*, judgment of 25 September 2012, no. 58555/10; *Othman (Abu Qatada) v. United Kingdom*, judgment of 17 January 2012, no. 8139/09; *Chahal v United Kingdom*, Grand Chamber judgment of 15 November 1996, no. 22414/93.

56 *Paposhvili v. Belgium*, Grand Chamber judgment of 13 December 2016, no. 41738/10 (included as a summary in this publication).

57 *Paposhvili v. Belgium*, Grand Chamber judgment of 13 December 2016, no. 41738/10 (included as a summary in this publication); *Othman (Abu Qatada) v. United Kingdom*, judgment of 17 January 2012, no. 8139/09.

faced upon removal. The Court is subsidiary to national systems. The authorities' obligation is fulfilled primarily through appropriate procedures allowing such examination to be carried out.

- (b) The applicants should adduce evidence capable of demonstrating that there are substantial grounds for believing that they would be exposed to a real risk of treatment prohibited by Article 3.
- (c) The State would need to dispel any doubts raised by this evidence. The risk alleged must be subjected to close scrutiny.
- (d) The State must consider the foreseeable consequences for removal in light of the general situation in the receiving State and the individual's personal circumstances.
- (e) The State should take into account general sources such as the reports of the WHO or reputable non-governmental organisations.
- (f) The State should take into account medical reports on the applicant.
- (g) Where serious doubts persist as to the impact of removal, the returning State must obtain individual and sufficient and reliable assurances from the receiving State as a precondition for removal that appropriate treatment will be accessible, so the individual does not find themselves in a situation contrary to Article 3.
- (h) The fact that the receiving country is another Contracting State to the Convention, and the applicant could initiate proceedings there, is not decisive. Returning States are not exempted from their duty of prevention.

**(d) Positive obligation to prevent ill-treatment by private individuals.**

For a positive obligation to arise where the treatment complained of was perpetrated by a private individual, not a State agent, it must be established that the State **knew or ought to have known at the time of the incident of a real and immediate risk of ill-treatment** of an identified individual or individuals from the criminal acts of a third party, and that the State **failed to take measures within the scope of their**

**powers which, judged reasonably, might have been expected** to avoid that risk.<sup>58</sup> The test is not one of “but-for”.<sup>59</sup>

The scope of the State’s positive obligations may differ between cases where the treatment has been inflicted through the involvement of State agents and cases where violence is inflicted by private individuals.<sup>60</sup>

The State cannot guarantee through its legal system that prohibited treatment is never inflicted. Nor can the State guarantee that if such ill-treatment inflicted, criminal proceedings should lead to a particular sanction. Rather, a violation will be found when the domestic legal system, particularly the criminal law, does not provide **practical and effective protection** of Article 3 rights.<sup>61</sup>

Once the Court has found that the level of severity of violence inflicted by private individuals attracts protection under Article 3, it is clear that the effect that this Article requires is the implementation of adequate criminal law mechanisms. This should be supported by laws and law-enforcement machinery for the prevention, suppression, and punishment of breaches of such provisions.

The Court has from time to time also acknowledged the particular vulnerability of certain groups in society, and the need for more active State involvement in their protection. The following are examples:

- (a) **Children and persons with physical or mental disabilities.**<sup>62</sup> The Court has noted that the UN Committee on the Rights of the Child has emphasised that a series of measures must be put in place to protect children from all forms of violence, which includes prevention, redress and reparation.<sup>63</sup> The Council of

58 *Bălșan v. Romania*, judgment of 23 May 2017, no. 49645/09 (included as a summary in this publication); *Đorđević v. Croatia*, judgment of 24 July 2012, no. 41526/10 (included as a summary in this publication); *M. and M. v. Croatia*, judgment of 3 September 2015, no. 10161/13 (included as a summary in this publication); *E. and Others v United Kingdom*, judgment of 26 November 2002, no. 33218/96; *Mastromatteo v. Italy*, Grand Chamber judgment of 24 October 2002, no. 37703/97.

59 *O’Keeffe v. Ireland*, Grand Chamber judgment of 28 January 2014, no. 35810/09 (included as a summary in this publication).

60 *Beganović v. Croatia*, judgment of 25 June 2009, no. 46423/06 (included as a summary in this publication).

61 *Beganović v. Croatia*, judgment of 25 June 2009, no. 46423/06 (included as a summary in this publication).

62 *Đorđević v. Croatia*, judgment of 24 July 2012, no. 41526/10 (included as a summary in this publication); *O’Keeffe v. Ireland*, Grand Chamber judgment of 28 January 2014, no. 35810/09 (included as a summary in this publication).

63 *C.A.S. and C.S. v. Romania*, judgment of 20 March 2012, no. 26692/05 (included as a summary in this publication).

Europe has also set out a Recommendation on integrated national strategies for the protection of children from violence.<sup>64</sup>

- (b) **Religious minorities.**<sup>65</sup> Treating religiously motivated violence and brutality on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. Members of religious minorities may also face discrimination from police investigation their allegations, manifesting in scepticism, or unfounded assumptions.
- (c) **Victims of domestic violence.** States have a positive obligation to establish and apply effectively a system punishing all forms of domestic violence and to provide safeguards for the victims.<sup>66</sup> The Court will consider whether authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even where they concern other states. In interpreting the provisions of the Convention and the scope of the state's obligations in specific cases, the Court will look for any consensus and common values emerging from the practices of European States and specialised international instruments such as the Convention for the Elimination of Discrimination Against Women, as well as giving heed to the evolution of norms and principles in international law through other developments such as the Belem do Para Convention which specifically sets out States' duties in the eradication of gender based violence. Nevertheless, it is not the Court's role to replace national authorities and choose in their stead from a wide range of possible measures that can be taken to secure compliance with the positive obligation.<sup>67</sup>
- (d) **Asylum seekers and those held in immigration detention.** States have failed to make adequate provisions for the essential needs of asylum seekers who may be without any family or friendly support, and unable to obtain work.

<sup>64</sup> *M. and M. v. Croatia*, judgment of 3 September 2015, no. 10161/13 (included as a summary in this publication); *A and Others v. United Kingdom*, Grand Chamber judgment of 23 September 1998, no. 3455/05; *Bevacqua and S. v. Bulgaria*, judgment of 12 June 2008, no. 71127/01.

<sup>65</sup> *Milanovic v. Serbia*, judgment of 14 December 2010, no. 44614/07 (included as a summary in this publication).

<sup>66</sup> *M. and M. v. Croatia*, judgment of 3 September 2015, no. 10161/13 (included as a summary in this publication); *A and Others v. United Kingdom*, Grand Chamber judgment of 23 September 1998, no. 3455/05; *Bevacqua and S. v. Bulgaria*, judgment of 12 June 2008, no. 71127/01; *Bălşan v. Romania*, judgment of 23 May 2017, no. 49645/09 (included as a summary in this publication); *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02 (included as a summary in this publication).

<sup>67</sup> *Opuz v. Turkey*, 9 June 2009 (included as a summary in this publication).

Facilities designed to be temporary have ultimately held individuals for extended periods.<sup>68</sup>

## (4) The Procedural Obligation.

Article 3 inherently imposes a **procedural obligation on States to investigate effectively incidents of alleged ill-treatment**. This obligation is extremely important. Without it, the substantive obligation to prohibit torture or inhuman or degrading treatment would be ineffective. Prohibited conduct would remain hidden and States could, in effect, act with impunity.<sup>69</sup>

The obligation to investigate is not an obligation of result, but of means. Not every investigation should necessarily conclude that the applicant's account of events is correct. However, it should be **capable of leading to the establishment of facts**, and if the allegations prove to be true, to the **identification and punishment of those responsible**.<sup>70</sup>

Allegations of ill-treatment can also arise where there has been medical negligence. In this respect, the obligation to set up an effective judicial system may be satisfied if the legal system affords victims a civil remedy enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as damages, to be obtained.<sup>71</sup>

The obligation to investigate applies to alleged ill-treatment by private individuals, as well as by the State.<sup>72</sup>

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68 *M.S.S. v. Belgium and Greece*, Grand Chamber judgment of 21 January 2011, no. 30696/09 (included as a summary in this publication); *Rahimi v. Greece*, judgment of 5 April 2011, no. 8687/08; *Kaja v. Greece*, judgment of 27 July 2006, no. 32927/03; *Shchebet v. Russia*, judgment of 12 June 2008, no. 16074/07.

69 *El-Masri v. The Former Yugoslav Republic of Macedonia*, Grand Chamber judgment of 13 December 2012, no. 39630/09 (included as a summary in this publication). The procedural guarantees required under Article 2, right to life, apply to Article 3 too.

70 *Grimailous v. Latvia*, judgment of 25 June 2013, no. 6087/03 (included as a summary in this publication).

71 *V.C. v. Slovakia*, judgment of 8 November 2011, no. 18968/07, (included as a summary in this publication), in the context of Article 2, but would also apply to Article 3.

72 *C.A.S. and C.S. v. Romania*, judgment of 20 March 2012, no. 26692/05 (included as a summary in this publication).

Investigations conducted must be:<sup>73</sup>

- (a) a serious attempt to find out what happened to an individual;
- (b) thorough and effective;
- (c) capable of leading to the identification of perpetrators;
- (d) capable of leading to the punishment of perpetrators;
- (e) open to public scrutiny;
- (f) take place promptly (so as to avoid loss of evidence) and with expedition.

Investigators must be able to:<sup>74</sup>

- (a) question and take witness statements from all relevant individuals, including police and security forces, and government officials;
- (b) access relevant documents;
- (c) assess relevant documents for truth and consistency;
- (d) highlight gaps in information in the documents;
- (e) pursue lines of enquiry that could contradict what appears on the face of the documents;
- (f) seek independent evidence and expert advice, including medical and forensic evidence and advice which may need to include thorough medical examinations, reports, photographs and autopsies;
- (g) conduct the investigation without undue delay;
- (h) remain independent and impartial in all respects, including being able to resist deferring to state authorities including the police; there should not be a presumption that state authorities have acted lawfully. This applies to lack of an institutional connection, as well as independence in practical terms. Where a State agent has been charged with crimes involving ill-treatment, it is important he or she be suspended from duty during the investigation and trial and dismissed if convicted.<sup>75</sup>

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73 *El-Masri v. The Former Yugoslav Republic of Macedonia*, Grand Chamber judgment of 13 December 2012, no. 39630/09 (included as a summary in this publication); *Jasar v The Former Yugoslav Republic of Macedonia*, judgment of 15 February 2007, no. 69908/01 (included as a summary in this publication); *Krsmanović v. Serbia*, judgment of 19 December 2017, no. 19796/14 (included as a summary in this publication).

74 *El-Masri v. The Former Yugoslav Republic of Macedonia*, Grand Chamber judgment of 13 December 2012, no. 39630/09 (included as a summary in this publication); *Jasar v The Former Yugoslav Republic of Macedonia*, judgment of 15 February 2007, no. 69908/01 (included as a summary in this publication); *Krsmanović v. Serbia*, judgment of 19 December 2017, no. 19796/14 (included as a summary in this publication); *M. and M. v. Croatia*, judgment of 3 September 2015, no. 10161/13 (included as a summary in this publication).

75 *El-Masri v. The Former Yugoslav Republic of Macedonia*, Grand Chamber judgment of 13 December 2012, no. 39630/09

The alleged victim must be able to:<sup>76</sup>

- (a) participate effectively in the investigation in one form or another;
- (b) have access to information about the investigation;
- (c) in certain circumstances, the State's procedural obligation may extend to providing effective access to free legal representation;
- (d) challenge decisions of prosecutors on the categorisation of their treatment.

Authorities must take into account the particularly vulnerable situation of victims and the fact that people who have been subjected to serious ill-treatment will often be less ready or willing or able to make a complaint.<sup>77</sup>

Where allegations that an attack was motivated by racism are brought, authorities should investigate the claim of racism as well as the circumstances of the attack itself.<sup>78</sup> When investigating violent incidents triggered by suspected racism, States must **take all reasonable action to ascertain whether there were racist motives** and to establish whether feelings of hatred or prejudices based on a person's ethnic origin played a role in the events.<sup>79</sup> In practice:

- (a) The obligation to investigate possible racist overtones is an obligation to the means employed – taking all reasonable measures, having regard to the circumstances – not an obligation to achieve a specific result.
- (b) Not only acts based solely on a victim's characteristics can be classified as hate crimes. Perpetrators may have mixed motives influenced by a biased attitude towards the group to which a victim belongs or to which he or she is thought to belong.

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(included as a summary in this publication); *Jasar v The Former Yugoslav Republic of Macedonia*, judgment of 15 February 2007, no. 69908/01 (included as a summary in this publication); *Savitskyy v. Ukraine*, judgment of 26 July 2012, no. 38773/05 (insufficient independence and impartiality where the accused police officers took the relevant witness statements and their department conducted the investigation); *Cestaro v. Italy*, judgment of 7 April 2015, no. 6884/11 (included as a summary in this publication).

<sup>76</sup> *El-Masri v. The Former Yugoslav Republic of Macedonia*, Grand Chamber judgment of 13 December 2012, no. 39630/09 (included as a summary in this publication); *Jasar v The Former Yugoslav Republic of Macedonia*, judgment of 15 February 2007, no. 69908/01 (included as a summary in this publication); *Bălșan v. Romania*, judgment of 23 May 2017, no. 49645/09 (included as a summary in this publication); *Savitskyy v. Ukraine*, judgment of 26 July 2012, no. 38773/05; *Macovei v Romania*, 21 June 2007.

<sup>77</sup> *Krsmanović v. Serbia*, judgment of 19 December 2017, no. 19796/14 (included as a summary in this publication).

<sup>78</sup> *Abdu v. Bulgaria*, judgment of 11 March 2014, no. 26827/08.

<sup>79</sup> *Škorjanec v. Croatia*, judgment of 28 March 2017, no. 25536/14 (included as a summary in this publication).

- (c) The obligation is on the authorities to seek a possible link between racist attitudes and a given act of violence.
- (d) The act can be based on a victim's actual or perceived personal characteristics or actual or presumed association or affiliation with another person who actually possesses or is presumed to possess those characteristics.

States must ensure that domestic legal systems contain adequate structures to enable such an investigation. Administrative practices, whether or not they mirror applicable legislation, will be relevant. States should ask the following questions:

- (a) Are different branches of the state cooperating as required?
- (b) Do they understand the substantive protections in Article 3?
- (c) Is adequate disclosure being made?
- (d) Are perpetrators being made public?
- (e) Is there adequate training at all stages of investigation, arrest, conviction and sentencing – from detectives and police officers to appellate judges?

The **adequacy of sentences under the criminal law** will be relevant. Lenient sentences for perpetrators can demonstrate a lack of effectiveness of an investigation and trial, because of the lack of a deterrent effect.<sup>80</sup> Strict limitation periods may also give rise to a procedural breach.<sup>81</sup>

Article 13 of the Convention provides the right to an **effective remedy**. For the purposes of violations of Article 3, the focus is on satisfying the procedural obligation. Upon a finding of violation, payment of compensation to the victim will be necessary<sup>82</sup> but is not a sufficient response. Were it otherwise, States could simply “pay” to torture. The Article 3 prohibition, despite its fundamental importance, would be rendered ineffective.

Where a person accused of criminal activity has been interrogated using a method prohibited under Article 3, and where the results of this interrogation could be said to have led to disadvantages for him or her, the Court has considered whether further types of redress are appropriate. The Court has not ruled out that the State should address the continuing impact of the prohibited conduct, and address the exclusion of evidence obtained by that conduct.<sup>83</sup>

80 *Zontul v. Greece*, judgment of 17 January 2012, no. 12294/07 (6-month sentence for a border guard who tortured an asylum-seeker found to be disproportionately lenient).

81 *Beganović v. Croatia*, judgment of 25 June 2009, no. 46423/06 (included as a summary in this publication).

82 *Cestaro v. Italy*, judgment of 7 April 2015, no. 6884/11 (included as a summary in this publication).

83 *Gäfgen v. Germany*, Grand Chamber judgment of 1 June 2010, no. 22978/05 (included as a summary in this publication);

## **(5) Concluding Remarks.**

The prohibition against torture is one of the most fundamental values of democratic societies. It is imperative that States fulfil their duty encompassed in the Convention to train detectives, police officers, security forces, lawyers, all levels of judges, prison staff, parole boards, welfare institutions, health professionals, immigration officials and border guards.

The substantive obligations that prohibit and prevent ill-treatment must be fulfilled by any State which claims to respect and protect the rule of law. The procedural obligation is no less vital. Without proper investigations, evidence of violations will remain buried. Without the identification and punishment of perpetrators, abuses will continue.

A selection of case summaries from the European Court of Human Rights will now follow to further illustrate and elaborate on issues discussed in this narrative.

## Article 3 Case Summaries

*No risk of ill-treatment in contravention of Article 3 if a foreign mujahedin was deported to Tunisia*

### JUDGMENT IN THE CASE OF AL HANCHI v. BOSNIA AND HERZEGOVINA

(Application no. 48205/09)

**15 November 2011**

#### 1. Principal facts

The applicant, Ammar Al Hanchi, was a Tunisian national born in 1965. He arrived in Bosnia and Herzegovina during the 1992-95 war and joined the foreign mujahedin: the mujahedin is a Muslim movement claiming to fight a jihad, or a holy war. While in possession of false documents, Mr Al Hanchi obtained a national identity card in 1995. He subsequently married a Bosnian and Herzegovinian citizen in 1997. The couple have two children, born in 1998 and 2000.

In April 2009, the authorities established that Mr Al Hanchi was an illegal immigrant. In May 2009, relying on secret intelligence reports, it was decided that Mr Al Hanchi was a threat to national security. Consequentially, his deportation was ordered and he was prohibited re-entry for five years.

In July 2009, Mr Al Hanchi applied for asylum claiming that, he would face treatment contrary to Article 3 if returned to Tunisia. His application was rejected and in December 2009 he was served with a removal order.

#### 2. Decision of the Court

Due to his involvement with the foreign mujahedin, Mr Al Hanchi complained that his removal to Tunisia would expose him to treatment contrary to Article 3. Mr Al Hanchi further complained that there had been breaches of Articles 5 and 8, due his detention pending deportation being illegal and the breakup of his family that deportation would entail.

#### Article 3

When considering the applicant's Article 3 claims, the Court referred to findings of the Parliamentary Assembly of the Council of Europe and UN Special Rapporteurs:

these findings identified that steps in Tunisia were being taken to move towards a democratic system of Government. The Court in particular referred to sections of the reports stating that: (a) amnesty had been granted to all political prisoners; (b) there had been the dissolution of the State Security Service; and (c) that there had been the dismissal or prosecution of some high-ranking officials for past abuses of human rights. In view of these findings, the Court therefore considered that while cases of treatment contrary to Article 3 were still reported in Tunisia, they were sporadic incidents. In particular, there was no indication that after the regime change, Islamists were systematically targeted as a group.

The Court also considered that Tunisia had acceded to the Optional Protocol of the UN Convention against Torture, and also adopted the Optional Protocol to the International Covenant on Civil and Political Rights. The nation therefore legally recognised the competence of the UN Human Rights Committee to hear individual cases alleging ill-treatment. In the circumstances therefore, the Court considered that there was a determination of the Tunisian authorities to eradicate the culture of violence and impunity which had prevailed during the former regime. The Court therefore concluded that there was no risk that, if deported to Tunisia, Mr Al Hanchi would be treated contrary to Article 3.

#### Articles 5, 6, and 8

The Court dismissed the remaining complaints by Mr Al Hanchi.

The Court found that Mr Al Hanchi had been detained with a view to deportation in strict compliance with domestic law, in suitable conditions and not on the basis of arbitrary reasons. There was therefore no violation of Article 5.

With regard to the alleged unfairness of the deportation proceedings, the Court recalled that decisions concerning the entry, stay and deportation of aliens were not protected under Article 6, as they did not involve the determination of civil rights and obligations.

Finally, as concerned Mr Al Hanchi's Article 8 complaint, the Court observed that an appeal to the Constitutional Court of Bosnia and Herzegovina was, in principle, an effective remedy under the Convention. Given that Mr Al Hanchi's complaint was still pending before that court, and that the Convention did not require applicants complaining about their deportation under Article 8 to have access to a remedy with automatic suspensive effect (in contrast with such complaints under Article 3), his Article 8 complaint was premature.

*The deportation of a foreign mujahedin to Syria would violate Article 3 as there was a risk of ill-treatment – and arbitrary detention before deportation proceedings violated Article 5*

## JUDGMENT IN THE CASE OF AL HUSIN v. BOSNIA AND HERZEGOVINA

(Application no. 3727/08)

**7 February 2012**

### **1. Principal Facts**

The applicant, Al Husin, was born in Syria, before moving to the then Socialist Federal Republic of Yugoslavia to study in 1983. In 1993, the applicant met a refugee from Bosnia Herzegovina in Croatia, who he married and had three children together with, all with Bosnian citizenship living in Bosnia Herzegovina at the time of this judgment.

During the 1992-1995 war in Bosnia and Herzegovina, Mr Al Husin joined a unit of the foreign mujahedin which aimed to support Bosnian Muslims in their military struggle. However, it is not clear how long Mr Al Husin was a member of El Mujahedin, which was a special unit within the local Army of Republic of Bosnia and Herzegovina forces mostly made out of foreign mujahedin fighters, however, later on locals outnumbered the number of foreign fighters in the unit. It is also not clear when Mr Al Husin obtained Bosnian citizenship, however, it seems to be between 1992 and 1994. In 2001 and 2007 the relevant administration authority quashed the naturalisation decision of 1992 and 1994 respectively, stating that the applicant had acquired BiH citizenship by means of fraudulent conduct, false information, and concealment of relevant facts. As a result the applicant became an unlawful resident in BiH.

Mr Al Husin made several applications for a residence permit, which were all rejected by the Aliens Service based on confidential intelligence reports, stating that the applicant was a threat to national security. After each dismissal he was granted a period for voluntary departure from the country of fifteen days.

On 1 June 2007 Mr Al Husin claimed asylum. He stated that he would be perceived by the Syrian authorities as a member of the outlawed Muslim Brotherhood or as an Islamist. He claimed that the Syrian authorities were aware of his activities in BiH and that they had allegedly interviewed his father and brothers in this connection and that one of his brothers was held in detention for nine months because he refused to spy on him. Mr Al Husin argued that given the political and human rights situation in Syria, his deportation would expose him to a risk of being subjected to ill-treatment

and claimed asylum on this ground as well as on the basis of his right to respect for private and family life, stating that deportation would move him away from his wife and children. On 8 August 2007 the Asylum Service refused the asylum claim and granted the applicant a fifteen day period for voluntary departure, stating that he did not face a real risk of being subjected to ill-treatment. The decision was upheld by the State Court, however, the Constitutional Court remitted the decision concerning his family life claim for retrial and indicated that the applicant should not be deported while the case was pending. The claim was quashed by the State Court and remitted to the Aliens Service for reconsideration. In 2009 the Aliens Service rejected the application for a residence permit and granted the applicant a period for voluntary departure of fifteen days. This decision was upheld by both the Ministry of Security and the State Court. The applicant lodged a constitutional appeal against this decision which was still pending at the time of this judgment.

On 6 October 2008 the Aliens Service placed Mr Al Husin in an immigration centre on security grounds, which was upheld by both the State and Constitutional Court. On 1 February 2011 the Aliens Service issued a deportation order, which would prohibit Mr Al Husin from re-entering the country for five years. In 2011 the Ministry of Security and State Court upheld the decision. However, also in 2011 under Rule 39 of the Rules of Court, the European Court of Human Rights made a request to the Government that Mr Al Husin not be deported to Syria. The applicant was at the time of this judgment still being detained with the intention of deportation.

## **2. Decision of the Court**

The applicant complained that his deportation to Syria would expose him to the risk of treatment contrary to Article 3. He also contested the lawfulness of his detention under Article 5.

### Article 3

The Government argued that the applicant's claim for asylum had been carefully considered and had been rejected based on the fact that the applicant failed to demonstrate that the risk to him was real. However, the Court referred to a submission made by Human Rights Watch as a third party intervener, which showed that in regards to Syria, individuals accused of being Islamists had suffered unfair trials and torture. The Court re-iterated, as established in international law as well as subject to its treaty obligations, that States have the right to control the entry, residence and expulsion of aliens. However, expulsion by the State can give rise to an issue under Article 3, where substantial grounds have been shown for believing that if expelled, the person

concerned would face a real risk of being subjected to ill-treatment. In these cases, Article 3 implies an obligation not to expel the person to the country in question. Furthermore, since the prohibition against torture or inhuman or degrading treatment is absolute, the conduct of the applicant, no matter how undesirable or dangerous, cannot be taken into account.

The obligation is on the applicant to prove that there are substantial grounds for believing that they would be exposed to a real risk of being subjected to treatment contrary to Article 3. Where such evidence is provided, it is for the Government to dispel any doubts about it. The assessment of the existence of a real risk must also be rigorous and the Court must be satisfied that the assessment made by the authorities was adequate and sufficiently supported by domestic material as well as other material from other objective sources.

In the present case, the Court found that the domestic authorities did not sufficiently take into account the nature of the mujahedin movement to which the applicant belonged. The Court also noted that the applicant gave a number of interviews to leading Arabic media in the aftermath of the war in BiH, revealing his association with the mujahedin movement. The applicant was also wrongly identified as a convicted terrorist in the US Department of State's Country Report on Terrorism in BiH and arrested in BiH based on national security grounds. All these factors would make him a person of interest for the Syrian authorities. The applicant even submitted documents issued by the Syrian security service from 2002, calling for his arrest upon reentering the country.

Based on Syria's human rights record and the fact that the situation in Syria had declined since the political protest in March 2011, the Court found that there was a real risk to the applicant, if deported to Syria, of being subjected to ill-treatment. Therefore, the Court found that the applicant's deportation would violate Article 3.

#### Article 5

The applicant complained that his detention was arbitrary, given the deportation order was not issued until 1 February 2011, more than two years after his arrest in 2008. The Government argued that the applicant's detention was in keeping with domestic law, since he allegedly constituted a threat to national security. The Court noted that Article 5 is a fundamental human right which protects all individuals against arbitrary interference by the State with their right to liberty. Article 5(1)'s sub-paragraphs are an exhaustive list of permissible grounds on which a person may be deprived of their liberty and must be interpreted narrowly. Article 5(1)(f) permits the State to control the

liberty of aliens in an immigration context, but it requires that deportation proceedings must be in progress and prosecuted with due diligence. In addition to complying with national law, deprivation of liberty should also be in keeping with protecting individuals from arbitrariness.

The Court noted that the deportation proceedings against the applicant was instituted on 1 February 2011, however, he was arrested on 6 October 2008. This meant that the first period of the applicant's detention was not justified under Article 5(1)(f). The Court argued that at the time of the applicant's arrest the domestic authorities could have issued a deportation order against him and then detained him for deportation purposes, however, the Government failed to give an explanation why this was not done. The Court hence found a violation of Article 5(1) with regard to the period of the applicant's detention from 6 October 2008 to 31 January 2011.

With regard to the subsequent period the Court noted that a deportation order was issued on 1 February 2011 and that the appeal was dealt with within a month. Although the applicant had remained in custody until the time of this judgment, the period since 15 March 2011 must be distinguished since the Government refrained from deporting the applicant in compliance with a request made by the Court under Rule 39. However, also in the implementation of an interim measure based on an indication by the Court, the deprivation of liberty of the individual must still be done in compliance with national law as well as the Convention.

The Court concluded that the deportation proceedings, although temporarily suspended, had been in progress since 1 February 2011. There were no indications that the authorities had acted in bad faith and that the applicant had been detained in unsuitable conditions or that the detention had been arbitrary for any other reason. The Court hence found no violation of Article 5(1) with regards to the period of detention after 1 February 2011.

#### Article 41

The Court awarded the applicant €3,000 for non-pecuniary damage, but decided to make no award for costs and expenses, as the claim was not evidenced by itemised bills and invoices.

*The Romanian authorities' failure to adequately protect the applicant from domestic abuse constituted a breach of Article 3*

## JUDGMENT IN THE CASE OF BĂLȘAN v. ROMANIA

(Application no. 49645/09)

**23 May 2017**

### **1. Principal Facts**

The applicant, Angelica Camelia Bălșan, was a Romanian national who was born in 1957 and lived in Petrosani (Romania).

The applicant was married to N.C. in 1979 and had four children with him. The applicant claimed that N.C. used violence towards her and their children throughout their marriage. The violence intensified in 2007 during their divorce proceedings, and continued into the following year when the divorce was finalised. She was assaulted by N.C. a total of eight times during this period, and sustained injuries recorded in medical reports which required between two to a maximum of ten days' medical care.

During this period, Ms Bălșan asked for help by way of emergency calls to the police, petitions to the head of police for protection, and formal criminal complaints. Concerning the latter, it was considered both at the investigation level and before the national courts that she had been provoking the domestic violence, and that it was not serious enough to come under the scope of criminal law. Therefore, concerning the three incidents which occurred in 2007, the national courts ultimately decided to acquit N.C. of bodily harm. Concerning the five incidents in 2008, the prosecuting authorities decided not to press charges. N.C. was given an administrative fine of 200 Romanian lei (approximately €50) following each of these decisions. During the criminal investigations and the court proceedings, Ms Bălșan continued to bring N.C.'s abuse to the authorities' attention, warning them that she feared for her life. No concrete measures were ever taken however, and her requests that the courts order protective measures went unanswered.

### **2. Decision of the Court**

Ms Bălșan alleged that the Romanian authorities had failed to protect her from repeated domestic violence and had not held N.C. accountable, despite her numerous complaints. She also submitted that the authorities' tolerance of such acts of violence had made her feel debased and helpless. The case was examined under Article 3

(prohibition of inhuman and degrading treatment) and Article 14 (prohibition of discrimination) in conjunction with Article 3.

### Article 3

The Court affirmed that the physical violence to which Ms Bălșan had been repeatedly subjected by N.C. and her resulting injuries, as documented in medical and police reports, had been sufficiently serious to reach the required level of severity under Article 3 of the Convention. Moreover, the Romanian authorities would have been well aware of the abuse, given Ms Bălșan's repeated calls for assistance to both the police and the courts. The authorities had therefore been under an obligation to take all reasonable measures to act upon her complaints and to prevent the assaults from happening again. Indeed, there was a legal framework in Romania through which to complain about domestic violence and to seek the authorities' protection, and Ms Bălșan had made full use of it.

However, the Court observed with grave concern how the authorities had found that Ms Bălșan had provoked the domestic violence against her, and how it had been considered not serious enough to fall within the scope of the criminal law. Such an approach, taken in a case where the fact of the domestic violence itself had not been contested, had deprived the national legal framework of its efficacy and purpose. This was inconsistent with international standards on violence against women and domestic violence in particular.

Furthermore, despite the fact that Ms Bălșan had continued to complain of further abuse throughout the related proceedings, the authorities had apparently taken no measures to protect her. The only sanctions imposed, administrative fines, had been an ineffective deterrent against further abuse.

The Court therefore found that the manner in which the authorities had dealt with Ms Bălșan's complaints had not provided her with adequate protection against N.C.'s violence, in violation of Article 3.

### Article 14 in conjunction with Article 3

The Court took note of official statistics demonstrating how domestic violence in Romania was tolerated, and was perceived as normal by the majority of the population. Furthermore, the general population might not be sufficiently aware of the extensive legal and policy framework in Romania for the elimination of discrimination against women, and women themselves might not be aware of their rights. The authorities

did not, moreover, fully appreciate the seriousness and extent of domestic violence in Romania, as demonstrated in the current case by their failure to apply the relevant legal provisions. Their passivity reflected a discriminatory attitude towards Ms Bălșan as a woman.

The Court therefore considered that the violence to which Ms Bălșan had been subjected had been gender-based violence, which is a form of discrimination against women. Despite the Government's adoption of a law and national strategy on preventing and combatting such abuse, the lack of a proper response by the judicial system and the impunity enjoyed by aggressors, as in Ms Bălșan's case, indicated that there had been insufficient commitment to address the problem of domestic violence in Romania.

Consequently, there had been a violation of Article 14, read in conjunction with Article 3.

#### Article 41

The Court held that Romania was to pay Ms Bălșan €9,800 euros in respect of non-pecuniary damage.

*Lack of an effective investigation of ill-treatment following a fight involving adults and minors violated Article 3*

## **JUDGMENT IN THE CASE OF BEGANOVIĆ v. CROATIA**

(Application no. 46423/06)

**25 June 2009**

### **1. Principal Facts**

The applicant, Darko Beganović, was a Croatian national of Roma origin living in Luka (Croatia). On 23 April 2000, the applicant (aged twenty-three) got into a fight with a group of seven friends (two of which were minors) over a violent incident which allegedly occurred between some of them on 8 December 1999. In the evening of 23 April 2000, the group of friends approached the applicant, who was in the company of other people, to confront him about the incident of 8 December 1999. The applicant then insulted one of the assailants on the basis of his Serbian origin and a fight ensued. In April and June 2000 the police interviewed the group of friends. They stated that they had agreed to attack the applicant as revenge for him having physically assaulted some of them in December 1999. The police also interviewed the applicant who at the time gave no indication that any of his assailants had made reference to his Roma origin.

On 12 June 2000 the applicant, represented by legal council, lodged a criminal complaint against six identified individuals and one unknown with the State Attorney's Office. The applicant alleged that they had beaten him on 23 April 2000 causing severe bodily injuries as well as that B.B. (aged seventeen) had hit him on the head with a wooden plank, causing him to lose consciousness. A medical report was also submitted to the police by a hospital in Zagreb, stating that the applicant had been examined after the incident and that he had suffered numerous contusions to the head and body as well as a concussion.

Based on the applicant's complaint the police brought a criminal complaint before the State Attorney's Office in respect of the assailants. In July 2001 and September 2002, the Attorney's Office decided not to institute criminal proceedings against the assailants as it found the applicant's injuries not severe enough and could only be prosecuted privately by the victim. Based on this information the applicant brought private prosecution against one of the assailants, B.B. This case was dismissed by a different State Attorney who found that a procedural error had been made according to domestic legislation and that B.B. had to be prosecuted by the State after all.

Criminal proceedings were then brought against B.B. before a juvenile judge in February 2002 only to be discontinued in December 2005 on the ground that the prosecution had been time-barred, despite multiple attempts by the applicant's legal council to get the proceedings expedited. The applicant prosecuted the rest of the assailants privately. These proceedings were discontinued in May 2006 after the court found that the prosecution had become time-barred almost two years earlier.

## **2. Decision of the Court**

The applicant, relying on Article 3 and 13, argued that the authorities did not protect him from an act of ill-treatment as they had not investigated and prosecuted effectively those responsible. The applicant also relied on Article 14 (prohibition of discrimination) in conjunction with Article 3, that both the attack and subsequent proceedings showed that he had been discriminated against due to his Roma origin.

### Article 3

Ill-treatment must attain a minimum level of severity in order to fall within the scope of Article 3. The assessment of this minimum level is relative and should take into account the circumstances of the case. The Court noted that the applicant alleged that seven individuals had confronted him and had attacked him by kicking and hitting him. The medical documentation showed that the applicant had sustained numerous blows and had contusions and lacerations on his head and body. The Court considered these acts of violence fell within the scope of Article 3.

Once the Court found that the level of severity of violence attracts the protection of Article 3, this imposes an obligation on the State to ensure that regulations and practices, in particular the domestic authorities' compliance with procedural rules, are applied effectively. Article 3 also requires that States have effective criminal law provisions in place to deter the commission of offences against personal integrity which are supported by mechanisms to punish breaches of such provisions. When no such practical and effective protections are in place to prevent and protect against breaches of Article 3, the State may be held responsible.

Article 3 also requires that authorities investigate allegations of ill-treatment when they are arguable and raise reasonable suspicion even if the treatment was administered by private individuals. In this case, the Court attached particular importance to the fact that the applicant was attacked by seven individuals, in the evening in an isolated place, where his calls for help would have been futile. The attack was also premeditated, and the act of violence in question was an assault on the applicant's

physical integrity. The injuries sustained by the applicant were not merely trivial in nature, and the Court found that the applicant's allegations of ill-treatment were arguable and raised reasonable suspicion and fell under Article 3.

In respect to the duty to investigate a minimum standard must be reached, namely the requirement that the investigation be independent, impartial and subject to scrutiny, and that the authorities act with diligence and promptness. The authorities must take reasonable steps to secure the evidence concerning the incident. The Court noted that the police promptly conducted interviews, however, the further steps taken by the prosecuting authorities and courts could not be seen as satisfying the requirement of effectiveness for the purposes of Article 3.

In this case the Court noted that the State authorities only filed an indictment against B.B., despite the investigation clearly showing that the other six assailants were also involved in the attack. In June 2000, the applicant lodged a criminal complaint with the Zagreb State Attorney's Office against the six assailants and one unknown; the office remained inactive for eight months. The error stating that the case had to be filed privately was eventually rectified, however it was only after the applicant brought a private prosecution against B.B. The criminal proceedings against B.B. were properly instituted almost two years after the incident. This was followed by further inaction until the prosecution became time barred. The error against the other six assailants was never rectified after being told that the case should be brought privately. The applicant filed a private indictment, however, no hearing was held and the prosecution became time barred as well. As a result, the facts of the case were never established by a competent court of law. The Court found that the above elements demonstrated that there had been a violation of Article 3 by the relevant State authorities. In the present case the authorities' practices did not adequately protect the applicant from an act of serious violence and, taken together with the manner in which the criminal-law mechanism had been implemented, had been defective.

#### Article 14 in conjunction with Article 3

The applicant complained that his ill-treatment and the subsequent proceedings conducted by the authorities showed he had been discriminated against based on his ethnic origin. He relied on Article 14, which secures the rights and freedoms set out in the Convention without discrimination on any ground. The applicant complained that the attack and lack of action by the authorities were as a result of his Roma origin. The Court stated that State authorities have an obligation to investigate possible racist overtones to a violent act. However, this obligation is not absolute, but the authorities must do what is reasonable in the circumstances in the case.

In the present case, the Court found that the police interviewed all the alleged assailants as well as the applicant in order to establish the facts. Based on the interviews it was concluded that the applicant and assailants were part of the same group of friends until 8 December 1999, when the applicant attacked three minors and two other individuals in the group. The attack on the applicant was a retaliation against that incident. As a result the Court found that the attack on the applicant was an act of revenge rather than racially motivated.

The Court also noted that the applicant did not mention that his assailants had made reference to his Roma origin during his police interviews or while giving evidence before the Municipal Court. The Court concluded that there was no evidence that the attack was racially motivated, and found no violation of Article 14 read in conjunction with Article 3.

#### Article 41

The Court awarded the applicant €1,000 in respect of non-pecuniary damage, and €6,250 for costs and expenses.

*Not providing adequate medical care or educational supervision to a minor in a temporary detention centre violated Article 3 and Article 5, and questioning and proceedings violated Article 6*

## GRAND CHAMBER JUDGMENT IN THE CASE OF BLOKHIN v. RUSSIA

(Application no 47152/06)

**23 March 2016**

### 1. Principal Facts

The applicant, Ivan Blokhin, was a Russian national born in 1992 and living in Novosibirsk (Russia). The applicant suffered from attention-deficit hyperactive disorder (ADHD) and enuresis. He was diagnosed in December 2004 and January 2005 after being examined by two specialists who prescribed him medication and regular consultation by a neurologist and psychiatrist.

On 3 January 2005, the applicant, who was 12 years old at the time, was arrested and taken to a police station. He was not told the reasons for his arrest, and alleged that he was put in a cell that had no windows and with the lights turned off. He stated that he spent an hour in the dark, after which he was questioned by a police officer. The officer told him that S. (the applicant's 9 year old neighbour) had accused him of extortion. According to the applicant, the police officer told him to confess, saying that if he did so he would be released, but if he refused he would be placed in custody. The applicant signed a confession statement. After the applicant's guardian, his grandfather, was contacted and came to the police station, he retracted his confession.

Relying on the applicant's confession along with the statements of the 9 year old neighbour and his mother, the prosecuting authorities found that his actions contained elements of the criminal offence of extortion. However, since he had not reached that age of criminal responsibility the authorities refused to open criminal proceedings. On 21 February 2005, a district court ordered his placement for 30 days in a temporary detention centre for juveniles to prevent him from committing further acts of delinquency; he was placed in the detention centre on the same day. After an appeal by the applicant's grandfather, stating that the detention was unlawful and incompatible with his grandson's health and that he had been intimidated and questioned in the absence of his guardian, the regional court quashed the detention order in March 2005. In May 2006 the same court, after re-examining the matter, held that the original detention order was lawful.

After being released from the detention centre on 23 March 2005, the applicant was taken to a hospital where he received treatment for enuresis and ADHD until 21 April 2005. According to the applicant he did not receive appropriate medical care during his time in the detention centre. He claimed access to the toilets was limited and that he had to endure bladder pain and humiliation, given he suffered from enuresis. He also claimed that he and the other juveniles detained at the centre spent the whole day in a large empty room which had no furniture. They were only allowed to go into the yard twice during the applicant's 30 day stay, and they were given lessons only twice a week for about three hours, where about 20 children all of different ages were taught together in one class.

## **2. Decision of the Court**

Relying on Article 3, the applicant complained that the conditions in the temporary detention centre had been inhuman and that he did not receive adequate medical care. He also complained that his detention had been in breach of Article 5 (right to liberty and security). Lastly he claimed that the proceedings relating to his placement in the temporary detention centre had been unfair and violated Article 6 (right to a fair trial).

On 14 November 2013 a Chamber of the Court delivered a judgment in which it unanimously found a violation of Article 3, 5, and 6. The case was referred to the Grand Chamber under Article 43 at the Government's request.

### Article 3

The Court reiterated that in order for treatment to come under the scope of Article 3, it must reach a minimum level of severity. The Court noted that Article 3 imposed an obligation on the State to protect the physical well-being of persons who are deprived of their liberty, by providing them, among other things, with the required medical care. However, assessing if the medical care is adequate is one of the most difficult elements to determine. As a result the authorities must ensure that a comprehensive record is kept concerning the detainee's state of health and their treatment while in detention. The State must ensure that the medical treatment provided within prison facilities are at a level comparable to that which the State provides to the public.

When dealing with children, the health of juveniles deprived of their liberty should be safeguarded according to recognised medical standards applicable to juveniles in the wider community. The authorities should always be guided by the child's best interests and the child should be guaranteed proper care and protection. This includes

a medical assessment of the child's state of health to determine if he/she should be placed in a juvenile detention centre. Where events lie in large part within the exclusive knowledge of authorities, as is the case of persons under their control or custody, strong presumptions of facts will arise in respect to injuries, damage, or death that occurred during detention. The burden of proof in such cases rests with the authorities to provide an explanation. In the absence of any sufficient explanation by the authorities the Court can draw adverse inferences.

In the present case the Court noted in particular the applicant's young age and his state of health as circumstances relevant in the assessment of whether the minimum level of severity had been attained. Despite the Government submitting documents as to the standards of the detention centre, the Court noted that the documents were all dated after the time when the applicant was placed there. The Court also found that the reports or certificates submitted by the Russian Government were of little evidentiary value as they lacked reference to original documentation held by the detention centre. The Court noted that the applicant's grandfather submitted medical certificates at the detention hearing to show that the applicant suffered from ADHD, to ensure that the authorities would be aware of his condition. The Court found this evidence sufficient to establish that the authorities knew about the applicant's medical condition upon his admission to the temporary detention centre. Furthermore, the fact that he had to be hospitalised after his release for almost three weeks, provided an indication that he did not receive the necessary treatment for his condition while at the centre.

The Court found that the Government had failed to show that the applicant received medical treatment required for his condition, and found a violation of Article 3. Having made this finding, the Court held it unnecessary to examine the remainder of the applicant's complaints under this provision.

### Article 5

The Court confirmed that the detention of the applicant for thirty days at the temporary detention centre amounted to a deprivation of liberty within the meaning of Article 5(1). The Court found that the applicant's detention did not come within in the scope of Article 5(1)(a),(b), (c), (e), or (f), but examined whether or not the applicant's placement in the temporary detention centre was in accordance with Article 5(1)(d). Detention for education supervision, in the case of minors, must take place in an appropriate facility with the resources to meet the necessary educational objectives and security requirements. This does not mean that the placement in such a facility must be immediate, interim placements are allowed in facilities which do not provide this,

however, the interim custody period must be followed in a short amount of time by the transfer to a centre that provides education supervision.

In the present case, the applicant was placed in the detention centre for the purpose of correcting his behaviour and not as a temporary hold before being transferred to a different centre. The Court found, contrary to the Government's claims, that the applicant's placement in the temporary detention centre could not be compared to a placement in a closed educational institution. As discussed above, placement in a temporary detention centre should be a short term solution, and the Court failed to see how any meaningful educational supervision, to change a minor's behaviour, could be provided during a maximum period of thirty days. The Court did not dispute that there was some schooling at the centre, however, the centre was characterised by a disciplinary regime rather than the schooling provided. Furthermore, none of the domestic courts stated that the applicant's placement was for educational purposes, instead they all referred to "behaviour correction," or to prevent him from committing further delinquent acts, neither of which is a valid ground covered by Article 5(1)(d).

The Court found that the applicant's placement in the temporary detention centre did not fall under Article 5(1)(d), and therefore violated Article 5(1).

## Article 6

With regard to juvenile defendants, the Court held that criminal proceedings should be organised to respect the principle of the best interests of the child and that the child charged with an offence is dealt with in a way that takes into account his age and level of maturity, and that steps are taken to promote his ability to understand and participate in the proceedings. The child should not be deprived of important procedural safeguards, because the proceedings could result in the deprivation of his liberty. Although not absolute, the right under Article 6(3)(c) provides for everyone charged with a criminal offence to be effectively defended by a lawyer. The Court noted that the particular vulnerability of the accused at the initial stages of police questioning can only be properly balanced by the assistance of a lawyer. For a fair trial, Article 6(1) requires that access to a lawyer be provided as soon as a suspect is first questioned by police, unless there is a compelling reason based on the circumstances of the case that that right should be restricted. The Court stressed in particular the fundamental importance of providing access to a lawyer where the person in custody is a minor given their particular vulnerability.

Article 6(3)(d) enshrines the principle that before an accused can be convicted, all evidence against him must usually be presented in his presence at a public hearing.

An accused should be given adequate and proper opportunity to challenge and question witnesses against him. Where the conviction is based solely or decisively on the evidence of an absent witness, the Court must decide if there are sufficient counterbalancing factors in place to still permit a fair and proper assessment of the evidence. The Court further noted that there must be good reason for the non-attendance of a witness at trial, especially when the conviction is based solely on the deposition made by a person whom the accused had no opportunity to cross examine. The rights of the defence in that case could be considered so restricted that it would violate the rights under Article 6.

In the present case the applicant was only twelve years old and suffered from ADHD when the police questioned him at the station. He was also below the age of criminal responsibility set by the Criminal Code for the crime of extortion, which he was accused of. He was however, in need of special treatment and protection by the authorities and at a minimum he should have been guaranteed the same legal rights and safeguards as those provided to adults. The Court noted that there was no indication that the applicant was told that he had the right to call his grandfather, a teacher, or lawyer or any other person of confidence during the period he was held at the police station to come assist him during questioning. Furthermore, no steps were taken to ensure that he was provided with legal assistance during questioning. The fact that domestic law did not provide for legal assistance to a minor under the age of criminal responsibility when interviewed by police was not a valid reason for failing to comply with that obligation. The Court found that the absence of legal assistance during the applicant's questioning by the police affected his defence rights and undermined the fairness of the proceedings as a whole, and constituted a violation of Article 6(1) and (3)(c).

The Court noted that the District Court was provided with the results of the pre-investigation inquiry, which included the witness statements made by the alleged victim and his mother. Neither S. nor his mother were called to the hearing to give evidence and to provide the applicant with an opportunity to cross examine them, despite the fact that their statements were of decisive importance to the pre-investigation inquiry's conclusion that the applicant committed the act. Based on these facts the Court concluded that the applicant was not afforded a fair trial and found a violation of Article 6(1) and (3)(d).

#### Article 41

The Court awarded the applicant €7,500 with respect to non-pecuniary damage. The Court also awarded the applicant €1,910 in respect of costs and expenses.

*Force, unless strictly necessary, used by authorities on individuals under their control violates Article 3 even if the injuries do not amount to serious physical or mental harm*

## **GRAND CHAMBER JUDGMENT IN THE CASE OF BOUYID v. BELGIUM**

(Application no 23380/09)

**28 September 2015**

### **1. Principal Facts**

The applicants, Saïd and Mohamed Bouyid (brothers), were Belgian nationals and lived in Saint-Josse-ten-Noode (a district of the Brussels-Capital region). They both lived with their parents and siblings next to the local police station. The applicants each complained that they had been slapped in the face by a police officer on separate occasions.

Saïd Bouyid stated that on 8 December 2003, while he was standing with a friend by the door of the building where he lived, ringing the bell since he had forgotten his keys, a plain-clothes police officer asked him to show his identity card. When he refused, asking the officer to show his credentials, the police officer grabbed him by his jacket and took him to the police station. At the station he was placed in a room where the police officer allegedly slapped him in the face while he was protesting his arrest. On the same day a medical certificate was issued which noted that Saïd Bouyid had been “in a state of shock” and had erythema (fading) on the left cheek and in the area of the left ear canal. The next day, Saïd Bouyid filed a complaint with the Standing Committee for the Oversight of Police Services and was interviewed by a member of the investigation department.

Mohamed Bouyid stated that on 23 February 2004, while he was being questioned at the local police station, he was slapped in the face by an officer. A medical certificate issued later that same day showed that there was bruising on the left cheek. That same day Mohamed Bouyid filed a complaint. On 5 May 2004 the police officer in question was interviewed by the director of internal oversight of the police and stated that Mohamed had been disrespectful towards him during the interview. The police officer, however, denied having slapped him.

On 17 June 2004 Saïd and Mohamed Bouyid applied to join the proceedings as civil parties. The police officers were charged with using violence against individuals in the course of their duties, and with intentional wounding or assault, and with engaging

in arbitrary acts in breach of the rights and freedoms guaranteed by the Constitution. The investigation department also sent the investigating judge a report listing cases brought against members of the Bouyid family, noting their difficult relationship with the police and highlighting the aggressive and provocative attitude the family had towards police officers. The investigating judge sent the file to the prosecuting authorities. The Crown Prosecutor called for the charges to be dropped, and the Com-mittals Division endorsed the discontinuance of the case. On 9 April 2008 the Indict-ments Division of the Brussels Court of Appeals upheld the discontinuance order. On 29 October 2008 an appeal on points of law by both applicants was dismissed by the Court of Cassation.

## **2. Decision of the Court**

Relying on Article 3 (prohibition of torture and inhuman or degrading treatment) the applicants complained that they had been victims of degrading treatment having been slapped in the face by police officers. They also complained that the investiga-tion into their complaints had been ineffective, incomplete, biased, and excessively lengthy.

On 21 November 2013 a Chamber of the Court delivered a judgment, in which it found no violation of Article 3. The case was referred to the Grand Chamber under Article 43 at the applicants' request.

### Article 3

The Court emphasised that Article 3 enshrines one of the most fundamental values of democratic society. It also noted that Article 3 has no provision for exceptions, even in the event of a public emergency. Allegations of ill-treatment contrary to Article 3 must be supported by appropriate evidence, meaning that it must be proven "beyond a reasonable doubt." Where the events are, in large part, within the exclusive knowledge of the author-ities, such as in cases where individuals are in custody, strong presumptions of facts will arise with respect to injuries that occur during the detention. The burden of proof is on the Government to produce evidence that casts into doubt the victim's account.

Ill-treatment must attain a minimum level of severity to fall within Article 3, which usually involves actual bodily injury or intense physical or mental suffering. However, where treatment humiliates or debases an individual or diminishes their human dig-nity it may be characterised as degrading and fall within the prohibition set forth in Ar-ticle 3. Where a person is deprived of his liberty or confronted by law enforcement offi-cers, any use of physical force which is not strictly necessary, diminishes human dignity.

In the present case the Government argued that the medical certificates produced by the applicants did not establish that their injuries had resulted from a slap. The Court observed however that the certificates, whose authenticity was not contested, documented injuries that were the possible consequences of slaps to the face. The certificates were issued on the day of the events, which strengthen their evidential value. It was also not disputed that the applicants did not display any such marks before entering the police station. Based on the evidence, it was sufficiently established that the bruising described in the medical certificate occurred while the applicants were under police control.

The Court stated that any conduct by a law enforcement officer against an individual which diminishes human dignity constitutes a violation of Article 3. From the case file it appeared that the slaps were an impulsive act and not a necessary use of force. It is considered that a slap inflicted by a law enforcement officer on an individual who is under his control constituted a serious attack on the individual's dignity. It could also be sufficient that the victim is humiliated in his own eyes for there to be degrading treatment within the meaning of Article 3. The Court emphasised that in a democratic society ill-treatment is never an appropriate response to problems facing the authorities. Furthermore, the first applicant was only 17 years old on 8 December 2003, making him a minor at the time of the event.

Turning to the procedural aspect of the complaint, the Court stated that the prohibition against torture and inhuman or degrading treatment would be ineffective if no procedure existed for the investigations of allegations of ill-treatment. An investigation is considered effective if it is capable of leading to the identification and punishment of those responsible and not carried out directly by those involved in the event. An effective investigation must also be prompt and thorough. In this case the Court did note that after the applicants lodged a civil-party complaint, an investigation was started promptly. The investigating judge asked the investigation department to take note of the applicants' civil-party application, to interview them, as well as draft a report on the conduct of the Bouyid family and to compile a list of all the complaints filed by them. However, he failed to interview the police officers, the physicians who had drawn up the medical certificates, or any eye-witnesses. The investigation was therefore limited to the interviews of the police officers involved in the incident by other police officers. The length of the investigation was also an issue given that the complaints were lodged in 2003 and 2004, however, the Court of Appeal and Court of Cassation did not deliver judgments, marking the close of the proceedings, until 2008, almost five years after the event. As a result the Court found that the applicants did not have the benefit of an effective investigation.

Based on the facts above the Court concluded that the slap administered to each of the applicants diminished their dignity. As a result a violation of Article 3 was found in respect of each of the applicants. The Court also found that the investigation into the incidents was ineffective in contravention of Article 3.

#### Article 41

The Court awarded each applicant €5,000 in respect of non-pecuniary damage. The Court jointly awarded the applicants €10,000 in respect of costs and expenses.

*The extent of prison overcrowding amounted to a violation of Article 3, and the applicant's pre-trial detention amounting to 5 years 8 months and 15 days violated Article 5(3)*

## JUDGMENT IN THE CASE OF BULATOVIĆ v. MONTENEGRO

(Application no. 67320/10)

**22 July 2014**

### **1. Principal Facts**

On 8 May 2001 the applicant, Mr Željko Bulatović, murdered X and immediately left Montenegro. On 6 March 2002 the applicant, in his absence, was found guilty of murder. Following his arrest in Spain and extradition to Montenegro, criminal proceedings were reopened on 3 February 2004. On 10 April 2009 he was found guilty of the murder, but the order was quashed by the Court of Appeal and a retrial ordered. On 4 October 2010 the applicant was again found guilty and sentenced to fourteen years in prison. He was transferred to prison on 26 April 2011.

Since 20 April 2004, the applicant had been in pre-trial detention for fear he might abscond.

### **2. Decision of the Court**

Relying on Articles 3 and 5(3) of the Convention, the applicant complained about the conditions of his detention on remand. He also complained of a lack of medical care while in detention, as well as about the length of his detention. He maintained, in particular, that the cell in which he had been detained had been overcrowded, and that he had lacked drinking water and daily exercise.

The applicant's complaints under Article 6, and 14 and Article 1 of Protocol No. 12 were declared manifestly ill-founded.

#### Article 3

The Court reiterated that severe overcrowding raises in itself an issue under Article 3. Article 3 requires the State to ensure that prisoners are detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured.

Turning to the present case, the Court noted that the prison administration had taken a number of measures aimed at improving the conditions in prison. It is observed, however, that those measures were taken only after 2008, and that the most significant improvement was the reduction in the number of inmates, which was nearly halved by March 2013. The Court, however, noted that the applicant's detention on remand ended on 4 October 2010 and that it was difficult to see how the reduction achieved over time had affected the conditions of the applicant's detention while it lasted. The Court therefore found a violation of Article 3 in this regard.

Regarding the alleged lack of medical care, the Court found that, based on the evidence before it as a whole, the applicant had received adequate medical attention. The failure of the authorities to provide for a further medical examination on one occasion did not attain a sufficient level of severity to entail a violation of Article 3, given that there was no indication in the case file that the recommended examination was urgent, or that without it the applicant was left to suffer considerable pain, or any pain for that matter.

#### Article 5(3)

The applicant complained about the length of his continuous detention.

The Court noted that the period to be taken into consideration in the applicant's case amounted to 5 years 8 months and 15 days. The Court noted that at the time when the initial detention was ordered there was a reasonable suspicion that the applicant had committed the murder. The detention was ordered for fear that he might abscond owing to the fact that he had already fled before. The subsequent decisions extending the detention evolved so as to take into account the gravity of the criminal offence of which the applicant was accused, the sentence that might be imposed on him, as well as his personal circumstances. The Court considered that the reasons advanced by the domestic authorities were certainly relevant. However, in the specific circumstances of the case, it did not consider it necessary to examine whether they were also sufficient or whether the domestic authorities should have considered in addition alternative measures to secure the applicant's presence at trial as in any event the criminal proceedings in question were not conducted with the required expedition, as acknowledged by the domestic courts themselves, and as required by Article 5(3). As there were no exceptional circumstances in the present case that could justify such lengthy proceedings, the Court considered that the applicant's detention extended beyond a reasonable time. There had accordingly been a violation of Article 5(3).

Article 41

The applicant was not awarded any non-pecuniary damage as he had submitted no claim in that respect.

*Failure to carry out an effective investigation and counselling to a minor after sexual abuse was reported violated Article 3 and 8*

## JUDGMENT IN THE CASE OF C.A.S. AND C.S. v. ROMANIA

(Application no. 26692/05)

**20 March 2012**

### 1. Principal Facts

The applicants, C.S. and C.A.S., are father and son and Romanian nationals, living in Romania.

In January 1998, C.A.S., who was seven years old at the time, was followed home from school by a man, P.E. P.E. forced his way into the family flat, where C.A.S. was alone, and hit C.A.S. several times in the stomach. P.E. then told him to strip naked, gagged him and tied his legs and hands up. P.E. then raped him and forced him into oral sex. Afterwards P.E. hit him again in the stomach, head, and genitalia and threatened him at knife point that he would be killed if he told anyone what happened.

This abuse continued over the following three months several times a week. C.A.S. eventually told his father, C.S., about what happened. His father lodged a complaint with the local police at the end of April, beginning of May 1998. This description of the facts was not disputed by the Government.

Three weeks after the abuse was reported to the police, an investigation was started and numerous witnesses were interviewed. C.A.S. was also questioned on a number of occasions between June 1998 and March 2003, during which he repeated the allegations of rape but gave contradictory statements about if he told anyone about the abuse. He also identified P.E. in a line-up organised by the police. P.E. was interviewed in June 1998, where he denied the accusations. During a lie-detector test it showed that P.E. had simulated behaviour when asked whether he had sexual intercourse with C.A.S. Other witnesses, including neighbours and acquaintances, stated that they had seen P.E. entering the boy's flat or in the vicinity of the flat during the time period in question. One of the neighbour's adolescent sons stated that he had seen P.E. entering the flat and had heard the boy scream.

The investigators searched the homes of both the applicant and P.E. but found no evidence to support the accusations. The boy underwent two medical examinations. The first on 18 May 1998, which noted lesions to his anal sphincter, the second on 1

February 2000, which concluded that the injuries could only have been the result of repeated sexual abuse. The investigation was discontinued on three different occasions, until April 2003, when the prosecuting authorities committed P.E. to trial for rape and unlawful entry of the victim's home.

In May 2004 the district court acquitted P.E. stating that he had not committed the crimes he was accused of. The case was appealed, but dismissed. The district court found that the parties as well as witnesses gave contradictory statements. Furthermore, they were concerned by the fact that despite being aware of the possible abuse (blood stains in boy's underpants) and odd occurrences around the house (moved furniture, missing food and money) the parents waited a long time before going to the police. The district court also stated that C.A.S. had not given an accurate description of the facts and that he was prone to fantasising.

C.A.S.'s father made multiple complaints about the length of the proceedings, which were all dismissed. C.A.S. changed schools following the abuse, however, in October 2005 the family moved to Iasi on recommendation of the school counsellor.

## **2. Decision of the Court**

C.A.S. complained under Article 3 that the violent sexual abuse amounted to torture and that the proceedings had been slanted, blaming him and his parents for not reacting sooner. Both C.A.S. and C.S. complained under Article 8, that their family life had been destroyed and that they had been forced to leave the town in which they lived to rebuild a normal life.

### Article 3 and Article 8

The Court reiterated that under Article 1 of the Convention, States have an obligation to secure to everyone within their jurisdictions the rights and freedoms defined in the Convention. This in conjunction with Article 3 requires States to take measures to ensure that individuals are not subjected to ill-treatment, even when at the hands of private individuals. Article 3 also requires, where alleged ill-treatment has occurred, that the authorities conduct an effective investigation. For an investigation to be considered effective, it should in principle be able to lead to the establishment of the facts of the case and to the identification and punishment of those responsible.

The Court also stated that the positive obligations on the State under Article 8 are inherent in the right to effective respect for private life. The State has an obligation to ensure effective deterrence against serious acts such as rape, which requires efficient

criminal-law provisions. The Court also noted that the United Nations Committee on the Rights of the Child emphasised that a series of measures had to be put in place to protect children from all forms of violence, which included prevention, redress, and reparation.

On the facts of the case, the Court noted that the acts of violence suffered by the first applicant met the threshold of Article 3. Hence, the State's positive obligation to conduct an investigation was engaged. The Court noted, that in this case the investigation was not started promptly, despite the gravity of the allegations and the vulnerability of the victim. It took the authorities three weeks, from the date of the complaint, before they ordered a medical examination and almost two months to question the main suspect. The investigation as a whole took a total of five years, despite repeated complaints by the applicants.

The Court also observed that for almost three years, no significant investigative steps were taken after the prosecutor's first decision not to prosecute, despite instructions to continue the investigation. The accused person was also exonerated at the end of the criminal proceedings, which was seven years after the date of the alleged acts. There is no indication that the authorities attempted to find out if someone else was responsible for these crimes. This raised doubt as to the effectiveness of the proceedings, especially in a case which involved the violent sexual abuse of a minor. The Court noted that Romania had ratified The Convention on the Rights of the Child and the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which placed an obligation on the State to protect children against any form of abuse.

In this case the Court was particularly concerned by the fact that the authorities did not try to weed-up conflicting evidence. The Court emphasised that the investigation has to be rigorous and child-sensitive when the case involves violence against a minor, such as the present case. However in this case the authorities adopted a lax attitude concerning the length of the investigation, and the domestic courts attached significant weight to the fact that the family did not immediately report the crimes to the police and that the victim did not react sooner. The Court saw no reason why the parents' alleged negligence in spotting and reporting the abuse in good time, should have had any major impact on the diligence of the police and their response to the reported facts. The Court also noted that the authorities were not mindful to the particular vulnerability of the victim.

In cases such as this, the State incurs an obligation under Article 3 and 8 which require that the best interest of the child be respected. The first applicant in this case

was never offered counselling and was not accompanied by a qualified psychologist during the proceedings or afterwards. The positive obligations that the State assumed under the international instruments protecting the rights of the child include adequate measures for recovery and reintegration, which were not present in this case.

Based on the above facts and the lack of effective investigation, the Court found that the authorities failed to meet their positive obligations under Article 3 and 8. Therefore, the Court found a violation of Article 3 and 8.

#### Article 41

Due to the hardship and distress suffered by the first applicant due to the ineffective investigation and the interference with the normal course of his private life the Court awarded the applicant €15,000 in respect of non-pecuniary damage.

*Police violence against peaceful demonstrators at their overnight location, and inadequate criminal laws to effectively deter police violence violated Article 3*

## **JUDGMENT IN THE CASE OF CESTARO v. ITALY**

(Application no. 6884/11)

**7 April 2015**

### **1. Principal Facts**

The applicant, Arnaldo Cestaro, was an Italian national who lived in Rome.

From 19 to 21 July 2001, the 27th G8 summit took place in Genoa. A group called the “Genoa Social Forum” (GSF), set up by a number of NGOs, were also in Genoa at the same time with the aim of organising an alternative anti-globalisation summit. As a result, the Italian authorities had put in place large-scale security arrangements. Over the course of 20 and 21 July, incidents involving clashes with the police took place in the city. Several hundred demonstrators and members of the security forces were injured or incapacitated by tear gas.

The Genoa city council had made the Diaz-Pertini School available as a shelter at night for some of the demonstrators. On 20 and 21 July residents of the area reported to the police that they had seen youths dressed in black entering the school and taking material from the site linked to ongoing works in the school. After contacting the GSF official to whom the school had been assigned, the police decided to conduct a search of the premises to secure evidence and possibly arrest so called Black Bloc members who were responsible for unlawful damage in the city.

Mr Cestaro, then aged 62, was on the ground floor inside the school at the time. When the police arrived he was sitting with his back against the wall with his arms raised. He was struck several times, causing multiple fractures. He was operated on at a hospital in Genoa, where he remained for four days, and was again operated on due to the injuries in a hospital in Florence a few years after the events. He was left with permanent weakness in his right arm and leg.

After three years of investigation by the Genoa public prosecutor’s office, 28 individuals from the security forces stood trial. On 13 November 2009 the Genoa Court sentenced 12 defendants to between two and four years’ imprisonment. They were also, jointly and severally with the Ministry of the Interior, ordered to pay costs and expenses and damages to the parties to whom the court awarded advances of between €2,500 and €50,000. Mr Cestaro received a provisional reward of €35,000. The

accused, the prosecutor, the Ministry of the Interior, and most of the victims appealed the decision. The Court of Appeal discontinued proceedings against some of the accused, since the limitation period for some of the offences had elapsed. Most of the sentences involving payment of damages and costs and expenses were upheld. On 2 October 2012 the Court of Cassation upheld the main part of the judgment.

## **2. Decision of the Court**

The applicant complained that during the storming of the Diaz-Pertini School, he had suffered acts of violence and ill-treatment which he considered amounted to torture by the security forces in violation of Article 3. He also complained that the penalty imposed on those responsible for the acts were inadequate, in particular the fact that statute-barring during the criminal proceedings resulted in the reduction of sentences of some of the convicted persons and the lack of disciplinary sanctions against others. He argued that failure by the State to create the offence of torture and to provide for an appropriate penalty meant that the State had failed to take the necessary steps to prevent violence and other ill-treatment.

### Article 3

In the present case the domestic courts had already confirmed that the acts of violence did indeed occur and were not disputed. The first-instance and appeal judgments established that once the police officers had entered the Diaz-Pertini School they had assaulted virtually all those present by punching, kicking, clubbing and threatening them. The applicant, who was already advanced in years at the time of the events, had been singled out by the domestic courts to highlight the absolute lack of proportionality between the police violence and the resistance put up by the persons occupying the premises.

The Court stated that in determining whether a particular form of ill-treatment should be classified as torture, a special stigma should be attached to deliberate inhuman treatment causing very serious and cruel suffering. In the present case the Court placed importance on the finding by the Court of Cassations that the violence at the Diaz-Pertini School had been perpetrated “for punitive purposes, for retribution, geared to causing humiliation and physical and mental suffering on the part of the victims.” It was also confirmed that the applicant had not put up any resistance and that the ill-treatment was therefore inflicted on the applicant entirely unjustifiably and could not be regarded as proportionate. The applicant had been struck with truncheons, which could have potentially been lethal and did result in severe physical consequences. Furthermore, the applicant’s feelings of fear and anguish should not

be underestimated, given he was awakened by noise caused by police storming the building. He also saw other protestors getting beaten by police officers for no apparent reason, which would cause further feelings of fear and anguish.

The Court could also not ignore the fact that the police attempted to cover up the events in question or tried to justify them on the basis of misleading statements. In the appeal judgments it was mentioned that the resistance put up by the people occupying the school, the knife attack on an officer, and the discovery of two Molotov cocktails were all fabricated. These facts were put forward by the police in order to justify the storming of the school as well as the violence used on the occupiers.

The Court reiterated that where an arguable claim of unlawful ill-treatment by the police or any other agent of the State has been raised, the State has a general duty to effectively investigate the event. Where proceedings are started before the domestic courts, the proceedings in their entirety must comply with the imperatives of the prohibition set out in Article 3. This means that national courts should not be prepared to allow assaults on individuals' physical and moral integrity to go unpunished, in order to maintain public confidence. The Court stated that in cases concerning torture or ill-treatment inflicted by State agents, criminal proceedings should not be discontinued due to a limitation period and amnesties and pardons should not be tolerated.

In the present case three main issues were raised: namely the failure to identify those responsible for the ill-treatment, the statute-barring of some of the offences and partial remission of sentences, and the doubts as to the disciplinary measures taken against those responsible for the ill-treatment. The police officers who assaulted the applicant and subjected him to acts of torture were never identified and therefore remained unpunished. Several high and middle ranking officials were prosecuted and tried for offences in connection with the storming of the Diaz-Pertini School. However, offences such as slander, abuse of public authority, simple bodily harm, and grievous bodily harm had become statute-barred before the appeal decision and many others received remittance of their sentences. The Court therefore found that the Italian criminal legislation applied in the case proved inadequate in terms of the requirement to punish the acts of torture and devoid of any deterrent effect to prevent future violations of Article 3. The Court stated that the authorities' response was unsatisfactory in the present case and as a result was incompatible with their procedural obligations under Article 3. Furthermore, those responsible for the acts of torture were not suspended from their duties during the criminal proceedings.

Based on the facts of the case the Court found that the measures adopted by the domestic authorities did not satisfy the criteria for a thorough and effective investigation.

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The Court also noted that it has held that a breach of Article 3 cannot be remedied solely by awarding compensation to the victim. In the present case the Court found a violation of Article 3 on the grounds of the torture sustained by the applicant.

#### Article 41

Having regard to the compensation already obtained by the applicant at the domestic level, the Court, awarded the applicant €45,000 for non pecuniary damage.

*Failure to protect individuals from religiously motivated violence and lack of effective investigation constituted a violation of Articles 3 and 9*

## **JUDGMENT IN THE CAES OF CONGREGATION GLDANI JEHOVAH'S WITNESSES AND OTHERS v. GEORGIA**

(Application no. 71156/01)

**3 May 2007**

### **1. Principal Facts**

The applicants were 97 members of the Gldani Congregation of Jehovah's Witnesses, together with Mr Vladimir Kokosadze and three others, who are also members of the congregation living in Tbilisi. Mr Kokosadze is also the Congregation's spokesperson. The case concerns an attack on 17 October 1999 against the Congregation by a group of Orthodox believers, led by Basil Mkalavishvili, also known as "Father Basil."

Father Basil was a defrocked priest in the Orthodox Church of Georgia. He had previously been accused of acts of physical aggression against members of the Orthodox Church, insulted the Catholicos-Patriarch of All Georgia, as well as boasted to the Georgian media about organising attacks against Jehovah's Witnesses. On 17 October 1999 dozens of individuals, identified as a group of Father Basil's supporters by the applicants, surrounded and entered the theatre in which 120 members of the Congregation were meeting. The group of Father Basil's supporters burst into the meeting room, shouting and waving sticks and large iron crosses. The attack was also filmed by one of Father Basil's supporters. Several members of the Congregation were able to escape, but about sixty remained blocked in the hall, including women and children. The group then proceeded to assault the members by punching, kicking, and hitting them with the sticks and crosses. Some of the women were pulled to the ground by their hair or pushed down staircases and whipped with belts. The attack caused 16 people to be admitted to hospital.

When members of the Congregation finally managed to leave the hall, they were surrounded by another group of Father Basil's supporters, who searched them and threw away symbols of their beliefs into a large fire. Some personal effects were also removed from the owners. Some of the individuals who managed to escape the attack tried to alert the police, and several of the applicants went to the local police station. The police officers registered one applicant's statement, but decided not to intervene; another applicant was told by the head of the police station that "in the place of the attackers' place, he would have given the Jehovah's Witnesses an even

worse time.” The police did, however, finally go to the site of the attack, but failed to arrest anyone at the scene.

On the same day, as well as for the next few days, the recordings of the attack from Father Basil’s group, where members were clearly identifiable, were broadcasted on national television channels. On the day following the attack, 42 applicants lodged complaints with the authorities. Criminal proceedings were opened, but only 11 applicants were recognised as civil parties to the case, the remaining 31 applicants never received a reply to their complaint. The case was transferred between various departments of the prosecution service as well as suspended on several occasions, on the ground that it was impossible to identify the perpetrators of the attack. After an identification parade, organised by the police investigator, two attackers were identified. The applicant in question was then put under investigation himself, and no follow up action was taken with regard to the identification. The applicant was sent to trial with two of Father Basil’s supporters, where the applicant was convicted of having committed acts endangering public order, while the charge against Father Basil’s two supporters was sent for further investigation, which was never completed. The applicant was eventually acquitted.

From October 1999 to November 2002, 138 violent attacks were carried out against Jehovah’s Witnesses and 784 complaints were lodged with the Georgian authorities. Between 2000 and 2002 the Parliamentary Assembly of the Council of Europe, the UN Committee against Torture and several NGOs condemned the attacks against religious minorities in Georgia, especially against Jehovah’s Witnesses.

## **2. Decision of the Court**

The applicants complained that they had been attacked by a group of extremist Orthodox believers, and that no effective investigation had been carried out in that respect. They relied on Article 3 (prohibition against degrading or inhumane treatment), Article 9 (right to freedom of thought, conscience, and religion), Article 10 (freedom of expression), Article 11 (freedom of association), Article 13 (right to an effective remedy), and Article 14 (prohibition of discrimination).

### Article 3.

The Court pointed out that Article 3 of the Convention is cast in absolute terms, meaning it cannot be derogated from. The Court also noted that for Article 3 to apply, ill-treatment must attain a minimum level of severity which is evaluated based on the circumstances of the case. Article 1 in conjunction with Article 3 requires States to

take measures designed to ensure that all individuals in their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment, even when at the hands of private individuals. This protection requires reasonable and effective measures, including with regard to children and other vulnerable individuals. Article 3 also gives rise to a positive obligation to conduct an official, prompt, and effective investigation as soon as an official complaint has been lodged.

In this case the Court noted that the attack was directed against all the members of the Congregation who were meeting in the theatre for religious purposes. The Court further noted that of the applicants who were attacked, only some submitted appropriate evidence to prove that they had experienced treatment alleged to be contrary to Article 3. The Government never challenged the facts submitted by those applicants with appropriate evidence, and given the treatment inflicted on 25 of the applicants the Court considered that the treatment reached the threshold of inhuman treatment within the meaning of Article 3. Furthermore, the Government did not dispute that the attackers' aim was to humiliate and publicly debase the applicants in such a way as to give rise to feelings of terror and inferiority and to desist them from holding religious meetings in line with their faith. The Court also attached weight to the fact that the attack was filmed by a member of the group of attackers, with the purpose of showing others.

The Court noted that the case file contained consistent evidence concerning the refusal by police officers after being alerted to the attack to take action promptly to end the violence and protect the victims. The day after the attack 42 applicants brought complaints to the prosecutor in Tbilisi. Prosecution was only set in motion for 11 applicants, and no follow up was given to the other 31 applicants, who had all submitted specific details of the physical abuse they sustained. The case for the 11 applicants were sent back and forth between various departments of the prosecution service with no explanation. Even more shocking was the claim that it was impossible to conduct the investigation due to a failure in identifying the perpetrators, despite the eyewitness accounts and video of the attack. The Court noted that the police refused to intervene promptly, the applicants were faced with indifference towards their complaints, as well as relevant authorities refusing to apply law in their case.

Given all the facts above the Court found that the Georgian State had failed to comply with its positive obligation to protect the 42 applicants from ill-treatment and to effectively investigate allegations of ill-treatment under Article 3. In contrast, the Court found no violation of Article 3 with regard to the 16 applicants who escaped the attack and the 37 applicants who did not complain to the authorities about the treatment to which they had been subjected.

### Article 9

Freedom of religion protected by Article 9 is one of the foundations of a democratic society, and participation in the life of a religious community falls under the protection of Article 9. The State's role is to protect public order and religious harmony, and to promote tolerance in a democratic society. When exercising its regulatory power as well as its relations with religions, denominations, and beliefs, the State has a duty to remain neutral and impartial. In this case the authorities, on account of the applicants' adherence to a religious community perceived as a threat to Christian orthodoxy, took no action in respect of their complaints.

The attack against the applicants constituted the first act of large-scale aggression against Jehovah's Witnesses, and the authorities' negligence opened the doors to a generalisation of religious violence by the same group of attackers. The Court found that through their inactivity the relevant authorities failed in their duty to enable the applicants' religious community to exercise freely their rights to freedom of religion. The Court found a violation of Article 9 in respect of all 96 applicants.

### Article 10 and 11

The Court found the complaints under these provisions to be identical to those submitted under Article 3 and 9, and did not find it necessary to examine them separately.

### Article 13

The Court considered that no separate issue was raised under Article 13.

### Article 14

Treatment described in Article 14 is discriminatory if it "lacks an objective and reasonable justification." Based on all the evidence in this case, the Court found that the refusal by the police to intervene promptly at the scene to stop the violence, as well as the subsequent indifference shown towards the applicants by the relevant authorities, was to a large extent related to the applicants' religious convictions. No justification for this discriminatory treatment in respect of the applicants had been put forward by the Government. As a result the Court found that the applicants were victims of a violation of Article 14 in conjunction with Articles 3 and 9.

#### Article 41

The Court found it appropriate to award non-pecuniary damage to the applicants. However, depending on the claim of each applicant, applicants were awarded different sums ranging from €120 to €700.

As to costs and expenses, the Court found it appropriate to award costs only to the applicants who used legal representation in their case.

*Croatia's failure to protect a disabled person from repeated and violent harassment violated Article 3 and 8*

## JUDGMENT IN THE CASE OF ĐORĐEVIĆ v. CROATIA

(Application no. 41526/10)

**24 July 2012**

### **1. Principal Facts**

The first applicant, Croatian national Dalibor Đorđević, was born in 1977, and the second applicant his mother Radmila Đorđević, was born in 1956. Dalibor, mentally and physically disabled, was cared for by his mother. He was repeatedly harassed physically and verbally between July 2008 and February 2011 by children from the neighbouring school on account of his disability and Serbian origin. The harassment took the form of insults, shouting, spitting, hitting and pushing around, and on one occasion cigarette stubbing on his hands. Children also mocked the second applicant in Serbian dialect. The applicants' home was vandalised, with the doorbell often being rung at odd times, and insulting graffiti painted outside.

As a result, Dalibor was deeply disturbed, afraid and anxious, which was recorded by a number of medical reports. These also showed that he often bit his lips and fists, had a twitch, and signs of psoriasis owing to stress, and needed a calm and friendly environment.

The incidents were reported to various authorities on several occasions, including the school which was 70 metres away and which most of the children in question attended, the Social Welfare Service and the Ombudswoman for Persons with Disabilities, and the police, who arrived, not always on time, and removed the children, without asking questions or identifying them. The children admitted violence towards Dalibor in interviews with police, but were too young to be held criminally responsible.

In October 2009 and May 2010, the applicants' lawyer wrote to the Municipality's State Attorney's Office, about the long and ongoing harassment, complaining that there was no effective remedy in Croatian law for protecting persons from violent acts committed by children. She also complained to the Ombudswoman and asked for advice, who responded that she had no jurisdiction in the matter. Social services informed the mother that a civil action would have to be brought. The police said that an inquiry would not yield results. The State Attorney's Office said that they had no jurisdiction in the matter.

## 2. Decision of the Court

The applicant contended *inter alia* that the state had not given them adequate protection from the harassment and that there had consequently been violations of Article 2, 3, and Articles 8, 13 and 14.

### Article 3

The Court decided to consider the incidents as a continuing situation. The incidents were well recorded and had an impact on the first applicant's mental and physical health, described as a peaceful person unable to defend himself. The Court considered the effects of the continuous verbal and physical harassment – feelings of helplessness, and fear for prolonged periods of time, were sufficiently serious to meet the threshold of engaging Article 3.

For a positive obligation to arise to protect the first applicant, the authorities must have known or ought to have known of the existence of such ill-treatment by a third party, and failed to have taken reasonable measures to avoid the risk. Violent acts which fell under Article 3 required, in principle, criminal-law measures against the perpetrators. However, given the young age of Dalibor's harassers, it had been impossible to criminally sanction them. Furthermore, while their acts, taken separately, might not have amounted to a criminal offence, if they were examined in their entirety, they might have proved incompatible with Article 3.

However, since July 2008, Dalibor's mother had informed the police about this ongoing treatment, as well as the ombudsman and social services. Therefore, the authorities had been well aware of the situation.

While the police had interviewed some children about the incidents, they had made no serious attempts to assess what had really been going on, and reports had not been followed by any concrete action. No policy decisions had been adopted and no monitoring mechanisms had been put in place in order to recognise and prevent further harassment. The lack of any true involvement of the social services and the absence of counselling given to Dalibor was particularly striking. Apart from responses to specific incidents, no relevant action of a general nature had been undertaken by the relevant authorities, despite their knowledge that Dalibor had been systematically targeted and that future abuse had been quite likely. Therefore, there had been a violation of Article 3 in relation to Dalibor.

### Article 8

Under Article 8, States did not only have to refrain from harming individuals, but there was also a duty to act to protect them from others. Radmila Đorđević's private and family life had been negatively affected by these incidents, and in the same way that the authorities had failed at effecting relevant measures to prevent Dalibor's further mistreatment, they had failed to protect her, in violation of Article 8.

### Article 14

Domestic proceedings could have been raised under the Croatian Prevention Discrimination Act, which had specific provisions on ethnic origin and disability. It was also prohibited by the Constitution and European Convention. These were considered to offer a range of effective remedies, and as they were not exhausted, this complaint was rejected as inadmissible.

### Article 13

As it had been impossible to complain about the mistreatment, it was concluded that this right had been violated in connection with Articles 3 and 8.

### Article 41

The Court awarded the applicants jointly €11,500 in respect of non-pecuniary damage. It awarded them jointly €1,206 for the costs and expenses incurred in the domestic proceedings and €3,500 for those before the Court, less €850 already received by way of legal aid from the Council of Europe.

*Inadequate detention conditions and medical treatment were contrary  
to Article 3 of the Convention*

## **JUDGMENT IN THE CASE OF DYBEKU v. ALBANIA**

(Application no. 41153/06)

**18 December 2007**

### **1. Principal facts**

The applicant, Ilir Dybeku, was an Albanian national who was born in 1971 and is currently in high security prison in Albania.

From 1996 onwards the applicant has been suffering from chronic paranoid schizophrenia. For many years he had received in-patient treatment in various psychiatric hospitals in Albania.

On 23 August 2002 two children, aged 10 and 13, and another person died following an explosion in the flat of the applicant's sister's family; others were injured.

On 24 August 2002 criminal proceedings were brought against the applicant, who, on the same day, was arrested and charged with murder and illegal possession of explosives. He was placed in the pre-trial detention police facility, where he shared a cell with an unspecified number of prisoners. On 27 May 2003, on the basis of a medical report, which concluded that at the time of the offence the applicant was in remission, the District Court ruled that he was able to stand trial. The court found him guilty and sentenced him to life imprisonment. The applicant appealed unsuccessfully and his requests for new medical examinations were rejected as unnecessary by the domestic courts.

Since December 2003 until the time of the Court's judgment, the applicant had been in three different prisons, where he shared cells with inmates who were in good health and was treated as an ordinary prisoner, despite his state of health. According to the Albanian authorities, as it was impossible to provide the applicant with the medical treatment he needed, he was treated with drugs similar to those prescribed by his doctor. He received in-patient treatment in the prison hospital only when his health worsened from 26 May 2004 to 2 June 2004 and from 1 December 2004 to 26 January 2005.

The applicant's father and lawyer lodged several complaints with the competent authorities against the prison hospital administration and the medical unit, alleging

that they had been negligent in failing to prescribe adequate medical treatment and that the applicant's health had deteriorated because of the lack of medical treatment. Their complaints were dismissed.

Given the applicant's increasingly disturbed state of mind, on 7 January 2005 his lawyer brought proceedings asking for him to be released or transferred to a medical facility on the ground that his detention conditions were inappropriate, given his state of health, and put his life at risk. Based on recent medical reports, the applicant's counsel also asked for psychiatric examinations to be undertaken. Those requests were rejected. The applicant's appeals were unsuccessful.

## **2. Decision of the Court**

The applicant alleged, in particular, that his detention conditions and the medical treatment he received in prison were not appropriate given his state of health. He also complained about the unfairness of the legal proceedings concerning his complaints. He relied on Articles 3 and 6.

### Article 3

The Court accepted that the very nature of the applicant's psychological condition made him more vulnerable than the average detainee and that his detention might have exacerbated to a certain extent his feelings of distress, anguish and fear. The fact that the Albanian Government admitted that the applicant was treated like the other inmates, notwithstanding his particular state of health, showed a failure to comply with the Council of Europe's recommendations on dealing with prisoners with mental illnesses.

The Court took into account the cumulative effects of the entirely inappropriate conditions of detention to which the applicant was subjected, which clearly had a detrimental effect on his health and well-being. It also took note of the Council of Europe's Committee for the Prevention of Torture's findings in its latest reports concerning the detention conditions in Albanian prisons, particularly with regard to prisoners with mental illnesses, and its own case-law.

Many of those shortcomings could have been remedied even in the absence of considerable financial means. In any event, a lack of resources could not in principle justify detention conditions so poor as to reach the threshold of severity for Article 3 to apply. The Court concluded that the nature, duration and severity of the ill-treatment to which the applicant was subjected and the cumulative negative effects on

his health were therefore sufficient to be qualified as inhuman and degrading, in violation of Article 3.

#### Article 6

The Court held that the applicant's complaints under Article 6, with respect to the proceedings concerning execution of sentences, were inadmissible.

#### Article 41

The Court awarded the applicant €5,000 in respect of non-pecuniary damage.

*Complicity of States in extraordinary rendition – including a finding  
of a violation of Article 3*

**GRAND CHAMBER JUDGMENT IN THE CASE OF EL MASRI v. THE  
FORMER YUGOSLAV REPUBLIC OF MACEDONIA**

(Application No. 39630/09)

**13 December 2012**

**1. Principal Facts**

The applicant, Khaled El-Masri, was a German national (born in 1963) living in Senden, Germany.

In December 2003, the applicant travelled to Skopje by bus, hoping to pursue a vacation. At the Serbian-Macedonian border, suspicion arose as to the applicant's newly issued German passport. As a result, his personal belongings were searched and he was questioned about his possible ties to several Islamic organisations. After an approximately seven-hour interrogation, he was driven to his hotel (the Skopski Merak) accompanied by armed men in civilian attire. Upon arrival at the hotel, the applicant was detained incommunicado, and repeatedly interrogated in English, a language in which he was not proficient. He was informed that he would be returned to Germany if he signed a confession as a member of Al-Qaeda. After ten days of detention, the applicant commenced a hunger strike, and he was transferred to Skopje airport, handcuffed and blindfolded.

At the airport, the applicant was informed he would be subject to a 'medical exam', at which point his arms were pulled behind his back, and he was beaten up. He was then thrown to the floor, pinned down by a boot, and a firm object was inserted in his anus. The applicant continued to be ill treated, and was shackled and chained to the walls of an aeroplane. His passport was affixed with a Macedonian exit stamp. The applicant was flown to Afghanistan via Iraq. The applicant was held at a detention centre for high-risk terrorists, and in March 2004, the applicant had begun another hunger strike.

In April 2004, hooded men, forcibly removed him from his bed, bound him to a chair, and force-fed him through a tube. The applicant was then provided with canned food and books. The force-feeding left the applicant ill, and he received medical care. In May 2004, the applicant was again blindfolded and handcuffed, instructed to change in to the clothes he had worn at the time he entered Skopje, and placed on another

aircraft. The applicant was flown to Albania, without being told where he was. When he was finally released at an Albanian building, he was told where he was, and an Albanian exit stamp was affixed in his passport. The applicant was then flown to Frankfurt, Germany. Upon his arrival, he was 18 kilograms lighter, unkempt, and diagnosed with Post-Traumatic Stress Disorder, likely caused by his torture and ill treatment.

## 2. Decision of the Court

The applicant contended that the Former Yugoslav Republic of Macedonia had been responsible for the ill treatment he had been subjected to in contravention of Articles 3, 5, 8, 10 and 13 ECHR.

The government denied any responsibility for the applicant's ill treatment and challenged the credibility of the expert reports as to his mental health.

The government further contended that, although the criminal investigation into the applicant's claims had been ineffective, this was attributable to the applicant's delay in filing his complaint and that he had brought his complaint against an unidentified perpetrator.

Third party interveners argued that the right to the truth in enforced disappearance cases were woven into the ECHR as part of Articles 2, 3 and 5, and embodied in Article 13. Further, it was argued that extraordinary rendition tactics, such as those complained of by the applicant were a breach of the *non-refoulement* principle of international law.

Jurisdiction was relinquished in favour of the Grand Chamber under Article 30 ECHR.

### Article 3

At the outset the Court recalled that freedom from torture under Article 3, was one of the most fundamental rights and necessary in a democratic society. Thus, to this end, it was imperative for States to effectively investigate all allegations of treatment which contravened Article 3. The Court stressed that this positive obligation to investigate such allegations arises from a reading of Article 3 in conjunction with Article 1 ECHR. Without effective investigations which were capable of identifying the perpetrators of such acts, the rights and freedoms of Article 3 would be ineffective in practice, and allow State actors to breach the Article 3 rights of persons in their control with impunity. Therefore, investigations must be prompt, thorough and independent of the executive.

The applicant had brought a criminal complaint in October 2008 to the public prosecutor of the complicity of State agents in his rendition and ill treatment. His claims were supported by corroborating evidence, such as credible media reports and other foreign investigations. The public prosecutor did no more than contact the Ministry of Interior upon receipt of the applicant's complaint and was therefore not justified in dismissing the applicant's complaint due to lack of evidence. The government conceded that the investigation into the complaint had not been effective. In order to combat impunity for States involved in serious human rights abuses, the Court held that the applicant had been deprived of being given an adequate account of what happened to him, and why.

In addition, the treatment of Mr El-Masri could not be justified on the grounds of national security, or the combatting of terrorism. The Court upheld that the prohibition of torture was to remain an absolute right. Therefore, the Court reiterated that authorities failing to take reasonable steps to avoid the risk of ill treatment that the State knew, or ought to have known, about, could trigger Article 3. Although, whilst Mr El-Masri was held in the hotel in Skopje, he was not subjected to physical force, the Court noted that Article 3 does not refer exclusively to physical pain. The prolonged confinement of the applicant was such that would cause him emotional and psychological distress. The applicant was deliberately placed in a situation of perpetual anxiety because the authorities wished to extract a confession from him. The authorities had been unable to give any justification for this. Thus the Court held that the conditions at the hotel were severe enough to breach Article 3.

The ill treatment that the applicant underwent at Skopje airport was also held to be the responsibility of the Former Yugoslav Republic of Macedonia. The actions of foreign officials which were undertaken with the knowledge or acquiescence of the authorities were imputable to the respondent State. The severity of the ill treatment could not be justified either, as the security officials clearly outnumbered the applicant, and he posed no risk to them. Not only this, but the Court also pointed out that forcible undressing conducted by the police serves to debase to such an extent that it should not be done arbitrarily.

It was further noted that the transfer of Mr El-Masri to the CIA was not done as part of a legitimate request for extradition. The Macedonian authorities knew the destination of the aeroplane that the applicant was forced on to. The Court expressed concerns as to the treatment meted out to suspected terrorists by US authorities, particularly in such high profile detention centres as Guantanamo Bay. Since this information was already in the public domain at the time that the applicant was handed over to the US authorities, the Court believed that the Macedonian authorities knew or ought to

have known of the risk of torture and ill treatment. Thus, the Court found the Macedonian authorities in breach of Article 3 ECHR.

#### Article 5

The Court reiterated the jurisprudence that States are in breach of the right to liberty, Article 5, if they transfer individuals to States where the individual is at risk of 'flagrant breach' of Article 5. In this instance, the Court found that the detention of the applicant at the hotel in Skopje, at the airport, in Afghanistan and his subsequent return via Albania were all imputable to the Macedonian authorities. The Macedonian authorities were complicit in the applicant's detention in Afghanistan, having willingly handed him over to the US authorities.

In addition, the Court held that the practice of extraordinary rendition amounted to an enforced disappearance, which by definition entails detention outside the normal legal system.

#### Article 8

The Court held that the applicant's rights to family and private life, Article 8, had been breached, as they had been interfered with in such a way as to be 'not in accordance with law.'

#### Article 13

The Court further held that there had been a breach of the applicant's right to an effective remedy, Article 13. The applicant was held to have been denied effective and practical remedies due to the lack of an effective investigation. There was no evidence that the decision to hand the applicant to the CIA had undergone any form of review. Therefore, in conjunction with Articles 3, 5 and 8 the Court found a breach of Article 13.

#### Article 41

The Court held that the Former Yugoslav Republic of Macedonia was to pay Mr El-Masri €60,000 plus any tax for non-pecuniary damages.

*Use by law enforcement officials of techniques prohibited by Article 3*

## **GRAND CHAMBER JUDGMENT IN THE CASE OF GÄFGEN v. GERMANY**

(Application no. 22978/05)

**1 June 2010**

### **1. Principal facts**

The applicant, Magnus Gäfgen, was a German national who was born in 1975. He is currently in prison in Germany.

In July 2003 Mr Gäfgen was sentenced to life imprisonment for the abduction and murder of J. The court found that his guilt was of a particular gravity, meaning that the remainder of his prison sentence could not be suspended on probation after 15 years of detention.

The child J., aged 11, had got to know the applicant, who at the time was a law student, through his sister. On 27 September 2002 the applicant lured J. into his flat and suffocated him. Subsequently, the applicant deposited a ransom demand at J.'s parents' home, requiring them to pay one million euros to see their child again. On 30 September 2002 Mr Gäfgen collected the ransom at a tram station. He was placed under police surveillance and was arrested by the police several hours later.

On 1 October 2002 one of the police officers responsible for questioning Mr Gäfgen, on the instructions of the Deputy Chief of Frankfurt Police, warned the applicant that he would face considerable suffering if he persisted in refusing to disclose the child's whereabouts. They considered that threat necessary as J.'s life was in great danger from lack of food and the cold. As a result of those threats, the applicant disclosed where he had hidden the child's body. Following that confession, the police secured further evidence, notably the tyre tracks of the applicant's car at the pond and the corpse.

At the outset of the criminal proceedings against the applicant, the regional court decided that all his confessions made throughout the investigation could not be used as evidence at trial as they had been obtained under duress, in breach of the Code of Criminal Procedure and Article 3 of the European Convention. However, the regional court did allow the use in the criminal proceedings of evidence obtained as a result of the statements extracted from the applicant under duress.

Ultimately, on 28 July 2003 the applicant was found guilty of abduction and murder and was sentenced to life imprisonment. It was found that, despite the fact that the applicant had been informed at the beginning of his trial of his right to remain silent and that all his earlier statements could not be used as evidence against him, he nevertheless again confessed that he had kidnapped and killed J. The court's findings of fact concerning the crime were essentially based on that confession. They were also supported by: the evidence secured as a result of the first extracted confession, namely the autopsy report and the tyre tracks at the pond; and, other evidence obtained as a result of the applicant being observed after he had collected the ransom money, later discovered in his flat or paid into his accounts.

The applicant lodged an appeal on points of law which was dismissed by the Federal Court of Justice. He subsequently lodged a complaint with the Federal Constitutional Court, which refused to examine it. That court confirmed the regional court's finding that threatening the applicant with pain in order to extract a confession from him constituted a prohibited method of interrogation under domestic law and violated Article 3 of the Convention.

On 20 December 2004 the two police officers involved in threatening the applicant were convicted of coercion and incitement to coercion while on duty and were given suspended fines.

In December 2005 the applicant applied for legal aid in order to bring official liability proceedings against the *Land* of Hesse to obtain compensation for being traumatised by the investigative methods of the police. Those proceedings were still pending at the time of the European Court's judgment.

## **2. Decision of the Court**

The applicant complained that he had been subjected to torture when questioned by the police, in violation of Article 3. Relying on Article 6, he further submitted that his right to a fair trial had been violated in particular by the use of evidence secured as a result of his confession obtained under duress.

In the Chamber judgment of 30 June 2008, the Court held that the applicant could no longer claim to be the victim of a violation of Article 3 of the Convention and that there had been no violation of Article 6 of the Convention.

On 1 December 2008, the case was referred to the Grand Chamber at the applicant's request.

### Article 3

The Court considered that in the present case, the immediate threats against the applicant for the purpose of extracting information from him were sufficiently serious to be qualified as inhuman treatment falling within the scope of Article 3. The Court was satisfied that the domestic courts, both in the criminal proceedings against the applicant and against the police officers, had acknowledged expressly and in an unequivocal manner that the applicant's interrogation had violated Article 3. It observed, however, that the police officers, having been found guilty of coercion and incitement to coercion, respectively, had been sentenced only to very modest and suspended fines.

As regards compensation to remedy the Convention violation, the Court noted that the applicant's request for legal aid to bring liability proceedings, following a remittal, had been pending for more than three years and that no decision had yet been taken on the merits of his compensation claim. The domestic courts' failure to decide on the merits of the claim raised serious doubts as to the effectiveness of the official liability proceedings.

The Court concluded that the German authorities did not afford the applicant sufficient redress for his treatment and that Germany had violated Article 3.

### Article 6

As the Court had established in its case-law, the use of evidence obtained by methods in breach of Article 3 raised serious issues regarding the fairness of criminal proceedings. It therefore had to determine whether the proceedings against the applicant as a whole had been unfair because such evidence had been used.

In the present case, it was the applicant's new confession at the trial – after having been informed that all his earlier statements could not be used as evidence against him – which formed the basis for his conviction and his sentence. The evidence in dispute had therefore not been necessary to prove him guilty or determine his sentence.

In light of these considerations, the Court found that, in the particular circumstances of the case, the failure of the domestic courts to exclude the impugned evidence, secured following a statement extracted by means of inhuman treatment, had not had a bearing on the applicant's conviction and sentence. As the applicant's defence rights had been respected, his trial as a whole had to be considered to have been fair. The Court concluded that there had been no violation of Article 6.

### Article 41

The applicant did not claim any award for pecuniary or non-pecuniary damage, but stressed that the objective of his application was to obtain a retrial. As there had been no violation of Article 6, the Court considered that there was no basis for the applicant to request a retrial or the reopening of the case before the domestic courts.

*Individuals with physical disabilities held in detention need to have their special needs adequately met by the prison authorities in order for the State to comply with Article 3*

## JUDGMENT IN THE CASE OF GRIMAILOVS v. LATVIA

(Application no 6087/03)

**25 June 2013**

### **1. Principal Facts**

The applicant, Artemijs Grimailovs, was a ‘permanently resident non-citizen’ of the Republic of Latvia and lived in Jelgava (Latvia). In June 2000 the applicant underwent surgery to have a metal implant inserted into his back for support after he broke his spine. He was certified as being Category 2 disabled.

On 10 September 2001, two traffic police officers, E.Š. and O.Ž., attempted to stop the applicant, who had exceeded the speed limit in Riga and appeared to be driving under the influence of alcohol. The applicant failed to stop on the officers’ instructions and continued driving. The two officers followed him out of the city onto the motorway, where they eventually overtook the applicant’s car and pulled it over to the side of the road. According to the Government, both police officers saw a firearm in the applicant’s left jacket pocket and proceeded to push him to the ground using unspecified restraint techniques and handcuffed him. They then called the local police to the scene to collect evidence. The applicant was also breathalysed on the spot and was taken to a local police station. The applicant alleged that the police officers had kicked him in the back several times upon arrest, injuring him badly. After he told the police officers that he was disabled he allegedly invited them to verify his documents which were in his wallet in his car. He claimed that upon finding out that he was disabled the officers had planted a firearm on him in an attempt to evade criminal liability for assaulting a disabled person. The applicant maintained that if he had been in possession of a firearm he would have disposed of it during the car chase.

On 11 September 2011, the applicant was taken to a public hospital where an X-ray of his spine showed that the fixing screws, that held the metal implant supporting his spine, were broken. He also suffered from a spinal contusion and lower back pain. Later that same day the applicant was seen by a specialist. He told the specialist about the arrest and that he had been pulled out of the car, pushed to the ground, and kicked several times by the officers. The applicant complained of lower back pain and said he was unable to move his right leg as a result of the pain. The specialist examined the applicant and diagnosed him with a hyperextension injury and contusions

to the lower back, transverse process fracture, and a compression fracture. Four of the screws had been broken and the metal implant had become dislodged. On 12 September 2001 the applicant was discharged from the hospital and was told to continue taking medication and to wear a fixating belt. That same day he was transferred to Riga Central Prison. He was examined by a doctor upon admission who noted the diagnoses of the specialist, and described the applicant's overall health as satisfactory. The days following his admission the applicant started to complain of back pain and being unable to move his legs. On 28 September 2001 a surgical procedure was carried out to relieve the applicant's pain which continued to persist until 9 October 2001. On 10 October he was discharged from the Prison Hospital, and his overall health was described as satisfactory and he could walk again.

On the day of the applicant's arrest, after he was taken to the police station, both officers were questioned by an inspector of the police station within the criminal proceedings concerning the firearm charge. Both officers stated that they had seen the firearm in the applicant's jacket and had pushed the applicant to the ground to handcuff him. The applicant was questioned by the inspector on 11 September 2001. He submitted that he had been ill-treated upon his arrest, but on 27 November 2001 the prosecutor decided to refuse the institution of criminal proceedings after receiving a forensic medical examination report stating that the injuries were not caused by the arrest.

From 24 May to 4 June 2001 a trial took place which found the applicant guilty of both the firearms charge as well as another charge concerning bodily injury and rape, which had taken place on 9 September 2001. At the trial the applicant had told the court that he was fleeing from the police on 10 September 2001, and when they pulled him over, they had pushed him to the ground and kicked him before taking him to the police station. He claimed that the officers then placed the gun and bullet in his jacket pocket and that it was not his. The trial judge did not give credence to the applicant's alleged ill-treatment by the police officers based on the forensic examination that concluded that the applicant did not sustain bodily injuries. The judge sentenced him to five years and six months' imprisonment. On 21 October 2002 following an appeal by the applicant the appeal court upheld the judgment of the trial court. The applicant then lodged an appeal on points of law, but on 2 December 2002 it was dismissed by the Senate of the Supreme Court.

## **2. Decision of the Court**

The applicant complained that the police officers had ill-treated him on 10 September 2001. He also complained that the investigation into these events was not effective.

The Court found the complaint fell to be examined under Article 3. The applicant also complained under Article 3 about the lack of adequate medical assistance in prison and that the facilities had not been suitable for him since he was wheel-chair bound. The Court declared the medical assistance claim inadmissible, but proceeded to look at conditions of detention.

### Article 3

#### Events of 10 September 2001

The Court stated that where a person is injured while in detention or under the control of the police, any injury will give rise to a strong presumption that the person was subjected to ill-treatment. The use of force during arrest may fall outside the scope of Article 3, even if it results in injury, if it is indispensable and results from the conduct of the applicant. However, if an individual makes a credible assertion that he has suffered treatment that infringed Article 3 at the hands of police or other similar State agents, the Convention requires that there should be an effective official investigation. The investigation into allegations of ill-treatment must be taken seriously by the authorities and they must make a thorough attempt to find out what happened. For an investigation to be effective it is regarded as necessary for the persons carrying out the investigation to be independent from those implicated in the event.

In the present case both parties were in agreement that force was used to arrest the applicant after he had failed to stop his vehicle on the officers' instructions. The Government stated that the applicant's spine had been twisted backwards, but emphasised that he had a prior spinal injury, and that the force used on the applicant was proportionate in view of his conduct. The applicant, on the other hand, held that the force used was disproportionate. The forensic expert in the case did not provide an answer to the question whether the injuries sustained by the applicant could have been inflicted by the police officers in the manner described by the applicant. The Court found it impossible to establish, based on the facts, if the applicant's injuries were caused as alleged.

The Court noted that the authorities carried out an inquiry into the applicant's allegations, however it was not convinced that the inquiry was sufficiently thorough and effective. The Court noted the police sent the case material to the prosecutor only eight days after the event to bring the firearm charge against the applicant and no additional investigative steps were taken after the prosecutor sent back the case material a month later in relation to the allegations of ill-treatment. All reasonable

steps were not taken to secure the available evidence by the police, and discrepancies between the two arresting police officers' accounts about where the bullet was found, was never looked into. Further discrepancies were found in the forensic reports as to where the bullet was found but none of these were examined, which undermined the thoroughness and reliability of the pre-trial investigation. The Court also considered that the prosecutor relied to a considerable extent on the statements by the police officers who denied the assault on the applicant, when she decided not to institute criminal proceedings. The prosecutor also failed to take any steps in order to obtain eyewitness accounts of the event.

Based on the above-mentioned facts, the Court concluded that the domestic authorities did not ensure an effective investigation into the applicant's allegations of police ill-treatment on 10 September 2001, and found a violation of Article 3.

### Conditions of detention

The Court stated that Article 3 cannot be interpreted as laying down a general obligation to release a detainee on health grounds or to transfer him to a public hospital. However, it does require the State to ensure that prisoners are detained in conditions which are compatible with respect for human dignity and to ensure that their health and well-being are adequately secured. In cases where the authorities decide to place a disabled person in continued detention, they need to demonstrate special care in guaranteeing that the conditions required for that person's special needs are met. The Court noted that where a disabled person is held in detention in a prison where he/she could not move around, and could not leave his/her cell independently, this would amount to degrading treatment.

In this case the applicant's complaint related to the material conditions of his detention in the prison in view of his physical disability and the lack of assistance. While serving his sentence in the prison the applicant was paraplegic and was confined to a wheelchair. The state of health of the applicant following release was found irrelevant by the Court for the present complaint under Article 3. Neither party disputed the fact that for the first two-and-a-half years, the applicant was detained in a regular detention facility, which was not adapt for a wheelchair bound person. The Court considered the accessibility to the sanitation facilities raised particular concern under Article 3. The applicant and the Government were in agreement that the applicant's physical disability had prevented him access to the toilets and sauna, without the help of others. The Court also noted that the applicant required daily assistance with his mobility due to his physical disability. The applicant had to rely on his fellow inmates to assist him with his daily routine and mobility around the prison. The Court

held that the conditions of the applicant's detention in light of his physical disability constituted degrading treatment contrary to Article 3.

Article 41

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

*Inadequate medical treatment in violation of Article 3*

## **JUDGMENT IN THE CASE OF GRORI v. ALBANIA**

(Application no. 25336/04)

**7 July 2009**

### **1. Principal facts**

The applicant, Arben Grori, was an Albanian national who was born in 1971. At the time of the European Court's judgment, he was in a high security prison in Albania serving a 15-year prison sentence for international narcotics trafficking and a life sentence for murder and illegal possession of firearms, the latter offences having been committed on Italian territory.

Mr Grori was initially detained in Albania on 30 April 2001 on the basis of an arrest warrant issued in Italy on 16 February 2001 in relation to his alleged involvement in drug trafficking. On that same day, Interpol Rome asked the Albanian authorities to initiate criminal proceedings against the applicant for crimes committed on Italian territory. In July 2002 the Albanian Prosecutor General charged Mr Grori with international narcotics trafficking and in December 2003 the Albanian courts found him guilty as charged and sentenced him, in June 2006, to 15 years in prison.

In addition, on 2 February 2001, the Italian authorities sentenced in absentia the applicant to life imprisonment for murder and to five years for illegal possession of firearms. However, they could not request the enforcement of that sentence in Albania, as at the time neither country was party to any international agreement on the matter.

While in detention pending the criminal proceedings in Albania for drug-trafficking carried out in Italy, on 15 May 2002 Mr Grori was served with an Albanian judicial decision ordering his detention pending the proceedings for the validation of the sentence imposed on him in Italy for murder and illegal possession of firearms.

Mr Grori complained before the Albanian courts, that no request for the validation of the sentence in absentia passed in his respect in Italy had been addressed by the Italian authorities to the Albanian Minister of Justice. He also claimed that there had been no relevant international agreement in force between the countries at the relevant time for such a validation to take effect. He also relied on the fact that he had not given his consent for the validation as required by the then Code of Criminal

Procedure. The domestic courts found against him, concluding that according to international criminal law rules, cooperation between countries could occur even in the absence of bilateral treaties, on the basis of good will, generally recognised norms and the principle of reciprocity.

Between September 2003 and February 2004, Mr Gori asked for an appropriate medical examination in view of the deterioration in his health. In August 2004 he was diagnosed with multiple sclerosis, the doctors reporting that his disease could cause him shock, organ damage, permanent disability or death. In 2005, he brought several sets of criminal proceedings against the prosecution and the Head of Tirana Prison Hospital complaining of negligence in the provision of medical care to him, given that it had been delayed and he was being treated mainly with drugs prescribed to cure rheumatism.

On 10 January 2008, upon his request, the European Court ordered the Albanian Government as an interim measure to transfer him immediately to a civilian hospital for examination and appropriate medical treatment. On 28 January 2008, the Government transferred him to Tirana University Hospital Centre where he passed a specialised medical examination. From 17 June 2008, Mr Gori received appropriate medical treatment for his disease.

## **2. Decision of the Court**

Mr Gori complained of having received inadequate medical treatment in prison and about the unlawfulness of his detention for the validation and enforcement in Albania of the life sentence imposed by the Italian courts in his absence. He relied on Articles 3, 5 § 1, 6 § 1 and 7 of the Convention and on Article 2 of Protocol No. 7. He also complained that his transfer to a civilian hospital in January 2008, as indicated by the European Court of Human Rights under Rule 39 of its Rules of Court, had been delayed, in breach of Article 34.

### Article 3

The Court noted with concern that between April 2005 and 28 January 2008 Mr Gori had been left for long periods of time without adequate medical treatment, despite suffering from a serious disease. In particular, the last medical report on his state of health had confirmed that the progression of the disease over the years had been due to the lack of medical care. The Government had not provided any justification about why it had refused to provide him with the medical treatment prescribed by the civilian doctors, especially given that it had been provided free of charge to persons

in public hospitals at the time; the Government had likewise failed to explain how the treatment with vitamins and anti-depressants could be considered adequate in the circumstances. Neither had the government provided a plausible explanation for the deterioration of the applicant's health in prison. The Court concluded that all the above had created such a strong feeling of insecurity in Mr Grori that, combined with his physical suffering, it had amounted to degrading treatment, in violation of Article 3.

#### Article 5 § 1

The Court noted that the Supreme Court's search for a legal basis for the applicant's detention, had led it to import into domestic law provisions of international law instruments which had not yet entered into force with respect to Albania. Thus, the legal basis ultimately found by the Supreme Court could scarcely be said to have met the requirements for "lawfulness" as regards the applicant's detention and the conversion of his sentence imposed by the Italian courts. The Court concluded therefore that, between 15 May 2002 and 29 December 2003, Mr Grori had not been detained in accordance with a procedure prescribed by law, and that there had therefore been a violation of Article 5 § 1.

#### Article 34

The Court noted that despite having become aware at the latest on the morning of 11 January 2008 of its order to transfer the applicant into a hospital, the Government had effectuated his transfer only on 28 January 2008. Accordingly, the Court's order had not been complied with for 17 days and there had been no objective obstacles preventing the authorities to do so. There had therefore been a violation of Article 34.

#### Other complaints

The Court held that it was not necessary to examine separately under Article 6 § 1 the applicant's complaint as regards the unlawfulness of the proceedings concerning the validity and enforcement in Albania of the sentence imposed on him in Italy. It also dismissed the applicant's other complaints.

#### Article 41

The Court awarded the applicant €8,000 in respect of non-pecuniary damage and EUR 7,000 for costs and expenses.

*Heavy-handed police operation to arrest politician held to be  
a violation of Articles 3, 5(3), 5(5), 6, 8 and 13*

## **JUDGMENT IN THE CASE OF GUTSANOV v. BULGARIA**

(Application No. 34529/10)

**15 October 2013**

### **1. Principal Facts**

The applicants are Mr Gutsanov, a well-known local politician, his wife and two minor daughters. The authorities suspected Gutsanov of involvement in a criminal group accused of abusing power and embezzling public funds. At around 6.30 a.m. on 31 March 2010 a special team which included armed and masked police officers arrived at the applicant's home. A caretaker alerted them to the presence of the wife and children. After Gutsanov did not respond to the order to open the door, the police officers forced entry. The house was searched and various items of evidence were taken. Gutsanov was arrested and escorted off the premises at 1p.m., recorded by journalists and television crew. A press conference was held on the same day, during which the prosecutor announced the charges against the arrested individuals, including Gutsanov, as part of a criminal group. At 10.55 p.m. a prosecutor formally charged Gutsanov of various offences and ordered a detention for seventy-two hours to ensure his attendance in court. On 1 April a newspaper published the prosecutor's speech, together with extracts of an interview with the Interior Minister, during which he referred to the closeness of Gutsanov with another suspect and their involvement in a "plot". On 3 April 2010, a tribunal placed him in pre-trial detention on the grounds that there was a risk that he might commit new offences. On 5 April 2010 the prime minister gave a live interview on current affairs, at the end of which he was asked to comment on the recent arrests, and mentioned the closeness of Gutsanov with another suspect and "material profits". Gutsanov's appeal against pre-trial detention on 13 April 2010 and a further request for release on 18 May 2010 were rejected. On 25 May 2010 the Court of Appeal placed Gutsanov under house arrest, noting that the danger of him committing new offences no longer existed. On 26 July 2010 the tribunal decided to release him on bail.

### **2. Decision of the Court**

Relying on Article 3 the applicants complained that they had been subjected to degrading treatment as a result of the police operation at their home. The applicant also relied on Article 5 to argue that he had not been brought promptly before a judge and that

he had been held in prison for an excessive time and that no sufficient reason for his continued detention were given. The applicant also complained that the remarks made about him by public figures violated his presumption of innocence under Article 6 and 13. Under Article 8 the Gustanovi family argued that the search carried out in their home was an unjustified interference with their right to respect for home and family life. The applicants also argued that under Article 13 they had not had an effective domestic remedy in respect of the alleged violations of their rights under Article 3.

### Article 3

The police operation pursued the legitimate aim of carrying out an arrest, search and find in the general interest of the prosecution of criminal offences. However, its planning and execution did not take into account several important factors, such as the nature of offences Gutsanov was accused of, the fact that he did not have any violent history and the presence of his wife and children. These factors indicated that the use of special, armed and masked agents and methods like arriving very early in the morning were excessive, rather than strictly necessary to apprehend a suspect and gather evidence. The four applicants had been subjected to a psychological ordeal generating feelings of fear, anguish and feelings of helplessness, qualifying it as degrading treatment for the purposes of Article 3, which the Court found to have been violated.

### Article 5

#### *Article 5(3) - appearance before a judge*

The applicant was detained without trial for three days and six hours but had not been participating in any investigatory measures after the first day. He was not suspected of involvement in violent activity and was in a psychologically fragile state during the initial stages of detention following the degrading treatment suffered during the police operation, which was exacerbated by his public notoriety. He was detained in the same city as the tribunal and no exceptional security measures were necessary. These elements led the Court to find a violation of the requirement in Article 5 to promptly present a suspect before a judge.

#### *Article 5(3) – length of detention*

Gutsanov was detained for a period of 118 days (31 March to 30 July 2010), two months of which was house arrest. The domestic tribunals' decisions to keep him in detention was based on a risk that he might commit a new offence, notably interference with evidence. However, on 25 May 2010, the Court of Appeal decided that following the

applicant's resignation from his post, this danger had passed. Yet, contrary to its obligations under domestic law, the same court placed the applicant under house arrest without offering any particular reason to justify this decision. Hence, the Court concluded that the authorities failed in their obligation to provide pertinent and sufficient reasons for Gutsanov's detention after 25 May 2010, and therefore violated Article 5(3).

#### *Article 5(5)*

The State Liability Act did not provide the applicant with an effective remedy for the action of damages suffered by him during detention. Since no other domestic provision for compensation existed, the Court found a violation of Article 5(5).

#### Article 6

The Court examined Gutsanov's claims that various public officials have violated his right to presumption of innocence.

After finding no violation regarding the Prime Minister's interview and the prosecutor's conference speech, the Court considered the Interior Minister's interview during which he declared that what "[Gutsanov and another suspect] had have done represents an elaborate plot during a period of several years". The Court distinguished the nature of this interview, exclusively concerned with the operation, from the spontaneous words of the Prime Minister several days later. In addition, the fact that this speech was published the day after the arrests (and before Gutsanov's appearance before a court) by a high government official who in the circumstances should have taken precautions to avoid confusion was significant. The words were more than a simple communication of information and suggestive of Gutsanov's guilt, and there had been a violation of Article 6(2).

Finally, the judge who rejected an application for release on 18 May 2010 stated that the court "remains of the view that a criminal offence was committed and that the accused was involved". The phrase was more than a mere description of suspicion, and rather a declaration of guilt before any decision on the merits had been made, and also breached Article 6(2).

#### Article 8

The search of the applicants' house was carried out without a judge's prior authorisation. Such a search was permitted on the condition that a tribunal reviewed the search retrospectively to ensure that it met certain material and procedural conditions. In

this case, the judge in question did not give any reasons for his approval and as a result, the Court considered that he did not demonstrate an effective control over the lawfulness and necessity of the search. Hence, the Court considered that the interference with the right to respect for home was not “prescribed by law” and therefore violated Article 8.

#### Article 13 in combination with Articles 3 and 8

No effective remedy existed in domestic law by which the applicants could assert their right not to be submitted to treatment contrary to Article 3 and to respect for their home under Article 8. A violation of Article 13 in combination with these two Articles was therefore found.

#### Article 41

A joint sum of €40,000 was awarded to the applicants in just satisfaction and €4,281 for costs and expenses.

*Ill-treatment by police on arrest***JUDGMENT IN THE CASE OF HAJNAL v. SERBIA**

(Application no. 36937/06)

**19 June 2012****1. Principal Facts**

The applicant is a Serbian national who was born in 1985 and lives in Subotica, Serbia.

On 8 August 2005 the applicant was arrested by the Subotica police and brought to their station concerning an alleged burglary. According to the minutes of his interrogation, the applicant confessed to one count of attempted burglary, and then signed the document using his nickname, notwithstanding a prior reference in the same minutes noting that he was “illiterate”.

On both 17 and 18 August 2005 the applicant was again brought to the police station for questioning about burglaries without having been previously summoned. On these occasions the applicant alleged that he had been physically abused by the police, who had attempted to obtain his confession. On the first occasion he had been able to briefly see his lawyer, but on the second occasion the police ignored this request. Instead, the applicant was provided with a legal aid lawyer, who, it is claimed, appeared only briefly to sign the minutes of the interrogation and left shortly thereafter. The minutes in question contained: (i) an indication that the applicant was being charged with numerous counts of burglary; (ii) his detailed confession of how he had committed those offences; (iii) his statement to the effect that he did not want to retain his original lawyer as his legal counsel; and (iv) his declaration that he had given his statement in the absence of “any physical or mental coercion”.

On 24 August 2005 the applicant was arrested again and detained for 48 hours. His original lawyer lodged an appeal which the Municipal Court rejected, stating that the applicant had been convicted of crimes in the past and had “continued committing crimes” thereafter, noting the six cases pending before him and stating that he had “committed” several property-related crimes in a short period of time.

A preliminary judicial investigation was instituted against the applicant and his detention was extended by the investigating judge on the basis that the applicant could, if released, re-offend, abscond or unduly influence witnesses. The applicant refused to give a statement when invited to, and instead referred to the police abuse he

had suffered as well as procedural defects in his case. His continued detention was confirmed on 30 August 2005. In the following weeks the investigating judge heard evidence from witnesses, two of whom stated that they had been either threatened with or subjected to physical violence by the police in order to elicit their statements.

On 16 September 2005 the applicant was indicted. His lawyer filed a formal objection against the indictment but this was rejected. His lawyer subsequently informed the Municipal Court that the applicant had been photographed while in prison and that during several prison visits with the applicant, prison staff had remained close enough to hear and see everything.

During the hearings that followed the applicant described the abuse which he had suffered whilst in police custody and stated that he had been coerced into signing a statement prepared by the police without his participation. Other individuals also referred to the abuse they had suffered at the hands of the police.

On 13 April 2006 the Municipal Court found the applicant guilty of eleven burglaries and sentenced him to one and a half years imprisonment. Testimony indicating certain witnesses had been ill-treated by the police in order to incriminate the applicant was either dismissed as irrelevant or simply ignored. The Municipal Court considered the six pending cases against the applicant as aggravating circumstance in sentencing. His appeals were rejected.

## **2. Decision of the Court**

The applicant complained under Article 3 about the police ill-treatment of 17 and 18 August 2005 as well as the respondent State's subsequent failure to conduct any investigation into these incidents. The applicant also relied on Article 6 alleging that the criminal proceedings against him had been unfair as his conviction was based on the confession he had made under duress on 18 August 2005.

### Article 3

Reiterating the status of Article 3 as one of the most fundamental provisions of the Convention, the Court noted that it was cast in absolute terms, without exception or proviso. As to whether the ill-treatment fell within the scope of Article 3 depended on all the circumstances of the case.

In relation to the facts before it, the Court found the applicant's decision to confess to numerous burglaries on 18 August 2005 suspicious, given that he had refused to give

a statement to the police only the day before. Further, the Court found it significant that although the applicant had been unable to obtain a medical certificate, his lawyer and another witness had observed his injuries and several witnesses had testified that they themselves had been subject to ill-treatment by the police. In addition the Court relied on a report published by the European Committee for the Prevention of Torture at the time of the interrogations indicating that baseball bats and similar objects had been found in offices used for interrogation purposes in almost all of the police stations visited in Belgrade by the Committee. Finally the Court noted the lack of official records regarding when the applicant was brought into custody and for how long he was there.

Accordingly the Court concluded that the applicant was subjected to physical violence on 17 August 2005 and at the very least, mentally coerced into giving his confession the following day. Consequently, the Court found a violation of Article 3. In relation to the failure to initiate and conduct a thorough investigation into the credible assertion of ill-treatment suffered at the hands of state agents, the Court found a violation of the procedural limb of Article 3.

#### Article 6§1

In assessing whether the applicant's right to a fair hearing had been breached, the Court noted that this depended on whether the proceedings taken as a whole, including the way in which evidence was obtained, were fair. In addition, the Court asserted that particular considerations applied in respect of evidence obtained in breach of Article 3 and that ECHR case law had held the admission of statements obtained as a result of ill-treatment to establish the relevant facts in the case renders the proceedings as a whole unfair.

Given that the Court had already found a violation of Article 3 in respect of the applicant's interrogations, and in view of the fact that his subsequent confession was used to convict him, the proceedings as a whole were found to be unfair. Consequently there had been a breach of Article 6.

#### Article 6§2

The applicant argued that his right to be presumed innocent had been breached by the Municipal Court's reference to the six criminal cases pending concurrently against him and the fact that the Municipal Court regarded this as an aggravating circumstance in sentencing.

The Court stated that only a formal finding of an individual's prior crime, i.e. conviction, could be taken as an aggravating circumstance in future sentencing. Accepting the relevance of pending criminal proceedings in sentencing unavoidably implied his or her guilt in those proceedings. Accordingly, the Court found a violation of Article 6§2.

#### Article 41

The Court held that Serbia was to pay the applicant €12,000 in respect of non-pecuniary damage and €9,000 for costs and expenses.

***THIS CASE HAS BEEN REFERRED TO THE GRAND CHAMBER UNDER ARTICLE 43,  
AND A HEARING WILL BE HELD ON 18 APRIL 2018***

*The 23-days' de facto confinement in transit zone of two asylum-seekers was unlawful, and their removal from Hungary to Serbia exposed them to a real risk of chain-refoulement*

**JUDGMENT IN THE CASE OF ILIAS AND AHMED v. HUNGARY**

(Application no. 47287/15)

**14 March 2017**

**1. Principal facts**

The applicants, Mr Md Ilias Ilias and Mr Ali Ahmed, are two Bangladeshi nationals who were born on 1 January 1983 and 3 June 1980 respectively.

Having left their home country, Bangladesh, they travelled through Pakistan, Iran, and Turkey, and entered the territory of the European Union in Greece. From there, they transited through FYROM to Serbia, where they spent 20 hours and two days respectively. On 15 September 2015 they arrived in the Rösztke transit zone on the border between Hungary and Serbia. On the same day, they submitted applications for asylum.

From that moment on, the applicants stayed inside the transit zone, which they could not leave in the direction of Hungary. The transit zone was, in their view, unsuitable for a stay longer than a day, especially in the face of their severe psychological condition. They were effectively locked in a confined area, surrounded by fence and guarded by officers. They claimed that they had no access to legal, social or medical assistance.

The applicants, both illiterate, were interviewed by the Citizenship and Immigration Authority ("the asylum authority"). Both applicants' mother tongue was Urdu. By mistake, the first applicant was interviewed with the assistance of an interpreter in Dari, which he did not speak. An Urdu interpreter was present for the second applicant's interview. According to the interview notes, Hungary was the first country where both applicants applied for asylum.

By a decision of 15 September 2015, the asylum authority rejected the applicants' asylum applications, finding them inadmissible on the grounds that Serbia was to be considered a "safe third country" according to Government Decree no. 191/2015.

The applicants challenged the decision before the Szeged Administrative and Labour Court, which annulled the asylum authority's decisions on the grounds that the latter should have analysed the actual situation in Serbia regarding asylum proceedings more thoroughly, and remitted the case to it for fresh consideration.

On 23 September 2015, both applicants were diagnosed with post-traumatic stress disorder ("PTSD"). The respective medical reports did not contain any indication of urgent medical or psychological treatment; the psychiatrist was, however, of the opinion that the applicants' mental state was liable to deteriorate due to the confinement.

On 30 September 2015 the asylum authority again rejected the applications for asylum and ordered their expulsion from Hungary. The applicants sought judicial review by the Szeged Administrative and Labour Court, which, however, upheld the asylum authority's decision. The decision was served on the applicants on 8 October 2015. They were subsequently escorted to the Serbian border, leaving the transit zone for Serbia without physical coercion.

## 2. Decision of the Court

The applicants complained that their confinement to the transit zone had been unlawful and had not been remedied by appropriate judicial review, in breach of Article 5(1) and (4) of the Convention. They also complained that their protracted confinement in the transit zone, given their vulnerable status and the prevailing conditions, amounted to inhuman treatment in breach of Article 3. What is more, they alleged that there was no effective remedy at their disposal to complain about these conditions, in breach of Article 13 read in conjunction with Article 3. Lastly, they alleged that their expulsion to Serbia had exposed them to a real risk of chain-*refoulement* which amounted to inhuman and degrading treatment in breach of Article 3.

### Article 5(1)

The Court found that the applicants were confined for 23 days in a guarded compound, which was under the State's effective control and could not be accessed from the outside, even by the applicants' lawyer. The applicants did not have the opportunity to enter Hungarian territory beyond the zone. Further, they could not have left the transit zone in the direction of Serbia without forfeiting their asylum claims and running the risk of *refoulement*. Therefore, they could not be considered as having validly consented to being deprived of their liberty and their confinement to the transit zone amounted to a *de facto* deprivation of liberty.

The Court was not convinced that the domestic provisions invoked by the Government as the legal basis for the applicants' detention, circumscribed with sufficient precision and foreseeability the prospect that asylum-seekers such as the applicants were liable to be committed to the transit zone. The provisions in question merely stated that asylum-seekers subjected to the border procedure were not entitled to stay in the territory of Hungary or seek accommodation at a designated facility.

In any case, the applicants' detention apparently occurred *de facto*, that was, as a matter of practical arrangement, which had not been embodied in a formal decision of legal relevance, complete with reasoning. The applicants' detention was thus not considered "lawful" for the purposes of Article 5(1). Accordingly, there was a violation of that provision.

#### Article 5(4)

Considering that the applicants' detention consisted in a *de facto* measure, the applicants could not have pursued any judicial review of their committal to the transit zone, which itself had not been ordered in any formal proceedings or taken the shape of a decision. The Court observed that the proceedings followed concerned the applicants' asylum applications. In contrast, the applicants did not have at their disposal any proceedings by which the lawfulness of their detention could have been decided speedily by a court, which amounted to a violation of Article 5(4).

#### Article 3

The applicants had been confined to an enclosed area of some 110 m<sup>2</sup> for 23 days, where they were provided a room in one of the several dedicated containers, the ground surface of which was, according to the CPT, 13 m<sup>2</sup>. The applicants' room contained beds for five but it appeared that at the material time they were the only occupants. Sanitary facilities were provided in separate containers. Furthermore, a psychiatrist was granted access to them, whereas the CPT had gained a generally favourable impression of the health-care facilities. There was no indication that the material conditions were poor, in particular that there was a lack of adequate personal space, privacy, ventilation, natural light or outdoor stays.

The Court took cognisance of the psychiatrist's opinion who found that the applicants suffered from PTSD, which, in the applicants' submissions, should have pre-empted the application of border procedure in their case. It did acknowledge that asylum seekers were particularly vulnerable, but it concluded that the applicants in the present case were not more vulnerable than any other adult asylum-seeker detained at the time. In view of the satisfactory material conditions and the relatively short time involved, the treatment

complained of did not reach the minimum level of severity necessary to constitute inhuman treatment within the meaning of Article 3. There was thus no such violation found.

#### Article 13 in conjunction with Article 3

The applicants' complaints about the conditions in which they were held were "arguable" for the purposes of Article 13. Nonetheless, the Government had not indicated any remedies by which those complaints could have been raised. Hence, there was a violation of Article 13 taken together with Article 3.

#### Article 3 (regarding the risk of inhuman and degrading treatment)

The Court observed that the applicants were removed from Hungary on the strength of Government Decree 191/2015, which introduced an abrupt change in the Hungarian stance on Serbia from the perspective of asylum proceedings, listing the latter as a safe third country and establishing a presumption in this respect, despite reports of the UNHCR and respected international human rights organisations indicating the lack of a fair and efficient asylum procedure in Serbia.

With respect to the particular procedure applied to the applicants' case, this was not found to be appropriate to provide the necessary protection against a real risk of inhuman and degrading treatment. The Hungarian authorities relied on a schematic reference to the Government's list of safe third countries, disregarded the country reports and other evidence submitted by the applicants and imposed an unfair and excessive burden of proof on them.

The Court further observed that, owing to a mistake, the first applicant was interviewed and provided with an information leaflet on asylum proceedings in a language he did not speak. What is more, all the information that the applicants received was contained in a leaflet despite the fact that they were both illiterate. As a result, their participation in the proceedings had been extremely limited.

In view of the above, the applicants did not have the benefit of effective guarantees which would have protected them from exposure to a real risk of being subjected to inhuman or degrading treatment in breach of Article 3.

#### Article 41

The Court awarded €10,000 to each applicant in respect of non-pecuniary damage and €8,705 to them jointly in respect of costs and expenses.

*Article 3 rights are absolute and therefore cannot be derogated from in an emergency*

## **JUDGMENT IN THE CASE OF IRELAND v. THE UNITED KINGDOM**

(Application no. 5310/71)

**18 January 1978**

### **1. Principal facts**

Between August 1971 and December 1975, the authorities in Northern Ireland exercised a series of extrajudicial powers of arrest, detention and internment in order to address frequent terrorist activities carried out in Northern Ireland. The UK Government therefore allowed the authorities to: (i) arrest for interrogation purposes during 48 hours; (ii) arrest and remand in custody; (iii) detain an arrested person; and (iv) intern individuals on a preventative basis without charge, trial or conviction of any offence.

The UK Government claimed that normal procedures of investigation and criminal prosecution had become inadequate to deal with the terrorists and the ease of escape into the Republic of Ireland presented difficulties of control.

Allegations of ill-treatment were made by the Irish Government (the applicant Government) in relation to both the initial arrests and to subsequent interrogations. The applicant Government submitted written evidence to the Commission, which examined the allegations in detail with medical reports and oral evidence.

The case was brought under the old system in which complaints were first assessed by the European Commission of Human Rights (a non-judicial body) and then by the Court. In this case the Commission found that a number of arrested persons were subjected to 'interrogation in depth', which involved a combination of one or more, or all of several techniques. There were five particular techniques, namely: (a) wall-standing, i.e. forcing the detainees to remain standing by a wall for periods of some hours in painful 'stress positions' supported only by their toes and fingertips; (b) hooding, i.e. putting a black or navy coloured hood over the detainees' heads so that they were unable to see; (c) subjection to continuous noise; (d) deprivation of sleep; and (e) deprivation of food and drink.

### **2. Decision of the Court**

The Government of the Republic of Ireland brought the application before the Commission alleging that various interrogation practices used by the British – in particular

the so-called ‘five techniques’ – and other practices to which suspects were subjected amounted to torture and inhuman or degrading treatment contrary to Article 3.

### Article 3

Article 3 prohibits torture, and inhuman and degrading treatment or punishment. The Irish Government alleged that the UK were in breach of this prohibition.

The Court reiterated the statement of the Commission that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative and depends upon all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.

The Court emphasised that the Convention prohibits, in absolute terms, torture and inhuman or degrading punishment, irrespective of the victim’s conduct. Therefore, unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and, under Article 15(2), there can be no derogation from this, even in the event of a public emergency threatening the life of the nation.

The Court formed the same view as the Commission in relation to the ‘five techniques’. It found that these had been applied in combination, with premeditation and for hours at a stretch, causing, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. Accordingly, these practices fell into the category of inhuman treatment within the meaning of Article 3. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. The distinction was said to derive principally from a difference in the intensity of the suffering inflicted. ‘Torture’ was said to attract a special stigma in relation to deliberate inhuman treatment causing very serious and cruel suffering.

Although the five techniques, as applied in combination, were said to amount to inhuman and degrading treatment, and although their object was the extraction of confessions, the naming of others and/or information, and although they were used

systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture.

The Court defined a practice incompatible with the Convention as consisting of 'an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system'. In such a situation, the Court found that it would be inconceivable that the higher authorities of a State were unaware of such practices. Furthermore, the Court made clear that, under the Convention, those authorities are strictly liable for the conduct of their subordinates and they are under a duty to impose their will on subordinates.

The Court therefore concluded that recourse to the five techniques amounted to a practice of inhuman and degrading treatment, and that this practice was a breach of Article 3.

*Extraction of evidence by force violated applicant's rights to prohibition of inhuman and degrading treatment and to a fair trial*

## **GRAND CHAMBER JUDGMENT IN THE CASE OF JALLOH v. GERMANY**

(Application no. 54810/00)

**11 July 2006**

### **1. Principal facts**

The case concerned an application brought by Abu Bakah Jalloh, a national of Sierra Leone, who was born in 1965 and lived in Germany.

On 29 October 1993, plain-clothes policemen spotted the applicant taking two tiny plastic bags out of his mouth and handing them over for money. Considering that the bags contained drugs, the police officers went over to arrest the applicant. While they were doing so he swallowed another tiny bag he still had in his mouth. As no drugs were found on him, the competent public prosecutor ordered that he be given an emetic to force him to regurgitate the bag.

The applicant was taken to a hospital, where he saw a doctor. As he refused to take medication to induce vomiting, four police officers held him down while a doctor inserted a tube through his nose and administered emetic by force. The doctor also injected him with another type of emetic. As a result the applicant regurgitated a small bag containing 0.2182 g of cocaine. A short while later he was examined by a doctor who declared him fit for detention. About two hours after being given the emetics, the applicant, who was found not to speak German, said in broken English that he was too tired to make a statement about the alleged offence.

On 30 October 1993 the applicant was charged with drug-trafficking and placed in detention on remand. His lawyer advanced three main arguments in his defence: firstly, the evidence against him had been obtained illegally and so could not be used in the criminal proceedings; secondly, the police officers and the doctor who had participated in the operation were guilty of causing bodily harm in the exercise of official duties; thirdly, the administration of toxic substances was prohibited by the German Code of Criminal Procedure and the measure was also disproportionate under the Code, as it would have been possible to obtain the same result by waiting until the bag had been excreted naturally.

On 23 March 1994 the District Court convicted the applicant of drug-trafficking and gave him a one-year suspended prison sentence. His appeal against conviction was unsuccessful, although his prison sentence was reduced to six-months, suspended. A further appeal was dismissed.

The Federal Constitutional Court declared the applicant's constitutional complaint inadmissible, finding that he had not made use of all available remedies before the German criminal courts. It also found that the measure in question did not give rise to any constitutional objections concerning the protection of human dignity or prevention of self-incrimination, as guaranteed under the German Basic Law.

## **2. Decision of the Court**

The application was lodged with the European Court of Human Rights on 30 January 2000. On 1 February 2005 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber under Article 30 of the Convention.

The applicant complained that he had been administered an emetic by force and that the evidence thereby obtained – in his view, illegally – had been used against him at his trial. He further complained that his right not to incriminate himself had been violated. He relied on Articles 3, 6 and 8 of the Convention.

### Article 3

The Court reiterated that the Convention did not, in principle, prohibit recourse to a forcible medical intervention that would assist in the investigation of an offence. However, any interference with a person's physical integrity carried out with the aim of obtaining evidence had to be the subject of rigorous scrutiny.

The Court was acutely aware of the problem confronting States in their efforts to combat the harm caused to their societies through the supply of drugs. However, in the case before it, it had been clear before the impugned measure was ordered and implemented that the street dealer on whom it was imposed had been storing the drugs in his mouth and could not, therefore, have been offering drugs for sale on a large scale. That had also been reflected in the sentence. The Court was not satisfied that the forcible administration of emetics had been indispensable to obtain the evidence. The prosecuting authorities could simply have waited for the drugs to pass out of the applicant's system naturally, that being the method used by many other member States of the Council of Europe to investigate drugs offences.

The Court noted that neither the parties nor the experts could agree on whether the administration of emetics was dangerous. It noted that in the majority of the German States and in at least a large majority of the other member States of the Council of Europe the authorities refrained from forcibly administering emetics, a fact that tended to suggest that the measure was considered to pose health risks.

As to the manner in which the emetics were administered, the Court noted that, after using force verging on brutality, a tube was fed through the applicant's nose into his stomach to overcome his physical and mental resistance. This must have caused him pain and anxiety. He was then subjected to a further bodily intrusion against his will through the injection of another emetic. The Court said that account also had to be taken of the applicant's mental suffering while he waited for the emetics to take effect and of the fact that during that period he was restrained and kept under observation. Being forced to regurgitate under such conditions must have been humiliating for him, certainly far more so than waiting for the drugs to pass out of the body naturally.

In conclusion, the Court found that the German authorities had subjected the applicant to a grave interference with his physical and mental integrity against his will. Although this had not been the intention, the measure was implemented in a way which had caused the applicant both physical pain and mental suffering. He had therefore been subjected to inhuman and degrading treatment contrary to Article 3.

#### Article 8

The Court found that no separate issue arose under Article 8 of the Convention.

#### Article 6

The Court noted that, even if it had not been the authorities' intention to inflict pain and suffering on the applicant, the evidence was nevertheless obtained by a measure which breached one of the core rights guaranteed by the Convention. Furthermore, the drugs obtained by the impugned measure proved the decisive element in securing the applicant's conviction. Lastly, the public interest in securing the applicant's conviction could not justify allowing evidence obtained in that way to be used at the trial. Accordingly, the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant had rendered his trial as a whole unfair.

Despite that finding, the Court considered it appropriate to address also the applicant's argument that the manner in which the evidence had been obtained and the use that had been made of it had undermined his right not to incriminate himself.

.....

The Court reiterated that the administration of the emetics amounted to inhuman and degrading treatment. Further, although German law afforded safeguards against arbitrary or improper use of the measure, the applicant, in reliance upon his right to remain silent, had refused to submit to a prior medical examination and had been subjected to the procedure without a full examination of his physical aptitude to withstand it. Lastly, the drugs thereby obtained were the decisive evidence in his conviction. Consequently, the Court would also have been prepared to find that allowing the use at the applicant's trial of evidence obtained by the forcible administration of emetics had infringed his right not to incriminate himself and therefore rendered his trial as a whole unfair.

#### Article 41

The Court awarded the applicant €10,000 in respect of non-pecuniary damage and €5,868.88 for costs and expenses.

*Lack of an effective investigation into torture allegations by person of  
Roma ethnic origin*

**JUDGMENT IN THE CASE OF JASAR v. THE FORMER  
YUGOSLAV REPUBLIC OF MACEDONIA**

(Application no 69908/01)

**15 February 2007**

**1. Principal facts**

The applicant, Pejrusan Jasar, is a Macedonian national of Roma ethnic origin who was born in 1965 and lives in Štip (the former Yugoslav Republic of Macedonia).

On 16 April 1998 the applicant was in a local bar. A row started in the bar and gunshots were fired. Several police officers came to restore the peace and the applicant was subsequently injured.

The Government and applicant gave different accounts of how the applicant sustained his injuries.

The applicant maintained that police officers grabbed him by his hair and forced him into a police van. He was taken into police custody, where he claimed he was kicked in the head, punched and beaten with a truncheon by a police officer. A medical report produced the following day stated that the applicant had sustained “light bodily injury” at the police station, in the form of numerous injuries to his head, hand and back.

According to the respondent Government, the applicant was involved in the row in the bar and was later taken to the police station after he had obstructed police officers. No force was used against him at the police station and no charges brought against him.

In May 1998 the applicant filed a criminal complaint with the public prosecutor against an unidentified police officer. After two inquiries, the public prosecutor stated, in November 1999, that he had officially requested the Ministry of the Interior to make additional inquiries. There has been no indication that any further investigative steps were taken.

The applicant also brought civil proceedings against the State, claiming that he was a victim of police brutality. In March 1999 his claim for damages was dismissed. The

national courts, on the basis of evidence from witnesses and a medical expert, found that the applicant might well have sustained his injuries in the bar, either as a result of the brawl or while resisting arrest, and that the arresting officers had not used excessive force.

## **2. Decision of the Court**

The applicant complained that he was ill-treated by the police and that no effective investigation was carried out. He relied on Article 3 and Article 13.

### Article 3

#### Concerning the alleged ill-treatment

The Court observed that it had received no evidence which could call into question the findings of the national courts and support the applicant's allegations. Eight years after the events in question – owing primarily to the national authorities' inactivity and reluctance to carry out an effective investigation into the applicant's allegations – the Court was not able to establish which version of events was the more credible.

In conclusion, since the evidence before it did not enable the Court to find beyond all reasonable doubt that the applicant had been subjected to physical and mental ill-treatment while in police custody, the Court considered that there was insufficient evidence for it to conclude that there had been a violation of Article 3 on account of the alleged ill treatment.

#### Concerning the lack of an effective investigation

The Court noted that the applicant's lawyer lodged a criminal complaint about the alleged police brutality together with a medical certificate, such that the matter was brought to the attention of the relevant domestic authority. The Court was satisfied that it raised at least a reasonable suspicion that the applicant's injuries could have been caused by the treatment he had undergone while in the police custody. As such, the public prosecutor was under a duty to investigate whether an offence had been committed. Yet the only investigative measure undertaken by the prosecutor was his request for additional information submitted to the Ministry, made more than a year and a half after the criminal complaint had been lodged.

In addition, the inactivity of the public prosecutor prevented the applicant from taking over the investigation as a subsidiary complainant and denied him access to the

subsequent proceedings before the court of competent jurisdiction. The applicant was still barred from taking over the investigation as the public prosecutor had not yet taken a decision to dismiss the complaint.

In those circumstances, having regard to the lack of any investigation into the allegations made by the applicant that he had been ill-treated by the police while in custody, the Court held that there has been a violation of Article 3.

#### Article 41

The Court awarded the applicant €3,000 in respect of non-pecuniary damage and a total of €9,148 for costs and expenses.

*Lack of effective monitoring and informed psychiatric input for mentally ill man in prison who committed suicide – violations of Articles 3 and 13*

## **JUDGMENT IN THE CASE OF KEENAN v. THE UNITED KINGDOM**

(Application no. 27229/95)

**3 April 2001**

### **1. Principal facts**

The applicant, Susan Keenan, a British national born in 1935, is the mother of Mark Keenan who died in HM Prison Exeter (England), at the age of 28, from asphyxia caused by self-suspension.

Mark Keenan had been receiving intermittent anti-psychotic medication from the age of 21 and his medical history included symptoms of paranoia, aggression, violence and deliberate self-harm.

On 1 April 1993, he was admitted to Exeter prison, initially to the prison health care centre, to serve a four-month prison sentence for assault on his girlfriend. Various attempts to move him to the ordinary prison were unsuccessful, as his condition deteriorated whenever he was transferred. On 1 May 1993, after the question of being transferred to the main prison was raised with him, Mr Keenan assaulted two hospital officers, one seriously. He was placed the same day in a segregation unit of the prison punishment block. On 14 May, he was found guilty of assault and his overall prison sentence increased by 28 days, including seven extra days in segregation in the punishment block, effectively delaying his release date from 23 May 1993 to 20 June. At 6.35 p.m. on 15 May 1993, he was discovered by the two prison officers hanging from the bars of his cell by a ligature made from a bed sheet. At 7.05 p.m. he was pronounced dead.

### **2. Decision of the Court**

The applicant alleged that her son had died from suicide in prison due to a failure to protect his life by the prison authorities, that he had suffered inhuman and degrading treatment due to the conditions of detention imposed on him and that she had no effective remedy in respect of her complaints. She relied on Articles 2, 3 and 13 of the European Convention on Human Rights.

## Article 2

In deciding whether there had been a violation of Article 2, the Court examined whether the authorities knew or ought to have known there was a real and immediate risk of Mark Keenan committing suicide and whether they did all that could be reasonably expected of them, having regard to the nature of the risk.

The Court noted that schizophrenics suffered from a condition in which the risk of committing suicide was well-known and high. However, while it was common ground that Mark Keenan was mentally ill, no formal diagnosis of schizophrenia provided by a psychiatric doctor had been submitted to the Court. It could not therefore be concluded that he was at immediate risk throughout the period of detention, although the variability of his condition required that he be monitored carefully.

Deciding whether the prison authorities did all that was reasonably expected of them, the Court found that, on the whole, the authorities made a reasonable response to his conduct, placing him in hospital care and under watch when he showed suicidal tendencies. He was subject to daily medical supervision by the prison doctors, who on two occasions had consulted external psychiatrists who had knowledge of his case. The prison doctors, who could have required his removal from segregation at any time, found him fit for segregation. There was no reason to alert the authorities on 15 May 1993 that he was in a disturbed state of mind rendering an attempt at suicide likely.

It was not therefore apparent that the authorities omitted any step which should have reasonably been taken and the Court did not find a violation of Article 2.

## Article 3

In deciding whether Mr Keenan had been subjected to inhuman or degrading treatment or punishment, within the meaning of Article 3, the Court was struck by the lack of medical notes concerning the applicant's son, who was an identifiable suicide risk and undergoing the additional stresses that could be foreseen from segregation and, later, disciplinary punishment. From 5 May to 15 May 1993, there were no entries in his medical notes. Given that there were a number of prison doctors who were involved in caring for him, this showed an inadequate concern to maintain full and detailed records of his mental state and undermined the effectiveness of any monitoring or supervision process.

Further, while the prison senior medical officer consulted Mark Keenan's doctor on admission and the visiting psychiatrist, who knew him, had been called to see him on 29 April 1993, the Court noted that there was no subsequent reference to a psychiatrist. Even though Dr Rowe had warned on 29 April 1993 that Mark Keenan should be kept from association until his paranoid feelings had died down, the question of returning to the main prison was raised with him the next day. When his condition proceeded to deteriorate, a prison doctor, unqualified in psychiatry, reverted to Mark Keenan's previous medication without reference to the psychiatrist who had originally recommended a change. The assault on the two prison officers followed. Though Mark Keenan asked the prison doctor to point out to the governor at the adjudication that the assault occurred after a change in medication, there was no reference to a psychiatrist for advice either as to his future treatment or his fitness for adjudication and punishment.

The Court found the lack of effective monitoring of Mark Keenan's condition and the lack of informed psychiatric input into his assessment and treatment disclosed significant defects in the medical care provided to a mentally-ill person known to be a suicide risk. The belated imposition on him in those circumstances of a serious disciplinary punishment – seven days' segregation in the punishment block and an additional 28 days to his sentence imposed two weeks after the event and only nine days before his expected date of release – which may well have threatened his physical and moral resistance, was not compatible with the standard of treatment required in respect of a mentally-ill person.

The Court concluded that there was a violation of Article 3.

#### Article 13

The Court observed that two issues arose under Article 13: whether Mark Keenan himself had available to him a remedy in respect of the punishment inflicted on him and whether, after his suicide, the applicant, either on her own behalf or as the representative of her son's estate, had a remedy available to her.

Concerning Mark Keenan, the Court noted that the punishment of further imprisonment and segregation was imposed on him on 14 May 1993 and that he committed suicide on the evening of 15 May 1993. The Government could not be liable for failing to provide a remedy which would have been available to him within a period of 24 hours.

However, no remedy at all was available to Mark Keenan which would have offered him the prospect of challenging the punishment imposed within the seven-day

segregation period or even within the period of 28 days' additional imprisonment. Even assuming judicial review would have provided a means of challenging the Governor's adjudication, it would not have been possible for Mark Keenan to obtain legal aid, legal representation and lodge an application within such a short time period. Similarly, the internal avenue of complaint against adjudication to the Prison Headquarters took an estimated six weeks.

If it were the case, as has been suggested, that Mark Keenan was not in a fit mental state to make use of any available remedy, this would point to the need for the automatic review of an adjudication. The Court moreover is not persuaded that effective recourse against the adjudication would not have influenced the course of events. Mark Keenan had been punished in circumstances disclosing a breach of Article 3 and he had the right, under Article 13, to a remedy which would have quashed that punishment before it had either been executed or come to an end.

Turning to the remedies available after Mark Keenan's death, the Court noted that the inquest did not provide a remedy for determining the liability of the authorities for any alleged mistreatment, or for providing compensation. The applicant should have been able to apply for compensation for her non-pecuniary damage and that suffered by her son before his death. Moreover, no effective remedy was available to the applicant, which would have established where responsibility lay for her son's death. In the Court's view, this was an essential element of a remedy under Article 13 for a bereaved parent.

#### Article 41

The Court awarded the applicant £10,000 for non-material damages and £21,000 for costs and expenses.

*Not carrying out an effective investigation after complaint of ill-treatment by State agents during arrest and detention at police station and detention facilities violated Article 3*

## **JUDGMENT IN THE CASE OF KRSMANOVIĆ v. SERBIA**

(Application no. 19796/14)

**19 December 2017**

### **1. Principal Facts**

The applicant, Đorđe Krsmanović, is a Serbian national and lives in Zemun (Serbia). In 2003, the applicant was arrested and detained as part of a large-scale police operation ordered following the assassination of the Serbian Prime Minister in 2003. As a result of the assassination the Serbian Government also declared a state of emergency.

Mr Krsmanović was a member of the criminal group linked to the Zemun Clan, held responsible for the Prime Minister's assassination. During the police investigation into the assassination approximately 10,000 people were arrested and placed in pre-trial detention, including all members of the Zemun Clan and groups linked to the them, which included Mr Krsmanović. The applicant was arrested on 1 April 2003, when the Special Anti-Terrorist Unit burst into his flat where he and five of his friends were hiding. The applicant claimed that upon the arrival of the Special Anti-Terrorist Unit he was subjected to physical and verbal abuse. He alleged that he was kicked and beaten indiscriminately and the Unit had put a pillowcase over his head and verbally abused him and made threats to his family. In a recording of his arrest, which was broadcasted on national television at the beginning of April 2003, he was shown with visible bruises on his face. On arrival at the police station he claimed that he was further abused as well as over the next 11 days, during which he was held in solitary confinement at the police station. He claimed to have been taken out of his cell routinely for questioning and that he was beaten, kicked, and had a truncheon inserted into his anus several times. On 12 April 2003, he was transferred to Belgrade District Prison, where a prison doctor examined him and reported bruising on the soles of his feet, the palms of his hands, and on his face, shoulders, and buttocks. During the first six days of his detention at Belgrade District Prison he was placed in a solitary confinement cell and only had contact with the doctors who examined him. Eventually he was charged, among other things, with drug offences and sentenced to four years and ten months' imprisonment. In June 2004 he was released pending the outcome of appeal proceedings.

Mr Krsmanović's allegations of ill-treatment were investigated by three different authorities – the Inspector General's Service, following a complaint brought by his

mother in 2004; the prosecutor's office following a complaint lodged by Mr Krsmanović in 2007; and an investigative judge when Mr Krsmanović took over criminal proceedings as a subsidiary prosecutor in 2008. The prosecutor's office opened an official inquiry in 2007, interviewing the applicant as well as three police officers who were identified in connection with the applicant's arrest and questioning. All three investigations were eventually terminated due to a lack of evidence of either the ill-treatment or of someone's guilt. Despite interviewing police officers involved in his arrest and detention, no officers involved in the alleged abuse or eyewitnesses were ever identified.

Mr Krsmanović lodged an appeal on points of law with the prosecutor's office and a constitutional appeal. Both were rejected in 2010 and 2013 respectively.

## **2. Decision of the Court**

The applicant complained that authorities had failed to conduct an effective investigation into his allegations of ill-treatment, which violated Article 3 of the Convention.

### Admissibility

The Government argued that the Court did not have jurisdiction in cases where the event happened before 3 March 2004, which is when the Convention entered into force for Serbia. However, the Court stated that it has consistently held that the procedural obligation to investigate under Article 2 and 3 of the Convention has its own distinct scope of application and operates independently from the substantive limb of Article 2 and 3. Where the events occurred before ratification, only procedural acts and/or omissions that occurred after the date of ratification can fall within the Court's temporal jurisdiction. There must also be a genuine connection between the death or ill-treatment and the entry into force of the Convention for the procedural obligations to come into effect. In the present case the Court noted that no significant time passed between the alleged ill-treatment and ratification of the Convention and all the pre-investigative steps were conducted after the Convention came into force, meaning it fell within the Court's temporal jurisdiction.

The Government also argued that the complaint had been lodged out of time. The Court noted that the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies, which is the constitutional appeal. In the present case, the applicant pursued all the legal remedies available to him in challenging the decisions of the judicial bodies. As a result the Court found that the applicant lodged his application within six months of 11 September 2013, which is the

date of service of the Constitutional Court's decisions. As a result the complaint was lodged within the six-month time-limit.

### Article 3

Where an individual raises an arguable claim that they have been seriously ill-treated by police or agents of the State in breach of Article 3, this provision, in conjunction with Article 1 of the Convention, requires that there should be an effective official investigation. The authorities must act as soon as an official complaint has been lodged. The obligation to investigate does not mean an obligation of result, but of means. An effective investigation must be adequate, and those responsible for carrying out the investigation must also be independent from those implicated in the events. The investigation must be thorough and places an obligation to react promptly and take action once a complaint has been lodged. Lastly, an effective investigation must afford a sufficient element of public scrutiny to secure accountability.

In this case, the Court took into account that the alleged ill-treatment of the applicant happened during a state of emergency after the assassination of the Serbian Prime Minister in 2003. The Court also noted that they are aware that the applicant was arrested and detained as part of Operation Sabre, when a large number of people were arrested and placed in pre-trial detention. Both the applicant and his mother lodged complaints with the relevant domestic authorities reporting his ill-treatment, and the Court found these complaints to be sufficiently detailed, containing precise dates, locations, as well as possible perpetrators. There was also a medical certificate documenting the applicant's injuries as well as the video broadcast showing the applicant with visible bruises on his face. All the evidence along with the complaints submitted justified an "arguable claim" within the meaning of Article 3 that the applicant had been subjected to ill-treatment. As a result, the Serbian authorities were under an obligation to conduct an effective investigation.

The Court noted that the investigations mainly consisted of interviews with several police officers involved in the incident. The applicant and his mother were not allowed to participate effectively in the investigations and little attention was given to the applicant's allegations despite the evidence presented by him. No eyewitnesses to the applicant's ill-treatment were identified, which amounted to a significant shortcoming in the adequacy of all three investigations. The fact that the investigations by the State authorities were incapable of even identifying the State agents who abused the applicant, reinforced the Court's doubt as to the effectiveness of the investigation.

These findings were enough for the Court to find that the applicant did not benefit from an effective investigation, and hence a violation of Article 3 was found.

#### Article 41

The Court awarded the applicant €4,000 in respect of non-pecuniary damage. The Court also awarded the applicant €4,200 in respect of costs and expenses.

*Excessive length of custody proceedings and State's failure to investigate effectively alleged child abuse in violation of Articles 3 and 8*

## JUDGMENT IN THE CASE OF M. AND M. v. CROATIA

(Application No. 10161/13)

**3 September 2015**

### **1. Principal facts**

The applicants, Ms M. and M., mother and her underage daughter, were Croatian nationals who were born in 1976 and 2001 respectively, and lived in Zadar, Croatia.

Ms M. married Mr I.M. on 23 June 2001, and on 4 September 2001 their daughter was born. The couple's relationship deteriorated however and divorce proceedings were started. On 24 August 2007 divorce was granted by Zadar Municipal Court. According to the domestic court's decision, the father was awarded custody of their daughter and the mother was granted contact rights, along with the payment for their daughter's maintenance.

According to M.'s statement given to the police, on 1 February 2011 a serious episode of domestic abuse took place: her father hit her in the face, squeezed her throat and verbally abused her. An ophthalmologist diagnosed her with bruising of the left eyeball and eye socket tissue indicating that the injury had been inflicted by a hand blow. M. had also reported other instances of physical and psychological violence by her father that had occurred in the past three years admitting that she was afraid of him as he was a violent man.

As a consequence of the problematic situation in the family, a series of inter-connected proceedings ensued before Croatian criminal courts (to decide on the alleged child abuse), civil courts (to decide on custody and divorce) and social welfare authorities.

Following the incident on 1 February, Mr I.M. was indicted by the State Attorney for having committed a criminal offence of bodily injury on 30 March 2011. In October 2014 the proceedings were still pending as the court in Zadar was waiting to obtain a video-link device with which to examine M. during the hearing.

On 27 April 2011 Ms M. filed a criminal complaint against Mr I.M. accusing him of child abuse, citing the incident on 1 February 2011 as well as the allegation by their daughter that this episode had not been an isolated one. The criminal complaint was dismissed in January 2012 as no sufficient elements had been found to confirm the abuse.

In parallel, on 30 March 2011 Ms M. instituted civil proceedings to reverse the custody order of 24 August 2007, and requesting to be awarded temporary custody of her daughter. However, the request for temporary custody was refused two months later due to lack of proof that the alleged abuse had taken place. These custody proceedings were still pending at first-instance at the time of the European Court's judgment.

In the proceedings before the social welfare authorities involved in M.'s case, by decision of 7 November 2006, a child protection measure of supervision of the exercise of parental authority was ordered with a view to improving communication between the family members. The measure lasted until August 2008. The same measure was then imposed from September 2011 to March 2014 as the family situation had not seen any consistent improvement.

During all of the above legal proceedings, M. had been examined by a series of psychiatrists and psychologists who had all concluded that the child was emotionally traumatised by her parents' separation and conflictual and resentful relation, and that she had consistently expressed the wish to live with her mother. However, no danger had been found in the child continuing to live with her father as the allegations that M. had been abused by her father were not plausible enough to justify her immediate temporary removal from his custody.

## **2. Decision of the Court**

The applicants claimed that the domestic authorities had failed to meet their positive obligations under the Convention as they neither adequately prosecuted Mr I.M. for the more serious criminal offence of child abuse perpetrated against his daughter, nor protected her against further violent acts by removing her from his home and care in breach of Article 3 (prohibition of inhuman or degrading treatment) and Article 8 (right to respect for private and family life).

### Articles 3 and 8

Having regard to the fact that M. had been abused and evidence of it had been presented, and in particular to the fact that M. was both a child and alleged victim of domestic violence, the Court considered that the present case gave rise to the State's positive obligations under Article 3 of the Convention to investigate the alleged cases of abuse and protect her from future ill-treatment. In examining the alleged violation of Article 8, the Court considered M.'s complaints under this Article as absorbed by her complaints under Article 3.

Croatian authorities had instituted criminal proceedings only regarding the incident of 1 February 2011, deciding to completely ignore the previous series of alleged abuses M. had had to endure rather than charging Mr I.M. also with criminal or minor offences capable of covering all instances of ill-treatment sustained before then. As a consequence, they had failed to address M.'s situation in its entirety. Further, the length of the criminal proceedings had been too long to lead to an effective investigation in breach of the requirement of promptness and reasonable expedition implicit in the context of Article 3. Therefore, the Court held that there has been a violation of that Article.

As regards the alleged breach of the authorities' positive obligations to prevent future potential ill-treatment by taking all the necessary reasonable measures, the Court found that the domestic authorities had taken all the possible required steps to assess and weigh the risk of potential ill-treatment and to prevent it by taking into account various dissenting opinions and recommendations issued by different social authorities, and by carefully considering all the relevant materials. Therefore, the Court held that there had been no violation on this point of Article 3.

#### Article 8

The applicants complained that the domestic authorities had been ignoring M.'s wish to live with her mother, and that she had not been heard in the custody proceedings, which had been pending for more than four years. After three and a half years, M. had started exhibiting self-injuring behaviour, which she herself had described as a reaction to the frustration resulting from the fact that she had not been allowed to choose with whom to live, her freedom of action and her right to personal autonomy being limited in that way. These circumstances had raised issues regarding the applicants' right to respect for private and family life distinct from those analysed in the context of Article 3 and thus, in Court's opinion, required separate examination.

According to the Court, the present case had called for greater diligence by national courts and authorities as it concerned a traumatised child who had suffered great mental anguish culminating in self-harming acts. However, the domestic courts had failed to recognise the seriousness and the urgency of M.'s situation. What was for the Court even more surprising was that no steps had been taken to accelerate the proceedings even after M. had started exhibiting self-injuring behaviour.

The forensic experts in psychology and psychiatry involved in the case had found that both parents were equally unfit to take care of their child, a view that had been shared by the local social welfare centre. They also had established that M. expressed

on various occasions a strong wish to live with her mother. As specified in Article 12 of the Convention on the Rights of the Child, children who are capable of forming their own views have the right to express them and to have due weight given to those views, in accordance with their age and maturity, in any proceedings affecting them. M. was nine and a half years old at the time of the institution of the proceedings and thirteen and a half at the time of the Court's decision. It would thus have been difficult to argue that, given her age and maturity, she had not been capable of forming her own views and expressing them freely.

The Court found that not respecting M.'s wishes as regards the issue with which parent to live constituted an infringement of her right to respect for private and family life in violation of Article 8 of the Convention. The findings concerning the protracted character of the custody proceedings equally applied to Ms M.'s situation as regards to her own right to respect for private and family life.

#### Article 41

The Court held that Croatia had to pay the child €19,500 and her mother €2,500 in respect of non-pecuniary damage, and €3,600 jointly to both for costs and expenses arising from the case.

*Positive obligation of states to establish and apply effectively a criminal law system punishing all forms of rape*

## JUDGMENT IN THE CASE OF M.C. v. BULGARIA

(Application no. 39272/98)

**4 December 2003**

### **1. Principal facts**

The applicant, M.C., a Bulgarian national born in 1980 alleged that she was raped by two men, A. and P., aged 20 and 21, when she was 14 years old, the age of consent for sexual intercourse in Bulgaria.

M.C. claimed that, on 31 July 1995, she went to a disco with her friend and the two men. She then agreed to go on to another disco with the men. On the way back, A. suggested stopping at a reservoir for a swim. M.C. remained in the car. P. came back before the others, allegedly forcing M.C. to have sexual intercourse with him. M.C. maintained that she was left in a very disturbed state. In the early hours of the following morning, she was taken to a private home. She claimed that A. forced her to have sex with him at the house and that she cried continually both during and after the rape. She was later found by her mother and taken to hospital where a medical examination found that her hymen had been torn. A. and P. both denied raping M.C.

The criminal investigations found insufficient evidence that M.C. had been compelled to have sex with A. and P. The proceedings were terminated on 17 March 1997 by the District Prosecutor, who found that the use of force or threats had not been established beyond reasonable doubt. In particular, no resistance on the applicant's part or attempts to seek help from others had been established. The applicant appealed unsuccessfully.

Written expert opinions submitted to the European Court by M.C. identified "frozen fright" (traumatic psychological infantilism syndrome) as the most common response to rape, where the terrorised victim either submits passively to or dissociates her- or himself psychologically from the rape. Of the 25 rape cases analysed, concerning women in Bulgaria aged between 14 and 20 years, 24 of the victims had responded to their aggressor in this way.

## 2. Decision of the Court

M.C. complained that Bulgarian law and practice did not provide effective protection against rape and sexual abuse, as only cases where the victim resists actively were prosecuted. She also complained that the authorities had not effectively investigated the events in question. She relied on Article 3 (prohibition of degrading treatment), Article 8 (right to respect for private life), Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination).

### Articles 3 and 8 of the Convention

The Court reiterated that, under Articles 3 and 8 of the Convention, Member States had a positive obligation both to enact criminal legislation to punish rape effectively and to apply this legislation through effective investigation and prosecution.

The Court then observed that, historically, proof of the use of physical force by the perpetrator and physical resistance on the part of the victim was sometimes required under domestic law and practice in rape cases in a number of countries. However, it appeared that this was no longer required in European countries. In common law jurisdictions, in Europe and elsewhere, any reference to physical force had been removed from legislation and/or case law. And although in most European countries influenced by the continental legal tradition the definition of rape, in case law and legal theory, contained references to the use of violence or threats of violence by the perpetrator, it was lack of consent, not force, that was critical in defining rape.

The Court also noted that the Member States of the Council of Europe had agreed that penalising non-consensual sexual acts, whether or not the victim had resisted, was necessary for the effective protection of women against violence and had urged the implementation of further reforms in this area. In addition, the International Criminal Tribunal for the former Yugoslavia had recently found that, in international criminal law, any sexual penetration without the victim's consent constituted rape, reflecting a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse. In general, law and legal practice concerning rape were developing to reflect changing social attitudes requiring respect for the individual's sexual autonomy and for equality. Given contemporary standards and trends, Member States' positive obligations under Articles 3 and 8 of the Convention required the penalisation and effective prosecution of any non-consensual sexual act, even where the victim had not resisted physically.

The applicant alleged that the authorities' attitude in her case was rooted in defective legislation and reflected a practice of prosecuting rape perpetrators only where there was evidence of significant physical resistance. The Bulgarian Government were unable to provide copies of judgments or legal commentaries clearly disproving the applicant's allegations of a restrictive approach in the prosecution of rape. Her claim was therefore based on reasonable arguments which had not been disproved.

The presence of two irreconcilable versions of the facts obviously called for a context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances. Little was done, however, to test the credibility of the version of events put forward by P. and A., or to test the credibility of the witnesses called by the accused or the precise timing of the events. Neither were the applicant and her representative able to question witnesses, whom she had accused of perjury. The authorities had therefore failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made. The reason for that failure appeared to be that the investigator and prosecutor considered that a "date rape" had occurred, and, in the absence of "direct" proof of rape such as traces of violence and resistance or calls for help, that they could not infer proof of lack of consent and, therefore, of rape from an assessment of all the surrounding circumstances.

Without expressing an opinion on the guilt of P. and A., the Court found that the effectiveness of the investigation of the applicant's case and, in particular, the approach taken by the investigator and the prosecutors fell short of Bulgaria's positive obligations under Articles 3 and 8 of the Convention - viewed in the light of the relevant modern standards in comparative and international law - to establish and apply effectively a criminal law system punishing all forms of rape and sexual abuse.

#### Articles 13 and 14 of the Convention

The Court found that no separate issue arose under Article 13 and that it was not necessary to examine the complaint under Article 14.

#### Article 41

The Court awarded the applicant €8,000 for non-pecuniary damage and €4,110 for costs and expenses.

*Lack of effective investigation into assaults likely motivated by religious hatred***JUDGMENT IN THE CASE OF MILANOVIĆ v. SERBIA**

(Application no. 44614/07)

**14 December 2010****1. Principal facts**

The applicant, Života Milanović, is a Serbian national who was born in 1961 and lives in Belica, Serbia.

Since 1984, he has been a leading member of the Hare Krishna Hindu community in Serbia. In 2000, he began receiving telephone threats and in 2001 informed the police of his impression that they came from members of a local branch of a far-right organisation called *Obraz*.

He was physically assaulted a number of times by unidentified men who cut or stabbed him with a knife, starting in 2001, and then again in the summer of 2005, 2006 and 2007, each time in the evening or at nighttime in the proximity of a relative's flat in the town of Jagodina. On each occasion, Mr Milanović or the hospital where he was provided with urgent care reported the incident to the police. Mr Milanović also informed the police that his attackers probably belonged to the local branch of the far-right organisation. The police questioned him and a number of potential witnesses and took some investigative steps, but failed to identify the perpetrators. They informed the Ministry of Internal Affairs that they had found no evidence that the organisations in question had ever existed in the municipality of Jagodina.

Two months after the incident in 2005, the police filed a criminal complaint against unknown perpetrators. From 2006 on, Mr Milanović was supported by a human rights organisation with which he jointly filed criminal complaints in respect of the 2005 incident and the subsequent ones, alleging that he was the victim of a crime motivated by religious hatred. Having repeatedly requested an update on the status of the criminal complaints, Mr Milanović was informed by the public prosecutor's office that the police had failed to provide it with any information in this respect. In 2008, Mr Milanović further informed the judge in a preliminary investigation that he believed to have seen one of his attackers in the street, wearing a shirt with a reference to another far-right organisation.

In September 2009, the Chief Public Prosecutor petitioned the Constitutional Court to ban the suspected organisations, in particular because of their incitement to racial and religious hatred throughout Serbia.

In its records, the police noted on a number of occasions that Mr Milanović was a member of a “religious sect” and had a “strange appearance”. In a report of April 2010, the police further noted that most of the attacks had taken place around a major orthodox religious holiday and that Mr Milanović had subsequently publicised these incidents in the media and thus “emphasised” his religious affiliation.

## **2. Decision of the Court**

Relying on Articles 2, 3 and 13, Mr Milanović complained about the authorities’ failure to prevent the repeated attacks on him and to investigate them properly. Under Article 14 taken together with Article 3, he further alleged that this failure was due to his religious affiliation.

The Court had jurisdiction to examine the complaints only in so far as they concerned events as of 3 March 2004, when Serbia ratified the Convention. For reasons of context and in order to examine the situation complained of as a whole, it decided to take into account all relevant events prior to that date.

### Article 3

The Court considered that the injuries suffered by Mr Milanović, consisting mostly of numerous cuts, combined with his feelings of fear and helplessness, were sufficiently serious to amount to ill-treatment within the meaning of Article 3. Many years after the attacks, the perpetrators had not been identified and brought to justice and Mr Milanović appeared not to have been regularly updated of the course of the investigation or given an opportunity to possibly identify his attackers from among a number of persons questioned as witnesses and/or suspects by the police.

There had been shortcomings in the cooperation between the police and the public prosecutor and the investigation seemed to have focused on Jagodina despite the fact that the suspected far-right organisations were known for operating throughout the country. Mr Milanović’s statement that one of his attackers, whom he identified in the street, may have been a member of another particular organisation did not seem to have been followed up at all. As from the second attack, it must have been clear to the police that Mr Milanović, being a member of a vulnerable religious minority, was systematically targeted and that future attacks were likely to follow. However, nothing had been done to prevent such attacks.

While the authorities had taken many investigative steps and had encountered significant difficulties, such as the apparent lack of eyewitnesses, the Court considered that they had not taken all reasonable measures to conduct an adequate investigation and they had failed to take effective steps in order to prevent Mr Milanović's repeated ill-treatment. There had thus been a violation of Article 3.

#### Article 14 taken together with Article 3

The Court considered that treating religiously motivated violence on an equal footing with cases that had no such overtones meant turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. It was unacceptable that, being aware that Mr Milanović's attackers likely belonged to one or several far-right organisations, the authorities had allowed the investigation to last for many years without taking adequate action to identify or prosecute the perpetrators. The statements made by the police in their reports, referring to Mr Milanović's beliefs, his appearance and the fact that he had publicised the incidents in the media, implied that they had doubts as to whether he was a genuine victim in respect of his religion. As a consequence, although the authorities had explored several leads proposed by Mr Milanović concerning the motivation of his attackers these steps amounted to little more than a *pro forma* investigation.

The Court therefore held that there had been a violation of Article 14 taken together with Article 3.

#### Other articles

In view of its findings under Article 3, the Court considered that it was not necessary to examine separately the identical complaints under Articles 2 and 13.

#### Article 41

The Court held that Serbia was to pay the applicant €10,000 in respect of non-pecuniary damage and €1,200 in respect of costs and expenses.

*Belgium authorities should not have expelled asylum seeker to Greece in view of the general situation facing asylum seekers in Greece*

## **GRAND CHAMBER JUDGMENT IN THE CASE OF M.S.S. v. BELGIUM AND GREECE**

(Application No. 30696/09)

**21 January 2011**

### **1. Principal facts**

The applicant, M.S.S., an Afghan national, left Kabul early in 2008 and, travelling via Iran and Turkey, entered the European Union through Greece.

On 10 February 2009, he arrived in Belgium where he applied for asylum. By virtue of the “Dublin II” European Union Regulation, the Belgian Aliens Office submitted a request for the Greek authorities to take charge of the asylum application. While the case was pending, the UNHCR sent a letter to the Belgian Minister for Migration and Asylum Policy criticising the deficiencies in the asylum procedure and the conditions of reception of asylum seekers in Greece and recommending the suspension of transfers to Greece. In late May 2009, the Aliens Office nevertheless ordered the applicant to leave the country for Greece, where he would be able to submit an application for asylum. The Aliens Office received no answer from the Greek authorities within the two-month period provided for by the Regulation, which it treated as a tacit acceptance of its request. It argued that Belgium was not the country responsible for examining the asylum application under the Dublin II Regulation and that there was no reason to suspect that the Greek authorities would fail to honour their obligations in asylum matters.

The applicant lodged an appeal with the Aliens Appeals Board, arguing that he ran the risk of detention in Greece in appalling conditions, that there were deficiencies in the asylum system in Greece and that he feared ultimately being sent back to Afghanistan without any examination of the reasons why he had fled that country, where he claimed he had escaped a murder attempt by the Taliban in reprisal for having worked as an interpreter for the air force troops stationed in Kabul.

His application for a stay of execution having been rejected, the applicant was transferred to Greece on 15 June 2009. On arriving at Athens airport, he was immediately placed in detention in an adjacent building where, according to his statements, he was locked up in a small space with 20 other detainees, access to the toilets was

restricted, detainees were not allowed out into the open air, were given very little to eat and had to sleep on dirty mattresses or on the bare floor. Following his release and issuance of an asylum seeker's card on 18 June 2009, he lived on the street with no means of subsistence.

Having subsequently attempted to leave Greece with a false identity card, the applicant was arrested and again placed in the detention facility next to the airport for one week, where he alleges he was beaten by the police. After his release, he continued to live on the street, occasionally receiving aid from local residents and the church. On renewal of his asylum seeker's card in December 2009, steps were taken to find him accommodation, but according to his submissions no housing was ever offered to him.

## **2. Decision of the Court**

The applicant alleged that the conditions of his detention and his living conditions in Greece amounted to inhuman and degrading treatment in violation of Article 3, and that he had no effective remedy in Greek law in respect of his complaints under Articles 2 (right to life) and 3, in violation of Article 13. He further complained that Belgium had exposed him to the risks arising from the deficiencies in the asylum procedure in Greece, in violation of Articles 2 and 3, and to the poor detention and living conditions to which asylum seekers were subjected there, in violation of Article 3. He further maintained that there was no effective remedy under Belgian law in respect of those complaints, in violation of Article 13.

The application was lodged with the European Court of Human Rights on 11 June 2009. On 2 July 2009 it decided to apply Rule 39 against Greece, to the effect that he would not be deported to Afghanistan pending the outcome of the proceedings before the Court.

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

### Article 3 (detention conditions in Greece)

While the Court did not underestimate the burden placed on the States forming the external borders of the EU by the increasing influx of migrants and asylum seekers and the difficulties involved in receiving them at major international airports, that situation could not absolve Greece of its obligations under Article 3, given the absolute character of that provision.

When the applicant arrived in Athens from Belgium, the Greek authorities had been aware of his identity and of the fact that he was a potential asylum seeker. In spite of this, he was immediately placed in detention, without any explanation being given. Various recent reports by international bodies and non-governmental organisations confirmed that the systematic placement of asylum seekers in detention without informing them of the reasons was a widespread practice of Greek authorities. The applicant's allegations that he was subjected to brutality by the police during his second period of detention were equally consistent with numerous accounts collected from witnesses by international organisations, in particular the European Committee for the Prevention of Torture (CPT). Findings by the CPT and the UNHCR also confirmed the applicant's allegations about the unsanitary conditions and the overcrowding in the detention centre next to Athens international airport.

Despite the fact that he was kept in detention for a relatively short period of time, the Court considered that the conditions of detention experienced by the applicant in the holding centre had been unacceptable. It found that, taken together, the feeling of arbitrariness, inferiority and anxiety he must have experienced, as well as the profound effect such detention conditions indubitably had on a person's dignity, constituted degrading treatment. In addition, as an asylum seeker he was particularly vulnerable, because of his migration and the traumatic experiences he was likely to have endured. The Court concluded that there had been a violation of Article 3.

#### Article 3 (living conditions in Greece)

Article 3 did not generally oblige Member States to give refugees financial assistance to secure for them a certain standard of living. However, the Court considered that the situation in which the applicant had found himself was particularly serious. In spite of the obligations incumbent on the Greek authorities under their own legislation and the EU Reception Directive, he spent months living in extreme poverty, unable to cater for his most basic needs – food, hygiene and a place to live – while in fear of being attacked and robbed. The applicant's account was supported by the reports of a number of international bodies and organisations, in particular the Council of Europe Commissioner for Human Rights and the UNHCR.

The situation of which the applicant complained had lasted since his transfer to Greece in June 2009 and was linked to his status as an asylum seeker. Had the authorities examined his asylum request promptly, they could have substantially alleviated his suffering. It followed that through their fault he had found himself in a situation incompatible with Article 3. There had accordingly been a violation of that provision.

### Article 13 taken together with Articles 2 and 3 (Greece)

It was undisputed between the parties that the situation in Afghanistan had posed and continued to pose a widespread problem of insecurity. As regards the risks to which the applicant would be exposed in that country, it was in the first place for the Greek authorities to examine his request. The Court's primary concern was whether effective guarantees existed to protect him against arbitrary removal.

While Greek legislation contained a number of such guarantees, for a few years the UNHCR, the European Commissioner for Human Rights and other organisations had repeatedly and consistently revealed that the relevant legislation was not being applied in practice and that the asylum procedure was marked by major structural deficiencies. They included: insufficient information about the procedures to be followed; the lack of a reliable system of communication between authorities and asylum seekers; the lack of training of the staff responsible for conducting interviews with them; a shortage of interpreters; and a lack of legal aid effectively depriving asylum seekers of legal counsel. As a result, asylum seekers had very little chance of having their applications seriously examined. Indeed, a 2008 UNHCR report showed a success rate at first instance of less than 0.1%, compared to the average success rate of 36.2% in five of the six EU countries which, along with Greece, received the largest number of applications.

In view of those deficiencies, and having examined the efficiency of appeals that the Greek government argued had been available to the applicant, the Court finally concluded that there had been a violation of Article 13 taken in conjunction with Article 3. In view of that finding there was no need to examine the complaints under Article 13 in conjunction with Article 2.

### Article 2 and 3 (the Belgian authorities' decision to expose the applicant to the asylum procedure in Greece)

The Court considered that the deficiencies of the asylum procedure in Greece must have been known to the Belgian authorities when they issued the expulsion order against the applicant and he should therefore not have been expected to bear the entire burden of proof as regards the risks he faced by being exposed to that procedure. The UNHCR had alerted the Belgian Government to that situation while the applicant's case was pending. While the Court in 2008 had found in another case that removing an asylum seeker to Greece under the Dublin II Regulation did not violate the Convention, numerous reports and materials had been compiled by international bodies and organisations since then which agreed as to the practical difficulties involved in the application of the Dublin system in Greece.

Against that background, it had been up to the Belgian authorities not merely to assume that the applicant would be treated in conformity with the Convention standards but to verify how the Greek authorities applied their legislation on asylum in practice, which they had failed to do. The applicant's transfer by Belgium to Greece had thus given rise to a violation of Article 3. There was no need to in addition examine the complaints under Article 2.

Article 3 (the Belgian authorities' decision to expose the applicant to the detention and living conditions in Greece)

The Court had already found the applicant's conditions of detention and living conditions in Greece to be degrading. These facts had been well known and freely ascertainable from a wide number of sources before the transfer of the applicant. In that view, the Court considered that by transferring the applicant to Greece, the Belgian authorities knowingly exposed him to detention and living conditions that amounted to degrading treatment, in violation of Article 3.

Article 13 taken together with Article 2 and 3 (Belgium)

As regards the complaint that there was no effective remedy under Belgian law by which the applicant could have complained against the expulsion order, the Belgian Government had argued that a request for a stay of execution could be lodged before the Aliens Appeals Board.

However, the Court found that the procedure did not meet the requirements of the Court's case-law that any complaint, where it was argued that expulsion to another country would expose an individual to treatment prohibited by Article 3, be closely and rigorously scrutinised, and that the competent body had to be able to examine the substance of the complaint and afford proper redress. Having regard to the Aliens Appeals Board's examination of cases, which was mostly limited to verifying whether those concerned had produced concrete proof of the damage that might result from the alleged potential violation of Article 3, the applicant would have had no chance of success. There had accordingly been a violation of Article 13 taken in conjunction with Article 3. There was no need to examine the complaints under Article 13 in conjunction with Article 2.

Article 46

The Court considered it necessary to indicate individual measures required for the execution of the judgment in respect of the applicant, without prejudice to the general

measures required to prevent other similar violations in the future. It was incumbent on Greece, without delay, to proceed with an examination of the merits of the applicant's asylum request that met the requirements of the Convention and, pending the outcome of that examination, to refrain from deporting the applicant.

#### Article 41

The Court held that Greece was to pay the applicant €1,000 in respect of non-pecuniary damage and €4,725 in respect of costs and expenses. It further held that Belgium was to pay the applicant €24,900 in respect of non-pecuniary damage and €7,350 in respect of costs and expenses.

*Detention for 27 consecutive days in less than 3 sq. m of personal space amounted to inhuman and degrading treatment*

## **GRAND CHAMBER JUDGMENT IN THE CASE OF MURŠIĆ v. CROATIA**

(Application no. 7334/13)

**20 October 2016**

### **1. Principal facts**

The applicant, Kristijan Muršić, was a Croatian national born in 1987 living in Kuršanec (Croatia).

In February 2009 Mr Muršić was sentenced to two years' imprisonment for armed robbery, which was followed by a separate conviction for theft in July 2010 carrying a sentence of a further year. In August 2011 Čakovec County Court combined the two terms and sentenced him to a single term of two years and eleven months' imprisonment. On 16 October 2009 the applicant was transferred from a semi-open regime in Turopolje State Prison to Bjelovar County Prison, where he remained until 16 March 2011.

Mr Muršić alleged that during his stay in Bjelovar Prison he was placed in overcrowded cells. In particular, he maintained that for a period of fifty days in total he disposed of less than 3 sq. m of personal space, including for a period of twenty-seven consecutive days. He also alleged that there were several non-consecutive periods in which he was allocated between 3 and 4 sq. m of personal space. Moreover, he claimed that the cells in which he had been held were badly maintained, humid, dirty and insufficiently equipped. What is more, he had not been given any opportunity to engage in prison work and he was not provided with sufficient access to recreational and educational activities.

In March 2010 the applicant requested to be transferred to Varaždin Prison for personal and family reasons, a request that he reiterated in May 2010. In August 2010 he complained about the conditions of his detention to a sentence-execution judge, who, after having requested and obtained a report from the prison concerning the conditions of his detention and having heard the applicant in person, dismissed the latter's complaints as ill-founded. In October 2010 the applicant appealed against this decision. His appeal, however, was dismissed by a three-judge panel of the Bjelovar County Court as ill-founded, endorsing the reasoning of the sentence-execution judge. In November 2010 the applicant complained to the Bjelovar County Court

about the decision of its three-judge panel and lodged a constitutional complaint with the Constitutional Court, complaining about a lack of personal space and work opportunities in Bjelovar Prison. In June 2012 the Constitutional Court declared the applicant's complaint inadmissible as manifestly ill-founded.

## **2. Decision of the Court**

On 12 March 2015 a Chamber of the First Section held that there had been no violation of Article 3 of the Convention. At the applicant's request, the case was referred to the Grand Chamber under Article 43.

The applicant complained that the poor conditions of his detention in Bjelovar Prison, namely the lack of personal space, poor sanitary and hygiene conditions and nutrition, a lack of work opportunities, and insufficient access to recreational and educational activities, amounted to inhuman or degrading treatment under Article 3 of the Convention.

### Article 3

The Grand Chamber affirmed the Chamber's judgment that the applicant had properly exhausted domestic remedies, dismissing the Government's preliminary objection.

The Court confirmed that, although the assessment of whether there was a violation of Article 3 could not be reduced to a numerical calculation of square metres allocated to a detainee, the requirement of 3 sq. m of floor surface per detainee in multi-occupancy accommodation emerged from its case-law as the minimum standard for such assessment. When the allocation of space to a detainee fell below 3 sq. m, the lack of personal space was so severe that a strong presumption of a violation of Article 3 arose. The respondent Government could rebut that presumption by demonstrating that there were factors capable of adequately compensating for the lack of space. This would normally be possible if the following factors were cumulatively met: the reductions in the required minimum personal space of 3 sq. m were short, occasional and minor, they were accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities, and the detention facility was generally appropriate.

In the present case, according to the documentation provided by the respondent Government, which the applicant did not contest, Mr Muršić stayed in Bjelovar Prison for one year and five months, during which period he was detained in four cells where he had between 3 and 6.76 sq. m of personal space. He had only 2.62 sq. m of

personal space once for one day, once for two days and three times for three days; and 2.55 sq. m once for eight days and once for three days; lastly, he had 2.62 sq. m for a consecutive period of 27 days.

In view of the abovementioned “strong presumption” test, the Court moved on to address the applicant’s complaints separately with regard to the period in which he disposed of less than 3 sq. m of personal space, and the period in which he was allocated between 3 and 4 sq. m of personal space in Bjelovar Prison.

The Court found that in the period of 27 consecutive days in which Mr Muršić disposed of less than 3 sq. m of personal space, he had been subjected to conditions of detention that clearly subjected him to hardship going beyond the unavoidable level of suffering inherent in detention and thus amounting to degrading treatment prohibited by Article 3. As regards the remaining periods, which were of short duration, the Court needed to have regard to other relevant factors, and it was the Government which had the burden to prove that there were such factors.

The Court observed that the Government’s submissions regarding the conditions of detention were very detailed and there was no reason for it to doubt the authenticity, objectivity and relevancy of the documents they had produced. On the other hand, in the absence of any detailed information from Mr Muršić about his daily routines at Bjelovar Prison, the Court was unable to accept the applicant’s submissions as sufficiently established or credible. It further highlighted that the applicant never raised at the domestic level allegations concerning certain aspects of his confinement, such as the alleged lack of outdoor exercise or insufficient time for free movement around the prison.

The Court noted that according to the evidence submitted in the ordinary daily regime Mr Muršić had been allowed the possibility of two hours of outdoor exercise, which was a standard under the relevant domestic law and above the minimum standards of the CPT (The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment). It was also undisputed by the applicant that he was allowed three hours per day of free movement outside his cell within the prison facility. Although Mr Muršić had been unable to obtain work, the possibility of free out-of-cell movement and the facilities available to him could be seen as significantly alleviating factors in relation to the scarce allocation of personal space. What was more, according to the material available before it, the general conditions of the applicant’s detention were generally appropriate.

In view of the above considerations, the Court found that the Government had rebutted the strong presumption of a violation of Article 3 as regards the other periods

during which the applicant disposed of less than 3 sq. m of personal space. Those were non-consecutive periods that could be regarded as short and minor reductions in personal space, during which sufficient freedom of movement and out-of-cell activities had been available to the applicant in a generally appropriate detention facility. The conditions of Mr Muršić's detention, although not completely adequate as regards personal space, had not reached the threshold of severity required for the treatment to be regarded as inhuman or degrading within the meaning of Article 3.

In view of the above considerations, the Court found that it could not be considered that the conditions of his detention in the period when he disposed of between 3 and 4 sq. m of personal space amounted to inhuman or degrading treatment within the meaning of Article 3.

Thus, the Court concluded that there was a violation of Article 3 of the Convention with regard to the period of 27 days in which the applicant disposed of less than 3 sq. m of personal space, whereas there was no violation with regard to the remainder of the periods examined.

#### Article 41

The Court awarded the applicant €1,000 in respect of non-pecuniary damage and €3,091.50 for costs and expenses.

*Structure of primary education in Ireland in the 1970s failed to protect a school girl from sexual abuse by her teacher in violation of Articles 3 and 13*

## **GRAND CHAMBER JUDGMENT IN THE CASE OF O'KEEFFE v. IRELAND**

(Application no. 35810/09)

**28 January 2014**

### **1. Principal facts**

The applicant, Ms Louise O'Keeffe, was an Irish national, born in 1964 and residing in Cork, Ireland. From 1968 she attended Dunderrow National School that was owned, through trustees, by the Catholic Bishop of the Diocese of Cork. One of the lay teachers ("LH") was also the school's principal and a married man. The first allegations of LH sexually abusing a child emerged in 1971, but were never acted upon. Subsequently, from January to mid-1973, the applicant was subject to constant sexual abuse by LH during music lessons in his classroom. Later that year the applicant's parents became aware of similar allegations concerning LH from other parents. Eventually LH resigned from his post but no further action concerning these allegations was taken by any State authorities. In 1974, LH resumed teaching in another National School where he remained teaching till his retirement in 1975.

The applicant made a statement to the police in January 1997 as a part of a police investigation into a complaint made by a former pupil of Dunderrow National School against LH. Subsequently a number of other pupils made statements during the investigation and as a result LH was charged with 386 criminal offences of sexual abuse. After he pleaded guilty he was sentenced to imprisonment and his licence to teach was withdrawn.

In 1998, the applicant applied to the Criminal Injuries Compensation Tribunal and she was awarded approximately €54,000. Subsequently, the applicant instituted civil action against LH and the Irish State, claiming damages for personal injuries suffered as a result of assault and battery including sexual abuse by LH. LH did not defend the civil action and was ordered to pay damages of approximately €305,000, however due to his insufficient means the applicant had at the time of the present judgment recovered approximately €30,000. However, the claims against the State were dismissed.

## 2. Decision of the Court

The applicant complained, under Articles 3, 8, 13 and 14, Article 2 of Protocol No. 1, that the State had failed to protect her from sexual abuse by a teacher in her National School and that she did not have an effective remedy against the State in that regard.

### Article 3

In relation to the substantive aspect of Article 3, the Court found it necessary to assess the issue of State responsibility from the point of view of facts and standards in 1973. The Court found that it is an inherent obligation of the authorities to protect children from ill-treatment, especially in a primary education context, and this obligation also had its implication in 1973. Hence the Court went on to assess whether the State had fulfilled its positive obligations in this respect. It acknowledged that the ill-treatment fell within the scope of Article 3 and that there was little disagreement between the parties on this issue, as well as to the structure of the Irish primary school system. Even if the National Schools were educational institutions managed by non-State actors, the State had to have been aware of the level of sexual crime against minors in schools through the enforcement of its criminal laws on the subject. The State should have also been aware of potential risks to the safety of children in that context, and that there was no appropriate framework of protection. Since the mechanisms on which the State had relied were not effective, Court held that the State had failed to fulfill its positive obligations to protect the applicant from sexual abuse and this constituted a violation of Article 3.

In relation to the procedural aspect of Article 3, the Court found that as soon as a complaint about sexual abuse by LH from the National School in question was made in 1995, an investigation was opened, and the applicant had been able to make a statement. The Court held that there had been no violation of Article 3 in this respect.

### Article 13

As the applicant had had no effective remedy available to her regarding complaints made under Article 3, the Court held that there had been a violation of Article 13 in conjunction with Article 3.

### Other complaints

The Court did not consider it necessary to examine the applicant's other complaints under the Convention.

Article 41

The Court held that Ireland was to pay the applicant €30,000 in respect of non-pecuniary damage, and €85,000 for costs and expenses.

*Landmark judgment on domestic violence – failure to protect in violation of  
Articles 2, 3 and 14*

## **CHAMBER JUDGMENT IN THE CASE OF OPUZ v. TURKEY**

(Application no. 33401/02)

**9 June 2009**

### **1. Principal facts**

The applicant, Nahide Opuz, is a Turkish national who was born in 1972 and lives in Turkey. In 1990 Ms Opuz started living with H.O., the son of her mother's husband. Ms Opuz and H.O. got married in November 1995 and had three children in 1993, 1994 and 1996. They had serious arguments from the beginning of their relationship and are now divorced.

Between April 1995 and March 1998 there were four incidents of H.O.'s violent and threatening behaviour towards the applicant and her mother which came to the notice of the authorities. Those incidents involved several beatings, a fight during which H.O. pulled out a knife and H.O. running the two women down with his car. Following those assaults the women were examined by doctors who testified in their reports to various injuries, including bleeding, bruising, bumps, grazes and scratches. Both women were medically certified as having sustained life-threatening injuries: the applicant as a result of one particularly violent beating; and, her mother following the assault with the car.

Criminal proceedings were brought against H.O. on three of those occasions for death threats, actual, aggravated and grievous bodily harm and attempted murder. As regards the knife incident, it was decided not to prosecute for lack of evidence. H.O. was twice remanded in custody and released pending trial.

However, as the applicant and her mother withdrew their complaints during each of those proceedings, the domestic courts discontinued the cases, their complaints being required under the Criminal Code to pursue any further. The proceedings concerning the car incident were nevertheless continued in respect of the applicant's mother, given the seriousness of her injuries, and H.O. was convicted to three months' imprisonment, later commuted to a fine.

On 29 October 2001 the applicant was stabbed seven times by H.O. and taken to hospital. H.O. was charged with knife assault and given another fine of almost 840,000

Turkish lira (the equivalent of approximately €385) which he could pay in eight installments. Following that incident, the applicant's mother requested that H.O. be detained on remand, maintaining that on previous occasions her and her daughter had had to withdraw their complaints against him due to his persistent pressure and death threats.

Finally, on 11 March 2002 the applicant's mother, having decided to move to Izmir with her daughter, was travelling in the removal van when H.O. forced the van to pull over, opened the passenger door and shot her. The applicant's mother died instantly.

In March 2008 H.O. was convicted for murder and illegal possession of a firearm and sentenced to life imprisonment and was released pending the appeal proceedings. In April 2008 the applicant filed another criminal complaint with the prosecution authorities in which she requested the authorities to take measures to protect her as, since his release, her ex-husband had started threatening her again. In May and November 2008 the applicant's representative informed the European Court of Human Rights that no such measures had been taken and the Court requested an explanation. The authorities have since taken specific measures to protect the applicant, notably by distributing her ex-husband's photograph and fingerprints to police stations with the order to arrest him if he was spotted near the applicant's place of residence.

In the meantime, in January 1998, the Family Protection Act entered into Force in Turkey which provides for specific measures for protection against domestic violence.

## **2. Decision of the Court**

The applicant alleged that the Turkish authorities failed to protect the right to life of her mother and that they were negligent in the face of the repeated violence, death threats and injury to which she herself was subjected. She relied on Articles 2, 3, 6 and 13. She further complained about the lack of protection of women against domestic violence under Turkish domestic law, in violation of Article 14.

### Article 2

The Court considered that, in the applicant's case, further violence, indeed a lethal attack, had not only been possible but even foreseeable, given the history of H.O.'s violent behaviour and criminal record in respect of his wife and her mother and his continuing threat to their health and safety.

According to common practice in the member States, the more serious the offence or the greater the risk of further offences, the more likely it should be that the prosecution

continue in the public interest, even if victims withdrew their complaints. However, when repeatedly deciding to discontinue the criminal proceedings against H.O., the authorities referred exclusively to the need to refrain from interfering in what they perceived to be a “family matter”. The authorities had not apparently considered the motives behind the withdrawal of the complaints, despite the applicant’s mother’s statements to the prosecution authorities that she and her daughter had felt obliged to do so because of H.O.’s death threats and pressure. Despite the withdrawal of the victims’ complaints, the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against H.O. on the basis that his violent behaviour had been sufficiently serious to warrant prosecution and that there had been a constant threat to the applicant’s physical integrity.

The Court therefore concluded that the national authorities had not shown due diligence in preventing violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against H.O.. Nor could the investigation into the killing, to which there had been a confession, be described as effective, it having lasted so far more than six years. Moreover, the criminal law system had had no deterrent effect in the present case. Nor could the authorities rely on the victims’ attitude for the failure to take adequate measures. The Turkish authorities had therefore failed to protect the right to life of the applicant’s mother, in violation of Article 2.

### Article 3

The Court considered that the response to H.O.’s conduct had been manifestly inadequate in the face of the gravity of his offences. The judicial decisions, which had had no noticeable preventive or deterrent effect on H.O., had been ineffective and even disclosed a certain degree of tolerance towards his acts. Notably, after the car incident, H.O. had spent just 25 days in prison and only received a fine for the serious injuries he had inflicted on the applicant’s mother. Even more striking, as punishment for stabbing the applicant seven times, he was merely imposed with a small fine, which could be paid in installments.

Nor had Turkish law provided for specific administrative and policing measures to protect vulnerable persons against domestic violence before January 1998, when the Family Protection Act came into force. Even after that date, the domestic authorities had not effectively applied those measures and sanctions in order to protect the applicant.

Finally, the Court noted with grave concern that the violence suffered by the applicant had not in fact ended and that the authorities continued to display inaction.

Despite the applicant's request in April 2008, nothing was done until after the Court requested the Government to provide information about the protection measures it had taken.

The Court therefore concluded that there had been a violation of Article 3 as a result of the authorities' failure to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her ex-husband.

#### Article 14

According to reports submitted by the applicant, drawn up by two leading non-governmental organisations, and uncontested by the Government, the highest number of reported victims of domestic violence was in Diyarbakır, where the applicant had lived at the relevant time. All those victims were women, the great majority of whom were of Kurdish origin, illiterate or of a low level of education and generally without any independent source of income. Indeed, the reports suggested that domestic violence was tolerated by the authorities and that the remedies indicated by the Government did not function effectively.

The Court therefore considered that the applicant had been able to show that domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence. Bearing that in mind, the violence suffered by the applicant and her mother could be regarded as gender-based, which constituted a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the applicant's case, indicated that there was insufficient commitment to take appropriate action to address domestic violence. The Court therefore concluded that there had been a violation of Article 14, in conjunction with Articles 2 and 3.

#### Other Articles

Given the above findings, the Court did not find it necessary to examine the same facts in the context of Articles 6 and 13.

#### Article 41

The Court awarded the applicant €30,000 in respect of non-pecuniary damage and €6,500 for costs and expenses.

*Failure of the authorities to consider the health of the applicant in his removal proceedings would have resulted in him being subject to inhuman or degrading treatment in violation of Article 3*

## **GRAND CHAMBER JUDGMENT IN THE CASE OF PAPOSHVILI v. BELGIUM**

*(Application no. 41738/10)*

**13 December 2016**

### **1. Principal Facts**

The applicant, Georgie Paposhvili, was a Georgian national who was born in 1958 and lived in Brussels. He died on 7 June 2016. On 20 June 2016 the applicant's wife and her three children expressed the wish to pursue the proceedings before the Court.

Mr Paposhvili arrived in Belgium on 25 November 1998, accompanied by his wife and their six-year-old child. The couple subsequently had two more children. Between 1998 and 2007 Mr Paposhvili was convicted of a number of offences, including robbery with violence and participation in a criminal organisation. While serving his various prison sentences, Mr Paposhvili was diagnosed with a number of serious medical conditions, including chronic lymphocytic leukaemia and tuberculosis, for which he received hospital treatment. He submitted several unsuccessful applications for regularisation of his residence status on exceptional or medical grounds relying on Articles 3 and 8 and alleging that he would be unable to obtain treatment if he were sent back to Georgia.

In August 2007 the Minister for the Interior issued a deportation order directing the applicant to leave the country, and barred him from re-entering Belgium for ten years on account of the danger he posed to public order. The order became enforceable once Mr Paposhvili had completed his sentence but was not in fact enforced, as he was undergoing medical treatment. On 7 July 2010 the Aliens Office issued an order for him to leave the country, together with an order for his detention. He was transferred to a secure facility for illegal immigrants with a view to his return to Georgia, and travel papers were issued for that purpose.

On 23 July 2010 Mr Paposhvili applied to the European Court of Human Rights for an interim measure under Rule 39 of its Rules of Court suspending his removal; the request was granted. He was subsequently released. The time-limit for enforcement of the order to leave Belgian territory was extended several times. In November 2009

the applicant's wife and the three children were granted indefinite leave to remain in Belgium. Between 2012 and 2015 Mr Paposhvili was arrested on several occasions for shoplifting.

## **2. Decision of the Court**

The applicant, relying on the right to life under Article 2 and the prohibition of inhuman or degrading treatment under Article 3, alleged that substantial grounds had been shown for believing that if he had been expelled to Georgia, he would have faced a real risk of inhuman and degrading treatment and of a premature death. He also complained, under Article 8, that removal would have resulted in his separation from his family, who constituted his sole source of moral support.

A Chamber of the Court held on 17 April 2014 that there had been no violations of Article 2, 3 or 8. On 20 April 2015 the panel of the Grand Chamber accepted a request on behalf of the applicant for the case to be referred to the Grand Chamber under Article 43 of the Convention. The Court found that given the nature of the claims and the role of the Convention system, it was not barred from hearing the case, despite the fact that the applicant had died.

### Articles 2 and 3

The Court reaffirmed the right of all Contracting States to control the entry, residence and expulsion of aliens. However, if there are substantial grounds for believing that the person concerned, upon expulsion, would face a real risk of being subjected to torture or inhuman or degrading treatment, Article 3 requires that the person not be expelled. What is considered to be ill-treatment depends on the circumstances of the case, such as the duration of the treatment, its physical and mental effects, and in some cases, the sex, age and state of health of the victim. Suffering flowing from a naturally occurring illness may also be covered by Article 3, where it risks being exacerbated by treatment for which the authorities can be held responsible.

The Court, after examining its case-law, concluded that the application of Article 3 by the Court to date did not afford sufficient protection to aliens who were seriously ill (as opposed to being close to death). The Court considered that the term "other very exceptional cases" used in previous case law which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious,

rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.

The State is obliged to assess the risks that the applicant would face if removed to the receiving country in order to comply with their negative obligation not to expose persons to a risk of ill-treatment. The State must verify whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the applicant's illness and whether the person in question will actually have access to this care. If serious doubts persist regarding the impact of removal, the returning State must obtain individual and sufficient assurances from the receiving State that appropriate treatment will be available to the individual. Here, the applicant had provided extensive medical information, detailing how the treatment in Belgium had made his condition stable and that if the treatment was discontinued, his life expectancy would have been less than six months. The applicant had also submitted that neither the treatment, nor the donor transplant, were available in Georgia.

Despite the above facts, the applicant's requests for regularisation on medical grounds were refused by the Aliens Office. The Aliens Appeals Board held that, where the administrative authority advanced grounds for exclusion, it was not necessary for it to examine the medical evidence submitted to it. With regard to the complaints based on Article 3 of the Convention, the Aliens Appeals Board further noted that the decision refusing leave to remain had not been accompanied by a removal measure, with the result that the risk of the applicant's medical treatment being discontinued in the event of his return to Georgia was purely hypothetical. The *Conseil d'État*, to which the applicant appealed on points of law, upheld the reasoning of the Aliens Appeals Board.

The Court, therefore, concluded that because the applicant's medical certificates had not been examined by the Aliens Office or by the Aliens Appeals Board from the perspective of Article 3 during the regularisation or removal proceedings, had the applicant been returned to Georgia, there would have been a violation of Article 3. The Court, thus, held it to be unnecessary to consider Article 2 of the Convention.

## Article 8

In the context of the proceedings for regularisation on medical grounds, the Aliens Appeals Board had dismissed Mr Paposhvili's complaint under Article 8 on the ground that the decision refusing him leave to remain had not been accompanied by a removal measure. Nevertheless, the Court considered that it had been up to the national authorities to conduct an assessment of the impact of removal on Mr Paposhvili's

family life in the light of his state of health; this constituted a procedural obligation with which the authorities had to comply in order to ensure the effectiveness of the right to respect for family life. The State should have examined whether, at the time of the removal, the family could reasonably have been expected to follow him to Georgia or, if not, whether observance of Mr Paposhvili's right to respect for his family life required that he be granted leave to remain in Belgium, for the time he had left to live. Thus, the Court held that if Mr Paposhvili had been removed to Georgia without these factors having been assessed, there would also have been a violation of Article 8 of the Convention.

#### Article 41

The Court held that its conclusion concerning Articles 3 and 8 constituted sufficient just satisfaction in respect of any non-pecuniary damage that Mr Paposhvili might have sustained. It also held that Belgium was to pay Mr Paposhvili's family €5,000 in respect of costs and expenses.

*The authorities had failed in their positive obligations to protect the applicants from persecution by their fellow prisoners in violation of Article 3*

## **JUDGMENT IN THE CASE OF RODIĆ AND OTHERS v. BOSNIA AND HERZEGOVINA**

(application no. 22893/05)

**27 May 2008**

### **1. Principal facts**

The four applicants were citizens of Bosnia and Herzegovina, and one of them is also of Croatia. They were born between 1946 and 1972 and were at the time of this judgment detained in Mostar Prison in Bosnia and Herzegovina. They were all convicted of war crimes against Bosniacs (Bosnian Muslim) civilians during the 1992-95 war in Bosnia and Herzegovina.

Between August 2004 and May 2005 the applicants were each sent to Zenica Prison, the only maximum-security prison in the Federation of Bosnia and Herzegovina. The prison population was approximately 90% Bosniac.

In May 2005 offensive graffiti referring to some of the applicants was discovered in the prison canteen. Those responsible were never identified. On 4 June 2005, following the screening of a video which showed a 1995 killing of Bosniacs from Srebrenica, a prisoner lured one of the applicants into his cell and punched him in the eye with a clenched fist. On 7 June 2005 he was taken to hospital. According to an official report, the attack was ethnically motivated, the attacker had a piece of glass in his hand and the consequences could have been more serious had it not been for the intervention of another prisoner.

On 5 June 2005 another prisoner attacked the second applicant in the prison canteen. The prison guards intervened after he had received several blows to the head. He was taken to hospital.

On 8 June 2005 the applicants declared a hunger strike to attract public attention to their situation and were immediately placed in separate accommodation in the prison hospital unit. The same day the prisoners responsible for the attacks were sentenced to 20 days' solitary confinement and an investigation was opened by an ad hoc commission into the attacks.

On 15 June 2005 the Ministry of Justice of Bosnia and Herzegovina ordered the applicants' transfer to a prison in the Republika Srpska, for security reasons. On 19 June 2005 the commission issued its final report criticising the prison authorities for failing to protect the applicants. In their defence, the authorities cited a lack of prison staff, space or any other maximum-security prison in the Federation of Bosnia and Herzegovina and the fact that prison transfers between the entities were not envisaged. On 21 June 2005 the Federation Ministry ordered that the applicants remain in Zenica Prison, in its hospital unit, until further notice.

On 1 July 2005 the applicants discontinued their hunger strike in response to a request from the European Court.

The applicants complained unsuccessfully to the Constitutional Court of Bosnia and Herzegovina about the failure to enforce the decision of 15 June 2005 ordering their transfer to another prison and about the conditions of their detention in Zenica Prison.

In November 2005 one of the applicants was transferred to Mostar Prison, another prison in the Federation of Bosnia and Herzegovina. From 28 November 2005 until 9 December 2005 the three applicants still in Zenica Prison went on a new hunger strike protesting against the conditions of their detention in the hospital unit. In December 2005 and October 2006 they were also transferred to Mostar Prison.

## **2. Decision of the Court**

The application was lodged with the European Court of Human Rights on 22 June 2005. On 24 and 29 June 2005, under Rule 39 of the Rules of Court (interim measures), the Court requested that the applicants end their hunger strike. In September 2005 the case was granted priority under Rule 41 of the Rules of Court.

The applicants alleged that they were persecuted by fellow prisoners from the time of their arrival in Zenica Prison until they were provided with separate accommodation in the prison hospital unit. They alleged that the various incidents ranged between spitting on their food and spilling water on their beds to death threats and beatings. They further complained about their detention conditions in the hospital unit. They relied on Articles 3 and 13.

### Article 3

#### Detention with other prisoners in Zenica Prison

The Court did not find the Government's policy of integrating those convicted of war crimes into the mainstream prison system to be inherently inhuman or degrading. However, it did not rule out that the implementation of that policy might raise issues under Article 3.

The Court recalled that because of all the atrocities committed during the war, inter-ethnic relations were still strained and occurrences of ethnically-motivated violence were still relatively frequent during the relevant period in Bosnia. Serious incidents of ethnically-motivated violence directed against prisoners of Serb and Croat origin had been reported in Zenica Prison. Taking into consideration the number of Bosniacs in the prison and the nature of the applicants' offences, it was clear that their detention there entailed a serious risk to their physical well-being.

Despite that, the applicants were placed in ordinary cell blocks, where they had to share a cell with up to 20 other prisoners and share communal facilities with an even larger number of prisoners. Furthermore, Zenica Prison was experiencing a serious shortage of staff during the period under examination. However, structural shortcomings did not alter the obligation of the State to adequately secure the well-being of prisoners.

It was significant that, notwithstanding the existence of a serious risk to the applicants' physical well-being, no specific security measures were introduced in Zenica Prison for several months. The applicants were provided with separate accommodation in the prison hospital only after the attacks of 4 and 5 June 2005, their declaration of a hunger strike and the consequent media attention, which occurred almost ten months after the first of the applicants came to the prison. The prison management was also clearly aware of the seriousness of the applicants' situation throughout that period.

The Court concluded that the applicants' physical well-being was not adequately secured from the time of their arrival at Zenica Prison until they were provided with separate accommodation in the hospital (a period which lasted between one and ten months depending on the applicant). The Court therefore considered that the hardship the applicants endured, in particular the constant mental anxiety concerning the threat of physical violence, was in violation of the State's positive obligations under Article 3.

### Detention conditions in Zenica Prison hospital

Having examined the evidence concerning facilities available to the applicants in the prison hospital, the Court found that the conditions of the applicants' detention in the Zenica Prison hospital unit were not in violation of Article 3.

### Article 13 taken in conjunction with Article 3

The Court found that the applicants had had no effective domestic remedy at their disposal for their Article 3 complaints. There had therefore been a violation of Article 13.

### Article 41

In respect of non-pecuniary damage, the Court awarded each applicant between €2,000 and €4,000.

*Failure to comply with Rule 39 interim measure to prevent extradition to the US  
was a violation of Article 34*

## **CHAMBER JUDGMENT OF RRAPO v. ALBANIA**

(Application No. 58555/10)

**25 September 2012**

### **1. Principal Facts**

The applicant was Mr Almir Rrapo, an Albanian and American national.

On 2 July 2010, the applicant applied for a renewal of his American passport at the United States (US) Embassy in Tirana. He was arrested by the Albanian police later that day at the request of the US Embassy.

A diplomatic note (no.55) was sent, requesting provisional arrest for the purpose of extradition, under the Extradition Treaty between the US and Albania. The note stated that a warrant for arrest had been issued on 28 May 2010 by a US judge.

On 4 July 2010, Tirana District Court ordered the applicant's detention for 40 days, relying on an Interpol notice issued by the US authorities. On 22 July 2010, the Tirana Court of Appeal upheld the lawfulness of detention, and extended the period to 60 days – until 2 September 2010. An appeal to the Supreme Court was rejected. Between August and November 2010, the applicant challenged his continued detention three times, and each time the domestic courts rejected his actions, and extended his detention relying on the Code of Criminal procedure until 2 November 2010.

The US Embassy requested extradition of the applicant on 30 August 2010 by way of another diplomatic note (no. 071), stating that he had been charged with membership of an organised racketeering enterprise engaged in murder, kidnapping, drug distribution, arson, robbery, extortion, transportation of stolen goods, and seven other related counts. The note stated that 5 of those charges carried a maximum sentence of life imprisonment, and the other charges carried sentences of between 20-40 years, or death or life imprisonment.

The District Court authorised the extradition on 30 September 2010. The applicant objected that the US authorities had not provided any assurances against imposition of the death penalty however the District Court rejected this as such assurances were not required by law.

On 12 October 2010, the European Court of Human Rights issued a Rule 39 interim measure, requesting the Albanian authorities not to extradite the applicant to the US.

The applicant's appeal against his extradition to the Tirana Court of Appeal was rejected as it ruled that there was no legal obligation to seek assurances from the US authorities against the imposition of the death penalty. The Minister of Justice ordered extradition for 16 November 2010, but also sent a *note verbale* asking the US Embassy if capital punishment would be imposed. They responded on 8 November 2010, (in diplomatic note no. 91) that the Department of Justice had authorised and directed the US Attorney not to seek the death penalty, and assured the Albanian government that it would not be sought and imposed.

On 9 November 2010 the applicant appealed to the Supreme Court that the US authorities had not given assurances about the non-imposition of the death penalty, in breach of Article 21 of the Constitution, and also requested the suspension of extradition, in light of the Strasbourg Court's Rule 39 order.

In the meanwhile, the applicant's detention was extended to 1 December 2010, the time-limit within which extradition could take place.

On 24 November 2010, the applicant was extradited to the US. Two days later, the Supreme Court quashed both lower courts' decisions and remitted the case to the District Court for a re-hearing. It was said that the extradition should not have been granted, as the courts had not obtained assurances from the US authorities about the non-imposition of capital punishment.

On 26 July 2012, the applicant was convicted by the US court as charged, sentenced to 80 months imprisonment, and supervised for 3 years upon release.

## **2. Decision of the Court**

The applicant complained that extradition to the US, and the risk of being subjected to the death penalty, gave rise to a breach of Articles 2 and 3 ECHR, and Article 1 of Protocol No. 13. The applicant also complained that extradition to the US was in breach of the Court's indication under Rule 39 of the Rules of Court, giving rise to a violation of Article 34 ECHR.

### Articles 2 and 3 ECHR, and Article 1 of Protocol No. 13

The Court referred to the general principles laid down in *Al-Saadoon and Mufdhi v. the United Kingdom* in relation to the abolition of the death penalty and States' duties under Article 1 of the Convention in instances of extra-territorial jurisdiction.

In the instant case, the Court stated it was a matter of profound regret that the lower courts were willing to allow the applicant's extradition without examining the reality of the risk alleged by the applicant, that it was striking that they never sought assurances that the death penalty would not be imposed if there was a conviction, and regretted that this only became a live issue before the Supreme Court when it was too late as the applicant had already been extradited. The abolition of the death penalty under Protocol No. 13, together with the state's obligations under Articles 1, 2 and 3 ECHR dictated that States should not detain individuals with a view to extraditing them to stand trial on capital charges or in any other way subjecting individuals within its jurisdiction to a real risk of being sentenced to the death penalty – sufficient and binding assurances had to be sought and obtained.

However, the US had sent a diplomatic note with assurances that the death penalty would not be sought, which the Court recognised as a standard means in extradition matters, and were recognised as carrying a presumption of good faith. The Court did not see anything which would cast doubt on the credibility of assurances provided by the US, which were specific, clear and unequivocal. It also attached importance to a later diplomatic note which described such notes as binding on the US. Considering all the circumstances, the Court found that the extradition did not give rise to a breach of Articles 2, 3 ECHR, or of Protocol No. 13 on account of a risk of the death penalty being imposed.

#### Article 34

Interim measures under Rule 39 are indicated only in limited spheres, when there is an imminent risk of irreparable damage. They play a vital role in avoiding irreversible situations that would prevent the Court from carrying out a proper examination of an application, and securing the practical and effective benefit of Convention rights.

Therefore, failure of a state to comply undermines the effectiveness of the right of individual application guaranteed by Article 34 ECHR. This Article is violated when the state fails to take all steps that could reasonably have been taken to comply with an interim measure. The Court will not re-examine whether the decision to apply the interim measure was correct. The state must demonstrate to the Court that it was complied with, or in exceptional cases, that there was an objective impediment preventing this and all reasonable steps were taken to remove this and keep the Court informed.

In this case, the interim measure was evidently not complied with. The argument that the government was impeded by the Court of Appeal's judgment of 1 November (to

extradite the applicant) being final was not accepted, as a higher court could quash it (as was in fact also done by the Supreme Court). The argument that otherwise Albania's international obligations would have been interfered with (under the Extradition Treaty) was also not accepted – the Court referred to *Al-Saadoon and Mufdhi*, and stressed that a State retains ECHR liability in respect of other treaty commitments before or after the entry into force of the Convention. Nor should a Contracting State enter into an agreement which conflicts with its obligations under the Convention. The argument that extradition was unavoidable because of the expiry of his period of detention was also rejected, as deficiencies in the national judicial system and difficulties in achieving legislative objectives could not be relied upon to the applicant's detriment. There was also no indication of taking steps to remove the risk of flight, such as using other security measures. Finally, the Court was not informed, prior to the extradition, of the difficulties encountered in complying with the Convention.

The Court concluded that non-compliance with the interim measure, without an objective justification, constituted a violation of Article 34.

*Injuries suffered by one applicant and which origins were not effectively investigated reached the necessary threshold to be considered ill-treatment in violation of Article 3*

## **JUDGMENT IN THE CASE OF SINIŠTAJ AND OTHERS v. MONTENEGRO**

(Applications nos. 1451/10, 7260/10 and 7382/10)

**24 November 2015**

### **1. Principal facts**

Mr Anton Siništaj and Mr Viktor Siništaj (Albanian nationals), Mr Pjetar Dedvukaj, Mr Djon Dedvuković and Mr Nikola Ljekočević (Montenegrin nationals), and Mr Kola Dedvukaj and Mr Rok Dedvukaj (US nationals of Albanian origins), born between 1946 and 1980, were arrested on 9 September 2006 by a special anti-terrorist unit on suspicion of associating for the purpose of anti-constitutional activities, preparing actions against the constitutional order and security of Montenegro and illegal possession of weapons and explosives.

On 11 and 12 September 2006, when interrogated by the investigating judge of the High Court, the applicants made statements about the fact that from the moment of their arrest and during the next few days, during police detention as well as when being taken to the investigating judge, they were ill-treated with the aim of extorting statements. In particular, they alleged that they were beaten, deprived of food, verbally abused, including on the basis of their ethnic origin, and threatened by police officers. The investigating judge noted these allegations in the interrogation minutes as well as a number of injuries on some of the applicants, such as cuts, scratches and haematomas. Mr Pjetar Dedvukaj's injuries were also subsequently confirmed and included in a medical report by a prison doctor.

On 14 September 2006, five applicants filed a criminal complaint with the investigating judge against unknown police officers for extorting statements, torture and ill-treatment. On 17 November 2006 a report issued by the Internal Control Division of the Police Directorate found that the accused officers' involvement in the alleged ill-treatment could not be confirmed. However, it was decided that all the relevant documents should be submitted to the State Prosecutor for further consideration. None of the above criminal complaints or their further supplements had been processed by the authorities at the time of the European Court of Human Rights' judgment, except for an indictment by the State Prosecutor in May 2008 of five police officers for the criminal offence of torture and abuse of the first and second applicants' father on the day of their arrest. However, in October 2010 the defendants were acquitted.

On 5 August 2008 the High Court found five of the applicants guilty of associating for the purposes of anti-constitutional activities and preparing actions against the constitutional order and security of Montenegro, and two of them guilty of illegal possession of weapons and explosives. Mr Kolja Dedvukaj and Mr Rok Dedvukaj were convicted on the basis of Mr Anton Siništaj's statement made at the police station and the contents of his diary found during a search of his flat. The High Court also ruled that the search of Mr A. Siništaj's flat had been conducted in line with the relevant legal provisions and that his rights had not been breached in the pre-trial proceedings. The applicants' appeal against the High Court's judgment was upheld by the Court of Appeal on 18 June 2009.

On 25 December 2009, the Supreme Court endorsed the reasoning of the High Court and the Court of Appeal. Four of the applicants then lodged constitutional appeals with the Constitutional Court, which were dismissed on 23 July 2014.

## **2. Decision of the Court**

Relying on Article 3 (prohibition of torture and inhuman or degrading treatment), all the applicants complained that they were tortured and ill-treated by police officers between 9 and 15 September 2006, and that the investigation into their complaints was ineffective. In addition, Mr Kola Dedvukaj complained under Article 3 about a lack of adequate medical care in detention. Further, relying on Article 6(1) (right to a fair trial) and Article 3, Mr Kola Dedvukaj and Mr Rok Dedvukaj complained that they were convicted on the basis of evidence extorted from Mr Anton Siništaj by torture, and taken from his diary which had been obtained during an unlawful search and which translation had been inadequate.

### Article 3

As to the admissibility of the complaints about the alleged ill-treatment suffered between 9 and 15 September 2006 submitted by all the applicants, the Court rejected all but one as inadmissible. The first, second, fifth, sixth and seventh applicants did not lodge their complaints with the Court within the six month time-limit prescribed by Article 35 and therefore their complaints were rejected accordingly. In examining Mr Djon Dedvuković's complaint, the Court observed that he had submitted a medical report issued in 2010, which stated that he had a couple of old fractures, but there was nothing in the case file indicating that he had submitted the same evidence to any domestic authority. In fact before the investigating judge he stated himself that he had no injuries. In view of the above, the Court rejected Mr Djon Dedvuković's complaint as manifestly ill-founded.

As to the third applicant's complaint, the Court declared it admissible and proceeded to examine its merits. After the third applicant had been arrested, both the investigating judge and the prison doctor noted that he had a bandage on his head under which there was a visible cut, as well as a bruise on the upper part of his left cheek. After filing a criminal complaint in this regard in October 2006, the only action undertaken thereafter appeared to be an investigation by the Internal Police Control, which resulted in a report and apparently in the identification of the police officers involved. However, this report did not make any reference whatsoever to the third applicant or to his injuries observed by the investigating judge and the prison doctor, and could be neither considered independent, given that it was done by the police themselves, nor thorough, given that the applicant's complaints and injuries had been completely ignored. Further, there was nothing in the case file that would have indicated that any other action had been undertaken to clarify the origin of the third applicant's injuries and identify the persons responsible for them.

The Court therefore found that the threshold of Article 3 was reached and considered that there had been a violation of both the substantive and procedural limb of Article 3 in respect of the third applicant.

Regarding the alleged lack of adequate medical care in detention for Mr Kola Dedvukaj, the Court reiterated its interpretation of the requirement to secure the health and well-being of detainees as an obligation on the State to provide them with adequate medical assistance – i.e. with a prompt and accurate diagnosis and care, as well as, when necessitated by the nature of the medical condition, regular and systematic supervision, taking into account the practical demands of imprisonment at the same time. At the time when he was arrested, Mr Kola Dedvukaj had high cholesterol, for which he had already been treated. This treatment continued to be regularly controlled throughout the entire period of his detention through various laboratory analyses and corresponding treatment. It further transpired from his medical file that between 12 September 2006 and 24 December 2008, he was examined 36 times in total by various specialists and duly received the necessary treatment and controls. Therefore, there was no evidence that on any occasion the applicant was denied medical assistance. Under these circumstances, the Court rejected the sixth applicant's complaint as manifestly ill-founded.

## Article 6

All the complaints submitted by Mr Kola Dedvukaj and Mr Rok Dedvukaj under Article 6 were rejected as manifestly ill-founded.

As to the first complaint, according to which they had been convicted on the basis of a statement extorted by torture from Mr Anton Siništaj, the Court noted how none of the applicants submitted any evidence whatsoever in support of their allegation, and the investigating judge did not observe any injuries with regard to the first applicant. Further, Mr Kola Dedvukaj and Mr Rok Dedvukaj's convictions were based on all the available evidence (and not only on the alleged extorted one) following the proceedings which, taken as a whole, could have been regarded as fair.

As to the object of their second complaint – evidence (i.e. a diary) obtained pursuant to an allegedly unlawful search of Mr Anton Siništaj's apartment – the Court stressed how the applicants merely complained about the lack of the presence of two witnesses required by the relevant national criminal provisions during the search of Mr Anton Siništaj's home. As it had not been possible to secure the presence of witnesses at the relevant time and there was a danger that the search would have to be postponed, the search was carried out according to domestic law and was lawful.

The Court noted that Mr Kola Dedvukaj and Mr Rok Dedvukaj were tried in a single set of proceedings with other accused, including those charged with offences punishable with up to fifteen years of imprisonment, and for the trial of which the domestic legislation provided for a five-judge bench. However, as the two applicants were accused of criminal offences punishable with imprisonment of less than fifteen years and hence for which the domestic legislation provided for a three-judge bench for the trial, the Court concluded that the bench that tried the applicants was composed in accordance with the Montenegrin law.

#### Article 41

The Court held that Montenegro had to pay the third applicant, Mr Pjetar Dedvukaj, €3,000 in respect of non-pecuniary damage. The same applicant was also awarded €3,500 for costs and expenses arising from the case.

*Failure of the Croatian authorities to investigate racially motivated act of violence against victim by association violated the Convention*

## JUDGMENT IN THE CASE OF ŠKORJANEC v. CROATIA

(Application no. 25536/14)

**28 March 2017**

### 1. Principal facts

The applicant, Ms Maja Škorjanec, was a Croatian national born in 1988 and living in Zagreb.

On 9 June 2013 the applicant and her partner, Š.Š., were at a flea market when some passers-by verbally and physically attacked them, uttering anti-Roma insults immediately preceding and during the attack and causing them bodily injuries. On 29 July 2013 the applicant and her partner, represented by the same lawyer, lodged a criminal complaint with the Zagreb Municipal State Attorney's Office against two unidentified suspects in connection with the incident of 9 June 2013.

In the criminal complaint it was alleged that one of the suspects had first pushed the applicant and had then told her that she was a "bitch" who had a relationship with a Roma man and that she would be beaten. She had been grabbed by the T-shirt and thrown to the ground, banging her head. The assailants had then continued beating Š.Š., threatening to kill him and the applicant. In the police investigation that followed the applicant was mentioned as a witness.

The two assailants were prosecuted and convicted of making serious threats against Š.Š. and inflicting bodily injury on him, associated with a hate-crime element. However, the applicant's criminal complaint was rejected on the grounds that the impugned criminal offence was not motivated by hatred towards Roma, as she is not of Roma origin.

### 2. Decision of the Court

The applicant complained that the domestic authorities had failed to effectively discharge their positive obligations in relation to a racially motivated act of violence against her merely because she had not been of Roma origin herself, in breach of Articles 3, 8 and 14. She also complained that by not responding to her criminal complaint the domestic authorities had prevented her from obtaining the attackers'

personal details, without which it had been impossible for her to bring a civil action for damages in breach of Article 6.

Article 3 in conjunction with Article 14

The Court found in view of the injuries which the applicant sustained and the presumed racially motivated violence against her, that the applicant's complaint should be examined under Article 3, rather than Article 8, and in conjunction with Article 14.

The Court reiterated that when investigating violent incidents triggered by suspected racist attitudes, the State authorities were required to take all reasonable action to ascertain whether there were racist motives and to establish whether feelings of hatred or prejudices based on a person's ethnic origin played a role in the events. Such obligation concerned not only acts of violence based on a victim's actual or perceived personal status or characteristics but also acts of violence based on a victim's actual or presumed association or affiliation with another person who actually or presumably possessed a particular status or protected characteristic.

The Croatian legal system provided adequate legal mechanisms affording an acceptable level of protection to the applicant in the circumstances, that is, the Criminal Code included a special provision for hate crime as an aggravating form of the offence of causing bodily injury. Further, the Court noted that it was sufficient under this provision for a hate crime to be committed on the grounds of or out of racial hatred, without requiring the victim to personally possess the protected characteristic or status. The Court then moved on to examine whether the manner in which the criminal-law mechanisms were implemented in the instant case was defective to the point of constituting a violation of the respondent State's obligations under the Convention.

Following the report about the attack on the applicant and her partner, the police immediately responded by going to the scene and conducting a preliminary investigation on the basis of a suspected attack on a couple motivated by hatred against people of Roma origin. In the course of the investigation the police interviewed the applicant, her partner and the two assailants. While the two assailants denied any racial overtones to the conflict, the applicant and her partner provided information to the contrary. The applicant's partner had explained how the two men, after his remark that they were drunk, had turned on him and started uttering various insults related to his Roma origin, after which they had attacked him. He also explained that the applicant had been attacked when she had run to his aid. For her part, the applicant had confirmed Š.Š.'s version of events. Their statements thus suggested that the applicant had fallen victim to a racially motivated attack owing to the fact that she had been in the company of Š.Š.

Despite the above evidence, the prosecuting authorities confined their investigation and analysis to the hate-crime element of the violent attack against Š.Š., failing to carry out a thorough assessment of the relevant situational factors and the link between the applicant's relationship with Š.Š. and the racist motive for the attack on them. Indeed, the police lodged a criminal complaint only with regard to the attack on Š.Š., treating the applicant merely as a witness, although she had also sustained injuries in the course of the same attack while in his company.

The Court further noted the applicant's specific allegations of racially motivated violence directed against her in her criminal complaint of 29 July 2013. The issue had similarly been raised in the course of the criminal proceedings against the two assailants, where further information came to light suggesting that the applicant had been a victim of racially motivated violence. However, in its assessment the State Attorney's Office emphasised the fact that the applicant was not of Roma origin herself and could therefore not be considered a victim of a hate crime.

The Court reiterated its subsidiary role, which prevented it from substituting its own assessment of the facts for that of the national authorities. Nonetheless, it could not but note that the prosecuting authorities' insistence on the fact that the applicant herself was not of Roma origin and their failure to identify whether she was perceived by the attackers as being of Roma origin herself, as well as their failure to take into account and establish the link between the racist motive for the attack and the applicant's association with Š.Š., had resulted in a deficient assessment of the circumstances of the case. That impaired the proper investigation by the domestic authorities of the applicant's allegations of a racially motivated act of violence against her to an extent irreconcilable with the State's obligation to take all reasonable steps to uncover any possible racist motives behind the incident.

Accordingly, it was confirmed that the domestic authorities had failed to comply with their obligations under the Convention when they rejected the applicant's criminal complaint without conducting a further investigation in that respect prior to their decision, which resulted in a violation of Article 3 under its procedural aspect in conjunction with Article 14.

## Article 6

The Court observed that in the course of the proceedings against her partner, who had also been represented by the same lawyer, the applicant had been provided with sufficient information about the personal details of the two assailants to allow her to institute a civil action for damages against them. Her complaint under Article 6 was thus rejected as manifestly ill founded.

Article 41

The applicant was awarded €12,500 in respect of non-pecuniary damage and €2,200 for costs and expenses.

*Sterilisation of Roma woman in a public hospital without her informed consent violated her human rights under Articles 3 and 8*

## JUDGMENT IN THE CASE OF V.C. v. SLOVAKIA

(Application no. 18968/07)

**8 November 2011**

### 1. Principal facts

The applicant, V.C., was a Slovakian national of Roma ethnic origin born in 1980 and living in Jarovnice, Slovakia.

In August 2000, she was sterilised at the Hospital and Health Care Centre in Prešov, Slovakia—under the management of the Ministry of Health—during the delivery of her second child.

The applicant alleged that, in the last stages of labour, she was asked whether she wanted to have more children and told that, if she did have any more, either she or the baby would die. She submits that, in pain and scared, she signed the sterilisation consent form but that, at the time, she did not understand the nature and consequences of the procedure, particularly its irreversibility. She was not informed of any alternative methods. Her signature on the form was shaky and her maiden name split into two words. She also claimed that her Roma ethnicity—clearly stated in her medical record—played a decisive role in her sterilisation.

Prešov hospital's management stated that the applicant's sterilisation was carried out on medical grounds—the risk of rupture of the uterus—and that she had given informed consent following the doctors' risk assessment.

In January 2003, the Centre for Reproductive Rights and the Centre for Civil and Human Rights published a report "Body and Soul: Forced and Coercive Sterilisation and Other Assaults on Roma Reproductive Freedom in Slovakia" ("the Body and Soul Report"). A number of proceedings ensued: a general criminal investigation into the alleged unlawful sterilisation of various Roma women, which was ultimately discontinued on the ground that no offence had been committed; and, civil and constitutional proceedings brought by the applicant in which she alleged that the hospital had misled her into being sterilised. The civil complaint was ultimately dismissed on appeal by the Prešov Regional Court in May 2006, the courts finding that the sterilisation, a medical necessity, had been carried out in accordance with domestic

legislation and with the applicant's consent. The constitutional complaint was also subsequently dismissed.

The applicant referred to several publications pointing to a history of forced sterilisation of Roma women which originated under the communist regime in Czechoslovakia in the early 1970s. In particular, she submitted that 60% of sterilisations performed from 1986 to 1987 in the Prešov district were on Roma women.

The Government submitted that health care in Slovakia was provided to all women equally and that all sterilisations were based on medical grounds.

The applicant's sterilisation had serious medical and psychological after-effects. Notably in 2007/2008, she experienced a hysterical pregnancy. Treated since 2008 by a psychiatrist, she continues to suffer from sterilisation, including being ostracised by the Roma community and divorced from her husband.

## **2. Decision of the Court**

The applicant complained that she had been sterilised without her full and informed consent and that the authorities' ensuing investigation had not been thorough, fair or effective. She further alleged that her ethnicity played a decisive role in her sterilisation and should be seen in the context of the more widespread practice of sterilising Roma women and in the enduringly hostile attitudes towards Roma people. She relied on Articles 3 (prohibition of inhuman or degrading treatment), 8 (right to respect for private and family life), 12 (right to found a family), 13 (right to an effective remedy) and 14 (prohibition of discrimination).

### Article 3

#### *Ill-treatment*

The Court noted that sterilisation amounted to a major interference with a person's reproductive health status and, involving manifold aspects of personal integrity (physical and mental well-being, as well as emotional, spiritual and family life), required informed consent when the patient was an adult of sound mind. Moreover, informed consent as a prerequisite to sterilisation is laid down in a number of international documents, notably the Council of Europe's Convention on Human Rights and Bio-medicine, which was in force in Slovakia at the time of the applicant's sterilisation.

However, from the documents submitted, the applicant—a mentally competent adult patient—had apparently not been fully informed about the status of her health, the proposed sterilisation and/or its alternatives. Instead, she was asked to sign a record while she was still in labour. Furthermore, she was prompted to sign the document after being told by medical staff that if she had one more child, either she or the baby would die. The intervention had not therefore been an imminent medical necessity as any threat to her health was considered likely in the event of a future pregnancy. Indeed, sterilisation is not generally considered as life-saving surgery. The Court considered that the way in which the hospital staff acted was paternalistic as she did not in practice have any other choice but to agree to the procedure, without having had time to reflect on its implications or discuss it with her husband.

The applicant's sterilisation, as well as the way in which she had been requested to consent, must therefore have made her feel fear, anguish and inferiority. This entailed long-lasting and serious repercussions on her physical and psychological state of health, as well as on her relationship with both her husband and the Roma community. Although there was no proof that the medical staff had intended to ill-treat the applicant, they had, nevertheless, acted with gross disregard to her right to autonomy and choice as a patient. The applicant's sterilisation had therefore breached Article 3.

#### *Investigation into the ill-treatment*

The Court noted that the applicant had an opportunity to have the actions of the hospital staff examined by the domestic authorities via civil and constitutional proceedings. The courts dealt with her civil case within two years and one month and her constitutional case within 13 months, a time period not open to particular criticism. She had not sought redress by requesting a criminal investigation, though that possibility was open to her. There had therefore been no violation of Article 3 as concerned the applicant's allegation that the investigation into her sterilisation was inadequate.

#### Article 8

Given its earlier finding of a violation of Article 3, the Court considered it unnecessary to examine separately under Article 8 whether the applicant's sterilisation had breached the right to respect for her private and family life.

It found that Slovakia failed to fulfill its obligation under Article 8 by not ensuring that particular attention was paid to the reproductive health of the applicant as a Roma.

Both the Council of Europe's Commissioner for Human Rights and the European Commission against Racism and Intolerance had identified serious shortcomings in the legislation and practice relating to sterilisations in general in Slovakia and stated that the Roma community were more likely to be affected by those shortcomings. Equally, a May 2003 Slovakian government expert report had identified shortcomings in health care and compliance with regulations on sterilisation, and made recommendations about training of medical staff regarding Roma.

Concerning the applicant in particular, the Court found that simply referring to her ethnic origin in her medical record without more information indicated a certain mindset of the medical staff as to the manner in which the health of the applicant, as a Roma, should be managed.

There had therefore been a violation of Article 8 concerning the lack of legal safeguards at the time of the applicant's sterilisation giving special consideration to her reproductive health as a Roma.

#### Article 13

The applicant's case was reviewed by the civil courts at two levels of jurisdiction and subsequently by the Constitutional Court. She could also have brought criminal proceedings. Additionally, Article 13 could not be interpreted as requiring a general remedy against a domestic law, to the extent that—as alleged by the applicant—the lack of appropriate safeguards in domestic law had been at the origin of her sterilisation and the subsequent dismissal of her claim. There had therefore been no violation of Article 13.

#### Article 12

Given its finding that the applicant's sterilisation had serious repercussions on her private and family life, the Court considered it unnecessary to examine separately whether there was a breach of her right to marry and to found a family under Article 12.

#### Article 14

The Court also held that it was unnecessary to examine separately the applicant's complaint under Article 14. The objective evidence was not sufficient to prove that the doctors acted in bad faith when sterilising the applicant, that their behaviour was intentionally racially motivated or that her sterilisation was part of an organised policy. Nevertheless, the Court further noted that international bodies and domestic experts

had pointed to serious shortcomings in the legislation and practice relating to sterilisations, which were particularly liable to affect members of the Roma community, and had thus found that Slovakia had not complied with its positive obligation under Article 8 to sufficiently protect the applicant.

#### Article 41

The Court held that Slovakia was to pay the applicant €31,000 in respect of non-pecuniary damage and €12,000 for costs and expenses.

*Failure by authorities to thoroughly examine the appropriate therapy for a long term drug addict in detention constituted a violation of Article 3*

## **JUDGMENT IN THE CAES OF WENNER v. GERMANY**

(Application no. 62303/13)

**1 September 2016**

### **1. Principal Facts**

The applicant, Wolfgang Adam Wenner, was a German national. He had been addicted to heroin since 1973, when he was 17 years old, and had been HIV-positive since 1988. He was also considered to be 100% disabled since 2001.

Mr Wenner had tried, unsuccessfully, to overcome his addiction with various types of treatment. Starting in 1991 until 2008 his addiction was treated with medically prescribed and supervised drug substitution therapy.

In 2008, Mr Wenner was arrested on suspicion of drug trafficking and was placed in detention, in Bavaria, where his drug substitution therapy was interrupted against his will. In June 2009 he was convicted of drug trafficking and sentenced to six years imprisonment. The trial court ordered that he be placed in a drug detoxification facility, which was to take place after six months' detention. In December 2009 he was transferred to the drug rehabilitation centre in Bavaria where he underwent abstinence-based treatment, without additional substitution treatment. In April 2010 the Memmingen Regional Court terminated his detention at the facility, after the treating doctors expressed that the applicant could not be expected with sufficient probability to be cured from his drug addiction, and he was transferred back to prison. Mr Wenner appealed against this decision, however, it was dismissed by the Munich Court of Appeal, which found that it was not to be expected with sufficient probability that he could be cured from his drug addiction or be prevented from relapse for a considerable time.

In June 2011 Mr Wenner made a request to the prison authorities to treat his drug addiction with a heroin substitute. He also requested that the question of whether such a substitution treatment was necessary be examined by a drug addiction specialist. He further claimed that his serious neurological pain could be considerably alleviated by drug substitution treatment, as was suggested by the external doctor that had examined him on the prison authorities request in October 2010. The prison authorities dismissed his request, stating that the substitution treatment was not

necessary, nor suitable for his rehabilitation. They argued that he had already been treated in the drug rehabilitation centre where he was not given a substitution treatment, and that after three years in detention he no longer suffered from physical withdrawal symptoms.

Mr Wenner appealed the decision, arguing that the prison authorities failed to examine, under the criteria laid down by law, whether drug substitution therapy was necessary. The Regional Court dismissed his appeal in March 2012, endorsing the reasons put forward by the prison authorities. The decision was also upheld by the Munich Court of Appeal and on 10 April 2013 the Federal Constitutional Court declined to consider the constitutional complaint.

On 17 November 2014, the prison authorities rejected the applicant's new request to be provided with substitution treatment in preparation for his release. His legal council was also advised by the prison authorities to take the applicant to a drug rehabilitation clinic as soon as he was released in order to prevent him from taking an overdose of heroin as soon as he was able to. In December 2014, after Mr Wenner's release from prison, he was examined by a doctor who prescribed him drug substitution therapy.

## **2. Decision of the Court**

The applicant complained that the refusal by the authorities to grant him drug substitution therapy in prison, which caused him to suffer substantial pain and had caused damage to his health, was contrary to Article 3. He also argued that the refusal to have the necessity of drug substitution therapy examined by an external medical expert amounted to inhuman treatment.

### Article 3

The Court reiterated that in order for treatment inflicted or endured by a victim to fall within the scope of Article 3, it must attain a minimum level of severity. The assessment of this minimum level is relative, depending on all the circumstances of the case. The Court also noted that Article 3 places an obligation on the State to ensure that any person detained is held in conditions that are compatible with respect for human dignity, which includes access to the required medical treatment, among other things. This means that the medical treatment provided must be at a comparable level to the treatment the State provides to the population as a whole – however this does not mean that it must be equivalent to the level of the best health establishments outside of prison. A prisoner suffering from a serious illness should

undergo an assessment of their current state of health by a specialist in the disease in question, and appropriate treatment should be provided. The Court will also take into account in its assessment of the State's compliance with Article 3 if independent medical assistance was refused to a prisoner suffering from a serious medical condition on his request. The Court noted that it was not its place to rule on matters that fell exclusively within the field of medical expertise or to decide what the correct treatment should be for the applicant's needs. However, the duty rested with the Government to provide credible and convincing evidence to show that the applicant received comprehensive and adequate medical treatment in detention.

In the present case it was contested between the parties whether drug substitution therapy was regarded as the necessary medical treatment which had to be provided to the applicant in order for the State to comply with its obligation under Article 3. The Court noted that although drug substitution treatment had become increasingly widespread in Council of Europe Member States during the past years, which measures should be taken to treat drug addiction were still the subject of controversy. In this case the Court considered that it did not need to decide if the applicant required drug substitution therapy, but instead, had to determine if the State had provided credible and convincing evidence proving that the applicants' state of health and treatment were adequately assessed and that the applicant did in fact receive adequate and comprehensive medical care.

It was uncontested between the parties that the applicant was a long-term opioid addict, and when detained had been addicted for some forty years. All his attempts to overcome his addiction, which included multiple rehabilitation therapies, had failed. It is also uncontested that the applicant suffered from chronic pain due to his long term drug consumption and polyneuropathy. Before the applicant's detention he was treated with drug substitution therapy for seventeen years. The Court observed that drug substitution therapy was available in prisons in Germany, and not only did doctors prescribe and found drug substitution therapy as necessary to treat the applicant prior to his detention, but an external doctor commissioned by the prison authorities, had also come to this conclusion. The fact that the applicant was prescribed drug substitution therapy upon release from prison, was a strong indication that it could be considered a required treatment for the applicant. Furthermore, after being transferred from the drug rehabilitation centre, the applicant's health in detention was characterised by chronic pain which he suffered independently from previous physical withdrawal symptoms. The abstinence-oriented therapy had failed according to the treating doctors at the drug rehabilitation centre as well as in the eyes of the domestic courts. As a result the authorities were called upon to assess if another therapy would be more suitable for the applicant.

The authorities had strong elements indicating that drug substitution therapy could be an adequate treatment for the applicant's state of health. There was no evidence that the domestic authorities, with the help of medical expert advice, examined if drug substitution therapy was still an adequate treatment for the applicant, despite his previous seventeen year drug therapy substitution treatment. The Court also stated that the applicant's pain was exacerbated by the fact that he was aware of the existence of a treatment which could alleviate his pain effectively, but was refused. The refusal to provide the applicant with drug substitution treatment, despite his addiction and previous drug substitution treatment, caused him considerable and continued mental and physical suffering over a long period of time. Based on the evidence the Court was satisfied that the physical and mental strain the applicant suffered because of his condition, could exceed the unavoidable level of suffering inherent in detention and fell within the scope of Article 3. The authorities had a duty to properly evaluate his health and provide adequate treatment, however, as shown, they failed to prove that the applicant's treatment with painkillers alone was sufficient in the circumstances and hence found a violation of Article 3.

#### Article 41

The Court considered that the finding of a violation constituted sufficient just satisfaction for any non-pecuniary damage, but awarded the applicant €1,801.05 in respect of costs and expenses.

*No effective investigation into claims of sexual assault, and the alleged victim should have been protected from cross-examination by the alleged perpetrator – violations of Articles 3 and 8*

## JUDGMENT IN THE CASE OF Y v. SLOVENIA

(Application no. 41107/10)

**28 May 2015**

### **1. Principal facts**

The applicant Ms Y. the applicant was a 28-year-old Slovenian national, born in Ukraine in 1987.

In 2002, the applicant's mother lodged a criminal complaint against Mr X. (a family friend), who had allegedly repeatedly sexually assaulted the then 14-year-old Ms Y. between July and December 2001.

Subsequently, a police investigation (2002) and, afterwards, a judicial investigation (2003) were instigated. In 2006, these investigations resulted in the indictment of Mr X. on charges of sexual assault of a minor below the age of fifteen.

During the criminal investigation, Ms Y., Mr X., witnesses and experts were questioned. While a psychologist confirmed that Ms Y. showed symptoms related to sexual abuse, the expert in orthopaedics argued that Mr X. could not have committed the alleged acts due to a disability of his arm. The gynaecology expert directly confronted Ms Y. with the findings of the orthopaedics report and questioned her why she had not defended herself more vigorously. In addition, there were two gynaecological reports which were inconclusive with respect to Ms Y.'s claims.

Notably, Ms Y.'s request to the trial court for the disqualification of the legal representative of Mr X., an acquaintance of Ms Y., was rejected based on the notion that this did not fall within any of the statutory grounds.

The trial lasted from June 2007 to September 2009. During 12 consecutive hearings, the criminal proceedings were repeatedly delayed. In particular, Ms Y. was publically cross-examined by Mr X. for the duration of four hours. He maintained that he was physically incapable of assaulting her and that her accusations against him were prompted by her mother's wish to extort money from him; several questions were phrased in a way to suggest a particular answer and he alleged that she was able to cry on cue to make people believe her.

Ultimately, the domestic court acquitted Mr X. of all charges as the alleged misconduct had not been proven beyond reasonable doubt.

## **2. Decision of the Court**

The applicant, relying on Article 3, submitted that she had been subjected to inhuman and degrading treatment as a result of the severe delays in the criminal proceedings and that the responsible authorities had been biased against her due to Ukrainian origin. In addition, the applicant held that her personal integrity, as safeguarded by Article 8, had been violated due to the public and intense cross-examination by the accused during the criminal trial, which had resulted in further traumatic experiences.

### Article 3

The Court reiterated its established principles concerning a State's positive obligation under Article 3 regarding the effective investigation and prosecution of ill-treatment, including sexual abuse. Notably, the significance of the promptness of the authorities' reaction to any complaint of ill-treatment was highlighted.

To this end, the Court acknowledged the difficulty for the responsible authorities to assess and investigate the particularly sensitive issue of sexual abuse in situations where the testimonies are incompatible and reliable physical evidence is missing.

Nonetheless, the investigations and the subsequent trial had been marked by several delays and inactivity of the responsible authorities. This had directly resulted in a seven-year gap between the applicant's criminal complaint and the judgment of the responsible domestic court. While these delays were insufficient to establish the partiality of the responsible authorities during the investigation of the applicant's criminal complaint, it did disclose the absence of the required procedural requirement of promptness over the course of the criminal proceedings.

Consequently, there had been a violation of the Government's procedural obligations under Article 3.

### Article 8

The complaint under Article 8 concerned the alleged failure of the government to instigate effective measures for the protection of the rights of victims of ill-treatment during criminal proceedings. The adoption of adequate measures to secure the respect for the victim's private life during criminal proceedings falls within the positive obligations under Article 8.

To this end, a fair balance must be struck between the interest of the defence and the interest of the witnesses and/or victims called upon to testify. In this particular case, this requires the examination of whether the manner in which the victim was questioned struck a fair balance between her personal integrity and the right of defence of the defendant.

In light of Article 6, a fair trial requires that the accused has the opportunity to cross-examine the witness and/or victim. This right, however, is not unlimited. The national courts should carefully assess the extent to which the examination and direct confrontation between the accused and the victim might result in the further traumatising of the victim.

During the criminal proceedings, Ms Y. had been directly cross-examined by Mr X., who had adopted an intimidating and humiliating examination technique. The Court held that it fell within the responsibility of the presiding judge to assess to what extent this technique would be in breach of the victim's personal integrity. However, Mr X.'s approach clearly exceeded the boundaries required for an effective defence. In addition, the domestic court had not taken into account the effect of the cross-examination of Ms X.'s legal representative, an acquaintance of Ms Y., could have had on the psychological state of the victim. The trial court should have taken this into consideration in their assessment of whether the legal representative should have been disqualified. Lastly, the gynaecology expert had similarly exceeded the scope of his task by directly confronting Ms Y. with the findings in his report.

Notwithstanding several protective measures that had been taken by the responsible authorities such as conducting the victim's statement in private and the adjournment of several hearings, the Court held that the personal relationship between the victim and the accused, the sensitivity of the subject matter, and the young age of the victim were significant factors to be taken into account when determining the protective measures that should have been taken during the criminal proceedings.

In light of the foregoing, there had not been a fair balance struck between the victim's rights under Article 8 and the right of defence of the accused under Article 6. Consequently, there had been a violation of Article 8.

#### Article 41

The Court held that the State was to pay €9,500 in respect of non-pecuniary damage and €4,000 for costs and expenses.

*Positive obligation of the State to protect children from harm by private individuals under Article 3, and lack of an effective remedy under Article 13*

## **JUDGMENT IN THE CASE OF Z. AND OTHERS v. THE UNITED KINGDOM**

(Application no. 29392/95)

**10 May 2001**

### **1. Principal facts**

The applicants, four siblings, Z, a girl born in 1982, A, a boy born in 1984, B, a boy born in 1986 and C, a girl born in 1988 were all British nationals.

In October 1987, the applicants' family was referred to the social services by its health visitor because of concerns about the children, including reports that Z was stealing food. Over the next four-and-a-half years, the social services monitored the family and provided various forms of support to the parents. During this period, problems continued. In October 1989, when investigating a burglary, the police found the children's rooms in a filthy state, the mattresses being soaked with urine. In March 1990, it was reported that Z and A were stealing food from bins in the school. In September 1990, A and B were reported as having bruises on their faces. On a number of occasions, it was reported that the children were locked in their rooms and were smearing excrement on the windows. Finally, on 10 June 1992, the children were placed in emergency foster care on the demand of their mother who said that, if they were not removed from her care, she would batter them. The consultant psychologist who examined the children found that the older three were showing signs of serious psychological disturbance and noted that it was the worst case of neglect and emotional abuse she had seen.

The Official Solicitor, acting for the applicants, commenced proceedings against the local authority claiming damages for negligence on the basis that the authority had failed to have proper regard for the children's welfare and to take effective steps to protect them. Following proceedings which terminated in the House of Lords, the applicants' claims were struck out. In the judgment given on 29 June 1995, which concerned three cases, Lord Browne-Wilkinson held, among other things, that public policy considerations were such that local authorities should not be held liable in negligence in respect of the exercise of their statutory duties safeguarding the welfare of children.

## 2. Decision of the Court

The applicants alleged that the local authority had failed to take adequate protective measures in respect of the severe neglect and abuse which they were known to be suffering due to their ill-treatment by their parents and that they had no access to court or to an effective remedy in respect of this. They invoked Articles 3, 6, 8 and 13 of the Convention.

### Article 3

Article 3 enshrines one of the most fundamental values of a democratic society, prohibiting in absolute terms torture or inhuman or degrading treatment or punishment. States which ratified the European Convention on Human Rights should take measures to ensure that individuals within their jurisdiction are not subjected to inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable people and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.

There was no dispute that the neglect and abuse suffered by the four child applicants reached the threshold of inhuman and degrading treatment. The Government did not contest the Commission's finding that the treatment suffered by the four applicants reached the level of severity prohibited by Article 3 and that the State failed in its positive obligation under Article 3 of the Convention to provide the applicants with adequate protection against inhuman and degrading treatment. This treatment was brought to the attention of the local authority, at the earliest in October 1987, which was under a statutory duty to protect the children and had a range of powers available to it, including removing them from their home. The children were however only taken into emergency care, at the insistence of their mother, on 30 April 1992.

Over the intervening period of four-and-a-half years, they had been subjected in their home to what the child consultant psychiatrist who examined them referred to as horrific experiences. The Criminal Injuries Compensation Board had also found that the children had been subject to appalling neglect over an extended period and suffered physical and psychological injury directly attributable to a crime of violence. The Court acknowledged the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life. The present case however left no doubt as to the failure of the system to protect the applicants from serious, long-term neglect and abuse. Accordingly, there had been a violation of Article 3.

## Article 8

Having regard to its finding of a violation of Article 3, the Court considered that no separate issue arose under Article 8.

## Article 6

Concerning the applicability of Article 6, the Court was satisfied that, at the outset of the proceedings, there was a serious and genuine dispute about the existence of the right asserted by the applicants under the domestic law of negligence and that the applicants had, on at least arguable grounds, a claim under domestic law. Article 6 was therefore applicable to the proceedings brought by the applicants alleging negligence by the local authority.

Concerning compliance with Article 6, the Court found that the outcome of the domestic proceedings brought was that the applicants, and any children with complaints such as theirs, could not sue a local authority in negligence for compensation, however foreseeable – and severe – the harm suffered and however unreasonable the conduct of the local authority in failing to take steps to prevent that harm. However, this did not result from any procedural bar or from the operation of any immunity which restricted access to court. The striking out of the applicants' claim resulted from the application by the domestic courts of substantive law principles and it was not for this Court to rule on the appropriate content of domestic law. Nonetheless, the applicants were correct in their assertions that the gap they had identified in domestic law was one that gave rise to an issue under the Convention, but in the Court's view it was an issue under Article 13, not Article 6 § 1. Considering that it was under Article 13 that the applicants' right to a remedy should be examined, the Court found no violation of Article 6.

## Article 13

In deciding whether there had been a violation of Article 13, the Court observed that where alleged failure by the authorities to protect people from the acts of others was concerned, there should be available to the victim or the victim's family a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention. Furthermore, in the case of a breach of Articles 2 and 3, which ranked as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of redress.

The applicants had argued that, in their case, an effective remedy could only be provided by adversarial court proceedings against the public body responsible for the breach. The Court noted that the Government had conceded that the range of remedies at the disposal of the applicants was insufficiently effective and that, in the future, under the Human Rights Act 1998, victims of human rights breaches would be able to bring proceedings in courts empowered to award damages.

The Court found that the applicants did not have available to them an appropriate means of obtaining a determination of their allegations that the local authority had failed to protect them from inhuman and degrading treatment or the possibility of obtaining an enforceable award of compensation for the damage suffered thereby. Consequently, they were not afforded an effective remedy in respect of the breach of Article 3 and there had, accordingly, been a violation of Article 13.

#### Article 41

Under Article 41 of the Convention, the Court awarded in respect of pecuniary damage 8,000 pounds sterling (GBP) to Z., GBP 100,000 to A., GBP 80,000 to B., and GBP 4,000 to C. The Court also awarded GBP 32,000 to each applicant for non-pecuniary damage and a total of GBP 39,000 for costs and expenses.



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