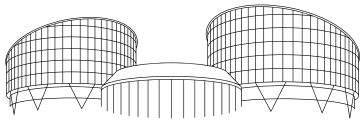

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Overview of the Court's case-law

1 January-15 June 2020

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Case-law overview

This overview[1] contains a selection by the Jurisconsult of the most interesting cases from 2020.

JURISDICTION AND ADMISSIBILITY

Jurisdiction of States (Article 1)[2]

The *M.N. and Others v. Belgium*[3] decision concerned whether a State's ruling on a visa application and an applicant's challenge against that refusal in the State's courts can create a jurisdictional link.

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

The applicants complained under Articles 3 and 13 of the Convention that the refusal to grant them visas had exposed them to a risk of ill-treatment for which they did not have an effective remedy, and under Articles 6 § 1 and 13 about the unjustified failure to enforce certain court decisions delivered initially in their favour. Following relinquishment, the Grand Chamber declared the application inadmissible as regards their complaints under Articles 3 and 13 of the Convention, finding that the applicants had not been within the jurisdiction of Belgium. It then recharacterised the second complaint under Article 6 § 1 and found that, regardless of the issue of jurisdiction, Article 6 § 1 was inapplicable

1. The overview is drafted by the Directorate of the Jurisconsult and is not binding on the Court. This provisional version will be superseded by the final version covering all of 2020.
2. *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, 26 May 2020. See also under Article 2 (Right to life – Obligation to protect life) below.
3. *M.N. and Others v. Belgium* (dec.) [GC], no. 3599/18, 5 May 2020.

because the enforcement proceedings in question did not concern a "civil" right within the meaning of the Court's settled case-law.

This Grand Chamber decision is interesting because it examined whether a State exercises control and authority, and thus jurisdiction, over individuals lodging visa applications in embassies and consulates abroad. It found that the respondent State was not exercising jurisdiction extraterritorially by processing the visa applications and that the applicants' appeals had not created a jurisdictional link.

(i) The first question to be examined was whether, in processing the visa applications, the State effectively exercised authority or control over the applicants, particularly through the acts or omissions of its diplomatic or consular agents posted abroad. The Court's analysis was informed by a number of factors: the applicants had never been within the national territory of Belgium; they had no pre-existing family or private-life ties with that State; and it had not been alleged before the Court that a jurisdictional link arose from any control exercised by the Belgian authorities in Syrian or Lebanese territories. In addition, the Court found it irrelevant who (whether the Belgian authorities in the national territory or diplomatic agents abroad) was responsible for taking the visa decisions and it thus attached no significance to the fact that the diplomatic agents in this case fulfilled merely a "letter box" role. It was, however, crucial that, when comparing the present case and the case-law of the European Commission on Human Rights on the acts and omissions of diplomatic agents (*X v. Germany*[4]; *X v. the United Kingdom*[5]; *S. v. Germany*[6]; and *M. v. Denmark*[7]), the Court found that none of the connecting links which characterised those cases was present in the present one. In particular, the applicants were not Belgian nationals seeking to benefit from the protection of their embassy. In addition, at no time had diplomatic agents exercised *de facto* control over the applicants, who had freely chosen to present themselves at the Belgian embassy in Beirut, rather than approaching any other embassy, to submit their visa applications. They had then been free to leave the premises of the Belgian embassy without any hindrance.

Furthermore, having regard to the Court's case-law concerning situations in which the officials of a State operating outside its territory,

4. *X v. Germany*, no. 1611/62, Commission decision of 25 September 1969, unreported.

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

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

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

through control over buildings, aircraft or ships in which individuals were held, exercised power and physical control over those persons (*Issa and Others v. Turkey*[8]; *Al-Saadoon and Mufdhi v. the United Kingdom*[9]; *Medvedyev and Others v. France*[10]; *Hirsi Jamaa and Others v. Italy*[11]; and *Hassan v. the United Kingdom*[12]), the administrative control exercised by the Belgian State over the premises of its embassies was not sufficient to bring every person who entered those premises within its jurisdiction. Finally, the present context was considered to be fundamentally different from the numerous expulsion cases in which the applicants were, in theory, on the territory of the State concerned – or at its border – and thus clearly fell within its jurisdiction. No exercise of extraterritorial jurisdiction could therefore be established on this ground in the present case.

(ii) Secondly, the Court found that the applicants could not create, unilaterally, an extraterritorial jurisdictional link between them and Belgium merely by challenging the visa decisions before the Belgian courts.

The Grand Chamber considered the applicants' submission to have no basis in the case-law of the Court. It referred, firstly, to the judgment in *Markovic and Others v. Italy*[13], which concerned civil proceedings for damages brought by nationals of the former Serbia and Montenegro before the Italian courts in respect of the deaths of relatives during NATO air strikes: in that case, the Court declared inadmissible for lack of jurisdiction all the applicants' substantive complaints, other than the one raised under Article 6. The Court then referred to the judgment in *Güzelyurtlu and Others v. Cyprus and Turkey*[14] in which the proceedings in question – which created a jurisdictional link with Turkey in respect of deaths which had occurred in the Cypriot Government-controlled area of the island – were criminal proceedings which had been opened on the initiative of Turkey (who had control over the "Turkish Republic of Northern Cyprus") in the context of its procedural obligations under Article 2. This was considered by the Court to be very different from the present case, which concerned administrative proceedings brought by private individuals who had no connection with the State except for

8. *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004.
9. *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, ECHR 2010.
10. *Medvedyev and Others v. France* [GC], no. 3394/03, ECHR 2010.
11. *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012.
12. *Hassan v. the United Kingdom* [GC], no. 29750/09, ECHR 2014.
13. *Markovic and Others v. Italy* [GC], no. 1398/03, ECHR 2006-XIV.
14. *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, 29 January 2019.

proceedings which they had freely initiated and without the choice of the State, in this case Belgium, being imposed on them by any treaty obligation.

In contrast, the position of the Government was supported by the Court's decision in *Abdul Wahab Khan v. the United Kingdom*[15], on which the Grand Chamber relied:

> The Court made clear in that decision that the mere fact that an applicant brings proceedings in a State Party with which he has no connecting tie cannot suffice to establish that State's jurisdiction over him ... The Court considers that to find otherwise would amount to enshrining a near-universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves, and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction ...

The Grand Chamber added that precisely such an obligation would be created were the State's ruling on an immigration application to be sufficient to bring the individual making the application under its jurisdiction: the individual could create a jurisdictional link by submitting an application and thus give rise, in certain scenarios, to an obligation under Article 3 which would not otherwise exist. Such an extension of the scope of the Convention would also have the effect of negating the well-established principle of public international law, according to which the States Parties, subject to their treaty obligations, have the right to control the entry, residence and expulsion of aliens (*Ilias and Ahmed v. Hungary*[16]).

(iii) Finally, the Grand Chamber nevertheless clarified that the above conclusion did not prejudice the endeavours made by the States to facilitate access to asylum procedures through their embassies and/or consular representations (see, for example, *N.D. and N.T. v. Spain*[17], where the Court examined under Article 4 of Protocol No. 4. whether the possibility for the applicants in that case to claim international protection in Spanish embassies and consulates was genuinely and effectively accessible to them).

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15. *Abdul Wahab Khan v. the United Kingdom* (dec.), no. 11987/11, 28 January 2014.
16. *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, § 125, 21 November 2019.
17. *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15, § 222, 3 October 2017.

Admissibility (Articles 34 and 35)

Exhaustion of domestic remedies (Article 35 § 1)

The judgment in *Beizaras and Levickas v. Lithuania*[18] is noteworthy in that it clarifies whether the applicants can be considered to have exhausted domestic remedies, since it was a non-governmental organisation (NGO) which made the criminal complaints in pursuit of the applicants' interests.

The applicants, two young men, posted a photograph of them kissing on Facebook. The photograph received hundreds of serious homophobic comments (for example, calls for the applicants to be "castrated", "killed" and "burned"). On the applicants' request, an NGO (of which they were members and which protected the interests of homosexual persons) requested a prosecutor to begin criminal proceedings for incitement to hatred and violence against homosexuals (under Article 170 of the Criminal Code, which established criminal liability for incitement of discrimination on the basis, *inter alia*, of sexual orientation). The prosecutor and the courts refused to prosecute. The two men were the only applicants in the case before the Court.

The Court emphasised that the legal action brought by the NGO in pursuit of the applicants' interests was not an *actio popularis*, since the NGO had acted in response to specific facts affecting the rights of the two applicants, who were members of the NGO. The NGO's standing had never been questioned or challenged at the domestic level. The Court also took into account the applicants' statement that they had preferred the NGO to initiate the criminal proceedings for fear that the Internet commenters would retaliate should they launch such proceedings themselves. Bearing in mind the serious nature of the allegations, it was therefore open to the NGO to act as a representative of the applicants' interests in the domestic criminal proceedings. To find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at the national level, given that in modern-day societies recourse to collective bodies is one of the accessible means, sometimes the only means, available to citizens to defend their particular interests effectively (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*[19], and *Gorraiz Lizarraga and*

18. *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020. See also under Article 13 (Right to an effective remedy) and Article 14 taken in conjunction with Article 8 below.

19. *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, ECHR 2014.

Others v. Spain[20]). The Court also observed that the present application had been lodged by the applicants, acting for themselves, after the domestic courts had adopted decisions in the case that dealt with their particular situation. The Government's plea of non-exhaustion was therefore dismissed.

"CORE" RIGHTS

Right to life (Article 2)

Obligation to protect life

Makuchyan and Minasyan v. Azerbaijan and Hungary[21] concerned the threshold for State responsibility for an act otherwise not attributable to a State, and Contracting States' duties in the context of the transfer of sentenced persons. It also concerned the discriminatory nature of the failure to enforce a prison sentence imposed abroad for an ethnically biased crime.

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

The applicants complained under Article 2 of the Convention, taken alone and in conjunction with Article 14. The Court found that the manifest "approval" and "endorsement" by Azerbaijan of the crimes committed by a member of its armed forces in a private capacity did not engage that State's responsibility under the substantive limb of Article 2 of the Convention. However, Azerbaijan's unjustified failure to enforce the prison sentence imposed in Hungary, coupled with the "hero's welcome" and various benefits given to R.S. without any legal basis, was considered to be incompatible with its procedural obligation

20. *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, ECHR 2004-III.

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

under Article 2 and, in addition, to constitute ethnically motivated discrimination within the meaning of Article 14 in conjunction with the procedural limb of Article 2. The Court found no violation of the procedural limb of Article 2 as regards Hungary, noting that it had followed the Transfer Convention procedure to the letter to ensure R.S. completed his sentence in Azerbaijan.

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

(i) The first question the Court considered was whether Azerbaijan could be held responsible for the crimes in question and thus of a substantive violation of Article 2 of the Convention. The Court attached crucial importance to the fact that R.S. was not acting in the exercise of his official duties or on the orders of his superiors. It also rejected the applicants' argument based on Article 11 of the UN Draft Articles on the Responsibility of States of Internationally Wrongful Acts[22]. The Court noted that Article 11 set a very high threshold for State responsibility in this context, a threshold not limited to the mere "approval" and "endorsement" of the relevant act, but one which required that two cumulative conditions be fulfilled: clear and unequivocal "acknowledgement" and "adoption" of the act in issue as having been perpetrated by the State itself. Although the measures taken by the Azerbaijani government manifestly demonstrated its "approval" and "endorsement" of R.S.'s criminal acts, it had not been convincingly demonstrated (on the basis of the very stringent standards under international law) that the State of Azerbaijan had "clearly and unequivocally" "acknowledged" and "adopted" R.S.'s acts "as its own", thus directly and categorically assuming, as such, responsibility for the actual killing of one victim and the attempted murder of another. Those measures could rather be interpreted as having the purpose of publicly addressing and remedying R.S.'s adverse personal, professional and financial situation, which the authorities had perceived, unjustifiably in the Court's view, as being the consequence of the allegedly flawed criminal proceedings in Hungary.

(ii) The case also gave the Court the opportunity to apply its case-law on the issue of jurisdiction (Article 1) and compatibility *ratione loci* of an Article 2 complaint (procedural limb) against a home State (Azerbaijan), where a convicted prisoner is transferred from a sentencing State to the

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

home State with the aim of continuing his or her sentence in the home State. The Court emphasised that the enforcement of a sentence imposed in the context of the right to life had to be regarded as an integral part of a State's procedural obligation under Article 2. Regardless of where the crimes had been committed, and since Azerbaijan had agreed to and assumed the obligations under the Transfer Convention to continue the enforcement of R.S.'s prison sentence, it was bound to do so in compliance with its procedural obligations under Article 2. There were therefore "special features" that triggered the existence of Azerbaijan's jurisdictional link to the procedural obligation under Article 2 (*Kitanovska Stanojkovic and Others v. the former Yugoslav Republic of Macedonia*[23], and *Güzelyurtlu and Others v. Cyprus and Turkey*[24]). The acts of Azerbaijan, which had in effect granted R.S. impunity for a very serious ethnically biased crime without any convincing reason, were not compatible with its obligation under Article 2 to effectively deter the commission of offences against the lives of individuals.

(iii) Moreover, the Court examined, for the first time, the scope of the obligation of the sentencing State (Hungary) to ensure the completion of a prisoner's sentence after his or her transfer to another State, particularly in the light of the protection of the rights of victims of a crime or their next of kin. It found that the Hungarian authorities had taken sufficient steps in this respect, by following the procedure set out in the Transfer Convention to the letter. They had requested the Azerbaijani authorities to specify which procedure would be followed in the event of R.S.'s return. Although the Azerbaijani's authorities' reply had admittedly been incomplete and worded in general terms, there was no tangible evidence to show that the Hungarian authorities had unequivocally been or should have been aware that R.S. would be released upon his return to Azerbaijan. Indeed, given the time already served by R.S. in a Hungarian prison, the Court did not see how the competent Hungarian bodies could have done anything other than respect the procedure and the spirit of the Transfer Convention and proceed on the assumption that another Council of Europe member State would act in good faith.

(iv) Finally, the judgment is also noteworthy for the manner in which the Court examined the question of whether the State's failure to enforce a prison sentence imposed abroad for an ethnic hate crime amounted to a discriminatory difference in treatment within the meaning of Article 14 in conjunction with the procedural limb of Article 2 and, in

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

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

particular, for the manner in which the Court distributed the burden of proof in this respect (*Nachova and Others v. Bulgaria*[25]). In view of the special features of the case (R.S.'s promotion, the award of several benefits without any legal basis, his glorification as a hero by a number of high-ranking officials, as well as the creation of a special page on the website of the President in appreciation of R.S.), the applicants were considered to have put forward sufficiently strong, clear and concordant inferences as to make a convincing prima facie case that the measures in issue had been racially motivated. Given the difficulty for the applicants to prove such bias beyond reasonable doubt, the Court, in the particular circumstances of the case, reversed the burden of proof so that it became incumbent on Azerbaijan to disprove the arguable allegation of discrimination, which it had failed to do.

The judgment in *A and B v. Romania*[26] concerned the application and implementation of a witness protection programme.

The applicants, who had been called as witnesses in a corruption case involving highly placed officials, were included in the witness protection programme. They were given the status of "threatened witnesses" following the statements they had made to the prosecution. Under the protection protocols signed by the applicants, they were required to refrain from activity which would compromise the protection measures, or disclose their status or the identity of the police officers involved. A number of difficulties were experienced in the application and implementation of the protection programme. On the one hand, there had been delays in putting in place certain aspects of the programme: the authorities had lacked a coherent strategy and, on the ground, the protection officers had been badly briefed and negligent in their duties on certain occasions. On the other hand, the applicants had been uncooperative and difficult with the protection officers and the measures put in place. Their demands, particularly concerning their protection, were considered unattainable. In addition, they had maintained a social media and television presence to complain about their protection, thus risking compromising their protected-witness status. Despite attempts by the authorities to remove the applicants from the witness protection programme, the competent court maintained the protection measures.

25. *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 157, ECHR 2005-VII.
26. *A and B v. Romania*, nos. 48442/16 and 48831/16, 2 June 2020.

The applicants complained under Article 2 of the Convention about the implementation of the witness protection programme and the Court found no violation of that Article.

(i) The judgment is noteworthy in that, while the Court has already applied the principles set out in *Osman v. the United Kingdom*[27] to the question of whether individuals should have been put in a witness protection programme (in *R.R. and Others v. Hungary*[28]), this is the first time the Court has had to apply those principles to examine the implementation of a witness protection programme.

(ii) Key to its assessment was finding a balance between, on the one hand, the State's duty to protect under Article 2 of the Convention and, on the other, the individuals' duty to protect themselves and not to contribute to the risk. In particular:

– The Court examined whether the authorities had done all that could reasonably be expected of them to avoid a real and immediate risk to the applicants' lives. As soon as a risk had been identified, a series of concrete measures had been taken to protect the applicants, but it took long periods of time (in total more than one year and four months) before the applicants were formally included in the programme. The Court stressed, however, that the applicants had not been left without protection during this time – even if that protection was, at least initially, mostly improvised and carried out in the absence of regulations – and that the inevitable deficiencies had been corrected by the authorities. As to the other failures identified as regards the police officers on duty (and notably the absence of clear instructions from their superiors concerning the scope and aim of their mission and several omissions while on duty entailing risks to the applicants' safety), the Court noted that they had been investigated and promptly corrected.

– The Court also emphasised the applicants' duty to cooperate with the authorities and to abstain from any action that might compromise the safety of the mission, which had been clearly set out in the protection protocols to which they had consented. The Court considered that the above-mentioned flaws did not justify the applicants' provocative behaviour, repeated disregard of their responsibilities for their own protection and their failure to comply with the obligations on them. They were not only uncooperative with the protection team but also risked compromising their protected-witness status through their presence on social media and on television. Finally, the applicants potentially exposed themselves to a serious risk as they unilaterally decided to change their residence and move abroad.

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27. *Osman v. the United Kingdom*, 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII.
28. *R.R. and Others v. Hungary*, no. 19400/11, 4 December 2012.

The Court emphasised the authorities' efforts to continue the applicants' protection, despite the applicants' behaviour and even when they were abroad, as well as their willingness to find alternative solutions instead of withdrawing the applicants from the witness programme, which was an option open to them in domestic law. Consequently, the Court concluded that the authorities had done what could reasonably be expected of them to protect the applicants' lives and that they had not failed in their obligation under Article 2 of the Convention to protect them.

Prohibition of torture and inhuman or degrading treatment and punishment (Article 3)

Inhuman or degrading treatment

Hudorovič and Others v. Slovenia[29] concerned the conditions of access to safe drinking water. The applicants belonged to Roma communities residing in two illegal and unserviced settlements. They complained that the authorities had not taken sufficient measures to provide them with access to safe drinking water and sanitation.

It is of interest that the Court stated that it did not exclude the applicability of Article 3 in such a context (*O'Rourke v. the United Kingdom*[30], and *Budina v. Russia*[31]). However, the positive measures undertaken by the domestic authorities had provided the applicants with the opportunity to access safe drinking water, and the way in which they had access and whether they had actually accessed it was irrelevant. Accordingly, even assuming that the alleged suffering had reached the minimum threshold and that Article 3 was applicable, the Court found no violation of this provision.

Positive obligations

Buturugă v. Romania[32] is noteworthy in that the Court, for the first time, addressed the phenomenon of cyberbullying as an aspect of violence against women. It held in this connection that the State had failed to comply with its positive obligations under Articles 3 and 8 of the Convention.

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

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

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

32. *Buturugă v. Romania*, no. 56867/15, 11 February 2020. See also under Article 8 (Positive obligations) below.

The *Association Innocence en Danger et Association Enfance et Partage v. France*[33] judgment concerned the failure by the State to take necessary and appropriate measures to protect a child from ill-treatment by her parents leading to her death.

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

Before the Court, the applicant associations complained, mainly under the substantive limb of Articles 2 and 3 of the Convention, of the French authorities' failure to fulfil their positive obligations to protect the child from parental abuse. In addition, under Article 13 of the Convention, they complained that there had been no effective domestic remedy on account of the need to prove "gross negligence" (*faute lourde*) in order for the State to be found liable.

The Court found that there had been a violation of Article 3, as the domestic system had failed to protect M. from the severe abuse to which she had been subjected by her parents. It also found that there had been no violation of Article 13.

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

(ii) Secondly, the Court reiterated its case-law on the State's positive obligation under Article 3 to take specific measures in order to protect children or other vulnerable persons from criminal abuse perpetrated by third parties. It emphasised in this connection the need to secure rights that were practical and effective, and the need for the authorities' response to be adapted to the situation in order to fulfil that obligation, as explained in *Opuz v. Turkey*[34].

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33. *Association Innocence en Danger et Association Enfance et Partage v. France*, nos. 15343/15 and 16806/15, 4 June 2020. See also under Article 13 (Right to an effective remedy) below.
34. *Opuz v. Turkey*, no. 33401/02, ECHR 2009.

In the present case, while recognising the difficulties faced by the domestic authorities, the Court pointed out the following, in particular: while the public prosecutor's office had reacted immediately (on the very day of the report), the case had only been entrusted to a police investigator thirteen days later; no inquiries had been conducted with the specific aim of shedding light on M.'s family environment (especially in view of the family's frequent relocations) and the teachers who had reported their suspicions had not been interviewed; and, while not mandatory, the participation of a psychologist when M. was examined would have been appropriate. The Court further found that the combination of the total discontinuance of the case (in 2008) and the lack of any mechanism to centralise information had seriously reduced the chances of special monitoring of the child and prevented any useful exchange of information between the justice system and the social services. Moreover, while those services had certainly taken some steps (home visits), they had not engaged in any really meaningful action to establish the child's actual condition.

(iii) Thirdly, as regards the specific issue of parental abuse of children, the Court seems to have consolidated its approach, which consists of characterising such acts as "domestic violence", with reference to the scope of this concept as defined in the Council of Europe Convention on preventing and combating violence against women and domestic violence (*M. and M. v. Croatia*[35], and *D.M.D. v. Romania*[36]).

PROCEDURAL RIGHTS

Right to a fair hearing in civil proceedings (Article 6 § 1)

Fairness of the proceedings[37]

The judgment in *Sanofi Pasteur v. France*[38] concerned the starting-point of the prescription period for an action for damages in respect of bodily harm.

Following an injection with a vaccine manufactured by the applicant company, an individual contracted various illnesses, including multiple sclerosis. She brought civil liability proceedings against the applicant company and was awarded compensation. The applicant company

35. *M. and M. v. Croatia*, no. 10161/13, ECHR 2015 (extracts).
36. *D.M.D. v. Romania*, no. 23022/13, 3 October 2017.
37. See also, under Article 8 (Applicability), *Evers v. Germany*, no. 17895/14, 28 May 2020.
38. *Sanofi Pasteur v. France*, no. 25137/16, 13 February 2020.

argued that the legal prescription period (ten years) had begun to run from the date of purchase of the vaccine. The court of appeal found, however, that the period in question had began to run from the date that the illness stabilised. In the present case, however, given that stabilisation of the illness was impossible in that the pathology in question was a progressive one, the proceedings had not become time-barred. In support of its appeal on points of law, the applicant company requested, in particular, that the case be referred to the Court of Justice of the European Union (CJEU). The Court of Cassation dismissed the appeal on points of law and indicated that it was not necessary to refer a question to the CJEU for a preliminary ruling. Before the Court, the applicant company argued, in particular, that by fixing the starting-point of the prescription period for proceedings on the date at which the damage had stabilised – even though the underlying illness was not amenable to stabilisation – the action had in effect become not subject to limitation, in breach of the principle of legal certainty protected by the Convention. The Court did not share that view and found no violation of Article 6 § 1. It is interesting to note that it did hold that there had been a violation of Article 6 § 1 on account of the failure to give reasons for the refusal to refer the case for a preliminary ruling.

The judgment is interesting in so far as it concerns the starting-point to be fixed for the prescription period in respect of an action for damages in a case concerning bodily harm, which, in the applicant company's submissions, meant that this action was in reality not subject to limitation.

In this case the Court was not examining an application which had been lodged by a victim seeking compensation (*Howald Moor and Others v. Switzerland*[39]; *Eşim v. Turkey*[40]; and *Stubbings and Others v. the United Kingdom*[41]), but instead one lodged by the respondent to the action (see, in another context, *Oleksandr Volkov v. Ukraine*[42]). The situation was thus that a right derived by one person from the Convention was in conflict with a right, also derived from the Convention, enjoyed by another person: on the one hand, the victim's right of access to a court; on the other, the applicant company's right to legal certainty. This implied a balancing of the competing interests. The Court afforded a wide margin of appreciation to the State in this difficult balancing exercise. In the

39. *Howald Moor and Others v. Switzerland*, nos. 52067/10 and 41072/11, 11 March 2014.

40. *Eşim v. Turkey*, no. 59601/09, 17 September 2013.

41. *Stubbings and Others v. the United Kingdom*, 22 October 1996, *Reports of Judgments and Decisions* 1996-IV.

42. *Oleksandr Volkov v. Ukraine*, no. 21722/11, §§ 138-40, ECHR 2013.

present case, it noted that the French legislation was intended to enable the victim to obtain full compensation for the bodily harm sustained, the extent of which could only be ascertained after his or her condition had stabilised. The Court found that it could not call into question, as such, the choice made in the national legislation to attach greater weight to the right of access to a court of individuals who had sustained physical injury than it attached to the right to legal certainty of the persons who were liable for those injuries. In this connection, it reiterated the importance attached by the Convention to the protection of physical integrity, which was covered by Articles 3 and 8 of the Convention. The approach in issue also made it possible to take account of the needs of persons suffering from a progressive illness, such as multiple sclerosis.

Presumption of innocence (Article 6 § 2)

Farzaliyev v. Azerbaijan[43] concerned the existence of a "criminal charge" and the applicablity of Article 6 § 2.

The applicant is the former Prime Minister of an autonomous region in Azerbaijan whose term of office ended in the early 1990s. In November 2005 a criminal investigation for embezzlement was opened relating to his time in office. Two months later, in January 2006, the investigation was discontinued as time-barred. The following month the prosecutor who had led the criminal investigation instituted civil proceedings against the applicant for embezzlement. The domestic courts ordered the applicant to pay compensation for – as was clearly indicated – his "crime" of embezzlement. The applicant had never been questioned or charged during the brief criminal investigation and, indeed, only discovered that there had been such an investigation later during the civil proceedings.

He complained to the Court under Article 6 § 1 about the unfairness of the civil proceedings and under Article 6 § 2 that the domestic courts in the civil proceedings had breached his right to be presumed innocent by declaring him guilty of the crime of embezzlement. The Court found a violation of both provisions.

The judgment is noteworthy for two reasons: first, because it confirms that the moment from which a "criminal charge" exists is to be interpreted in the same way under both Article 6 § 1 and Article 6 § 2 and, further, because it confirmed and applied a narrow exception to

43. *Farzaliyev v. Azerbaijan*, no. 29620/07, 28 May 2020.

this rule (recently recognised in *Batiashvili v. Georgia*[44]) to find Article 6 § 2 applicable in the particular circumstances of the case. In particular:

(i) The Court confirmed that a "criminal charge" exists within the meaning of Article 6 § 2 from the moment an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been "substantially affected" by actions taken by the authorities as a result of a suspicion against him (as regards Article 6 § 1, see, in the context of the fairness of the proceedings, *Simeonovi v. Bulgaria*[45], with further references, and, in the context of the length of proceedings, *Mamič v. Slovenia (no. 2)*[46], and *Liblik and Others v. Estonia*[47]).

(ii) According to *Allen v. the United Kingdom*[48], Article 6 § 2 would be violated if, without having been convicted in earlier criminal proceedings, a later judicial statement reflects the view that the applicant was guilty. According to the above-described definition of a "criminal charge", for Article 6 § 2 to apply to such a complaint to protect the applicant from statements made in later linked proceedings (the civil action in the present case), the applicant would need to have been previously actually charged or "substantially affected", the latter generally meaning he or she had been aware of an investigation when it was taking place (through, for example, being questioned by the police).

However, neither event occurred in the present case: the applicant was never actually charged and was not made aware of the criminal investigation until it was over. Finding – as it had done recently in *Batiashvili*, cited above, in the rather unique circumstances of that case – an exception to the above-described principles concerning the applicability of Article 6 §§ 1 and 2 given the very particular circumstances of the present case, the Court nonetheless concluded that the applicant could be considered to have been "substantially affected" by the conduct of the investigating authorities (and thus "charged with a criminal offence"). In particular, the Chamber found that:

> 48. ... The question before it is whether the applicant was a person "charged with a criminal offence" within the autonomous meaning of Article 6 § 2 of the Convention. In order to answer that question, the Court is compelled to look behind the appearances and investigate the realities of the situation before it (see *Batiashvili*

44. *Batiashvili v. Georgia*, no. 8284/07, 10 October 2019.
45. *Simeonovi v. Bulgaria* [GC], no. 21980/04, §§ 110-11, 12 May 2017.
46. *Mamič v. Slovenia (no. 2)*, no. 75778/01, § 24, ECHR 2006-X (extracts).
47. *Liblik and Others v. Estonia*, nos. 173/15 and 5 others, § 94, 28 May 2019.
48. *Allen v. the United Kingdom* [GC], no. 25424/09, ECHR 2013.

> *v. Georgia*, no. 8284/07, § 79, 10 October 2019). It notes once again that it is true that the applicant was never formally charged with a criminal offence in the discontinued criminal proceedings and that he became aware of the allegations made against him in those proceedings only ... after the civil claim ... had been lodged against him on 16 February 2006, less than a month after their discontinuation on 21 January 2006. However, having regard to the case-specific sequence of closely interconnected events ... considered as a whole, as well as to the relatively close temporal proximity between the relevant events in question, the Court considers that, in the particular circumstances of the present case, the combined effect of the authorities' actions taken as a result of a suspicion against the applicant was that his situation was "substantially affected" by the conduct of the authorities (compare, *mutatis mutandis*, *Batiashvili*, cited above, § 94) and that therefore, for the purposes of the present complaint, he must be considered as a person "charged with a criminal offence" within the autonomous meaning of Article 6 § 2.

Other rights in criminal proceedings

No punishment without law (Article 7)

In response to the request submitted by the Armenian Constitutional Court under Protocol No. 16 to the Convention, the Court delivered its advisory opinion[49] on 29 May 2020. The opinion concerned Article 7 and the use of certain referencing techniques when defining an offence and comparing the criminal provisions in force at the time of the commission of an alleged offence with the subsequently amended provisions. The Court further developed some aspects of its case-law relating to Article 7 of the Convention.

Baldassi and Others v. France[50] concerned the existence of a case-law precedent rendering the likelihood of a criminal conviction foreseeable.

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49. *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* [GC], request no. P16-2019-001, Armenian Constitutional Court, 29 May 2020. See also under Article 7 of Protocol No. 16 (Advisory opinions) below.

50. *Baldassi and Others v. France*, nos. 15271/16 and 6 others, 11 June 2020. See also under Article 10 (Freedom of expression) below.

The case concerned the criminal conviction of activists in the Palestinian cause who were involved in the international campaign "Boycott, Divestment and Sanctions" launched by Palestinian non-governmental organisations following the publication by the International Court of Justice of an opinion concerning the unlawfulness of the Israeli separation barrier, with a view to putting pressure on Israel to comply with international law. The applicants were convicted of incitement to economic discrimination under section 24(8) of the Law of 29 July 1881 on freedom of the press on account of their involvement in actions to boycott Israeli products.

They complained to the Court of violations of Articles 7 and 10 of the Convention, emphasising in particular that the general nature of the words "incitement to discrimination" in the provision under which they had been convicted was contrary to Article 7, because a very broad term was being applied to an ambivalent concept, namely discrimination. The Court found no violation of Article 7 of the Convention and a violation of Article 10.

The most interesting feature of this judgment is the Court's finding concerning the conformity with Article 7 of the application of the Law on freedom of the press to the present case. While expressing reservations about the foreseeability of the references among different legislative texts underpinning the applicants' conviction, that is to say, on the one hand, between various subsections of the 1881 Law and, on the other, between the latter and the Criminal Code, the Court concluded that as the case-law had stood at the material time, the applicants should have known that they were likely to be convicted on that basis for calling for a boycott of products imported from Israel.

OTHERS RIGHTS AND FREEDOMS

Right to respect for one's private and family life, home and correspondence (Article 8)

Applicability[51]

In *Evers v. Germany*[52] the Court concluded that Article 8 was not applicable to the applicant's challenge against a contact ban concerning a disabled woman whom he had sexually abused.

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

52. *Evers v. Germany*, no. 17895/14, 28 May 2020.

The applicant had sexually abused, and had a child with, the mentally disabled daughter of the woman with whom he was living. Criminal proceedings, initiated against him for sexual abuse of a person incapable of resistance, were discontinued. The disabled woman was placed in specialised residential care. The district court appointed a guardian and issued a contact ban against the applicant, who wished to continue his sexual relationship with the disabled woman. The applicant's appeal against the contact ban was dismissed by the Regional Court.

The applicant complained under Article 8 about the contact ban. He also alleged certain shortcomings in the domestic proceedings including that he had not been heard in person, in particular, before the Regional Court. The Court found the complaint under Article 8 to be inadmissible and that there had been a violation of Article 6 § 1 given the Regional Court's refusal to hear the applicant in person.

The judgment is noteworthy for its finding that the applicant's complaint did not fall within the scope of Article 8 and, in particular, of "private life", which is generally considered to be a broad term not susceptible to exhaustive definition. In particular:

In the first place, the Court considered that the mere fact that the applicant had been living in a common household with the disabled woman and had been the biological father of the latter's child did not constitute, in the circumstances of the case, a family link which would fall under the protection of "family life".

Secondly, and as regards the "private life" aspect of Article 8, the Court reiterated that, while this provision protected the right to establish and develop relationships with other human beings and the outside world (*Denisov v. Ukraine*[53]), a broad construction of Article 8 did not mean that it protected every activity in which a person might seek to engage with other human beings in order to establish and develop such relationships (*Friend and Others v. the United Kingdom*[54], and *Gough v. the United Kingdom*[55]). The Court explained that it had generally assumed contact with a specific other person to constitute a fundamental element of Article 8 mainly under the family-life limb (see, for example, *Elsholz v. Germany*[56] (concerning parents and children); *Kruškić v. Croatia*[57] (concerning grandparents and their grandchildren);

53. *Denisov v. Ukraine* [GC], no. 76639/11, § 95, 25 September 2018.

54. *Friend and Others v. the United Kingdom* (dec.) , nos. 16072/06 and 27809/08, § 41, 24 November 2009.

55. *Gough v. the United Kingdom*, no. 49327/11, § 183, 28 October 2014.

56. *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000-VIII.

57. *Kruškić v. Croatia* (dec.), no. 10140/13, § 111, 25 November 2014.

and *Messina v. Italy (no. 2)*[58] (regarding prisoners and close members of their family)). However, the Court emphasised that private life did not as a rule come into play in situations where a complainant did not enjoy family life within the meaning of Article 8 in relation to a person with whom he or she wanted to establish contact and where that person did not share the wish for contact. This was all the more so if that person had been the victim of behaviour which had been deemed detrimental by the domestic courts.

Since, moreover, Article 8 could not be relied upon to complain about, *inter alia*, personal or psychological loss which was the foreseeable consequence of one's own actions, such as a criminal offence or other misconduct entailing a measure of legal responsibility with foreseeable negative effects on private life (*Denisov*, cited above, § 98), the Court concluded that the applicant's challenge against the contact ban did not fall within the scope of the "private life" aspect of Article 8 and was thus incompatible *ratione materiae* with that provision of the Convention.

Private life[59]

The domestic legal obligation on service providers to store the personal data of users of their prepaid mobile phone SIM cards was examined in *Breyer v. Germany*[60].

In June 2004 amendments to the Telecommunications Act introduced a legal obligation for telecommunication providers to acquire and store personal details of all their customers, including customers where such details were not necessary for billing purposes or other contractual reasons, such as those who purchased prepaid mobile phone SIM cards. These amendments were considered necessary by the domestic authorities to comply with obligations arising from European Union law. The applicants purchased prepaid mobile phone SIM cards and were required to register certain personal details (including the phone number and their name, address and date of birth) with their respective service providers when activating those SIM cards. The applicants challenged this obligation before the Federal Constitutional Court, which found that such an obligation was not incompatible with the Basic Law. The Court found that the legal obligation under section 111 of the Telecommunications Act was not contrary to Article 8 of the Convention.

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58. *Messina v. Italy (no. 2)*, no. 25498/94, § 61, ECHR 2000-X.

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

60. *Breyer v. Germany*, no. 50001/12, 30 January 2020.

The judgment is noteworthy as it concerns a novel data-protection issue. It also contains a comprehensive overview of the case-law under Article 8 relating to the protection of private life when compiling personal data, in particular as regards the principle of informational self-determination (*Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*[61]).

(i) As regards the nature of the interference with Article 8 rights, the Court reiterated that the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8 (*Leander v. Sweden*[62]). In this connection, the Court also took note of the finding of the Federal Constitutional Court to the effect that the extent of protection of the right to informational self-determination under domestic law was not restricted to information which by its very nature was sensitive and that, in view of the processing possibilities, there was no item of personal data which was of itself (namely, regardless of the context of its use) insignificant.

(ii) As regards the lawfulness of the interference, the Court found that the very storage of data had a basis in the law (section 111 of the Telecommunications Act), which was sufficiently clear and foreseeable. Moreover, the duration of the storage was clearly regulated and the technical side of the storage was clearly outlined. In so far as safeguards, access of third parties and further use of the stored data were concerned, section 111 had to be read in conjunction with other provisions of that Act, which the Court found more appropriate to examine in its proportionality assessment.

(iii) In its proportionality assessment, a number of issues were of importance to the Court.

It acknowledged that the pre-registration of mobile-phone subscribers substantially simplified and accelerated investigation by law-enforcement agencies and was capable of contributing to effective law enforcement and prevention of disorder or crime. In this connection it also reiterated that in a national-security context national authorities enjoyed a certain margin of appreciation when choosing the means for achieving a legitimate aim and that there was no consensus between the Council of Europe member States as regards the retention of subscriber information of prepaid SIM card customers. Thus, the Court accepted that the obligation to store subscriber information under section 111 of the Telecommunications Act was, in general, a suitable

61. *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 137, 27 June 2017.

62. *Leander v. Sweden*, 26 March 1987, § 48, Series A no. 116.

response to changes in communication behaviour and in the means of telecommunications.

It was significant that the storage of data in issue concerned only a limited data set: this data did not include any highly personal information or allow the creation of personality profiles or the tracking of the movements of mobile-phone subscribers. Moreover, no data concerning individual communication events were stored. The Court thus distinguished this level of interference from previous cases concerning the collection of more sensitive data or cases in which the registration in a particular database led to frequent checks or further collection of private information. In this connection, the Court also referred to the findings of the Court of Justice of the European Union in the case of *Ministerio Fiscal*[63]. In sum, the Court concluded that the interference was, while not trivial, of a rather limited nature.

Certain safeguards were highlighted by the Court in this context.

In the first place, the Court observed that there were no technical insecurities as regards the storage of data, that the duration of the storage was limited to the expiry of the calendar year following the year in which the contractual relationship ended, and that the stored data appeared limited to the information necessary to clearly identify the relevant subscriber.

Secondly, the Court examined the possibilities for future access to and use of the data stored and, notably, information requests which could be made under sections 112 and 113 of the Telecommunications Act. It found it important that the named authorities who could request access to the stored data under section 112 of the Act were concerned with law enforcement or the protection of national security. While under section 113 of the Act the authorities who could request access to the data were identified only by reference to the tasks they performed and were not therefore explicitly enumerated, those authorities had to make a written request and the wording of the provision was detailed enough to clearly foresee which authorities were empowered to request information. In each case, the stored data were further protected against excessive or abusive information requests by the fact that the requesting authority required an additional legal basis to retrieve the data. Moreover, these information requests under sections 112 and 113 were also subjected to review and supervision. The Court explained that the level of review and supervision was an important, but not a decisive, element in the proportionality assessment of the collection and storage of a limited data set, such as that in the present case. As regards the

63. *Ministerio Fiscal*, C-207/16, 2 October 2018, EU:C:2018:788.

applicable regime, in particular, the Court noted that the Federal Network Agency was competent to examine the admissibility of the transmission of data when needed; that each retrieval and the relevant information regarding the retrieval were recorded for the purpose of data-protection supervision by the relevant independent data-protection authorities; that these authorities could also be seized in an individual appeal relating to the collection, processing or use of personal data by public bodies; and that legal redress against information retrieval could be sought under general rules of domestic law, and was available against the final decisions of the authorities.

The decision in *Platini v. Switzerland*[64] concerned the protection of private life in connection with an arbitral decision in professional sport that resulted in a suspension of activity for the applicant.

The applicant was a former professional football player, who had been captain and coach of the France national team. He had served as President of UEFA (Union of European Football Associations) and Vice-President of FIFA (*Fédération Internationale de Football Association*). Disciplinary proceedings were brought against him in respect of a salary "supplement" of 2 million Swiss francs, which was granted to him by FIFA's former President, against whom proceedings had also been brought, both criminal and disciplinary. The FIFA sanction consisted of his suspension from any football-related professional activity for six years plus a fine. The applicant appealed against this decision to the Court of Arbitration for Sport (CAS), which reduced the suspension period from six years to four and decreased the amount of the fine. The Swiss Federal Court upheld that decision. Before the Court, the applicant complained in particular that the sanction was incompatible with his freedom to exercise a professional activity, in breach of Article 8. The Court rejected the complaint as manifestly ill-founded.

The decision is of interest as the Court provided clarification under Article 8, firstly, on its jurisdiction *ratione personae* in such matters and, secondly, for the first time, on the applicability of Article 8 (private life) to this type of professional dispute and on the State's positive obligations and margin of appreciation.

(i) As regards the Court's jurisdiction: in the case of *Mutu and Pechstein v. Switzerland*[65], the respondent State's responsibility under the Convention was acknowledged when it came to the Article 6 compliance

64. *Platini v. Switzerland* (dec.), no. 526/18, 11 February 2020.

65. *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, §§ 65-67, 2 October 2018.

of the CAS proceedings as validated by the Federal Court. However, the issue in the present case was the State's responsibility under Article 8 for the substance of the decisions by those organs. The Court took the view that the relevant decisions engaged the State's responsibility for two reasons: firstly, Swiss law provides for the legal effects of CAS awards and for the jurisdiction of the Federal Court to examine their validity; secondly, that apex court had dismissed the applicant's appeal, thereby giving the arbitral decision the force of *res judicata* in the Swiss legal order. The Court thus found it had jurisdiction to entertain the application against Switzerland.

(ii) As to the applicability of Article 8 to the professional dispute in question, the Court applied the *Denisov* approach, based on the consequences of the professional sanction for the applicant's private life (*Denisov v. Ukraine*[66]). Having regard to the concrete and convincing arguments submitted by the applicant, it found that the threshold of severity required to engage Article 8 had been attained (ibid., § 116). It acknowledged that the applicant, who had spent his whole career in football, could indeed feel significantly affected by the four-year ban on any football-related activity.

(iii) Concerning the positive obligations imposed on the respondent State and the extent of its margin of appreciation, the Court first pointed out that, unlike the applicants in *Mutu and Pechstein* (cited above, §§ 114 and 122), the present applicant had not claimed before the Court that he had been forced to sign compulsory arbitration clauses excluding the possibility of submitting disputes to an ordinary domestic court. Moreover, he had expressly accepted the jurisdiction of the CAS. The Court, having examined the procedure and the decisions, found that the applicant had, in his dispute with FIFA, been afforded adequate institutional and procedural safeguards in the context of both private (CAS) and State (Federal Court) adjudicatory organs, as required by Article 8. Lastly, it took account of the State's significant margin of appreciation in the present case.

Positive obligations

Buturugă v. Romania[67] is noteworthy in that the Court, for the first time, addressed the phenomenon of cyberbullying as an aspect of violence against women under Articles 3 and 8 of the Convention.

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66. *Denisov v. Ukraine* [GC], no. 76639/11, §§ 115-17, 25 September 2018.

67. *Buturugă v. Romania*, no. 56867/15, 11 February 2020. See also under Article 3 (Positive obligations) above.

The applicant complained to the authorities about the violent behaviour of her ex-husband. He received an administrative fine. The criminal proceedings against him were discontinued, essentially on the ground that his conduct had not been sufficiently serious to be designated as a criminal offence. Moreover, the authorities did not address the acts in issue from the perspective of domestic violence. As part of the proceedings, the applicant requested an electronic search of the family computer, alleging that her ex-husband had wrongfully consulted her electronic accounts, including her Facebook account, and had copied her private conversations, documents and photos. This request was refused on the ground that the evidence likely to be gathered by such a search was unrelated to the offences allegedly committed by her ex-husband. A further complaint by the applicant, alleging a breach by her ex-husband of the secrecy of correspondence, was dismissed without an examination on the merits. The Court held in this connection that there had been a failure to comply with the positive obligations arising under Articles 3 and 8 of the Convention.

The judgment is noteworthy in that the Court, for the first time, addressed the phenomenon of cyberbullying as an aspect of violence against women.

The Court reiterated in this context that the phenomenon of domestic violence was not perceived as being limited to incidents of physical violence alone, but that it included, among other forms, psychological violence or harassment (compare *Opuz v. Turkey*[68]; *T.M. and C.M. v. the Republic of Moldova*[69]; and *Talpis v. Italy*[70]). In addition, cyberbullying was currently recognised as one aspect of violence against women and girls and could take on a variety of forms, including cyber-breaches of privacy, intrusion into the victim's computer and the capture, sharing and manipulation of data and images, including private data. In the context of domestic violence, cyber-surveillance was often carried out by the person's intimate partner. The Court therefore accepted that acts such as illicitly monitoring, accessing or saving one's partner's correspondence could be taken into account by the domestic authorities when investigating cases of domestic violence.

The Court also emphasised the need to address comprehensively the phenomenon of domestic violence in all its forms (see *Talpis*, cited above, § 129), which was of particular relevance in the present case. In examining the applicant's allegations of cyberbullying and her request

68. *Opuz v. Turkey*, no. 33401/02, §§ 132 and 138, ECHR 2009.

69. *T.M. and C.M. v. the Republic of Moldova*, no. 26608/11, § 47, 28 January 2014.

70. *Talpis v. Italy*, no. 41237/14, §§ 129-30, 2 March 2017.

to have the family computer searched, the national authorities had been overly formalistic in dismissing any connection with the domestic violence which she had already reported to them. The applicant had thus later been obliged to submit a new complaint alleging a breach of the confidentiality of her correspondence. In dealing with it separately, the authorities had failed to take into consideration the various forms that domestic violence could take.

In contrast, the Court adopted a comprehensive approach, by examining, under Articles 3 and 8 of the Convention, the allegations of physical violence and cyberbullying taken as a whole.

Hudorovič and Others v. Slovenia[71] sets out the criteria for determining the existence of a State's positive obligation under Article 8 to provide access to safe drinking water

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

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

(i) Relying on the consequence-based approach outlined in *Denisov v. Ukraine*[72], the Court defined as follows the threshold of severity which could bring Article 8 into play in this context: a "persistent and long-standing lack of access to safe drinking water" with "adverse

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

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

consequences for health and human dignity effectively eroding the core of private life and the enjoyment of a home".

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

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

– As to the comprehensive regulatory framework in place, the Court considered it reasonable that the State or its local authorities assumed responsibility for the provision of that service while it was left to the owners to install individual house connections at their own expense. Likewise, it appeared reasonable that alternative solutions such as the installation of individual water tanks or systems for harvesting rainwater were proposed in those areas not yet covered by a public water supply system.

– As regards the applicants' specific circumstances, the key consideration for the Court was the fact that they belonged to a socially disadvantaged group which faced greater obstacles than the majority in accessing basic utilities.

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

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

including an obligation to bear the entire burden of providing running water to the applicants' homes.

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

Freedom of expression (Article 10)

Freedom of expression

Magyar Kétfarkú Kutya Párt v. Hungary[73] concerned the foreseeability of restrictions on the freedom of expression of political parties in the context of an election or a referendum

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

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

The judgment is noteworthy in that it clarified the extent of the Court's scrutiny of restrictions on the freedom of expression of political

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

parties in an electoral context and, in particular, the level of foreseeability required of the legal basis for such a restriction.

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

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

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

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

The Court observed that the vagueness of the principle of the "exercise of rights in accordance with their purpose" relied on by the authorities had been noted by the Constitutional Court. The relevant legislation did not define what constituted a breach of that principle, it did not establish any criteria for determining which situation constituted a breach and it did not provide any examples. The relevant domestic regulatory framework allowed the restriction of voting-related expressive conduct on a case-by-case basis and therefore conferred a very wide discretion on the electoral bodies and on the domestic courts called upon to interpret and apply it. While the Constitutional Court

had restricted the reach of the said principle to voting-related conduct that entailed "negative consequences", it had not been established how the restriction in issue "related to, and addressed, a concrete 'negative consequence', whether potential or actual", particularly since the applicant party had not been found to have infringed the fairness of the referendum or the secrecy of the ballot.

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

Baldassi and Others v. France[74] concerned the right to call for a boycott as a specific form of expression.

The case concerned the criminal conviction of activists in the Palestinian cause who were involved in the international campaign "Boycott, Divestment and Sanctions" launched by Palestinian non-governmental organisations following the publication by the International Court of Justice of an opinion concerning the unlawfulness of the Israeli separation barrier, with a view to putting pressure on Israel to comply with international law. The applicants were convicted of incitement to economic discrimination under section 24(8) of the Law of 29 July 1881 on freedom of the press on account of their involvement in actions to boycott Israeli products.

They complained to the Court of violations of Articles 7 and 10 of the Convention, emphasising in particular that the general nature of the words "incitement to discrimination" in the provision under which they had been convicted was contrary to Article 7, because a very broad term was being applied to an ambivalent concept, namely discrimination. The Court found no violation of Article 7 of the Convention and a violation of Article 10.

The Court has seldom had occasion to consider the issue of the compatibility of a call for a boycott with Article 10 of the Convention, one previous case being *Willem v. France*[75]. The judgment in the present case is the first time the Court has designated boycotts as a means of

74. *Baldassi and Others v. France*, nos. 15271/16 and 6 others, 11 June 2020. See also under Article 7 (No punishment without law) above.

75. *Willem v. France*, no. 10883/05, 16 July 2009.

expressing protest opinions, while reiterating the limits which should not be overstepped in the framework of Article 10 of the Convention:

> 63. A boycott is first and foremost a means of expressing a public protest. A call for a boycott, which is intended to communicate protest opinions while calling for specific related actions, is therefore, in principle, protected by Article 10 of the Convention.
>
> 64. However, a call for a boycott is a special mode of exercise of freedom of expression in that it combines the expression of a protest opinion with incitement to differential treatment such that, depending on the particular circumstances, it is liable to amount to a call to discriminate against others. Incitement to discrimination is a form of incitement to intolerance, which, together with incitement to violence and hatred, is one of the limits which should never be overstepped in the framework of the exercise of freedom of expression (see, for example, *Perinçek*, cited above, § 240). However, incitement to different treatment is not necessarily the same as incitement to discrimination."

In its analysis of the necessity of the interference (the conviction of the applicants), the Court adopted a three-stage approach:

(i) First of all, it decided that the judgment in *Willem* (cited above), in which it had found no violation of Article 10 of the Convention, could not serve as a precedent here, having noted that Mr Willem had not been convicted on the basis of his political opinions but of incitement to a discriminatory act.

In that case the applicant had been a mayor who, in 2002, at a municipal council meeting with journalists in attendance and subsequently on the municipal website, had announced that he had asked the municipal catering services to boycott Israeli foodstuffs in protest against the Israeli Prime Minister's policy *vis-à-vis* the Palestinians. In announcing his decision, the applicant had been acting in his capacity as mayor and using his mayoral powers, in disregard of the concomitant duties of neutrality and discretion. He had made the announcement without a prior debate or vote in the municipal council, and therefore could not claim to have encouraged free discussion of a subject of public interest.

The Court drew the following distinctions between the circumstances of the present case and those in *Willem*: the applicants here were ordinary citizens who were not restricted by the duties and responsibilities arising from a mayoral mandate and whose influence on consumers was not comparable to that of a mayor on the services in his municipality; and it had manifestly been in order to trigger or stimulate

debate among supermarket customers that the applicants had issued the calls for a boycott which had led to the criminal proceedings of which they complained before the Court.

(ii) Reiterating the limits which should never be overstepped in the framework of exercising freedom of expression (see above), the Court emphasised that the applicants had not been convicted of making racist or antisemitic remarks or of inciting to hatred or violence; nor had they been convicted of engaging in violence or causing damage.

(iii) Without calling into question the interpretation of the law on which the applicants' conviction was based, that is to say incitement to economic discrimination, the Court assessed, in particular, the reasoning of the domestic court in convicting the applicants. It noted that French law, as interpreted and applied in the present case, prohibited any call for a boycott of products on account of their geographical origin whatever the tenor, grounds and circumstances of such a call.

The Court noted that by adjudicating on that legal basis, the domestic court had failed to give detailed reasons, which would have been all the more vital in this case as it concerned a situation in which Article 10 of the Convention required a high level of protection of the right to freedom of expression. Indeed, on the one hand, the actions and remarks imputed to the applicants had concerned a subject of public interest, that is to say, compliance by the State of Israel with public international law and the human rights situation in the occupied Palestinian territories, and had been part of a contemporary debate, in France and throughout the international community. On the other hand, the actions and words had fallen within the ambit of political or militant expression.

The Court deduced that the applicants' conviction was not based on relevant and sufficient grounds, applying rules in conformity with the principles set out in Article 10 and relying on an appropriate assessment of the facts. It found that there had been a violation of Article 10 of the Convention.

Right to an effective remedy (Article 13)[76]

In *Beizaras and Levickas v. Lithuania*[77] the Court decided to examine separately the applicants' complaint under Article 13 after finding a

76. See also, under Article 4 of Protocol No. 4 (Prohibition of collective expulsion of aliens), *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, 13 February 2020.

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

violation of Article 14 of the Convention taken in conjunction with Article 8.

The issue to be considered was whether a complaint under Article 13, based on discriminatory attitudes impacting on the effectiveness of remedies in the application of domestic law, gave rise to a separate issue to that already examined under Article 14 of the Convention and which had already given rise to a violation under that Article. In this regard, the Court noted that, in cases involving complaints under Article 13 based on such allegations, the Court had not usually considered it necessary to examine separately the complaints under that provision if a violation of Article 14 taken in conjunction with other Convention provisions had already been found (*Opuz v. Turkey*[78]). However, considering the nature and substance of the violation found in the applicants' case on the basis of Article 14 taken in conjunction with Article 8, the Court considered that a separate examination of the applicants' complaint was warranted.

The Court found a violation of Article 13 since the applicants had been denied an effective domestic remedy in respect of their complaint concerning a breach of their right to their private life, on account of their having been discriminated against because of their sexual orientation.

The *Association Innocence en Danger et Association Enfance et Partage v. France*[79] judgment concerned the failure by the State to take necessary and appropriate measures to protect a child from ill-treatment by her parents leading to her death.

An eight-year-old child, M., was subjected to repeated barbaric acts by her parents, leading to her death in August 2009. Following a police investigation, the public prosecutor's office had discontinued the case in October 2008. The applicants, two child-protection associations, brought civil proceedings against the State for a series of failings and negligence. Their case was dismissed.

Before the Court, the applicant associations complained, mainly under the substantive limb of Articles 2 and 3 of the Convention, of the French authorities' failure to fulfil their positive obligations to protect the child from parental abuse. In addition, under Article 13 of the Convention, they complained that there had been no effective domestic remedy on account of the need to prove "gross negligence" (*faute lourde*) in order for the State to be found liable.

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

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

The Court found that there had been a violation of Article 3, as the domestic system had failed to protect M. from the severe abuse to which she had been subjected by her parents. It also found that there had been no violation of Article 13.

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

Secondly, the judgment is of interest with regard to the assessment of the margin of appreciation to be afforded to States in fulfilling their obligation under Article 13 (*De Souza Ribeiro v. France*[80], citing *Jabari v. Turkey*[81]), in the light of Article 3. The Court found that the interpretation by the national courts of the minimum threshold of "gross negligence", within the meaning of Article L. 141-1 of the Code of Judicial Organisation, since it could be constituted by a series of more minor acts of negligence resulting in deficiencies in the justice system, thus fell within their margin of appreciation. The Court found that the fact that the applicant associations had not met the conditions laid down by Article L. 141-1 of that Code did not suffice for it to be concluded that the remedy, taken as a whole, was ineffective. The requirement to establish "gross negligence" had not negated the effectiveness of this remedy, which had been available to the applicant associations.

Prohibition of discrimination (Article 14)

Article 14 taken in conjunction with Article 2

The judgment in *Makuchyan and Minasyan v. Azerbaijan and Hungary*[82] is interesting for the way in which the Court examined the question whether the failure of the State to enforce a prison sentence imposed abroad for an ethnically biased crime could be considered a discriminatory difference in treatment within the meaning of Article 14 in conjunction with the procedural limb of Article 2.

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

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

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

Article 14 taken in conjunction with Article 8

In *Beizaras and Levickas v. Lithuania*[83] the Court emphasised the necessity of a criminal-law response to direct verbal assaults and physical threats based on homophobic attitudes.

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

The judgment is noteworthy in that it clarified the following two issues:

(i) Whether criminal-law measures are required with respect to direct verbal assaults and physical threats motivated by discriminatory attitudes (*R.B. v. Hungary*[84]; *Király and Dömötör v. Hungary*[85]; and *Alković v. Montenegro*[86]);

(ii) Whether a complaint based, under Article 13, on discriminatory attitudes impacting on the effectiveness of remedies in the application of domestic law gives rise to a separate issue to that raised under Article 14 of the Convention.

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83. *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020. See also under Article 35 § 1 (Exhaustion of domestic remedies) and Article 13 (Right to an effective remedy) above.
84. *R.B. v. Hungary*, no. 64602/12, §§ 80 and 84-85, 12 April 2016.
85. *Király and Dömötör v. Hungary*, no. 10851/13, § 76, 17 January 2017.
86. *Alković v. Montenegro*, no. 66895/10, §§ 8, 11, 65 and 69, 5 December 2017.

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

(ii) The Court also examined whether Article 13 could be infringed in situations where generally effective remedies are considered not to have operated effectively in a particular case owing to discriminatory attitudes negatively affecting the application of national law. In this regard, the Court noted that, in cases involving complaints under Article 13 based on such allegations, the Court had usually not considered it necessary to examine separately the complaints under that provision if a violation of Article 14 taken in conjunction with other Convention provisions had already been found (*Opuz v. Turkey*[87]). However, considering the nature and substance of the violation found in the applicants' case on the basis of Article 14 taken in conjunction with Article 8, the Court considered that a separate examination of the applicants' complaint was warranted. Having regard to the general developments in the case-law of the national courts, conclusions by international monitoring bodies and statistical information provided, the Court concluded that there had been a violation of Article 13 mainly on the following grounds:

- it did not appear that the Supreme Court had had an opportunity to provide greater clarity on the standards to be applied in cases of hate speech of comparable gravity: the manner in which its case-law

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

had been applied did not provide for an effective domestic remedy for complaints about homophobic discrimination;

- the growing level of intolerance against sexual minorities had remained largely unchecked;
- the failure by law-enforcement institutions to acknowledge bias as a motive for such crimes and to adopt an approach adequate to the seriousness of the situation; and
- the authorities' lack of a comprehensive strategy to tackle the issue of homophobic hate speech.

Prohibition of collective expulsion of aliens (Article 4 of Protocol No. 4)

The immediate and forcible return of aliens from a land border, following an attempt by migrants to cross in an unauthorised manner and by taking advantage of the fact that there was a large number of them, was examined in *N.D. and N.T. v. Spain*[88].

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

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

(i) In the context of the applicability of Article 4 of Protocol No. 4, the Grand Chamber was, for the first time, called upon to ascertain whether the concept of "expulsion" as used in that Article also covered the non-admission of aliens at a State border or – in respect of States belonging to the Schengen area – at an external border of that area. Interpreting the relevant terms autonomously, it took the view that the

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

protection of the Convention, particularly Article 3, which embraces the prohibition of *refoulement* as defined in the 1951 Geneva Convention relating to the Status of Refugees, cannot be denied or rendered ineffective on the basis of purely formal considerations, for instance on the ground that the relevant persons could not make a valid claim for such protection as they had not crossed the State's border lawfully. The Grand Chamber therefore confirmed the interpretation of the term "expulsion" in the generic meaning in current use ("to drive away from a place"; see *Khlaifia and Others v. Italy*[89], and *Hirsi Jamaa and Others v. Italy*[90]). It further specified that this term refers to any forcible removal of an alien from a State's territory, irrespective of the lawfulness of the person's stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or asylum-seeker or his or her conduct when crossing the border. It is also of interest that the Grand Chamber confirmed the relevance of the recent judgments in *Hirsi Jamaa and Others* (cited above), *Sharifi and Others v. Italy and Greece*[91] and *Khlaifia and Others* (cited above), concerning applicants who had attempted to enter a State's territory by sea, to the circumstances of the instant case, refusing to adopt a different interpretation of the term "expulsion" in the context of an attempt to cross a national border by land as in the present case. It follows from this case-law that Article 3 of the Convention and Article 4 of Protocol No. 4 have been found to apply to any situation coming within the jurisdiction of a Contracting State, including to situations or points in time where the authorities of the State in question had not yet examined the existence of grounds entitling the persons concerned to claim protection under these provisions. The Grand Chamber concluded that the applicants, who were within Spain's jurisdiction when forcibly removed from its territory by members of the Civil Guard, had been subjected to an "expulsion" within the meaning of Article 4 of Protocol No. 4, which provision was therefore applicable.

(ii) The Grand Chamber then turned to the extent of the protection to be afforded under Article 4 of Protocol No. 4 to applicants, such as those in the present case, whose conduct created "a clearly disruptive situation which is difficult to control and endangers public safety". It decided to apply the principle drawn from the Court's well-established case-law according to which there is no violation of this provision if the lack of an individual expulsion decision can be attributed to the

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

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

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

applicant's own conduct (see *Khlaifia and Others*, cited above, § 240; *Hirsi Jamaa and Others*, cited above, § 184; *M.A. v. Cyprus*[92]; *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia*[93]; and *Dritsas and Others v. Italy*[94]). It also developed a two-tier test for the assessment of complaints in this particular context. In the first place, the Court considered it important to take account of whether the respondent State in a particular case has provided genuine and effective access to a means of legal entry, in particular border procedures. Such means should allow all persons who face persecution to submit an application for protection, based in particular on Article 3, under conditions which ensure that the application is processed in a manner consistent with international norms, including the Convention. Secondly, where the respondent State has provided such access but an applicant has not made use of it, the Court will consider, in the context of the case and without prejudice to the application of Articles 2 and 3, whether there were cogent reasons not to do so which were based on objective facts for which the respondent State was responsible. Only the absence of such cogent reasons preventing the use of these procedures could lead to this being regarded as the consequence of the applicants' own conduct, justifying the lack of individual identification.

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

In the instant case, the Grand Chamber was satisfied that Spanish law afforded the applicants several possible means of seeking admission to the national territory, in particular at the Beni Enzar border crossing point. On the facts, it was not persuaded that the applicants had demonstrated

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

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

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

the required cogent reasons for not using it, which was sufficient of itself to conclude that there had been no breach of Article 4 of Protocol No. 4. The Grand Chamber also took note of the applicants' unexplained failure to apply to Spanish embassies or consulates in their countries of origin or transit, or in Morocco. In any event, their complaints under Article 3 had been declared inadmissible by the Chamber and they had been unable to indicate the slightest concrete factual or legal ground which would have precluded their removal had they been registered individually. Consequently, the lack of individual removal decisions had been a consequence of the applicants' own conduct, namely, their failure to use the official entry procedures. The Grand Chamber emphasised, however, that the finding of no violation of Article 4 of Protocol No. 4 in this case does not call into question the obligation and necessity for Contracting States to protect their borders in a manner which complies with the Convention guarantees, and in particular with the obligation of *non-refoulement*.

ADVISORY OPINIONS (ARTICLE 1 OF PROTOCOL No. 16[95])

In response to the request submitted by the Armenian Constitutional Court under Protocol No. 16 to the Convention, the Court delivered its advisory opinion[96] on 29 May 2020, which further defines the scope of advisory opinions. The opinion concerned Article 7 and the use of certain referencing techniques when defining an offence and comparing the criminal provisions in force at the time of the commission of an alleged offence with the subsequently amended provisions.

In 2018 a former President of Armenia, Mr R. Kocharyan, was charged with overthrowing the constitutional order essentially on account of having declared a state of emergency and used the armed forces to quell post-election protests in February and March 2008. By the time he was charged in 2018 the provisions of the Criminal Code had been amended (in 2009) so that the definition of the offence in issue had become broader in one respect and narrower in another, when compared to the provision which had been in force at the time of the commission of the

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

96. *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* [GC], request no. P16-2019-001, Armenian Constitutional Court, 29 May 2020. See also under Article 7 (No punishment without law) above.

alleged offences in 2008. Both the first-instance court and Mr Kocharyan lodged applications with the Constitutional Court, which then requested this Court to give an advisory opinion on the following questions:

> 1. Does the concept of "law" under Article 7 of the Convention and referred to in other Articles of the Convention, for instance in Articles 8 to 11, have the same degree of qualitative requirements (certainty, accessibility, foreseeability and stability)?
>
> 2. If not, what are the standards of delineation?
>
> 3. Does the criminal law that defines a crime and contains a reference to certain legal provisions of a legal act with supreme legal force and higher level of abstraction meet the requirements of certainty, accessibility, foreseeability and stability?
>
> 4. In the light of the principle of non-retroactivity of criminal law (Article 7 § 1 of the Convention), what standards are established for comparing the criminal law in force at the time of committal of the crime and the amended criminal law, in order to identify their contextual (essential) similarities or differences?

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

In the first place, since the Court considered the questions to be at least in part broad and general, it reiterated that its opinions must be confined to issues directly connected to the pending domestic proceedings, inferring therefrom the power to reformulate and combine the submitted questions having regard to the specific factual and legal circumstances in issue in the domestic proceedings. It also clarified that the panel's decision to accept the request as a whole could neither deprive the Court of the possibility of employing the full range of the powers conferred upon it, including in relation to the Court's jurisdiction, nor preclude the Court itself from assessing (on the basis of the request, the observations received and all the other material before it) whether each of the submitted questions fulfilled the requirements of Article 1 of Protocol No. 16. On this basis, the Court decided not to answer the first and second questions, which were found to have no direct link with the domestic proceedings and could not be reformulated so as to enable the Court to discharge its advisory function effectively and in accordance with its purpose.

Secondly, a particular feature of the present request was the preliminary nature of the proceedings before the Constitutional Court,

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

(ii) The Court went on to respond to the remaining questions (the third and fourth) in the request and, in so doing, further developed certain aspects of its case-law under Article 7 of the Convention.

(a) The third question referred to the fact that Mr Kocharyan had been accused of an offence which was defined by reference to certain provisions of the Constitution. In responding to this question in the light of the requirements of clarity and foreseeability arising out of Article 7, the Court, for the first time, explicitly ruled on the technique of "blanket reference" or "legislation by reference", that is, where substantive provisions of the criminal law ("referencing provisions") referred, when defining the constituent elements of criminal offences, to legal provisions outside the criminal law ("referenced provisions"):

> Using the "blanket reference" or "legislation by reference" technique in criminalising acts or omissions is not in itself incompatible with the requirements of Article 7 of the Convention. The referencing provision and the referenced provision, read together, must enable the individual concerned to foresee, if need be with the help of appropriate legal advice, what conduct would make him or her criminally liable. This requirement applies equally to situations where the referenced provision has a higher hierarchical rank in the legal order concerned or a higher level of abstraction than the referencing provision.
>
> The most effective way of ensuring clarity and foreseeability is for the reference to be explicit, and for the referencing provision to set out the constituent elements of the offence. Moreover, the referenced provisions may not extend the scope of criminalisation as set out by the referencing provision. In any event, it is up to the court applying both the referencing provision and the referenced provision to assess whether criminal liability was foreseeable in the circumstances of the case.

In reaching this conclusion, the Court drew on case-law in which this technique had been implicitly accepted (*Kuolelis and Others v.*

Lithuania[97], and *Haarde v. Iceland*[98]) and on the comparative material available to it. It also specified that constitutional provisions were often developed further through acts of lower hierarchical levels, through non-codified constitutional customs and through jurisprudence. The Court thus confirmed its previous finding that Article 7 did not exclude that evidence of existing constitutional practice might form part of the national court's overall analysis of foreseeability of an offence based on a constitutional provision. Furthermore, both of the above-cited cases, in which no breach of Article 7 had been found, indicated that the status of the accused was a relevant consideration so that particular caution may be required from professional politicians/holders of high office in assessing whether conduct could entail criminal liability.

(b) Finally, the fourth question in the request concerned the amendment of the definition of the offence in issue, which became broader in one respect and narrower in another, compared to the provision which had been in force at the time of the commission of the alleged offence. While its case-law did not offer a comprehensive set of criteria for comparing successive criminal laws, the Court drew upon its approach in cases relating to the reclassification of charges (*G. v. France*[99]; *Ould Dah v. France*[100]; *Berardi and Mularoni v. San Marino*[101]; and *Rohlena v. the Czech Republic*[102]), emphasising in particular that the Court has regard to the specific circumstances of the case, the formal classification of the offences in issue being of no concern. The Court thereby extended the application of the "principle of concretisation" – developed in the context of the amendment of penalties (*Maktouf and Damjanović v. Bosnia and Herzegovina*[103]) – to cases, such as the present one, involving an amendment of the definition of the offence itself. Based on that principle, if the subsequent law is considered more severe than the law in force at the time of the alleged commission of the offence, it may not be applied.

97. *Kuolelis and Others v. Lithuania*, nos. 74357/01 and 2 others, 19 February 2008.
98. *Haarde v. Iceland*, no. 66847/12, 23 November 2017.
99. *G. v. France*, 27 September 1995, Series A no. 325-B.
100. *Ould Dah v. France* (dec.), no. 13113/03, ECHR 2009.
101. *Berardi and Mularoni v. San Marino*, nos. 24705/16 and 24818/16, 10 January 2019.
102. *Rohlena v. the Czech Republic* [GC], no. 59552/08, ECHR 2015.
103. *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, ECHR 2013 (extracts).