Victim Support Europe
The Voice of Victims in Europe

Judgements from the European Court of Human Rights and the Court of Justice of the European Union

2020 REPORT

Victim Support Europe
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I. Cases involving the right to life (Art. 2)

a. State's breach of Art.2 & consequences on the family of the victim

MURDALOVY v. RUSSIA – 31 March 2020 (Appl. No. 51933/08)

Summary of facts: According to the applicants, Mr Murdalov was walking down the street when six police officers surrounded him, searched him under the pretext of suspicion of his unlawfully using drugs, and then beat him. Then the officers forced him into the department of the interior and formally arrested him under suspicion of illegal possession of drugs. A police officer, L., subjected Mr Murdalov to beatings with fists, boots and a baton with the aim of forcing him to become an informant for the police. Then Mr Murdalov was placed in a cell, where he suffered several strokes. Later, Mr Murdalov was taken from his cell by several police officers, including officer L. He has not been seen since. The Court finds that Mr Murdalov must be presumed dead and finds that his death can be attributed to the State and that there has been a violation of the substantive aspect of Article 2.

Legal reasoning: The Court has found that **in a situation of enforced disappearance, the close relatives of the victim may themselves be victims of treatment in violation of Article 3**. The essence of such a violation does not mainly lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. The Court therefore concludes that there has been a violation of Art. 3 of the Convention in respect of the applicants on account of their mental suffering caused by their relative's disappearance and the authorities' response to their suffering.

DANCIU AND OTHERS v. ROMANIA – 12 May 2020 (Appl. No. 48395/16)

Summary of facts: The applicants are the family members of Mr Dumitru Danciu, who was physically assaulted by 5 men at a restaurant on 17 September 2008. His wife was present at the scene and called the police, which then called the ambulance, who took him to the hospital, while his wife and the five men had been taken to the police station. However, for unknown reasons, no statements were taken at the police station at that stage. The injured party submitted that he knew those persons because he had previously won a civil case against them. Mr Dumitru was later threatened by one of the perpetrators, while he was still at the hospital recovering. The criminal proceedings took a few months, although a Court order put a deadline for the investigations to be carried out. In the meantime, 3 years later, the victim died, but the medical reports did not find a causal link between his death and the attack he underwent in 2008.

Legal matter: Article 2 imposes a duty on that State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. This obligation requires by implication that there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances, even where the presumed perpetrator of the fatal attack is not a State agent. Compliance with the procedural requirements of Article 2 is assessed on the basis of several essential parameters: the adequacy of the investigative measures; the promptness of the investigation; the involvement of the deceased person's family; and the independence of the investigation.

Legal reasoning: The Court found that the **authorities failed to lead effective proceedings because it initiated them only after the victim lodged a criminal complaint**, although the facts involved life-threatening violence and they were aware of them. Moreover, it took 9 months for the prosecutor to hear the perpetrators for the first time. The Court also criticized the way the applicants were involved

in the proceedings and allowed 15 000 EUR compensation for damages to the applicants (the family of the deceased victim).

VANYO TODOROV v. BULGARIA - 21 July 2020 (Appl. No. 31434/15) - English Summary

Underlying issue: Ineffective judicial system, given the impossibility for the brother of a murder victim to claim compensation as a civil party in respect of non-pecuniary damage.

Summary of facts: The applicant, M. Vanyo Petkov Todorov, a Bulgarian national, discovered on 25th January 2014 the body of his deceased brother in his courtyard. An investigation was immediately opened, and the victim's neighbor, G.V., was arrested and charged with murder. The applicant later **discovered that some items were missing from his brother's home** and signaled it to the officer in charge of the investigation. In July, the investigation was closed without any further advancements regarding the missing items.

The domestic courts **refused the applicant should join as a civil party**, the criminal proceedings related to his brother's murder by a private person, in order to obtain compensation for the pecuniary and non-pecuniary losses sustained. The courts rejected his demands notably under the argument that, **under the binding case-law of the Supreme Court, family members other than parents, spouse and children, were not allowed to claim non-pecuniary damaged** for the death of a relative and consequently join the proceedings as a private prosecutor and a civil party.

Legal reasoning: Assessing the possibility of claiming compensation for non-pecuniary damage, resulting from the death of a close relative, the Court notably noted that **the Directive 2012/29/EU** (Victims' Rights Directive) **included a deceased person's brothers and sisters within the concept of the "victim"** of an offence, consequently entitled to benefit from the rights set out in the Directive.

The Court took note that a **consensus existed among the Contracting States** that the closest family members ought to have an opportunity to claim compensation for such damage, as the result of a relative's death. It also noted that the mentioned Bulgarian case-law had been amended since the time of the events and that persons other than those exhaustively listed in the decisions of the former Supreme Court were now allowed to claim compensation when they were able to establish that they had endured mental suffering comparable to that of persons in the immediate family circle.

As in the present case, the applicant was the only family member and his deceased brother's sole heir, the Court decided that **the respondent State had breached its obligation to set up an effective judicial system capable of providing an appropriate response for the victim's close relatives in the event of death,** notably enabling him to claim compensation for the damage he has suffered from.

Finality of the judgement: Violation of Art. 2, the Court awarded 12 000 EUR in respect of non-pecuniary damage.

SHURIYYA ZEYNALOV v. AZERBAIJAN – 10 September 2020 (Appl. No. 69460/12)

Summary of facts: The applicant's son was arrested and remanded in custody for 5 days. He died on the 5th day of his detention, without having any specific health problems. There were bruises on his body that proved fatal bodily injuries, which were never reported by the authorities, but which the family managed to capture in video recordings before burying the body. Authorities refused to give relatives the details of the file, including the forensic report. The domestic courts rejected the applicant 's

request for information. All the relatives were then accused of defamation for publishing photos showing the bodily harm.

Legal reasoning: The applicant or other family members were refused information about the circumstances and causes of the death of their close relative and, moreover, prevented from disputing the findings of the forensic expert. Such a refusal can constitute a flagrant disregard by the authorities of their procedural obligations under Articles 2 and 3 of the Convention, which require accessibility and public scrutiny of an investigation as an element of its effectiveness. The Court also stresses that this is not the first case of this sort, where the authorities failed to report injuries on bodies in post mortem examinations.

The Court noted that the fact that the state authorities repeatedly accused the deceased's family of defamation, could be understood as entailing a threat to open proceedings against them, in response to their attempts to exercise their procedural rights. The Court found that the Government failed to discharge their burden of proof regarding the the injuries found on the body, and concluded that the applicant's son was subjected to ill-treatment in custody.

The Court considered that the ill-treatment found on the applicant's son's body had caused him severe bodily harm and mental suffering, reducing his human dignity. It thus held that there had been a violation of Article 3 of the Convention on account of the applicant's son.

With regard to the right to life (Art. 2), the Court reminded its previous interpretations as to the state's obligations. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. As a general rule, the mere fact that an individual dies in suspicious circumstances while in custody should raise an issue as to whether the State has complied with its obligation to protect that person's right to life. The standard of proof lies with the state. The Court found that the state authorities failed to cooperate with the Commission against Torture, and did not provide convincing evidence of the causes of death, and therefore considered that there had been a violation of Article 2 as regards its substance.

Finally, as regards the investigation, The Court reiterates that the investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests. There must also be a sufficient element of public scrutiny of the investigation, the degree of which may vary from case to case. The requisite access of the public or the victim's relatives may, however, be provided for in other stages of the procedure. As the Court found that the state authorities failed to fulfil these obligations because they did not inform the applicant of the progress and outcome of the investigation, and that the applicant did not receive copies of the file, it also **emphasised the importance of involving the families of the deceased or their legal representatives in the investigation and of providing them with information as well as enabling them to present other evidence**. The Court found violations of Art. 2 and 3 under their procedural limbs. The Court awarded the applicant 35 000 EUR for non-pecuniary damages.

SHAVADZE v. GEORGIA – 19 November 2020 (Appl. No. 72080/12)

Summary of facts: The applicant's husband was a military officer who was involved in the five-day war against Russia. He was interrogated by the Department of Constitutional Security of the Ministry of the Interior on 15 August 2008 about his involvement in the war, and on the following day, he was violently arrested. A few hours later, the applicant was notified of her husband's death. She claimed that the dead body displayed distinguishable marks of torture (she submitted a video footage of her husband's dead body). Furthermore, she received several phone calls from unknown people threatening her with prison, or offering her money in exchange of her silence. The authorities, on the other hand, claimed that the applicant's husband was arrested in relation to a drug offence, and that he tried to escape,

which lead them to use lethal force, fatally injuring the suspect. **The applicant had no procedural standing and was not able to exercise any procedural rights at all: she could not obtain any information about the investigation, and was not allowed to consult the report on the post-mortem forensic examination of her husband's body**.

Legal reasoning: The Court reiterated the state's obligation to account for the treatment of an individual who is taken into custody in good health and dies at the hands of the security forces. The applicable standard of proof is "beyond reasonable doubt": the authorities must provide a satisfactory and convincing explanation. It also reminded the obligation to carry out an effective investigation into unlawful or suspicious deaths.

The Court noted that the investigative measures were carried out immediately after the death, however, not by the prosecuting authorities themselves, but by the Ministry of the Interior. And the prosecution authority took over at a later stage, but relying on the evidence gathered by the Ministry of the Interior. The Court found that this is contrary to the requirements of independence and impartiality under Art. 2.

The Court was particularly concerned by the inexplicable, persistent, and possibly deliberate applicant's inexistent procedural standing. Furthermore, over 10 years after the facts, the Court finds no conclusive findings to the case by the responsible authorities, which is a failure to comply with the requirements of promptness and reasonable expedition. The Court reiterates that justice delayed is often justice denied, as the existence of unreasonable periods of inactivity and a lack of diligence on the authorities' part in conducting the proceedings renders the investigation ineffective irrespective of its final outcome.

As regards the substantive aspect of Art. 2, it was not disputed that the applicant's husband had been killed by state agents. The state authorities having failed to provide evidence to support their version of the circumstances of his death, and taking into account eyewitnesses accounts of police brutality at his arrest, and the injuries found on the dead body, the Court does not accept the official version of the applicant's husband's death.

Finality of the judgment: The Court found a procedural and substantial violation of Art. 2. The Court awarded 40 000 EUR of damage for non-pecuniary loss. Due to the absence of any documents supporting a claim of loss of earnings (based on the fact that her husband was the breadwinner) and reimbursement of costs, no other compensation was awarded.

YUKHYMOVYCH v. UKRAINE – 17 December 2020 (Appl. No. 11464/12)

Summary of facts: The applicant is the father of Ruslan Yukhymovych, who was suspected of being part of a criminal organization extorting money and property from people (named B.) with the use of weapons in 1999. The police surveilled the place of residence of B. and when they saw Ruslan and another man with him about to enter that house, as B.'s daughter opened the door, the police intervened and ordered the two men to freeze. Yet, Ruslan disobeyed and tried to flee. He was chased by two of the police officers who ended up shooting him twice. He died of his injuries.

During the criminal proceedings, the prosecution claimed that Ruslan was armed. The applicant, though, argued that the documents and witness statements had been contradictory, and that these contradictions had not been resolved in the course of the investigation. The criminal proceedings were still pending in 2018, with no clear outcome.

Legal reasoning: The Court reiterated that for an investigation into alleged unlawful killing by state agents to be effective, it is necessary that it is independent and effective. Additionally, **the investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests**. There is also a requirement of promptness and reasonable expedition, especially to maintain public confidence in the adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

For nearly a month, the circumstances of the applicant's son's death were examined exclusively in a **pre-investigation inquiry**. The Court has already held that such investigative procedures do **not comply with the principles of an effective remedy** because the inquiring officer may only take a limited number of steps and the **victim has no formal status**, meaning his or her effective participation in the procedure is excluded.

Finality of the judgment: The Court found a violation of the procedural limb of Art. 2 due to the substantial shortcomings of the investigation and the lack of promptness and effectiveness. As regards the substantial limb of Art. 2, the Court also found a violation because the State failed to plan the operation in such a way as to minimise to the greatest extent possible recourse to lethal force and any risk to the life of the applicant's son. The applicant was awarded 39 000 EUR in respect of non-pecuniary damage, and 70 EUR covering costs and expenses incurred.

b. In the context of special protection owed to victims

KOTILAINEN AND OTHERS v. FINLAND – 17 September 2020 (Appl. No. 62439/12) – Summary

Underlying issue: Issue of duty of personal protection towards the victims of a shooting, after a student who published online posts that could cast doubt on his fitness to possess a firearm commits a school shooting, killing 10.

Summary of facts: A student had been licensed to possess a gun. After publishing internet posts that led to doubts on his fitness to safely possess a firearm, he was interviewed by the police. The latter decided that there was no need to withdraw his weapon. He later killed ten people in a school shooting and killed himself during the incident. The applicants are relatives of individual who were killed during the school shooting.

Legal reasoning: In the present case, the Court concludes that **there has not been a real and immediate risk to life emanating from the perpetrator,** at the moment he was interviewed by the police, as the information posted couldn't give any reason to suspect an actual risk of an attack of such a form.
However, the Court affirms that the **duty to provide general protection to society against potential criminal acts** may be engaged in the present case. The Court finds that given the particularly high level of risk to life involved by the use of firearms, the State needed to put in place a system of adequate and effective safeguards to prevent any dangerous use of such weapons. In the present case, after being confronted with the Internet postings, the Court judges that the seizure of the perpetrator's weapons was a reasonable measure of precaution. The Court therefore concludes to the violation of Article 2.

Finality of the judgement: Violation of Article 2, 30 000 EUR for non-pecuniary damage to each household and 31 571,97 EUR for pecuniary damage to one of the applicants.

c. Impunity for murder motivated by hate

MAKUCHYAN AND MINASYAN v. AZERBAIJAN AND HUNGARY – 26 May 2020 (Appl. No. 17247/13)

Summary of facts: The applicants are two Armenian nationals, Hayk Makuchyan and Samvel Minasyan, who is now deceased, who were born in 1975 and 1958 respectively. Mr Minasyan's widow and their two children are pursuing the case in his stead. In 2004, Mr Makuchyan and Mr Minasyan's nephew, G.M., both members of the Armenian military, attended an English-language course in Budapest organised by the NATO-sponsored "Partnership for Peace" programme. The course included two participants from each of the former Soviet states, including Azerbaijan. During the course, R.S., a member of the Azerbaijani military, murdered Mr Minasyan's nephew while he was asleep by decapitating him with an axe. R.S. also tried to break into Mr Makuchyan's room before being arrested by the Hungarian police. R.S. was convicted of exceptionally cruel and premeditated murder and preparation of murder and sentenced to life imprisonment by the Hungarian courts, with a possibility of conditional release after 30 years.

During the criminal proceedings R.S. showed no remorse, admitting that he had murdered Mr Minasyan's nephew on account of his Armenian origin and because the Armenian participants in the course had provoked and mocked him. In 2012, following a request by the Azerbaijani authorities, R.S. was transferred to Azerbaijan, in accordance with the Council of Europe Convention on the Transfer of Sentenced Persons, to serve the rest of his sentence. However, **upon his arrival in Azerbaijan, R.S. was informed that he had received a presidential pardon and was released. He was also promoted to the rank of major at a public ceremony, granted a flat and paid eight years of salary arrears**.

Legal reasoning:

The Court did not find Azerbaijan in violation of the substantive limb of Art. 2:

The murder and attempt of murder could not be found to be attributable to Azerbaijan, because of the very high threshold for State responsibility under international law for an act otherwise non-attributable to a State at the time it had been committed. In particular, to find a State responsible under international law it had to have "acknowledged" and "adopted", not just "approved" and "endorsed" the act. The Azerbaijani Government actions as a whole, including the decision to pardon R.S., promote him, award him salary arrears and grant him the use of a flat, had clearly and unequivocally demonstrated their "approval" and "endorsement" of his conduct. **The Court agreed that many of the statements and actions were particularly disturbing in that they glorified R.S. as a national hero for the gruesome crimes that he had committed.** However, the **Court was not convinced that Azerbaijan had "clearly and unequivocally" "acknowledged" and "adopted" "as its own" R.S.'s deplorable acts, which had been part of a private decision**. Furthermore, the attack had taken place at night, outside of training hours, and there was no suggestion that he had committed the crimes on orders given by his superiors. The Court was not convinced either that such flagrantly abusive private acts, so far removed from R.S.'s official status as a military officer, could have been foreseen by his commanding officers or that the Azerbaijani State could be held responsible for them under international law just because he had been an agent of the State. Nor was there anything in the case file to suggest that the procedure in Azerbaijan for the recruitment of members of the armed forces and the monitoring of their fitness to serve at the time that R.S. was sent on his mission to Hungary had been inadequate.

The Court found a violation of the procedural limb of Art. 2:

The Court considered that Azerbaijan had assumed responsibility for the enforcement of R.S.'s prison sentence upon his transfer, and from that point on, it had been called upon to provide an adequate response to a very serious ethnically-biased crime for which one of its citizens had been convicted in another country. Given the extremely tense political situation between Azerbaijan and Armenia, the authorities should have been all the more cautious. Instead of enforcing R.S.'s sentence, however, he

had been set free and treated as an innocent or wrongfully convicted person and bestowed with benefits that had not apparently had any legal basis under domestic law. There was a fair trial in Hungary, and as to R.S.'s personal history and mental difficulties, they could hardly justify the Azerbaijani authorities' failure to enforce the punishment of one of their citizens for a serious hate crime.

R.S. had in effect been granted impunity in Azerbaijan for the crimes committed against his Armenian victims. That was not compatible with Azerbaijan's obligation under Article 2 to effectively deter the commission of offences which put others' lives at risk.

As regards Hungary's procedural obligations under Art. 2, the Court did not find any violation in the decision to allow the transfer of R.S. to continue his prison sentence in Azerbaijan. The Hungarian authorities acted in good faith, following the Council of Europe Convention on the Transfer of Sentenced Persons when extraditing R.S. There was no evidence to support that they knew R.S. would be released by Azerbaijan.

Finally, the Court found that Azerbaijan's measures towards R.S. upon his return from Hungary were clearly motivated by the Armenian ethnic origin of R.S.'s victims, hence violating Art. 14 in conjunction with Art. 2.

Finality of the judgment: The applicants requested the Court to order appropriate measures in order to achieve *restitutio in integrum* – including, for example, measures analogous to the re-opening of domestic proceedings. They suggested that this could include the revocation of the 2012 presidential order pardoning R.S. The Court recalled Art. 46 and the respondent's State freedom to choose the means by which it will discharge its obligations. The Court, however, declined the applicants' request to take general or individual measures in respect of Azerbaijan.

The Court awarded 15 143,33 pounds sterling (GBP) in respect of costs and expenses.

II. Cases involving the freedom from torture and degrading treatment (Art. 3)

a. In the context of domestic violence

MUNTEANU v. THE REPUBLIC OF MOLDOVA – 26 May 2020 (Appl. No. 34168/11)

Summary of facts: The applicants are the mother and son, both victims of domestic violence of the father/husband (I.M.). On 18 April 2011 the first applicant asked the police to take action against I.M., who had assaulted her. The police instead fined her, because I.M. had already called the police that weekend to complain that she had verbally and physically attacked him. The applicant then applied for a protection order. Despite infringements of the protection order, the police did not sanction I.M. nor sought to protect the applicants, who were both beaten. Instead, a series of further arguments and beatings took place, and at different occasions, the police refused to take the situation seriously, and instead blamed the applicant for not staying calm. Social workers also advised her to keep the family together and stop causing problems. The applicant and her lawyer kept lodging complaints about the different incidents and the lack of support, as well as the non-enforcement of the protection order. Then, despite the divorce, the domestic violence continued.

On 22 February 2013 the District Court convicted I.M. of domestic violence and making death threats to the first applicant, as well as for failing to abide by the court orders. He was sentenced to one year and two months' imprisonment and ordered to pay the first applicant MDL 7,000 (437 EUR) and the second applicant MDL 3,000 (187 EUR) in compensation. The District Court held that it was an aggravating factor that I.M. had already been convicted for bodily harm against the first applicant and had not changed his behaviour. It also **held that "the immorality of the victim's actions, who [had]**

provoked the offence" was a mitigating factor. In determining the amount of damages to be paid by I.M., the court noted that the first applicant was also responsible for victimising the second applicant.

The applicant appealed, and the Court of Appeal quashed the previous judgement and sentenced I.M. to two years of imprisonment with higher pecuniary damages. Yet, it still found that the applicant **provoked** I.M's violence, including by **her failure to leave the family home after the protection order was adopted in favour of I.M**. Based on I.M.'s refusal to leave the house, the authorities had advised her to leave the house herself. After I.M.'s release from prison, he beat up the applicant again (23 July 2015). The prosecutor wanted to open criminal investigations, but it was eventually discontinued on 31 October 2016, and I.M died on 15 December 2016.

Legal reasoning: The Court found that the applicant suffered a number of assaults, and her injuries were quite serious (knife wound, broken jaw). It was found to be systematic ill-treatment that was interrupted only while I.M. was in prison. Moreover, the fear of further assaults was sufficiently serious to cause the first applicant to experience suffering and anxiety amounting to inhuman treatment within the meaning of Article 3 of the Convention. The second applicant was also abused apart from witnessing the abuse.

The Court reiterated that the State authorities have a responsibility to take protective measures in the form of effective deterrence against serious breaches of an individual's personal integrity by a member of her family or by a partner. The risk of a real and immediate threat must be assessed, taking due account of the particular context of domestic violence. The Court reiterated that, even when the authorities did not remain totally passive, they still failed to discharge their obligations under Article 3 of the Convention because the measures they had taken had not stopped the abuser from perpetrating further violence against the victim. Indeed, none of the protection orders was fully enforced, because I.M. returned home after a while every time and the police more often than not did nothing to remove him. Moreover, it is striking that, against the background of I.M.'s repeated domestic violence against the applicants, the authorities adopted an order to protect I.M. and ordered the first applicant to leave home, while later partly blaming her for provoking violence against herself by failing to leave home.

ASSOCIATION INNOCENCE EN DANGER ET ASSOCIATION ENFANCE ET PARTAGE v. FRANCE - 4 June 2020 (Appl. No. 15343/15 and 16806/15) – SUMMARY (ENG)

Underlying issue: An eight years-old child has suffered from ill-treatment from her parents, which led to her death in August 2009. Despite several complains and reports to the police from her teachers, of marks and bruises, the police conducted a limited investigation despite the fact that several negative findings were found, leading to the qualification of violation of Article 3 by the Court.

Summary of facts: A child of eight years-old has suffered from ill-treatment from her parents. Her teachers made several complains and reports to the gendarmerie, of marks and bruises that they spotted on her body. Useful and pertinent measures were taken by the gendarmerie in the context of the investigation, such as filmed interview of the child, interview of the mother of the child and a forensic medical examination.
The ill-treatment led to the death of the child in August 2009. Two child protection associations lodged a complaint, arguing that the French authorities should have fulfilled their positive obligations to protect the child from ill-treatment by her parents.

Legal reasoning: The Courts notes that useful measures have been taken by the gendarmerie. However, these measures seem to be **limited compared to the seriousness of the case and of the alarming investigation's findings**. For instance, the Court notes that a police officer was not entrusted with the case until 13 days after the public prosecutor's complaint; that the teachers who discovered the bruises

were not interviewed; that the family's environment had not been investigated; that the mother of the child was interviewed briefly at her home rather than at the gendarmerie and that it was conducted without a psychologist; and that no precautions had been taken when the decision to discontinue the case was taken.

The Court therefore finds that **the State has failed to protect the child from the serious abuse she was suffering from** and which led to her death and concludes to the **violation of Article 3** in its positive obligation for the State to carry out an investigation to assess the possibility of an ill-treatment, and, if necessary, to determine the perpetrator, in order to protect the child from being ill-treated in the future.

The applicants also argued of a violation of Article 13. However, the Court finds no violation of Article 13, as the applicants have been able to take their case before a court of law, and the fact that the claims have been dismissed was not sufficient to assess whether the remedy was effective or not.

VOICA V. ROMANIA – 7 July 2020 (Appl. No. 9256/19)

Underlying issue: After separating from her French husband and being granted joint parental authority of her children, the applicant, a Romanian national living in France since years, moves back to Romania with her children. The domestic courts decide on the return of the applicant's children to joint parental authority in France to their father, despite allegations of violence perpetrated by him, made by the applicant.

Summary of facts: The applicant is a Romanian national, who started living with Mr X., a French national in 2009 and with who she had two children (Y and Z). They were all living in France. In April 2016, the couple separated and the domestic court granted joint parental authority and established the children's residence as being with their mother, who at that time was living in France. During the proceedings, the applicant notably complained that she was subject to psychological pressure, verbal and physical abuse from X, which the children sometimes witnessed.

As she was offered a three-years contract in Romania, the applicant then took the decision to move to Romania and to take the children with her; after notifying X. X later lodged a request for the return of the children to France with the Bucharest County Court, who upheld his request, notably as under French law, the children's residence could only be changed if both parents agreed or by a court decision; none of which applied in that case. It also found that the allegations of abusive behaviour didn't constitute the exception of "grave risk" under The Hague Convention.

Legal reasoning: The Court concludes that there is **no violation of Article 8 of the Convention**.
The Court notes that the Bucharest County Court order of the children's return to France does constitute an interference with the applicant's right to respect for her family life; but that the interference was made in respect of the requirements made by The Hague Convention and other international instruments. The Court notes that it was clear that the applicant was aware that she couldn't move to Romania with the children without the father's consent or a court decision when she did so, and that **the children's removal from France was unlawful under The Hague Convention**. The Court **does not find any arbitrariness** in the manner in which the domestic courts assessed the allegations of grave risks, and that they did what was in the children's best interest.

LEVCHUK v. UKRAINE – 3 September 2020 (Appl. No. 17496/19)

Summary of facts: The applicant complained to the police about domestic violence by her husband numerous times, but the case was not filed, the police only issued warnings. If the materials of the investigation were submitted to the court, the consideration of the case ended with a conciliation agreement. The violence continued even after the divorce. In 2016, the woman filed a lawsuit to evict her husband from the apartment because she decided that this would be the only effective way to protect herself and her children. The following year, the Rivne City Court ruled in favor of Iryna Levchuk. However, the husband, having appealed the decision, received a support of the appeal and cassation and remained living in the apartment, continuing to put psychological pressure on his ex-wife and children. In March 2019, Iryna Levchuk appealed to the ECHR, alleging violations of the Convention on Human Rights and Fundamental Freedoms under three articles: the right to a fair trial (Article 6), the right to an effective remedy (Article 13) and the right to respect for private and family life (Article 8). This is the first case against Ukraine where a violation of Article 8 of the Convention has been identified raising the problem of domestic violence.

The legal issue: This is a matter of balancing interests. The applicant argued that the refusal to evict her ex-husband exposed her and her minor children to the risk of further victimisation by him. The national appeal court had found that the eviction would constitute a disproportionate interference with his right to respect for his home.

Legal reasoning: The Court recalled that where an individual makes a credible assertion of having been subjected to repeated acts of domestic violence, however trivial the isolated incidents might be, it falls on the domestic authorities to assess the situation in its entirety, including the risk that similar incidents would continue. Among other things, this assessment should take due account of the particular vulnerability of victims – who are often dependent on their assailants emotionally, economically, or otherwise – and the psychological effect that the risk of repeated harassment, intimidation and violence may have on their everyday life. Where it is established that a particular individual has been systematically targeted and future abuse is likely to follow, apart from responses to specific incidents, the authorities may be called upon to implement an appropriate action of a general nature to combat the underlying problem and prevent future ill-treatment.

Addressing this balancing of rights, the Court recalled that eviction is the most extreme measure of interference with one's right to respect for the home guaranteed by Article 8. However, it has also stated that **interference by the national authorities with individual rights under Article 8 might be necessary in order to protect the health and rights of the others. Moreover, in the context of Article 2 the Court has noted that, in domestic violence cases, perpetrators' rights cannot supersede victims' human rights, in particular, to physical and mental integrity**.

The Court found that, in rejecting the relocation request, the domestic court of appeal had not carried out a comprehensive analysis of the situation, based on the available facts, and the risk of future psychological and physical violence faced by the applicant and her children, and that a fair balance had not been struck between all her and her ex-husband. He further noted that the proceedings lasted 2 years, during which the applicant and her children remained at risk of further domestic violence.
The Court held that relocation decisions by national courts should not relieve national authorities of their duty to assess the gravity of the situation in cases of domestic violence in order to seek an appropriate solution.

Finality of the judgement: The Court found a violation of the applicant's right to respect for her privacy (Article 8 of the ECHR) and awarded her 4 500 EUR in respect of non-pecuniary damage.

b. In the context of sexual abuse

Z v. BULGARIA – 28 MAY 2020 (Appl. No. 39257/17)

Summary of facts: the applicant, aged 13 at the time of the crime, was victim of rape at her friend's house by her friend's boyfriend, G.S., aged 28. The case was prosecuted for sexual intercourse with a person under the age of fourteen despite the applicant's request and the initial recommendation of the lower prosecutor that it be prosecuted for rape. The reasoning behind this criminal charge was that none of the three hypotheses listed in Article 152 of the Bulgarian Criminal Code had been observed: the victim had not been deprived of a possibility to protect herself; no force or threats had been used against her; and she had not been "brought to a helpless state" before the incident. Though, the prosecution did record that immediately before the intercourse, the victim had "pulled herself away", "pretended to be asleep", "pushed the perpetrator's hands away" and "clutched her legs together".

Legal reasoning: The Court found that the article and its interpretation by the domestic courts has made lack of consent on the part of the alleged victim an element of the crime of rape and there is no requirement of physical resistance by the victim. What was decisive was the meaning given by the investigative authorities and the courts to words found in that legal provision, such as "compelled" and the victim's being "incapable of defending herself" or "brought to a state of helplessness".

The prosecutor failed to examine whether the applicant's actions and the overall context indicated a lack of consent by her and whether the perpetrator's actions could be qualified as rape. This failure is particularly striking in view of the submissions made by the applicant's lawyer explicitly prompting the authorities to prosecute the perpetrator for rape, and the initial recommendation of the lower prosecutor. The prosecution failed to engage in any meaningful examination of the evidence signifying lack of consent, namely the age of the applicant, the specific circumstances under which the intercourse had taken place, the lack of prior relationship between the applicant and G.S., the behavior of the applicant during the intercourse and her behavior after the incident. The Court notes that at the first-instance court, the judge rapporteur was empowered by law to discontinue the judicial proceedings and to send the case to the prosecutor, had he or she identified breaches at the pre-trial stage of the victim's procedural rights. The first-instance court was also fully aware of the explicit request made by the applicant's lawyer that the perpetrator be prosecuted for rape.

The Court also recalled that it has repeatedly held that in cases of sexual abuse children are particularly vulnerable. **The right to human dignity and psychological integrity requires particular attention where a child is the victim of violence**. The obligations incurred by the State under Articles 3 and 8 of the Convention in cases involving and affecting a child, allegedly victim of sexual abuse, require the effective implementation of children's right to have their best interests as a primary consideration and to have the child's particular vulnerability and corresponding needs adequately addressed by the domestic authorities.

Neither the prosecution nor the court analysed the circumstances of the case from a child-sensitive stand-point. **The principle of the best interest of the child must be duly considered as well as ensuring that an effective investigation and prosecution is carried out, without aggravating the trauma experienced by the child**. The Court found that the failure to take into account the surrounding specific circumstances of the present case by the prosecutorial and judicial authorities alike was the result of their having attached little or no weight to the particular vulnerability of the applicant as a very young person, and the special psychological factors involved in cases concerning rape.

Finality of the judgment: The Court awarded the applicant EUR 12,700 in respect of non-pecuniary damage. In support of her request she referred to her mental and emotional state after the attack, her self-harming, and an electronic communication by the applicant's mother to her lawyer asking for

recommendations of psychological help for the applicant. It also awarded EUR 1,500 covering costs and expenses in the proceedings before the Court.

c. In the context of mental-illness

AGGERHOLM v. DENMARK – 15 September 2020 (Appl. No. 45439/18) – Summary

Underlying issue: A schizophrenic man with a history of violent offences was strapped to a restraint bed in a psychiatric hospital for nearly 23 hours, one of the longest periods of immobilisation ever examined by the Court. The immobilisation continued even after the applicant was found calm for hours already.

Legal matter: Article 3 (Prohibition of torture and inhuman and degrading treatment), Strict necessity of the continuation of restraint measures taken against a mental-ill patient.

Summary of facts: The applicant, a Danish national suffers from a mental illness and was sentenced in 2005 to committal to a psychiatric hospital, following incidents of violence against government officials. During the 8th year of his sentence, as he makes threats against her and taking into account previous assaults on staff and patients, the hospital's chief doctor decides to strap him to a restraint bed, and revokes his day release. He was released nearly 23 hours later. The applicant complained to various administrative and judicial bodies and in 2017, the domestic courts found that the measures taken against him had been necessary and that no less intrusive measures had been possible.

Legal reasoning: The Court finds that the domestic courts have failed to address several issues, notably regarding the continuation and duration of the measure. After a few hours, the restraint measures were indeed maintained, as the doctor judged he was still representing a potential danger. However, the Court observes that **a 'potential danger' can't be equated with an immediate or imminent danger** that justifies such measures. The Court also notes that no danger assessment has been carried out during the 12-hour period of sleep, and that he was released with a one-hour and 35 minutes delay without any justification.

The Court therefore concludes that **the authorities didn't sufficiently prove that continuing to strap the applicant to a restraint bed for 23 hours had been strictly necessary** and concludes to the violation of Article 3 of the Convention.

Finality of the judgement: The Court held that Denmark was to pay the applicant 10 000 EUR in respect of non-pecuniary damage and 4 000 EUR in respect of costs and expenses.

III. Case involving the prohibition of slavery or forced labor: human trafficking (Art. 4)

S.M. v. CROATIA – 25 June 2020 (Appl. No. 60561/14)

Underlying issue: This is the first judgment delivered by the Grand Chamber under Article 4 (the right not to be held in slavery or servitude or to be required to perform forced or compulsory labour) **concerning inter-personal harm**, i.e. circumstances where one private individual has arguably abused another.

Summary of facts: S.M., a Croatian woman, who claimed to have been subject to human trafficking and forced prostitution, lodged a criminal complaint in September 2012, alleging that T.M., a former police officer and friend of her parents, had forced her into prostitution over a period of several months in 2011. The police carried out a preliminary investigation and established that T.M. had a previous conviction for rape and for procuring prostitution using force. At the end of 2012 T.M. was indicted and

the applicant was officially given the status of victim of human trafficking. T.M. was brought to trial in 2013, but he was acquitted of forcing the applicant into prostitution because the Croatian courts found that the prosecution had failed to provide sufficient evidence for a conviction. In June 2014, a constitutional complaint by the applicant was declared inadmissible. On 19 July 2018, the ECtHR handed down its Chamber judgment in the case, finding that Article 4 ECHR had been breached. On 3 December 2018, the Grand Chamber Panel accepted the Croatian Government's request that the case be referred to the Grand Chamber under Article 43 ECHR.

Legal reasoning: The Court clarified its previous case law on the scope of application of Art. 4 ECHR. It recalled that human trafficking comes within the scope of that provision, but noted that it refers to three concepts (slavery, servitude, and forced or compulsory labour) without defining them or the notion of trafficking. Then the court confirmed that international law must be used as guidance when dealing with those concepts. In this regard, the Court recalled that international law defines the crime of trafficking as a combination of three necessary elements, namely: (i) an action, such as recruitment, transportation, transfer, harbouring or receipt of persons; (ii) certain means involving the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to gain control over another person; and (iii) a specific purpose, such as the exploitation of the prostitution of others or other forms of sexual exploitation.

The Court further made clear that the concept of human trafficking covers both national and transnational trafficking in human beings, irrespective of whether or not it is connected with organised crime. It also clarified that the notion of 'forced or compulsory labour' under Article 4 ECHR is intended to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they were related to the specific human trafficking context.

In the applicant's case, the Court considered that there had been an arguable claim and prima facie evidence that there was a treatment contrary to Article 4 ECHR. It noted in particular that certain **characteristics of trafficking and forced prostitution had been present in the applicant's case, such as abuse of power over a vulnerable individual, coercion, deception and harbouring**. In particular, the applicant's alleged abuser was a policeman, while she had been in public care from the age of 10, and he had first contacted her by Facebook, leading her to believe that he would help her to find a job. The Court therefore considered that the applicant's situation triggered the domestic authorities' positive obligation to safeguard the applicant's rights under that provision through an investigation into her allegations. The Court recalled that such positive obligations involve a duty to institute and conduct an investigation capable of leading to the establishment of the facts and of identifying and – if appropriate – punishing those responsible. In order to do that, the authorities had to take whatever reasonable steps they could to collect evidence.

The Court concluded that, although the Croatian prosecuting authorities reacted promptly to the applicant's allegations against T.M., in their investigation they had failed to follow some obvious lines of enquiry. Notably, they did not interview all possible witnesses, and therefore in the court proceedings it had been a question of the applicant's word against her alleged abuser's. Such shortcomings had fundamentally undermined the domestic authorities' ability to determine the true nature of the relationship between the applicant and her alleged abuser and whether she had indeed been exploited by him.

Finality of the judgment: The Court concluded that the manner in which the criminal-law mechanisms were implemented in the case was flawed, in violation of Croatia's procedural obligation under Article 4 ECHR. The Court awarded the applicant 5 000 EUR for non-pecuniary damage.

IV. Case involving anonymous witnesses and the right to a fair trial (Art. 6)

SÜLEYMAN v. TURKEY – 17 November 2020 (Appl. No. 59453/10)

Underlying issue: The alleged unfairness of the criminal proceedings against the applicant in so far it concerned his conviction for murder, owing to his alleged inability to examine an anonymous witness as required by Article 6 § 3 (d) of the Convention.

Summary of facts: The applicant was involved in a number of criminal acts between May 2005 and January 2006. He was prosecuted for a murder committed in a shooting in a hotel, and was convicted for life imprisonment. The decision was based *inter alia* on the statements of witness X who did not appear in court and who the defence never had the opportunity to question or challenge. Witness X was the only eyewitness to the shooting and there was no other direct and concrete evidence capable of proving that it was the applicant who committed the murder. Although the trial court found it unnecessary to examine witness X, and rather keep their identity hidden, the name of witness X actually appeared in a page of its reasoned judgment. Furthermore, the trial court decided that the victims and witnesses would give evidence in courts located in their places of residence.

Legal reasoning:

(i) whether there was a good reason justifying the concealment of the anonymous witness's identity
The Court reiterated that national legislation requires the courts/judges to explain "the grave danger" for which it is acceptable to conceal a witness' identity. Furthermore, the identity of witness X was known to the parties of the case because a list of the personnel present at the hotel during the shooting, implying that the only one who had not testified and whose identity had not been disclosed, was necessarily witness X. Furthermore, witness X had at no stage of the proceedings indicated that he had experienced a general fear on account of his appearing before the trial court to give evidence in the presence of the parties or fear that is attributable to threats or other actions of the defendant or those acting on his behalf. Hence, the Court found no reason to keep the identity of witness X, in the light of the trial court's contradictory stance on that issue.

(ii) whether there was a good reason for his absence
The reason advanced by the trial court for witness X to give their statement in their court of residence was geographical (distance: 268km and a mountainous zone where the roads are of poor quality). The Court found no factual or legal basis of any good reason for the absence of witness X – but that alone, does not determine the fairness of the trial.

(iii) whether the evidence given by him was the sole or decisive basis for the applicant's conviction or it was of significant weight for it
The Court found that the trial court did not examine the weight to be given to the the evidence given by witness X. It was only eyewitness capable of indicating that the applicant was the one who committed the murder. And importantly, the ballistics report on the bullet casing found at the scene of the incident concluded that it was not possible to verify whether that bullet had been fired from the applicant's pistol used in previous incidents. Considering all the evidence analysed by the trial court, the Court finds that in fact, witness X's testimony was decisive for the applicant's conviction of murder.

(iv) whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured *vis-à-vis* the evidence given by witness X.
The Court stressed that where a conviction is based decisively on the evidence of an absent witness, the Court must subject the proceedings to the most searching scrutiny. In order to assess this, the Court

addressed the following elements (stemming from a previous judgment, *Schatschaschwili*, cited above, §§ 125-31 and 145):

(a) **the trial court's approach to the untested evidence**

The Court found that no reasoned decision was given to justify the absence of the witness: it failed to show that examining the witness in the presence of the parties would cause a "grave danger", and no alternatives were considered. The trial court made no explicit balancing of the rights of the defendant vs the rights of the victims and witnesses. no indication in the case file showing that the national courts either approached the evidence given by witness X with any particular caution or that they were aware that it carried less weight owing to his absence from the trial. No reliability test was made either. This constitutes a breach of Art. 6 (3) (d).

N.B.: Responding to one of the Government's arguments, the Court reiterated that the possibility to put written questions to an absent witness should not be seen as a solution remedying the absence of an important witness from the trial. This is especially true when there was no good reason justifying the absence of the witness at the trial.

(b) **the availability and strength of further incriminating evidence**
(c) **the procedural measures taken to compensate for the lack of opportunity to directly cross-examine the witnesses at the trial:**

The Court highlighted that the numerous requests from the applicant to examine witness X were not even addressed by the trial court. The Court also found that a video recording of the statements of witness X was not sufficient to cure the restrictions imposed on the defence in its ability to effectively challenge that evidence – which was at the heart of the applicant's conviction.

The Court hence found a violation of Art. 6 (1) and 6 3(d) of the Convention. The Court held that the most appropriate form of redress would be a retrial in accordance with the requirements of Art. 6., should the applicants so request.

V. Case involving the right to family life (Art. 8) of same-sex parents

HONNER v. FRANCE – 12 November 2020 (Appl. No. 19511/16)

Underlying issue: The applicant was refused the visiting and contact rights by the French courts regarding the child that was born to her former partner in Belgium using assisted reproductive techniques and despite the fact that the applicant had raised the child during his early years.

Legal matter: Article 8, Right to respect for family life, visiting and contact rights

Summary of facts: The applicant, a French national and her former-partner, a Belgian national, had a child using assisted reproductive techniques while the two women were a couple and had entered into a civil partnership. The applicant therefore raised him during his early years. After their separation, the applicant was granted visiting and staying contact rights by the domestic courts. That judgement was overturned in appeal, where the court found that **the contacts between the child and the applicant were excessively traumatic** and that these rights were therefore **contrary to his best interests**. The applicant claims that the refusal to grand her contact rights had breached her right to respect for her family life.

Legal reasoning: The Court first notes that the ties that had developed between the applicant and the child during these early years constituted family life within the meaning of Article 8. The Court observes that the French law allows a person who had developed a family relationship with a child to seek

measures to preserve that relationship. However, the child is considered as fragile, at the centre of a conflict between the two women, that G. had been reluctant to go to the applicant's home. The Court therefore concludes that **the French authorities took this decision by prioritising the child's best interests**, and that there has been **no violation of Article 8** of the Convention.

VI. Cases involving discrimination (Art. 14)

a. Discrimination on the basis of sexual orientation

BEIZARAS AND LEVIKAS v. LITHUANIA (Application no. 41288/15) – 14 January 2020

Summary of facts: The first male applicant shared a post on Facebook regarding his relationship with the second male applicant, this depicting a same-sex kiss between them to announce the beginning of their relationship. This picture was made available to "the general public", not only to "Facebook friends". According to the applicants, the picture went viral and attracted many (homophobic) comments aimed at inciting hatred and violence towards the LGBT community as well as direct threats directed at the applicants. The applicants attempted to open domestic criminal proceedings against the hateful comments, which according to them were not only degrading to their dignity and incited discrimination but also incited violence. However, the Prosecutor's office did not initiate a pre-trial investigation by stating that the comments were unethical yet not criminal in line with case law of Lithuanian Supreme Court. This decision was appealed with District Court. The District Court dismissed the appeal, since the comments on Facebook had only been an expression of the authors' opinion in improper words and did not constitute an incitement to discrimination or violence. The Regional Court dismissed a further appeal, upholding the reasoning of Prosecutor's office and District Court. In the course of these legal proceedings, the case generated a lot of media interest, following which the applicants fell victim to verbal harassment in public places and received threatening private messages through social media channels.

Legal reasoning: The Court held that Art. 14 had been violated, read in conjunction with Art. 8, given that the hateful comments disguised incitement to violence directed towards the applicants as well as the homosexual community as a whole and the failure of national authorities to fulfil their positive obligation by properly investigating whether these comments constituted incitement to violence and hatred showcased the very same discriminatory state of mind. The Court further held that article 13 had been violated, since the applicants were denied an effective domestic remedy in light of their complaint relating to discrimination on the basis of their sexual orientation.

Finality of the judgement: Accepting that the applicants suffered distress and frustration as a result of those violations, the Court granted their request for compensation of non-pecuniary damages amounting to 5 000 EUR each.

AGHDGOMELASHVILI AND JAPARIDZE v. GEORGIA – 8 October 2020 (Appl. No. 7224/11)

Summary of facts: On 15 December 2009 around 17 police officers in civilian clothing rushed into the office of the LGBT non-governmental organisation, the Inclusive Foundation, where preparations were being made for an art exhibition. The officers announced that they were there to conduct a search, without showing a search warrant or any other judicial order. The applicants submitted that the police, on realising that they were on the premises of an LGBT organisation, became aggressive. One of the officers forcibly seized the first applicant's mobile phone, while another said that he wished he could burn the place down. The officers insulted the women present, calling them "sick", "perverts" and "dykes", and threatened to reveal their sexual orientation to the public.

Female officers later proceeded to strip-search nearly all of the women present, including the applicants. No records of the strip-searches were drawn up, and the women concerned all felt that the measure had been carried out to humiliate them as the officers did not search the clothes they were told to take off.

The applicants' criminal complaint filed in January 2010 for police abuse is still ongoing. There has been no reply to the applicants' requests that they be granted victim status or that the investigating authorities examine the allegedly discriminatory aspects of the police's behaviour during the raid.

Legal issue: Relying on Article 3 (prohibition of inhuman or degrading treatment) and Article 14 (prohibition of discrimination), the applicants alleged that the police had subjected them to physical and mental abuse with clear homophobic and/or transphobic overtones, which had moreover been overlooked in the course of the ensuing ineffective investigation.

Legal reasoning: The Court reiterated that, when investigating ill-treatment, the authorities had a duty to take all reasonable steps to unmask possible discriminatory motives. However, the domestic authorities had not undertaken a single investigative act since the applicants had lodged their criminal complaint in January 2010. Indeed, despite numerous requests, the applicants had not even been declared victims. The Court considered that such protraction in the investigation had exposed the authorities' inability, or unwillingness, to examine the role played by homophobic and/or transphobic motives in the alleged police abuse, against a background of Georgia's well-documented hostility towards the LGBT community. It thus found that there had been a procedural violation of Article 3 taken in conjunction with Article 14.

Secondly, it looked into the question of whether the State could be held responsible for the alleged police abuse committed during the raid. It considered that the applicants' version of events, uncontested by the Government and confirmed by clear and concordant eyewitness statements, had been established beyond reasonable doubt. It went on to conclude that the police officers' behaviour, motivated by homophobic and/or transphobic hatred, had been grossly inappropriate. The officers had not only wilfully humiliated and debased the applicants through hate speech, but had also made threats. Of particular concern were the strip-searches, for which no reasons had ever been given either by the police or the Government, leading the Court to conclude that their sole purpose had been to embarrass and punish the applicants for their association with the LGBT community.
The police officers' conduct had to have made the applicants feel fear, anguish and insecurity, which had not been compatible with respect for their human dignity. There had therefore also been a substantive violation of Article 3 taken in conjunction with Article 14.

Finality of the judgment: The Court concluded that Georgia was to pay each applicant 2 000 EUR in respect of nonpecuniary damage.

b. Discrimination based on gender

B v. SWITZERLAND – 20 October 2020 (Appl. No. 78630/12)

Underlying issue: legal discrimination against men in the context of allowances of a widower.

Summary of facts: The applicant, B., aged 57, is a widower who raised his two children alone. When the youngest child reached the age of 18, he was notified that he would no longer receive widower allowances, as provided by Swiss federal law. Indeed, widowers are only entitled to allowances as long as the children are below 18 years old, unlike widows.

Legal issue: B. claimed this was a violation of the Constitution's provision of equality of rights between men and women. The Tribunal rejected his complaint. Although it recognized inequality of treatment between widows and widowers, it argued that the legislators considered that men at home taking care of their children are still relatively rare, and that it is reasonable to expect them to find a professional occupation when they no longer need to take care of the children. Furthermore, the Tribunal considered that only the legislator can change this, which is why they could not refuse to apply the existing legislation. B. therefore lodged a complaint to the ECtHR, arguing that he was a victim of violation of Art. 14 in conjunction with Art. 8.

Legal reasoning: The Court reiterated that a distinction amounts to discrimination where it lacks objective and reasonable justification. This justification needs to be assessed against its aim and effects of the measure in place, under the principles of a democratic society. A difference in treatment in the exercise of a Convention right cannot only pursue a legitimate aim: Art. 14 is violated when it is clearly established that there is no proportionality between the means and the aim. Member States do have a margin of appreciation when assessing whether a difference in treatment is justified, and the Court does have the power to pronounce itself in last resort. The Court also reminded that the progress towards gender equality has been an important goal for Member States of the Council of Europe. Referring to traditions, presupposed to be general, or majority social attitudes in place in a certain country are not sufficient to justify a difference in treatment based on gender. For example, States may not impose traditions that stem from the idea that the man plays a primary role and the woman a secondary role in a family. The Convention is a living instrument that is meant to be interpreted in light of the current living conditions, and prevailing conceptions in democratic societies.

The Court observed that indeed, B. had been treated differently because he is a man. In light of the enounced principles, the Government cannot rely on a conception of society supposing that men financially support their wives, in order to justify a different treatment that discriminates widowers against widows. There is no strong consideration that would justify such discrimination and therefore, the Court found a violation of Art. 14 in conjunction with Art. 8.

The Court agreed that the national authorities are in a better position to estimate the pecuniary loss that B. suffered as a consequence of the refusal of the allowances since December 2010, and therefore it is their responsibility to calculate and compensate him. In addition, the Court found a moral damage for which it ordered a compensation of 5 000 EUR, and 6 380 EUR of compensation for expenses he endured in the proceedings.

Y.T v. BULGARIA – 9 July 2020 (Appl. No. 41701/16)

Underlying issue: Violation of the right to private life of a transsexual of male appearance whose request for gender reassignment was dismissed without reasons.

Legal matter: Article 8, Right to respect for private and family life, Gender reassignment, Transsexuality

Summary of facts: The applicant is a Bulgarian national (Y.T.), born in 1970. At his birth, the applicant was recorded as female in the civil-status registers and was given a feminine forename. As a teenager, he became aware that he was identifying himself as a man and started living in society as a man and under a male forename. In the context of his gender transition process, the applicant voluntarily underwent surgery in 2014 to remove his mammary glands and parenchymal tissue. The year after, he filled an application to the district court, asking for his sex, civil identification number, forenames, patronymic and family name be changed in the civil-status registers – as the operation to complete the process of gender reassignment could only take place following prior recognition of this reassignment by a judicial decision. His request was rejected by the district court and Y.T. lodged an appeal.
The courts rejected his request notably considering that the public interest required that the legal change of sex should not be permitted, however without giving an explanation of their reasoning as to the exact nature of this public interest and without balancing it against the applicant's right to legal recognition of his gender identity.

Legal reasoning: The Court established that the refusal to grant legal recognition to the applicant's gender reassignment, without giving relevant and sufficient reasons, and without explaining why it had been possible to recognize identical gender reassignment in other cases, had constituted an unjustified interference with the applicant's right to respect for his private life.

Finality of the judgement: The Court held that Bulgaria was to pay the application 7,500 EUR in respect of non-pecuniary damage and 4,150 EUR in respect of costs and expenses (Final judgement 9 October 2020).

c. Discrimination based on disability

G. L. v. ITALY – 10 September 2020 (Appl. No. 59751/15)

Underlying issue: an autistic child was refused specialised learning support during her first two year of primary school, to which she was entitled by law, leading the Court to conclude to a violation of Article 14.

Legal matter: Article 14, Prohibition of Discrimination, Disability rights, Obligation of the State to provide "reasonable accommodation" capable of correcting inequalities that would result in discrimination

Summary of facts: The child, suffering from non-verbal autism, could not receive specialised assistance to which she was entitled by law, and was therefore obliged to pay for private specialised assistance.

Legal reasoning: Under Article 14 of the Convention, the State party is obliged to **provide "reasonable accommodation" capable of correcting de facto inequalities that would result in discrimination.** The Court notes that the domestic courts dismissed the applicant's claims under the argument that the authorities did not have the financial resources to provide learning support, as all the available funds had been allocated to the needs of sufferers of amyotrophic lateral sclerosis (ALS).
However, the Court concludes that the authorities had not sought to determine the child's real needs or the possible solutions to permit her to attend school in conditions that were equivalent as far as

possible to those enjoyed by non-disabled children – and therefore considers that **Article 14 of the Convention had been violated**.

d. Discrimination based on ethnicity/ the association of national minority

HIRTU AND OTHERS v. FRANCE – 14 May 2020 (Appl. No. 24720/13)

Summary of facts: This case concerns the evacuation of a camp of Romanian nationals, belonging to the Roma community. They were represented by the European Roma Rights Centre in this case. They had been installed for 6 months in a French town. They received a police order for their eviction on 31st March 2013, which notified that they had 48 hours to evacuate. This order relied on legislation for individuals deemed to be travellers. The applicants lodged appeals, based on the ground that the legal basis for their evacuation was not applicable, since they were not Travellers. They submitted pictures of their caravans and explained that they were trying to find stable housing. They asked the authorities more time before their eviction, in order to find a stable place to move to. The families had applied for social housing previously, which was never successful. Their appeals were unsuccessful, and they left the camp in the night between the 11th and 12th April 2013.

Legal reasoning:
First, the applicants claimed violations of **Art. 3 ECHR** regarding the circumstances of their expulsion. After they left the first spot, they moved to another one, close-by, and were forcibly evicted by the police, who intimidated them and seized most of their caravans. Second, the applicants complained about their living conditions after the eviction, which they claimed, constituted degrading treatment under Art. 3.The Court noted that a few of them returned to Romania after the eviction, and one family benefited from a social housing. The three other families' requests for temporary measures as to their situation in the new camp was rejected by the authorities. The Court then concluded that there was no violation of Art. 3 by the French authorities.

Based on **Art. 8 ECHR**, the applicants complained about a violation of their private and family life, and their domicile. The Court reiterates the notion of "domicile", which is not limited to the legal domicile that is occupied or established, but that it is an autonomous concept that does not depend on a national legal qualification. Determining that a place amounts to a domicile protected by Art. 8 depends on the factual circumstances, notably the existence of links that are sufficiently continuous with a determined place. The Court found that 6 months of occupying the parcel of land was not sufficient for the applicants to invoke Art. 8 for the respect for their domicile.

Examining the legal basis for this intervention, the Court found that the French eviction law on individuals deemed to be travellers was applicable and that therefore there is a valid legal basis for the State's interference. As for the **legitimate aim**, the Court noted that the eviction order was meant to avoid risks for public health (because no safe access to water and electricity) and nuisance for the surrounding inhabitants (enterprises, place of worship and schools). The police reports showed intrusion in enterprises' offices, people walking around with knifes, fights, garbage and dejections under the windows or cars of the employees). Therefore, the Court found that there was a legitimate aim for the State's intervention.

The Court found a violation of Art. 8 when assessing the necessity of the measures that were taken by the French authorities. It first found that the appeal against the eviction order conducted by the applicants did not entail a judicial review with a proportionality test before the eviction, the notice period was too short, and the seizure of caravans with no provision of housing was not appropriate. The Court also stressed that possessing caravans does not remove the State's obligation to provide for

housing anyway. **The Court found that there was no consideration of the consequences of the eviction and the particular situation of the applicants**.

Examining Art. 13, the right to an effective remedy, the Court finds that although French law provides for an effective remedy, in this case, the judge did not examine the merits of the case, and instead, found it inadmissible because M. Hirtu did not have residence/domicile on that piece of public land, and that therefore he had no legal interest to oppose the eviction order by default. Although the administrative court of appeal, 18 months after the eviction, found this decision to be null, the Court concluded that M. Hirtu did not have an effective remedy. The Court made the same conclusion regarding the other families that had their appeals inadmissible in front of the administrative judge.

Finality of the judgment: The Court ordered 7 000 EUR for the moral damage incurred on each applicant in addition to 7 920 EUR for the legal and procedural expenses.

R.R. AND R.D. v. SLOVAKIA – 1 September 2020 (Appl. No. 20649/18) – Summary

Underlying issue: Complaint of police ill-treatment, lack of effective investigation and discrimination on the grounds of their Roma origin.

Legal matter: Article 14, Prohibition of discrimination; Article 3, Effective investigation; Inhuman or degrading treatment.

Summary of facts: On 14th June 2013, the district directorate of police issued a report on extraordinary events and criminal offences conducted in the Kosice-okolie district. On that basis, they ordered a "search operation". On 19th June 2013, the police carried out the search operation, in the town of Moldava nad Bodvou (eastern Slovakia), where an important Roma community live. The intervention team was handed a list of wanted individuals.

The two applicants, R.R. and R.D. are Slovakian nationals from the Roma community living in the targeted district. They reported to **have been handcuffed, beaten by the police officers, kicked, stuck by electroshock weapons among others.** The forensic medical reports supported their testimonies. Investigations were conducted into allegations of ill-treatment made by the applicants, but their complaints were dismissed.

In 2016, they lodge complaints with the Constitutional Court and alleged violations of Articles 3, 13 and 14 of the ECHR, and argued that **the true aim of the investigation was the aim of intimidating their community, rather than searching individuals and objects**. They alleged that the investigation lacked effectiveness, promptness and independence and they the lawfulness of the use of coercive measures by the police with a possible racist motive was not independently examined. The Court declared the complaints inadmissible.

Legal reasoning:
On the qualification of inhuman treatment (Article 3 violation): The Court firstly noted that measures such as the use of handcuffing, grabs, kicks, can apply to a situation of resistance and verbal aggression to which the police officers claim to have responded. However, the Court notes that the use of batons was unusual and indicative of a repressive element of the intervention against them, and that there was no note of extraordinary circumstances, events or security incidents in realisation of the search operation of 13th June 2013 that would justify the use of batons rather than other coercive instruments mentioned above, and therefore that **the Government has failed in proving that the use of force against the applicants was indispensable and not excessive**. Additionally, the Court finds that the ill-treatment produced against them can be qualified as "inhuman".

On the effective investigation (Article 3 violation): The Court concludes that the violation of Article 3 in its procedural limb is qualified, notably because **the investigation did not involve any verifiable assessment** of the necessity of the use of coercive measures against the applicants.

On discrimination (Article 14 violation): The Court finds the **lack of proper examination of whether racist attitude played a role in the planning of the police operation**, incompatible with the State's positive obligation under Article 14, to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic prejudice may have played a role in the applicants' treatment. The Court therefore finds a violation of Article 14 in conjunction with Article 3.

Finality of the judgement: Qualification of violation of Article 3 and Article 14 in conjunction with Article 3. The Court held the respondent State was to pay a total of 26 500 EUR to each of the applicants.

Judgments from the European Court of Justice

JUDGMENT, 24TH SEPTEMBER 2020, CASE C-195/20 PPU, GENERALBUNDESWANWALT BEIM BUNDESGERICHTSHOF v XC – Judgement - Summary

Legal matter: European Arrest Warrant (EAW) and surrender procedures between EU Member States; Prosecution, sentence or deprivation of liberty for an offence committed before the surrender and other than that for which he or she surrendered.

Question referred: interpretation of the **Specialty rule, Article 27(2**) of Framework Decision 2002/584 regarding the European arrest warrant and the surrender procedures between Member States. According to Article 27(2), a person surrendered should not be prosecuted, sentenced or otherwise deprived on his or her liberty for an offence committed prior to his or her surrender other than that for which he or she surrendered. **The specialty rule does not apply where the executing judicial authority gave its consent**.

Summary of facts: XC was prosecuted in Germany in three separate sets of criminal proceedings, in 2011, 2016 and 2018. In **2011**, he was convicted by a local court to a sentence of 1 year and 9 nine months, suspended on probation. In **2016**, the Public Prosecutor's Office, Hannover, issued an EAW in order to prosecute XC for an offence he committed in Portugal. After the Portuguese authorities authorised his surrender, XC received a custodial sentence, **during which the suspension on probation of the 2011's sentence was revoked**.

In **2018**, the Public Prosecutor's Office, Flensburg (DE), **asked the Portuguese authorities to renounce to the Specialty rule** detailed above (Article 27(2) of Framework Decision 2002/584) and consent to the execution of the sentence imposed in 2011. In the absence of answer from the Portuguese authorities, XC was released and left for the Netherlands then Italy. The Flensburg Prosecutor's office **issued a second EAW for the purposes of executing the sentence of 2011.** The Italian authorities agreed to surrender him.

Later in **2018**, the Local Court, Braunschweig (DE), issued **a third EAW** for the purposes of conducting **investigation on an offence XC conducted in Portugal in 2005**. The Italian authorities also gave their consent to this request. By judgement of December 2019, XC was convicted to a combined custodial 7-year sentence for the 2005 and the judgement of 2011.

XC brought appeal on the argument that Portuguese authorities never agreed to his prosecution and that, therefore, the German authorities were not entitled to prosecute him. The referring court therefore asks whether the first EAW should be maintained or annulled.

Legal reasoning: Assessing the interpretation of Article 27(2) of Framework Decision 2002/584, the Court declares that such measure of deprivation of liberty against a person referred to in a first EAW on the basis of an offence that is different to that which constituted the basis for his surrender under that warrant and prior to that offence **is not contrary to EU law**, **if that person's departure from the Member State which issued he first EAW was voluntary**, and **if he was surrendered to that Member State under a second EAW** issued after that departure for the purposes of executing a custodial sentence, under the condition that, under the second EAW, the judicial authority executing that warrant consented to the prosecution.

The Court adds that in those circumstances, requiring the consent of judicial authorities which issued the first EAW and the second EAW would prevent the effectiveness of the surrender procedure,

therefore undermining the objective of simplifying and accelerating surrenders between Member States, pursued by the Framework Decision 2002/584.

As these criteria apply to the present case, **the Court finds that XC is no longer entitled to benefit from the specialty rule related to the first EAW.** The only surrender relevant to the compliance with the specialty rule is the one related to the second EAW.

JUDGMENT, OCTOBER 6TH 2020, JOINT CASES C-511/18 LA QUADRATURE DU NET, C-512/18 FRENCH DATA NETWORK, C-520/18 ORDRE DES BARREAUX FRANCOPHONES ET GERMANOPHONES ET C-623/17 PRIVACY INTERNATIONAL – Judgement – Summary

Applicants: Privacy International (UK – Investigatory Powers Tribunal), La Quadrature du net and Others (FR, Conseil d'Etat), Ordre des Barreaux francophones et germanophone and others (BE - Cour constitutionnelle).

Legal matter: transmission or retention of traffic data and location data by electronic communication services providers, for the purpose of combating crime; data protection.

Question referred: interpretation of the Article 15(1) of Directive 2002/58/EC of the EP and European Council of 12 July 2002 on the processing of personal data and the protection of privacy in the electronic communications sector. That article empowers the Member States to restrict the scope of certain rights and obligations provided by the Directive, on the grounds of protection (national security).

Summary of facts: In a common judgement ***Tele2 Sverige*** and ***Watson and others*** (21st December 2016, C-203/15), the Court assessed that **Member States could not require providers of electronic communications services to retain traffic data and location data in a general and indiscriminate way**. While this collect was not allowed, some Member States were proceeding to such collect for police forces, intelligence services or criminal justice authorities and making them available to counter-terrorism authorities. The applicants lodged a complaint regarding the lawfulness of legislation adopted by certain Member States in those fields, laying down obligation for providers of electronic communications services to retain such data in a general or indiscriminate way.

Legal reasoning: On 6th October, the Court confirmed its case law from the *Tele2 Sverige* and *Watson and others* judgement, regarding the disproportional nature of general and indiscriminate retention of such data. The Court provides clarifications as to the scope of the powers conferred on the MS by that Directive for the purpose mentioned above.

Firstly, the Court **confirms the applicability of the directive** to the case of national legislations requiring the transfer of such data to national security and intelligence authorities. The Court clarifies that **the Directive does not permit exception** to the obligation to ensure the confidentiality of electronic communications and related data, **unless** the adopted measures comply with the general principles of EU law, including principle of proportionality and fundamental rights guaranteed by the Charter. The Court also interprets the Article 23(1) of the GDPR as precluding such measures.

The Court recalls that, as EU law currently stands, it is for national law alone to determine the rules relating to admissibility and assessment, in criminal proceedings, of information and evidence obtained by general and indiscriminate retention of such data in breach of EU law.

Conditions of derogation: A Member State may derogate the obligation to ensure the confidentiality of data relating to electronic communications in case it is facing a serious threat to national security that proves to be **genuine, present and foreseeable**. This derogation allows it to require the general and

indiscriminate retention of that data **for a period that is limited in time to what is strictly necessary**, which may be extended if the threat persists.
For combating serious crime and preventing serious threats to public security: a Member State may provide for the **targeted retention** of that data and its expedited retention. The MS shall **provide effective safeguards** and the interference must be reviewed by a court or an independent administrative authority.
The Court explains that the Directive does not preclude national legislation to require providers to have recourse to **real-time collection** of such data, if it is limited to persons for whom there is a valid reason to suspect they are involved in a terrorist activity and is subject to a prior review carried out by a court or by an independent administrative body whose decision is binding. The collection must be **limited to what is strictly necessary**.

Conclusions:

- In *Privacy International*: the Court precludes national legislation to carry out the general and indiscriminate transmission of traffic data and location data for such purposes.
- In Joined Cases *La Quadrature du net and Others* and *Ordre des barreaux francophones et germanophone and others*: the Court precludes such national measures as preventive measures. It would be a serious interference with fundamental rights (guaranteed by the Charter), where there is no link between the conduct of the persons whose data is affected and the objective pursued by the legislation.