The AIRE Centre
Advice on Individual Rights in Europe

Human Rights in Europe
Legal Bulletin

The AIRE Centre is a non-governmental organisation that promotes awareness of European law rights and provides support for victims of human rights violations. A team of international lawyers provides information, support and advice on European Union and Council of Europe legislation. It has particular experience in litigation before the European Court of Human Rights in Strasbourg and has participated in over 120 cases. Over the last 15 years the AIRE Centre has conducted and participated in a number of seminars in Central and Eastern Europe for the benefit of lawyers, judges, government officials and non-governmental organisations. The AIRE Centre has been focusing on the countries of Western Balkans in particular, where it is conducting a series of long-term projects focused on the rule of law and full recognition of human rights.

The Council of Europe, based in Strasbourg, is an international organisation bringing together 47 member states (all European countries except Belarus). Its main objectives include the protection of human rights, improvement of global democracy and promotion of respect for the rule of law. In order to standardise social and legal practice in member states, more than 200 international conventions in various fields such as human, minority and social rights, media, legal cooperation, healthcare, education, culture, sport, youth, local governments, interstate cooperation and regional planning have been adopted under the aegis of the Council of Europe. Defence is the only area where Council of Europe has no jurisdiction.

The European Convention on Human Rights is the most important instrument of the Council of Europe. Since the 1980s, every country hoping to join the organisation had to ratify the Convention. Convention rights are to be protected by local government and courts in the first instance, but in case this fails, the European Court of Human Rights ensures that member states respect their Convention obligations. The European Court, which has the same number of judges as the member states, protects rights and liberties of more than 800 million people, regardless whether they are citizens of one of the member states.
Welcome to the Fourth Issue of this Bulletin for 2012! Here we continue to provide case summaries from the European Court of Human Rights in Strasbourg, and Court of Justice of the European Union (CJEU) in Luxembourg. The cases reported focus on issues linked to the European integration process. In addition, each quarterly issue contain an article written by prominent European lawyers focusing on an issue particularly relevant for the region.

It is our hope that the Bulletin will continue to contribute to increase the awareness of European human rights laws and practice, and rule of law standards applied across both the Council of Europe and the European Union. In addition to the quarterly printed copy of the Bulletin which is distributed throughout the region, readers can also use the database on the AIRE Centre’s website www.airecentre.org to search through older editions of the publication and specific case summaries and comments.

In this edition of the Bulletin, we are very pleased to include an article by Navi Singh Ahluwalia, Barrister at Garden Court Chambers in London, and Emma Fenelon, staff member at the AIRE Centre, entitled Reflections on Family Life: a Developing Concept. In this article the authors discuss how the notion of “family life”, and the concept of “right to respect for family life” in Article 8 have developed through the European Court’s case law to come to encompass quite a wide variety of situations. This article shows how the Convention is indeed a living instrument, and over the years the Court has taking into account the diversity of modern family arrangements, the implications of the break-up of families following separation or divorce, and medical advancements allowing gender changes and artificial insemination, in order to ensure rights under Article 8 are protected.

We are also reporting a number of cases of particular relevance for the region in this issue. The first case involves a discussion of some of the issues highlighted in the article featured in this Bulletin: In Harroudj v. France the Court considered a child in kafala foster care, a form of guardianship provided for under Islamic law, and its relationship with French adoption laws. In Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and FYROM, the applicants were unable to access “old” foreign currency savings deposited before the breakup of former SFRY, and argued that their right to respect for property had been violated. Eparhija Budimljankslo-Nikšićka and others v. Montenegro is an admissibility decision where the Court considered the situation of a diocese and eleven monasteries and churches who complained about their property having been expropriated shortly after WWII. In Vučković and others v. Serbia, the
Court considered the applicants’ claim of discrimination in relation to the non-payment of per diems to some military reservists. In the case of Alkaya v. Turkey the home address of a famous actress had been disclosed by the media, and the Court here looked at the relationship between the right to respect for private life and the right to freedom of expression. In Plesó v. Hungary the applicant was subjected to forced committal to a psychiatric hospital to, in the domestic court’s view, prevent deterioration of his health, however the European Court did not find this to be justified under Article 5. In Rrapo v. Albania the applicant was extradited to the United States despite a Rule 39 measure having been handed down by the Court, asking the Albanian authorities to halt the extradition. Finally, Djokaba Lambi Longa v. the Netherlands is an admissibility decision where the Court considered the jurisdiction of the Netherlands over witnesses detained at the International Criminal Court in the Hague.

We hope that you will continue to find this publication a useful tool in your work and practice, and we look forward to hearing your views and comments on the bulletin.

London, February 2013

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REFLECTIONS ON FAMILY LIFE: A DEVELOPING CONCEPT

This article explores some of the recent decisions of the European Court of Human Rights on the meaning and scope of the protection afforded to applicants asserting the right to respect for family life, as protected by Article 8 of the Convention.

The concept of family life is rooted in the changing social mores prevalent in the Member States of the Council Europe. As a concept, family life has been developed by the European Court of Human Rights taking account of changing social values and norms, together with consideration of other international instruments and statements reflecting those norms. The Court’s approach to family life reflects two key interpretational principles: first, the need to interpret the Convention as a dynamic and evolutive instrument in the light of modern day conditions; second, the need to interpret the rights protected by the Convention so as to provide real and effective protection. These two principles have allowed the Court to ensure that the scope of the protection afforded by the Convention to families operates in the broadest sense, extending well beyond the traditional notion of the nuclear family. Like the concept of ‘private life’, the Court has operated on the basis of a flexible approach to the existence of family life, taking into account the diversity of modern family arrangements, the implications of the break-up of families following separation or divorce, and medical advancements allowing gender changes and artificial insemination.

Certain relationships will involve the presumption of the existence of family life. Thus relationships lawfully contracted through marriage or the relationship between parents and their minor children will always constitute family life, unless there is very strong evidence to suggest the contrary. In Berrehab v. Netherlands the Court stated:

“…the relationship created between the spouses by a lawful and genuine marriage - such as that contracted by Mr. and Mrs. Berrehab - has to be regarded as ‘family life’ …. It follows from the concept of family on which Article 8 (art. 8) is based that a child born of such a union is ipso jure part of that relationship; hence, from the moment of the child’s birth and by the very fact of it, there exists between him and his parents a bond amounting to ‘family life’, even if the parents are not then living together.” (emphasis added)

Outside of these traditional relationships, the Court has been careful to avoid a checklist for the existence of family life, instead asserting that it requires that applicants adduce evidence to establish the existence of such a relationship since,

1 Tyrer v. UK (1978), para 31.
“…family life is a question of fact to be determined by consideration of all the circumstances, and is dependent upon evidence of real and close family ties”.

The flexibility of this approach has led the Court to have little difficulty in finding relationships outside of marriage as amounting to family life. Thus, in X, Y, and Z v. the United Kingdom, in which a female-to-male transsexual living in a stable relationship with a woman and their child (born through artificial insemination with donated sperm), complained that the failure of the authorities to recognise their relationship was discriminatory, the Court stated that family life:

“…is not confined solely to families based on marriage, and may encompass other de facto relationships. When deciding whether a relationship may be said to amount to ‘family life’, a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means”.

The need to demonstrate the existence of close and personal ties has led the Court to accept a variety of different relationships as amounting to family life on a case-by-case basis, including those between adult siblings, the relationship between grandparents and grandchildren, the relationship between uncle and child where the child’s natural father had died and who lived in close proximity and visited the child most weekends, and between an adult and his parents, where the adult had always lived with his parents. Where, however, the relationship is one of mere biology, and where there is no evidence of anything beyond mere emotional ties without any further evidence of dependence, the Court has tended to find that relationships will not be protected by family life:

“Generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties”.

Instead, the Court will look at such relationships as constituting part of the fabric of an applicant’s private life.

5 X, Y and Z v. United Kingdom at para 36; see also Rodríguez de Silva v. Portugal (2003), at para 37 on children born to cohabiting couples.
Of course, the Convention requires that States provide respect for family life, which may extend to certain positive obligations to ensure that States “act in a manner calculated to allow those concerned to lead a normal family life”\(^{12}\). Any interference with the enjoyment of family life will require the State to justify that the decision is in accordance with national law, that the law itself has been enacted for a legitimate and valid reason and that when the facts are properly assessed, there is a reasonable relationship of proportionality - a fair balance - between the reasons for the law being enacted and the necessity of the interference with the applicant’s family life. This classic formulation, addressing whether a reasonable balance has been achieved between the competing interests, lies at the heart of all of the qualified rights contained within the Convention. Whilst the focus of these cases has been on Article 8, because of the factual scenarios considered by the Court involving families, the Court frequently considers such cases alongside Article 6,\(^{13}\) Article 13,\(^{14}\) Article 12,\(^{15}\) Articles 1 and 2 of Protocol No. 1,\(^{16}\) most often in conjunction with Article 14.\(^{17}\)

Whilst the Court remains a conservative institution, following the social and cultural norms of the Member States, rather than shaping their direction, even in its earliest judgments the Court responded to the question of illegitimacy robustly, recognising the difficulties caused to children born from relationships outside of marriage. In its judgment in 1979 in the case of *Marckx v. Belgium*,\(^{18}\) the applicant complained of national restrictions on legitimacy which prevented her from bequeathing property to her child born out of wedlock; only by marrying and then adopting her own daughter (or applying for her legitimation) could she have secured the same rights for her as those enjoyed by her other children born at a time when she married. The Court considered that there was no objective or reasonable justification for differentiating between children born in or out of wedlock in the inheritance of property from their parents. The same approach was adopted by the Court some 20 years later in *Mazurek v. France*\(^{19}\) in which it considered that a French law which restricted inheritance claims by illegitimate children to a maximum 25% of the value of the estate unlawfully discriminated against illegitimate children. More recently, in *Fabris v. France*,\(^{20}\) pointing to the pan-European consensus on the equal treatment of illegitimate children, the Court considered that transitional provisions of a new law introduced in France as a result of the judgment in *Mazurek*, precluding equality in inheritance claims by children “born of adultery”, again unlawfully discriminated against the applicant.

\(^{13}\) Fairness of civil proceedings.
\(^{14}\) Right to an effective remedy.
\(^{15}\) Right to marry and found a family.
\(^{16}\) Right to peaceful enjoyment of possessions and the right to education.
\(^{17}\) Prohibition on discrimination in the enjoyment of Convention rights.
\(^{19}\) *Mazurek v. France* (2000).
The Court has also considered cases concerning the difficulties created for illegitimate children where the domestic authorities impose restrictions on claiming a right of paternity. In Mikulic v. Croatia, the Court found a violation of Article 6(1) and Articles 8 and 13 since Croatian law did not oblige men against whom paternity suits were brought to comply with court orders to undergo DNA tests, leaving the children in a prolonged state of uncertainty as to their personal identity. Equally, where domestic law inhibits a father from challenging an assertion of paternity or where the authorities refuse to recognise a father’s paternity that too may be regarded as a disproportionate interference with Article 8. In essence, the jurisprudence of the Court, often interpreted by reference to the best interests of children, requires that children born of relationships outside marriage are afforded full equality and are entitled to be recognised by their parents.

As mentioned above, the Court has long since recognised the existence of family life in stable heterosexual relationships outside of marriage. Such relationships, and the children born from them, will generally be regarded as amounting to family life. As the Court noted in Rodriguez de Silva v. Portugal the Court stated:

“The Court observes at the outset that there can be no doubt that there is family life within the meaning of Article 8 of the Convention between the first applicant and her daughter Rachael, the second applicant: Rachael was born from a genuine relationship, in which her parents cohabited as if they were married.”

By contrast, the Court has as yet to find that the refusal to grant the same social and tax advantages to those who chose to cohabit and not marry, amounts to unlawful discrimination.

The question of whether same sex and transgender couples enjoy family life has been a vexed and long fought issue. In its early jurisprudence, the Court considered that same sex couples did not enjoy protection under family life; rather their sexual identity was protected as an intimate element of their private life. Thus the European Commission in Kerkhoven v. Netherlands, reflecting the social norms of the times, refused to find that a stable relationship between two women and the child born to one of them amounted to family life. In Karner v Austria, the Court side-stepped having to decide whether the right to succeed to a tenancy on death of a partner fell within ‘private’ or ‘family’ life, and instead decided the case as an aspect of the right to respect for enjoyment of the home, also protected by Article 8.

However, in the light of changing attitudes towards same sex unions, and in particular, the ability of same sex couples to enter into civil partnerships in many Member States of the Council of Europe, the Court’s view has shifted considerably. Thus in *Kozak v. Poland*, 29 which concerned the blanket exclusion of persons living in same-sex relationships from succession to a tenancy upon the death of their partner, the Court found a violation of Article 14 taken together with Article 8, on the basis that there was no objective and reasonable justification for treating same sex-partners differently. Similarly, in *P.B. and J.S. v. Austria*, 30 which concerned the extension of a worker’s health and accident insurance to his same-sex partner, the Court accepted that a cohabiting same-sex couple living in a stable *de facto* partnership fell within the notion of “family life”, and the difference in treatment between same-sex and heterosexual partners could no longer be justified. In *Schalk and Kopf v. Austria*, 31 the Court belatedly accepted that homosexual unions amounted to family life in a Chamber judgment of the First Section. Whilst the Court rejected the idea that the applicant’s inability to marry was a breach of the Convention, noting the “…rapid evolution of social attitudes towards same-sex couples had taken place in many member states and a considerable number of states had afforded them legal recognition”, it held that it was now “artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy ‘family life’ for the purposes of Article 8.”

Developing the idea that same-sex couples should enjoy formal equality has led the Court to answer what some consider to be a controversial issue of whether same-sex individuals and couples should be permitted to adopt children in the affirmative, albeit belatedly. Whilst the Court initially rejected the ability of same sex couples to adopt, 32 in *EB v. France*, which concerned the right to adopt as an individual (rather than joint adoption as a couple) the Court noted that whilst there was no ‘right to adopt’ provided by the Convention, such a facility fell within the ambit of Article 8 ECHR, and held the evidence pointed to the fact that the French authorities had considered the applicant’s sexual orientation was a ‘decisive factor’ in the decision to refuse her authorisation to adopt. More recently, in *X and Others v. Austria*, 33 two women who lived in a stable homosexual relationship challenged the Austrian courts’ refusal to grant one of the partners the right to adopt the son of the other partner (in what is known as ‘second-parent’ adoption). The Court found a violation of Article 14, in conjunction with Article 8, holding that there was no justification for the difference of treatment between unmarried heterosexual partners who were permitted to adopt such children, although it did not accept that the applicants’ situation was comparable to that of a married

32 In *Frette v. France* (2002) in which the applicant complained that he was prevented from adopting a child because of his sexual orientation, the Court found no violation of Article 14 taken together with Article 8, observing that the Convention did not guarantee, as such, the right to adopt.
33 *X and Others v. Austria* (2013).
A couple in which one spouse wished to adopt the other spouse’s child. As various factual scenarios are brought to the Court’s attention, such cases are likely to result in yet further developments of the concept of family life.34

The Court has frequently been asked to consider the question of adoption, in particular, where the state authorities have removed children from the care of their parents, often with a view to freeing them for adoption. Again influenced by the need to ensure the best interests of children, the Court has been robust in ensuring that such measures are used as a matter of last resort. In Keegan v. Ireland,35 the Court found a violation of Article 8 where a child had been placed for adoption without the knowledge or consent of the applicant father, and in circumstances where Irish law did not even afford him a right to be appointed guardian. In essence, where children are removed from their parents, the denial of any contact at all will frequently be considered to amount to a disproportionate interference with the right to respect for family life, particularly where States seek to justify removal on questionable motives.36 The Court has required that where decisions are taken to remove children from their parents, which by definition involve a substantial interference with family life, cogent reasons are required, the best interests of the child must be properly considered, and the rights of parents to continue to enjoy and develop a relationship with their children should be permitted to continue, save in the most extreme instances.37 The Court has also been robust in ensuring that foreign adoptions are recognised by the State so as to ensure the continuity of family life,38 although it has not extended this to recognition of Islamic-law principles of guardianship.39

As medical advances continue, the Court has also been required to consider family life issues relating to artificial insemination, including the right to found a family, protected by Article 12. In SH and others v. Austria,40 the Grand Chamber reversed the finding of the First Section Chamber judgment and held that an absolute restriction on access to IVF did not violate the Convention. However, the Court warned the Austrian authorities that although it had not found a violation of Article 8,

“the Court reiterates that the Convention has always been interpreted and applied in the light of current circumstances . . . Even if it finds no breach of Article 8 in the present case, the Court considers that this area, in which the law appears to be continuously evolving and which is subject to a particularly dynamic development in science and law, needs to be kept under review by the Contracting States”.

34 The authors are not aware of a case involving joint adoption by a same-sex couple of a child unrelated to both of them, however it would seem to follow from the Court’s case law that once national legislation provides this opportunity to unmarried heterosexual couples, a failure to grant the same to same-sex couples will be found in breach of the Convention on the basis of Article 8 taken with Article 14.
40 SH and others v. Austria (2011).
By contrast, in *Costa and Pavan v. Italy*,\(^{41}\) an Italian couple who were carriers of cystic fibrosis and wanted to avoid, with the help of medically-assisted procreation and genetic screening, transmitting the disease to their offspring, but were refused such assistance, the Court found a violation of Article 8. It noted in particular the inconsistency in Italian law which denied the couple access to embryo screening but authorised medically-assisted termination of pregnancy if the foetus showed symptoms of the same disease, but stressing the difference between this case, which concerned pre-implantation diagnosis and homologous insemination, and that of *S.H. v. Austria*, which concerned access to donor insemination.

This brief review of the Court’s jurisprudence highlights both the diversity of factual scenarios the Court has been asked to consider, together with the adaptability of the Court in its interpretation of the Convention to the changing values and scientific developments that are a feature of modern society. From its initially highly conservative approach, the Court has had the confidence to interpret the Convention to place a wide variety of relationships outside of marriage on a near equal footing, in particular, to prevent discriminatory treatment toward same sex couples and illegitimate children. It is likely that the Court will continue to tread a careful and measured path in this often controversial area, as it reflects upon changes in social attitudes toward the concept of the family as they develop through consensus. We anticipate yet further developments in what we believe can aptly be described as a dynamic and evolutive area of law.

Emma Fenelon and Navtej Singh Ahluwalia\(^{42}\)

March 2013

\(^{41}\) *Costa and Pavan v. Italy* (2012).

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Refusal to allow adoption of a child in ‘kafala’ foster care under Islamic law not a violation of the Convention

JUDGMENT IN THE CASE OF HARROUDJ V. FRANCE

(Application No. 43631/09)

4 October 2012

1. Principal facts

The applicant, Katya Harroudj, is a French national who was born in 1962 and lives in Villeurbanne (France). In 2004 an Algerian court granted her the right to take into her legal care (kafala) a child born in Algeria of unknown parents on 3 November 2003 and abandoned at birth. Katya Harroudj was granted legal authorisation by the Algerian authorities to change the child’s name to Hind Harroudj. She brought her to France on 1 February 2004.

In France the applicant applied to adopt the child, but her application was rejected on 21 March 2007. The Lyons tribunal de grande instance noted that kafala gave the applicant parental authority, enabling her to take all decisions in the child’s interest, and gave the child the protection to which all children are entitled under international treaties. The court also pointed out that under the French Civil Code a child could not be adopted if the law of his or her country – Islamic law in this case – prohibited adoption, which it did in the case of Hind Harroudj, as Algerian family law did not authorise adoption.

In Islamic law, adoption, which creates family bonds comparable to those created by biological filiation, is prohibited. Instead, Islamic law provides for a form of guardianship called “kafala”. In Muslim States, with the exception of Turkey, Indonesia and Tunisia, kafala is defined as a voluntary undertaking to provide for a child and take care of his or her welfare and education.

In French law kafala is considered as a form of guardianship if the child is an orphan or has been abandoned and the parents are unknown, or as a delegation of parental authority. Kafala creates no filial bonds, no right to inherit and no right for the child to acquire the nationality of the guardian, and in the event of the latter’s death before the child comes of age, the child becomes a ward of his or her State of origin. The French Civil Code, however, authorises the adoption of a minor whose personal status is governed by Islamic law “if the minor was born and habitually resides in France”. Also, a child who cannot be adopted because of his or her personal status under Islamic law has the right, before coming of age, to apply for French citizenship if they have lived in France for at least five years, in the care of a French national.

43 This judgment is final.
The applicant argued in her subsequent appeal that it was in the child’s interest for a filial bond to be established between them, and that denying her the right to adopt established a difference of treatment based on the child’s country of origin, as children born in countries which did not prohibit adoption could be adopted in France. That appeal was rejected on 25 February 2009. The Court of Cassation noted that cooperation agreements on international adoption applied only to adoptable children, and kafala was explicitly acknowledged by the Convention on the Rights of the Child as protecting the child’s best interests in the same way as adoption.

2. Decision of the Court

Relying on Article 8 (right to respect for private and family life), the applicant complained that she was not allowed to adopt a child she had taken into her care (kafala), and that the refusal to acknowledge a filial bond with a child she considered as her own daughter amounted to disproportionate interference with her family life. Relying on Article 14 (prohibition of discrimination), she further argued that in applying Islamic law, which prohibited adoption, to the child’s situation the French Civil Code was effectively encouraging discrimination based on national origin.

Article 8

The Government did not dispute the existence of a family life between Mrs Harroudj and Hind, but they did deny that the refusal to let the applicant adopt amounted to an “interference” with the applicant’s family life. The Court shared that view, noting that Mrs Harroudj was not complaining about a major obstacle to her family life, but simply wanted to establish a filial bond which the Civil Code denied her because adoption was prohibited in the child’s country of origin. The Court went on to examine whether France was under any positive obligation regarding respect for the applicant’s family life.

The Court considered, first of all, that the discretion (margin of appreciation) open to the French State here was wide, in so far as there was no consensus on this question among the Council of Europe’s Member States. Although none of the States considered kafala equal to adoption, approaches as to whether or not the law of the child’s country of origin constituted an obstacle to adoption varied.

The refusal to let the applicant adopt was based on the French Civil Code, but also, to a large extent, on compliance with international treaties, particularly the Convention on the Rights of the Child, which explicitly referred to the Islamic kafala as “alternative care”, on a par with adoption. The fact that kafala was acknowledged in international law was a decisive factor when assessing how States accommodated it in their domestic law and dealt with any conflicts that arose.

The Court also noted that kafala was fully accepted in French law, and in Mrs Harroudj’s case had produced effects comparable to guardianship, so that she was able to take all decisions in the child’s interest. It was also possible for her to include the child in
her will and choose a legal guardian to look after her in the event of her demise. Lastly, under the French Civil Code, the child had the possibility, after a short time, to acquire French nationality and thereby become adoptable, as she had been taken into the care of a French national in France.

Thus, by providing for an exception for children born and residing in France, and giving children taken into care in France by a French national rapid access to French nationality, the authorities had made an effort to encourage the integration of such children without immediately severing the ties with the laws of their country of origin, thereby respecting cultural pluralism. A fair balance had therefore been struck between the public interest and that of the applicant, without interfering with her right to respect for her private and family life. The Court accordingly held that there had been no violation of Article 8.

**Article 14**

In the light of the above finding, the Court considered that no separate issue arose under Article 14.

**3. Comment**

There was little chance that this complaint would result in the finding of a violation of the Convention, given that not a single Member State of the Council of Europe treated *kafala* the way the applicant argued Article 8 required them to treat it – as the equivalent of a full adoption. The Court could very well have used the applicant’s failure to request French nationality for the child as grounds for dismissing her complaint altogether. The Court nonetheless confronted head-on the difficult issues that were at the heart of the complaint. In particular, the Court did not shy away from seeing this as a cultural issue, pitting the Roman-law notion of adoption against Islamic law, which prohibits adoption but allows for *kafala* fostering. The Court explicitly approved of the French approach aimed at reconciling these cultural differences.

In cases involving international adoption or fostering arrangements, the Court appears to favour States when they respect the law of or legal decisions taken in the child’s country of origin. This may signal the Court’s approach to future issues that arise in cases involving mobile families with children, including, for example, in the context of adoption and fostering arrangements by same-sex couples. The Court recently found no violation of the Convention when the French courts refused to allow a woman to adopt her female partner’s biological child (*Gas and Dubois v. France*, judgment of 15 March 2012).

Those who wish to avoid an interpretation of this judgment that allows such an approach to future cases can take comfort in the Court’s reliance on the recognition of the *kafala* in international conventions. The failure of international treaty law to cope with other thorny issues that transnational families present, such as same-sex adoption, may give the Court more flexibility in other cases to find a violation.
Inability to access ‘old’ foreign-currency savings from former SFRY banks held to be a violation of Article 1 Protocol No. 1

CHAMBER JUDGMENT IN THE CASE OF ALIŠIĆ AND OTHERS V. BOSNIA AND HERZEGOVINA, CROATIA, SERBIA, SLOVENIA AND THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

(Application No. 60642/08)
6 November 2012

1. Principal facts

The applicants are Emina Ališić, a national of Germany and Bosnia and Herzegovina (born in 1976), Aziz Sadžak, a national of Bosnia and Herzegovina (born in 1949), and Sakib Šahdanović, also a national of Bosnia and Herzegovina (born in 1952). The applicants live in Germany.

The applicants had deposited their foreign-currency savings in the Sarajevo branch of the bank Ljubljanska banka Sarajevo (now a Slovenian based bank) and the Tuzla branch of the Investbanka (now a Serbian based bank), in an area which is now Bosnia and Herzegovina. They had deposited their savings at the time that the Socialist Federal Republic of Yugoslavia (SFRY) still existed.

The SFRY, because they were hard pressed for hard currency, made it attractive for citizens to deposit foreign currency with their banks. Customers could benefit from a high interest rate (the annual rate often exceeding 10%), and a State guarantee (which they could not activate themselves) in the case of bankruptcy or ‘manifest insolvency’. The depositors could collect their savings from the bank at any time, with accrued interest.

When the dinar exchange rate depreciated in the 1970s, re-depositing schemes were activated. This ended in 1988, and reforms ensued. After the reforms of 1989/90, on 1 January 1990, Ljubljanska Banka Sarajevo became a branch (without legal personality) of Ljubljanska Banka Ljubljana, taking over the former’s rights, assets and liabilities. Investbanka became an independent bank headquartered in Serbia, with branches in Bosnia and Herzegovina – including that of the Tuzla branch.

In 1991/2, the SFRY disintegrated, and foreign currency deposited before that time was customarily referred to as ‘old’ or ‘frozen’ foreign currency savings in the successor States. These savings remained frozen for varying periods of time, and the successor States agreed to repay them into domestic banks.

44 This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.
However, this has not occurred in Bosnia and Herzegovina. The State’s Constitutional Court has examined numerous individual complaints about the failure of Bosnia and Herzegovina and its entities to carry this out at the domestic branches of those two banks. That Court found that there was no liability, and ordered the State to help the clients of those branches to recover their savings from Slovenia and Serbia.

In 2001/2, four rounds of negotiations were held, as set out by the Agreement on Succession Issues, on the distribution of SFRY’s guarantees of ‘old’ foreign-currency savings. An agreement could not be reached, and in September 2002, the Bank for International Settlements (BIS) stated that they would not be further involved in the matter.

The applicants have therefore still been unable to recover their ‘old’ foreign-currency savings deposits, dating back to the dissolution of the former SFRY.

2. Decision of the Court

The applicants submitted that the respondent States, as the successor States of the SFRY, should pay back their ‘old’ foreign-currency savings in view of the fact that they had failed to settle this remaining succession issue.

Article 1 of Protocol No. 1

Article 1 of Protocol No. 1 is made up of three rules: i) principle of peaceful enjoyment of property, ii) deprivation of property and conditions for this, and iii) States can control the use of property if it is in the general interest. The Court considered the present case under the third rule, and examined in particular whether a fair balance had been struck between the general interest and the applicants’ rights.

The applicants had an entitlement to withdraw their savings at any time but could not do this. The Court found that the banks remained liable (not the SFRY), despite their relocation, as the savings guarantee could not only be activated by banks, and none of them had done this.

The Court also stated, that as sole shareholder of the old Ljubljanska Banka, Slovenia was responsible for the inability to service debts. Further, relying on case law in similar cases, and as Investbanka was either largely or entirely state-owned, Serbia was found responsible in this case.

The applicants’ continued inability to freely dispose of their savings had amounted to a violation of Article 1 of Protocol No. 1 by Slovenia and Serbia. Although certain delays could be justified in exceptional circumstances, the applicants’ continued inability to freely dispose of their savings despite the negotiations conducted under the Agreement on Succession Issues as well as a lack of any meaningful negotiations concerning this issue thereafter was contrary to Article 1 Protocol 1.
Article 13

The applicants argued that they had no effective remedy at their disposal for their complaints under the abovementioned article. Referring to the fact that Slovenia had been found to be liable for the old Ljubljanska Banka branch and Serbia for the Investbanka branch, the Court found that the applicants had not had an effective remedy at their disposal in these countries and a breach of Article 13 was found.

Article 14

The Court considered that it was not necessary to examine the applicants’ complaints under this Article.

Article 41

The Court held that Serbia was to pay €4,000 to Mr Sahdanovic and Slovenia the same amount to Ms Alisic and Mr Sadzak in respect of non-pecuniary damage.

Article 46

This is one of a large number (over 1,650) of applications, involving more than 8,000 applicants, concerning matters of “old” foreign-currency savings following the dissolution of the former SFRY. For this reason, the Court applied the pilot judgment procedure.

The Court concluded that Slovenia and Serbia should undertake all necessary measures within six months from the date on which this judgment became final in order to allow the applicants and all others in their position to be paid back their “old” foreign currency savings under the same conditions as those who had such savings in domestic branches of Slovenian and Serbian banks. The Court also adjourned the examination of all similar cases during this period.

3. Comment

This interesting case was brought by the applicants against the governments of Slovenia, Croatia, Serbia, Bosnia and Macedonia. As a consequence the national judge from each of the respondent states sat ex officio on the panel of judges which constituted the Chamber deciding the case, leaving only two seats for judges from jurisdictions not involved in the litigation. The Chamber found both Serbia and Slovenia in violation of the Convention and adopted the pilot judgement procedure in relation to those two States: under this procedure the respondent governments are required to take the necessary steps to ensure that the situation of both the applicants in the present cases and other applicants in the same situation have their problems resolved without having to have recourse to the European Court to be paid the “old” foreign currency savings they were claiming they had been unable to access, or the balance of those monies in the event of them having received part payment. The Slovenian judge delivered a forceful dissenting judgment and the government of Slovenia have now asked for the case to be referred to the Grand Chamber.
1. Principal Facts

The applicants are the diocese and eleven monasteries and churches of the Serbian Orthodox Church in Montenegro.

On unspecified dates immediately after World War II, several plots of land were expropriated from some of the applicants, without a decision to this effect. A request was filed to the government for restitution of this land on 18 March 2004, where the applicants relied on the Just Restitution Act of 2002. In May 2003, the Constitutional Court of Montenegro had declared certain key provisions of this act unconstitutional. In April 2004, a new Restitution of Expropriated Property Rights and Compensation Act entered into force, providing that the restitution of property to religious communities would be regulated by a separate law.

There was no response from the government, so the applicants filed an administrative dispute on 16 June 2004, before the Supreme Court. This was taken over by the Administrative Court, who ruled against the applicants, stating that the government had no jurisdiction to rule on their request. The judgment could not be served, as the applicant’s representative had moved house. Consequently the relevant documents were posted on the court’s notice board.

2. Decision

The applicants complained about the breach of their property rights, discrimination faced in that respect, the length of proceedings concerning the administrative action, and the lack of an effective domestic remedy, under Articles 6, 13, 14 and Article 1 of Protocol No. 1.

Article 1 of Protocol No. 1

The Court underlined that a violation of this article can only be alleged in relation to a ‘possession’. This has an autonomous meaning, independent of that given in domestic law. It can be either for ‘existing possessions’ or assets, which include claims, that an individual has a legitimate expectation will be realised.
Not included is a hope that a long extinguished property right can be revived, nor a conditional claim which has lapsed because the attached condition was not fulfilled. Further, a claim is an asset only when it has been sufficiently established to be enforceable – otherwise there is no legitimate expectation.

Legislation providing for a full or partial restoration of property confiscated under a previous regime may be regarded as generating a new property right. However, there is no general obligation imposed on the Contracting States by this right to restore property transferred before the Convention was ratified, nor are there restrictions on determining the scope of property, and conditions under which this occurs.

In the present case, the property was expropriated after WWII, long before the Convention and Protocol entered into force for Montenegro. The Court declared that it was not competent _ratione temporis_ to examine the circumstances of expropriation, or any continuing effects up to the present day. The applicants had not exercised owner's rights after that time, so there was no retention of title to property. They were claimants, not owners, and ‘existing possessions’ were not at issue here.

The applicants argued that there was a legitimate expectation that the restitution request would be determined in their favour - under the Just Restitution Act. However the key provisions of this legislation had been declared unconstitutional before the Convention had entered into force in respect of Montenegro, and before they had filed their request. Thus, it was unrealistic to expect a determination, let alone a determination in their favour. Further, a belief that there would be a chance in the law did not amount to a legitimate expectation - it must be more than a hope and based on a concrete provision or legal act or decision.

Consequently, the complaint was therefore declared inadmissible as incompatible _ratione materiae_.

**Article 14**

It was not necessary to examine the applicant’s complaint under this Article.

**Article 6 and Article 13**

The Court considered the applicants further arguments to be inadmissible.

3. **Comment**

This is an admissibility decision and not a judgment on the merits. Over 95% of all cases brought to the ECtHR are declared “inadmissible”, but most of these are rejected by a Committee of three or a single judge and are never notified to the Respondent Government. This complaint was “communicated” (notified) to the Montenegrin Government, which submitted observations to which the applicants responded, and third party observations were submitted by the Serbian Government. The Court however eventually decided that the case was inadmissible _ratione materiae_.


The applicants had alleged that their rights under Article 1 of Protocol No.1 (the peaceful enjoyment of possessions) had been violated. The Court however found that their complaint did not fall within the scope of that Article. It is well recognised that the concept of “possessions” for the purposes of that Article can include not only a person’s actual vested possessions but also claims in respect of which he has a legitimate expectation that they can be enforced in national law. The Convention does not impose on States any general obligation to restore property which was confiscated by a previous regime before the ratification of the Convention. However, where the State has chosen to set up a scheme which does this and national law provides for the restitution of property if the individual meets the requirements specified for entitlement to restitution, a claim falling within the scope of Article 1 of Protocol No. 1 will arise for those who meet those requirements. But a mere hope, or a reliance on a political commitment which is not grounded in a provision of national law, which has been enacted and is in force, will not be sufficient to create an asset which falls within the scope of Article 1 of Protocol No.1.
Non-payment of per diems to some military reservists and not others amounted to discrimination in violation of the Convention

CHAMBER JUDGMENT IN THE CASE OF VUČKOVIĆ AND OTHERS v. SERBIA

(Application no. 17153/11 and 29 others)
28 August 2012

1. Principal Facts

The applicants were reservists, drafted by the Yugoslav Army for NATO’s intervention in Serbia. They remained in service from March to June 1999, which entitled them to a certain per diem.

However, when demobilisation occurred, the government refused to pay the per diem to the reservists, including the applicants. After public protests and some confrontation with the police, an agreement was reached between the Government and some of the reservists, where per diems were paid to individuals from ‘underdeveloped’ municipalities – this did not include the current applicants. Therefore, on 26 March 2009, they filed a civil claim to recover the payment, also alleging discrimination. The Niš Court of First Instance ruled against the applicants holding that the claim had been filed out of time, and this was upheld on appeal. The applicants took the case to the Constitutional Court, complaining that the Niš court had ruled in a manner inconsistent with other Serbian appellate courts (district courts, high courts, and appeal courts) that applied a ten-year prescription period. They also referred to an agreement of 2008 with some of the reservists, which excluded all other reservists. The proceedings before the Constitutional Court were pending at the time of the European Court’s judgment.

2. Decision

The applicants complained, under Article 6(1) ECHR, that the Serbian courts applied inconsistent case law in rejecting their own claims whilst other civil courts had accepted identical claims by following a different interpretation of the applicable prescription periods. The applicants also complained about discrimination against them under Article 14 ECHR, stemming from an agreement of 2008 to make payments to the other reservists (of ‘underdeveloped’ status).

45 This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.
Article 6 (1)

The Court reiterated the main principles relating to conflicting court decisions, and underlined that it was not the Court’s function to deal with the national courts’ alleged errors of fact or law, unless ECHR rights could have been infringed. Its function was not to compare different decisions of national courts, as their independence must be respected, unless there had been evident arbitrariness.

Conflicting court decisions are an inherent trait of any judicial system, and divergences can even occur within the same court. On its own, that is not contrary to the Convention. Assessing whether such conflicting decisions were in breach of Article 6 (1) meant establishing whether ‘profound and long-standing differences’ existed, whether domestic law provided a way to overcome inconsistencies, whether that machinery had been applied, and if appropriate, to what effect.

Assessment also had to be based on the principle of legal certainty. This principle guarantees stability in legal situations, and contributes to public confidence in the courts. The persistence of conflicting court decisions can create a state of legal uncertainty which can have the opposite effect.

However, these requirements do not confer an acquired right to consistency of case law, as its development is not, in itself, contrary to the proper administration of justice. This is because a failure to keep up a dynamic and evolutive approach could hinder reform or improvement.

The Court did not consider that there had been ‘profound and long-standing differences’ in the relevant case law, nor that this had resulted in judicial uncertainty for the period in question, and rejected the complaints as being manifestly ill-founded.

Article 14 and Article 1 of Protocol No. 1

The Court rejected the government’s objection that the claim was inadmissible, and went on to consider the merits. The government submitted that there was no discrimination, and that the amount paid to the other reservists was a social benefit, not a per diem. Secondly, the decision was made in light of a finite amount of resources available to the state. Thirdly, those other reservists had to give up all legal claims concerning their military service. There was a difference, but there was a reasonable and objective justification for it.

However, the Court noted that the per diems had been formally recognised as an outstanding pecuniary obligation of Serbia since 1999, and that the payments referred to in the agreement of 2008 – namely the applicants’ exclusion from this – were connected to the said entitlement. It followed that the complaints were of a ‘sufficiently pecuniary’ nature to fall under Article 1 of Protocol No. 1.

The Court noted that the payments under the agreement of 2008 were clearly per diems, not social benefits awarded to persons in need, and therefore fully endorsed the reasoning offered by the Serbian Commissioner for the Protection of Equality in 2011 on this point.
The areas chosen to enter into the agreement between the Government and some of the reservists were apparently chosen because of their ‘underdeveloped status’, implying the reservists’ indigence. However those reservists were never required to prove this, whereas the applicants in this case, as with all other reservists without a registered residence in those areas, could not benefit from the agreement, irrespective of their means. Therefore, the Government’s response to the entire situation was arbitrary. The Government submission about a civil claim being possible was a circular one, as this had been attempted, but to no avail.

The Court held, by 6 votes to 1, that there was no ‘objective and reasonable justification’ for the differential treatment of the applicants merely on the basis of their residence, in violation of Article 14 ECHR together with Article 1 of Protocol No. 1.

**Article 1 of Protocol No. 12**

It was not necessary to examine the applicants’ complaint under this provision.

**Article 41**

The applicants had failed to submit their applications for just satisfaction in time, and their claims were therefore dismissed.

**Article 46**

The respondent government had to, within six months from the date of which the present judgment became final, take all appropriate measures to secure non-discriminatory payment of the war per diems in question to all those entitled (however see below regarding referral to the Grand Chamber).

**3. Comment**

The case of Vučković and others concerned the complaints of the reservists who were called to serve in the Army in 1999 that they had never been paid the per diems to which they were entitled for that period of service. They also complained that reservists from certain areas had received payments which had been denied to them. The applicants complained inter alia about the inconsistency of the case law of the Serbian courts in this matter and in particular about the rejection of their claims by the Niš court when other civil courts had accepted identical claims by their fellow reservists based on a different interpretation of the applicable prescription periods. Some courts applied a three year rule, some five years, and some ten. It was alleged that the difference was not based on any objective differences between the claims, but on the subjective approach taken by the different courts as to the period that should correctly be applied to all claims of this kind.

One of the fundamental principles of the Convention is that of legal certainty. Rights must be protected by a national law which is “precise and ascertainable so that an individual may regulate his conduct by it”. But the way in which the Court has applied
this rule in practice is not so simple. In the Grand Chamber decision in *Nejdet Sahin and Perihan Sahin v. Turkey* (Judgment of 20 October 2011, reported in *Bulletin Issue 4, 2011*) the Court set out its approach to this situation. Affirming its adherence to the principle of legal certainty, it nevertheless found that “the requirements of legal certainty and of the protection of legitimate confidence of the public in the legal system do not confer an acquired right to consistency of case law since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement”.

In the present case, the Chamber of the Court found that the Supreme Court’s definitive ruling on the prescription period was the ruling that mattered, and found this part of the complaint inadmissible. It then went on to find a violation of the prohibition of discrimination in conjunction with the right to respect for property. However, the case has been referred to the Grand Chamber (the first Serbian case to go before the Grand Chamber) and will be heard on 15 May 2013.
Disclosure of famous actress’s address by a large national newspaper was a violation of the right to respect for private life

CHAMBER JUDGMENT IN THE CASE OF ALKAYA V. TURKEY\textsuperscript{46}

(Application No.42811/06)

9 October 2012

1. Principal Facts

The applicant is Ms Yasemin Alkaya, a Turkish national (born in 1964), who lives in Istanbul. Ms Alkaya is a well-known cinema and theatre actress in Turkey. In October 2002 she was the victim of a burglary, and was still in the house at the time this occurred. The police were alerted, and a complaint filed.

On 15 October, a national daily newspaper called \textit{Akşam} published a report on the incident, giving details of Ms Alkaya’s exact address, including the street name, number of the building, and number of the flat, and adding a photograph of the applicant.

An action for damages was brought before the District Court against the newspaper by the applicant on 3 December 2002, but was dismissed on 29 March 2005. That court held that, because of the applicant’s celebrity status as a public figure, the disclosure of her address was not capable of infringing her rights.

An appeal was lodged on points of law. It was submitted that since the publication of that article, Ms Alkaya had been regularly disturbed at her place of residence, and had become fearful and afraid of being there alone. It was further stated that her personality rights had been infringed.

On 12 June 2006, the first instance judgment was upheld by the Court of Cassation.

2. Decision

The applicant alleged that there had been an interference with her right to respect for her private life and home, under Article 8 of the Convention. It was argued that the interference was discriminatory, as it was based on her celebrity status. The fact that her address had been published and made publicly available meant that the State had failed in its obligation to protect the applicant.

\textsuperscript{46} This judgment is final.
Article 8

The Court pointed out that the concept of private life under Article 8 had a broad meaning, including the right to personal autonomy and personal development, physical and moral integrity, and the right to live privately. The Article 8 guarantee was designed to ensure the development of the personality of each individual in his relations with other human beings, without external interference.

The right to respect for his or her home was also protected under Article 8, and did not mean only the actual physical area, but also the quiet enjoyment of that area. The choice of where to live was a private matter, and being able to do so was an integral part of 'personal autonomy'. Furthermore, a home address was personal data or information under 'private life', and breaches to the right to respect of the home included those that were not concrete or physical.

The choice of one’s place of residence was an essentially private matter and the free exercise of that choice formed an integral part of the sphere of personal autonomy protected by Article 8. A person’s home address thus constituted personal data or information which fell within the scope of private life and as such was eligible for the protection granted to the latter.

Private individuals unknown to the public could claim particular protection of such rights, but the Court observed that the same did not apply to public figures. Nevertheless, despite being known to the general public, such figures could rely on a ‘legitimate expectation’ of protection of and respect for the right to private life.

The Court noted that the level of protection conferred by the domestic courts in this respect was considered by the applicant to be insufficient.

What had to be ascertained was whether the State had struck a fair balance between the applicant’s right to protection of private life, and the opposing party’s right to freedom of expression under Article 10 of the Convention.

The publication of an article on the burglary that occurred was not what the applicant challenged. The applicant challenged the disclosure of her home address, which was not of public interest – the decisive element in weighing those rights. The Court agreed that the public had a right to be informed, but articles that aimed only at satisfying the curiosity of a certain readership on the details of a person’s private life, irrespective of how famous they were, were not a contribution to a debate of general interest to society. Further, the Court could not see any evidence that showed that the disclosure of the address without the applicant’s consent was in the general interest.

The Court also noted that the District Court had only referred to the celebrity status in their finding that the disclosure was not possible of infringing the applicant’s personality rights. In addition, the national courts had not considered the repercussions of publishing this information in the press. This failure to weigh the interests at stake was not compatible with the State’s positive obligations under Article 8. This was all the more
so as the applicant had complained of the inappropriate behaviour of persons outside her home, and the greater sense of resulting insecurity she felt.

The Court unanimously found that there was a violation of Article 8.

Article 41

The Court awarded EUR 7,500 in respect of non-pecuniary damage.

3. Comment

This judgment adds to the Court’s case law about the positive obligations of States (and notably domestic judges) under Article 8 when the media invade the privacy of celebrities. Perhaps the most well known of these cases are the two brought by Princess Caroline of Monaco, which illustrate the Court’s case law in this area. In Von Hannover v. Germany (judgment of 24 June 2004), the Court found a violation of Article 8 when the German courts failed to sanction a magazine for publishing private photos of the popular royal that did not contribute to any debate of public interest. In Von Hannover v. Germany (no. 2) (judgment of 7 February 2012, reported in Bulletin Issue 1, 2012), the Grand Chamber refused to find a violation; the German courts had taken no action following the publication in a magazine of the Princess on holiday whilst her father (Prince Rainier of Monaco) was ill, but this inaction was justified because the photograph contributed to a debate of general interest (about the Prince’s illness).

Just as Prince Rainier’s illness justified the publication of a photograph of his daughter on holiday, it could be argued that the news about the applicant’s home being burgled in this case justified the publication of related, private information: her address. However, the impact on the applicant’s private life in this case was much greater than the impact on Princess Caroline of the publication of her photo (in Von Hannover (no. 2)): the applicant in this case became prey to stalkers outside her home. It is not difficult to see why the Court concluded there was a violation. No reasons were given, or could be, as to why divulging the applicant’s address would contribute to a debate of public interest. Indeed, the Court appeared to doubt whether the burglary of a celebrity’s home related to the public interest at all.

The case is instructive in other less obvious ways. The Government claimed to rely on the State’s margin of appreciation, noting well-established jurisprudence in Turkey about the invasion of private life by the media. The Court rejected the argument, noting that the domestic court had not undertaken any balancing of the interests at hand, nor had it cited the established case law in Turkey about this issue. Instead, the national court merely noted how famous the applicant was, giving no consideration to the consequences on her private life of divulging her address.

This is an important lesson for national judges and those training them on how to apply the Convention. In cases involving complaints against the media for invasion of privacy (i.e. the balancing of Article 8 rights against Article 10 rights), national courts
enjoy a margin of appreciation. As the Court said in *Von Hannover (no. 2)*, ‘Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court’s case-law, the Court would require strong reasons to substitute its view for that of the domestic courts’ (§ 107). Where the domestic courts do not engage in any balancing test at all and do not invoke the criteria in the Court’s case law (or, indeed, in domestic case law), the Court apparently feels much less obliged to produce such strong reasons. Application of the Convention principles must not be left implicit; the Court must see national authorities (in this case courts) wrestling with the issues raised in the Court’s case law before it will allow Governments to use the margin of appreciation as a shield against the finding of a violation.
Forced committal to a psychiatric hospital to prevent deterioration of health was not justified

CHAMBER JUDGMENT IN THE CASE OF PLESÓ V. HUNGARY

(Application No. 41242/08)47
2 October 2012

1. Principal facts

The applicant, Tamás Plesó, is a Hungarian national who was born in 1975 and lives in Dunakeszi (Hungary).

Contacted by Mr Plesó’s mother, who was concerned about his “strange behaviour” and about the fact that he had not taken up a proper job, the psychiatrist Dr M. diagnosed Mr Plesó with “paranoid schizophrenia under observation” in September 2007 and conducted a number of counselling sessions with him together with a psychologist. Following Mr Plesó’s refusal to attend further sessions, Dr M. requested the District Court to order his mandatory institutional treatment.

At a court hearing on 11 December 2007, a guardian was appointed for Mr Plesó for the purpose of the proceedings and Dr M. was heard, who indicated her suspicion that Mr Plesó suffered from paranoid schizophrenia. Questioned by the court, Mr Plesó stated that he was considering seeking help from health professionals, with the exception of Dr M. During the hearing, the court ordered a forensic psychiatrist, Dr H., to prepare a medical opinion about Mr Plesó’s condition. This psychiatric evaluation was done during a break in the court hearing, in approximately forty minutes. Neither the guardian nor Mr Plesó had the opportunity to learn about the expert opinion prior to the resumed hearing. Dr H. considered that Mr Plesó suffered from delusional schizophrenia and specified that she considered his treatment necessary as otherwise his health would decline. In her opinion, Mr Plesó could not take care of himself and thus represented a significant danger to himself. Upon her suggestion that a decision on compulsory treatment be postponed for six months, in order to observe his conduct, the judge pointed out that no such option was allowed under the relevant law.

On 18 December 2007, the District Court ordered Mr Plesó’s mandatory institutional treatment, on the basis of the relevant sections of the Act on Health Care and on the jurisprudence of the Supreme Court. Relying on the medical opinions provided, the court accepted that he suffered from schizophrenia with grandiose delusions and it was satisfied that he posed a danger to his own health by failing to voluntarily subject himself to treatment.

47 This judgment is final.
to psychiatric treatment and by not looking after himself. It affirmed that appropriate medical treatment would improve his condition and that, if untreated, his health would decline.

Mr Plesó’s guardian appealed, arguing that the conditions for mandatory treatment as required by the Health Act were not fulfilled, since the evidence provided by the two psychiatrists did not prove that Mr Plesó was a significantly dangerous character but consisted of no more than vague predictions of an eventual deterioration of his condition. The regional court dismissed the appeal in February 2008. On 27 March 2008, Mr Plesó was admitted to the psychiatric department of a hospital, where he received treatment initially in the closed ward and after two weeks in the regular ward. On 25 April 2008, a court ordered his release, relying on the opinion of another forensic expert - according to whom Mr Plesó suffered from schizophrenia, but represented no direct danger and was willing to accept voluntary treatment – and holding that the conditions for mandatory treatment were no longer met.

2. Decision of the Court

Relying on Article 5 § 1, Mr Plesó complained that his compulsory confinement had amounted to an unjustified deprivation of his liberty.

Article 5

Mr Plesó’s involuntary hospitalisation had been ordered on the basis of the Act on Health Care and on the case law of the Hungarian Supreme Court. While the Court thus accepted that his detention in hospital had a formal basis in national law, it observed that the procedure followed was marked by the risk of arbitrariness.

The Hungarian courts had reached their conclusion - that Mr Plesó was unwilling to undergo treatment voluntarily and that this situation represented a significant danger to his health - almost exclusively by relying on the medical opinions obtained. The Court noted that the case law applied in the case did not provide guidance as to the precise meaning of the notion “significant danger” in this context and, in particular, whether it extended to a potential deterioration in the concerned person’s mental health. In those circumstances, reliance to such an extent on medical opinions was difficult to reconcile with the paramount importance of independent and impartial judicial decision-making in cases pertaining to personal liberty. This was all the more so since the key opinion had been drawn up in a 40-minute court session break.

Mr Plesó had not represented an imminent danger to others or to his own life or limb; only the medically predicted deterioration of his own health was at stake. In those circumstances, the authorities would have been obliged to strike a fair balance between the competing interests resulting, on the one hand, from society’s responsibility to ensure the best possible health care for those with diminished faculties and, on the other hand, the individual’s inalienable right to self-determination, including the right
to refuse medical intervention, or the “right to be ill”. However, the Hungarian courts had not made a true effort to achieve such a fair balance.

While noting that the law and practice concerning compulsory confinement varied among the Council of Europe Member States, the Court considered that the States’ margin of appreciation in this field, where the core right of personal liberty was at stake, was not a wide one. The Court underlined that involuntary hospitalisation might be used only as a last resort for want of a less invasive alternative, and only if it carried true health benefits without imposing a disproportionate burden on the person concerned.

Mr Plesó had not previously been subjected to psychiatric treatment. He had, moreover, no history of presenting a danger to others, let alone of criminal conviction. The Hungarian courts had essentially relied on his refusal to undergo hospitalisation, in which they perceived proof of his lack of insight into his condition, which - according to the courts - entailed the risk of his health declining. The Court could not accept this line of reasoning, as it represented a circular argument and was incompatible with the effective protection of Convention rights. When ordering Mr Plesó’s psychiatric detention, the Hungarian courts had given no in depth consideration to the following factors: the reasons for his choice to refuse hospitalisation; the actual nature of the envisaged involuntary treatment or the medical benefits which could be achieved through it; or the possibilities of applying a period of observation or requiring him to pursue outpatient care. Finally, it was remarkable that the courts had attached no importance to Mr Plesó’s non-consent despite the fact that his legal capacity had not been removed. The Court was therefore not persuaded that Mr Plesó’s mental disorder had warranted compulsory confinement. There had accordingly been a violation of Article 5 § 1.

Article 41

The applicant was awarded €10,000 in respect of non-pecuniary damage and €2,500 for costs and expenses.

3. Comment

Over the years, we have had the opportunity to report a number of judgments and decisions by the European Court of Human Rights concerning the rights of individuals with different kinds of disabilities. The case of X. and Y. v. Croatia, judgment of 3 November 2011, reported in Bulletin Issue 4, 2011, dealt with divesting the two applicants of their legal capacity, and Dordevic v. Croatia, judgment of 24 July 2012, Bulletin Issue 3, 2012, concerned the authorities’ failure to protect the applicant against harassment. Further, in Hadzic and Suljic v. Bosnia and Herzegovina, judgment of 7 June 2011, reported in Bulletin Issue 3, 2011, the two applicants were detained in a psychiatric ward in wholly inappropriate conditions, and the Court found this to violate Article 5 as the detention was not lawful.
In the present case, the Court is again concerned with the concept of lawfulness. As the Court has held many times, the notion underlying this concept is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and not be arbitrary. In an important part of the judgment, the Court states that a fair balance must be struck between society’s responsibility to secure the best possible health care for individuals with diminished faculties, and these individuals’ right to self-determination, including the “right to be ill”.

Disability rights campaigners have welcomed this judgment, and in particular pointed to the use by the Court of this phrase, the “right to be ill”. It has been stressed that the right to take risks is something that people with disabilities badly need, and is often denied them.

This judgment has emphasised the need for domestic courts to make an assessment of all relevant factors including therapeutic prospects or the viability of less invasive measures before deciding to deprive an individual of his liberty. In the present case the Court found that this had not been done, and went on to award the applicant €10,000 in non-pecuniary damage.
CHAMBER JUDGMENT IN THE CASE OF RRAPO V. ALBANIA

(Application No. 58555/10)

25 September 2012

1. Principal Facts

The applicant is Mr Almir Rrapo, an Albanian and American national.

On 2 July 2010, the applicant applied for a renewal of his American passport at the United States (US) Embassy in Tirana. He was arrested by the Albanian police later that day at the request of the US Embassy.

A diplomatic note (no.55) was sent, requesting provisional arrest for the purpose of extradition, under the Extradition Treaty between the US and Albania. The note stated that a warrant for arrest had been issued on 28 May 2010 by a US judge.

On 4 July 2010, Tirana District Court ordered the applicant’s detention for 40 days, relying on an Interpol notice issued by the US authorities. On 22 July 2010, the Tirana Court of Appeal upheld the lawfulness of detention, and extended the period to 60 days – until 2 September 2010. An appeal to the Supreme Court was rejected. Between August and November 2010, the applicant challenged his continued detention three times, and each time the domestic courts rejected his actions, and extended his detention relying on the Code of Criminal procedure until 2 November 2010.

The US Embassy requested extradition of the applicant on 30 August 2010 by way of another diplomatic note (no. 071), stating that he had been charged with membership of an organised racketeering enterprise engaged in murder, kidnapping, drug distribution, arson, robbery, extortion, transportation of stolen goods, and seven other related counts. The note stated that 5 of those charges carried a maximum sentence of life imprisonment, and the other charges carried sentences of between 20-40 years, or death or life imprisonment.

The District Court authorised the extradition on 30 September 2010. The applicant objected that the US authorities had not provided any assurances against imposition of the death penalty however the District Court rejected this as such assurances were not required by law

On 12. October 2010, the European Court of Human Right’s issued a Rule 39 interim measure, requesting the Albanian authorities not to extradite the applicant to the US.

48 This judgment is final.
The applicant’s appeal against his extradition to the Tirana Court of Appeal was rejected as it ruled that there was no legal obligation to seek assurances from the US authorities against the imposition of the death penalty. The Minister of Justice ordered extradition for 16 November 2010, but also sent a note verbale asking the US Embassy if capital punishment would be imposed. They responded on 8 November 2010, (in diplomatic note no. 91) that the Department of Justice had authorised and directed the US Attorney not to seek the death penalty, and assured the Albanian government that it would not be sought and imposed.

On 9 November 2010 the applicant appealed to the Supreme Court that the US authorities had not given assurances about the non-imposition of the death penalty, in breach of Article 21 of the Constitution, and also requested the suspension of extradition, in light of the Strasbourg Court’s Rule 39 order.

In the meanwhile, the applicant’s detention was extended to 1 December 2010, the time-limit within which extradition could take place.

On 24 November 2010, the applicant was extradited to the US. Two days later, the Supreme Court quashed both lower courts’ decisions and remitted the case to the District Court for a re-hearing. It was said that the extradition should not have been granted, as the courts had not obtained assurances from the US authorities about the non-imposition of capital punishment.

On 26 July 2012, the applicant was convicted by the US court as charged, sentenced to 80 months imprisonment, and supervised for 3 years upon release.

2. Decision of the Court

The applicant complained that extradition to the US, and the risk of being subjected to the death penalty, gave rise to a breach of Articles 2 and 3 ECHR, and Article 1 of Protocol No. 13. The applicant also complained that extradition to the US was in breach of the Court’s indication under Rule 39 of the Rules of Court, giving rise to a violation of Article 34 ECHR.

Articles 2 and 3 ECHR, and Article 1 of Protocol No. 13

The Court referred to the general principles laid down in Al-Saadoon and Mufdhi v. the United Kingdom in relation to the abolition of the death penalty and States’ duties under Article 1 of the Convention in instances of extra-territorial jurisdiction.

In the instant case, the Court stated it was a matter of profound regret that the lower courts were willing to allow the applicant’s extradition without examining the reality of the risk alleged by the applicant, that it was striking that they never sought assurances that the death penalty would not be imposed if there was a conviction, and regretted that this only became a live issue before the Supreme Court when it was too late as the applicant had already been extradited. The abolition of the death penalty under Protocol No. 13, together with the state’s obligations under Articles 1, 2 and 3 ECHR dictated that
States should not detain individuals with a view to extraditing them to stand trial on capital charges or in any other way subjecting individuals within its jurisdiction to a real risk of being sentenced to the death penalty – sufficient and binding assurances had to be sought and obtained.

However, the US had sent a diplomatic note with assurances that the death penalty would not be sought, which the Court recognised as a standard means in extradition matters, and were recognised as carrying a presumption of good faith. The Court did not see anything which would cast doubt on the credibility of assurances provided by the US, which were specific, clear and unequivocal. It also attached importance to a later diplomatic note which described such notes as binding on the US. Considering all the circumstances, the Court found that the extradition did not give rise to a breach of Articles 2, 3 ECHR, or of Protocol No. 13 on account of a risk of the death penalty being imposed.

**Article 34**

Interim measures under Rule 39 are indicated only in limited spheres, when there is an imminent risk of irreparable damage. They play a vital role in avoiding irreversible situations that would prevent the Court from carrying out a proper examination of an application, and securing the practical and effective benefit of Convention rights.

Therefore, failure of a state to comply undermines the effectiveness of the right of individual application guaranteed by Article 34 ECHR. This Article is violated when the state fails to take all steps that could reasonably have been taken to comply with an interim measure. The Court will not re-examine whether the decision to apply the interim measure was correct. The state must demonstrate to the Court that it was complied with, or in exceptional cases, that there was an objective impediment preventing this and all reasonable steps were taking to remove this and keep the Court informed.

In this case, the interim measure was evidently not complied with. The argument that the government was impeded by the Court of Appeal’s judgment of 1 November (to extradite the applicant) being final was not accepted, as a higher court could quash it (as was in fact also done by the Supreme Court). The argument that otherwise Albania’s international obligations would have been interfered with (under the Extradition Treaty) was also not accepted – the Court referred to *Al-Saadoon and Mufidhi*, and stressed that a State retains ECHR liability in respect of other treaty commitments before or after the entry into force of the Convention. Nor should a Contracting State enter into an agreement which conflicts with its obligations under the Convention. The argument that extradition was unavoidable because of the expiry of his period of detention was also rejected, as deficiencies in the national judicial system and difficulties in achieving legislative objectives could not be relied upon to the applicant’s detriment. There was also no indication of taking steps to remove the risk of flight, such as using other security measures. Finally, the Court was not informed, prior to the extradition, of the difficulties encountered in complying with the Convention.
The Court concluded that non-compliance with the interim measure, without an objective justification, constituted a violation of Article 34.

3. Comment

The Court has always recognised the importance of extradition arrangements as a key aspect of the international rule of law and of comity between nations. The key issue in this case was that the Court had ordered an interim measure under Rule 39 of its Rules of Procedure requiring the respondent state, Albania, to refrain from extraditing the individual until the Court was satisfied that this extradition would not violate fundamental rights. Albania disregarded the Court’s measures. The case of Mamatkulov and Askarov v. Turkey (Grand Chamber judgment of 4 February 2005, reported in Bulletin Issue March 2005) made clear that the failure of a State to comply with Rule 39 measures will constitute a violation of Article 34 ECHR – the exercise of the right of individual petition to the Court. Since Mamatkulov the Court has re-affirmed and elaborated its position in a number of cases including in the earlier case of Grori v. Albania (judgment of 7 July 2009, reported in Bulletin Issue August 2009). The Court emphasised that the fact that the harm that the interim measure was designed to prevent does not materialise is irrelevant for the assessment of whether the state has fulfilled its obligation under Article 34. In this case – as in the case of Al-Saadoon and Mufdhi v. the United Kingdom (judgment of 2 March 2010, reported in Bulletin Issue April 2010) – the Government argued that they were obliged to carry out the surrender because the time limit for detention was about to expire and he would otherwise have had to be released. The Court did not accept this argument. The bottom line remains as it was set out in the Paladi v. Moldova (Grand Chamber judgment of 10 March 2009, reported in Bulletin Issue April 2009) case: only the Court can lift interim measures which it has imposed; states cannot do this unilaterally.
Witness detained on the premises of the International Criminal Court did not fall within the Netherlands’ jurisdiction

CHAMBER DECISION IN THE CASE OF DJOKABA LAMBI LONGA V. THE NETHERLANDS
(Application No. 33917/12)
8 November 2012

1. Principal Facts

The applicant, Bède Djokaba Lambi Longa, is a Congolese national who was born in 1966. He was at all relevant times detained in the United Nations Detention Unit within Scheveningen Prison, The Hague, Netherlands. Mr Djokaba Lambi Longa was a prominent member of the Union of Congolese Patriots (Union des Patriotes Congolais, “UPC”), a political movement created in the Ituri region of the Democratic Republic of the Congo. The UPC’s military wing, the Forces Patriotiques pour la Libération du Congo (“FPLC”), was one of the armed factions active in that area in recent years.

On 19 March 2005 he was arrested in Kinshasa together with other members of UPC or FPLC including Thomas Lubanga Dyilo, the UPC’s president and the FPLC’s commander-in-chief. Mr Djokaba Lambi Longa was apparently charged with participation or complicity in the murder of nine Bangladeshi members of the United Nations Organization Mission in the Democratic Republic of the Congo (Mission de l’Organisation des Nations Unies en République démocratique du Congo, “MONUC”). Mr Djokaba Lambi Longa’s detention on remand was extended several times until 2 July 2007. He stated that no subsequent extension had ever been authorised and that he had been detained without title ever since.

On 27 March 2011 Mr Djokaba Lambi Longa was transferred from detention in the Democratic Republic of the Congo to the custody of the International Criminal Court (ICC) in The Hague to give evidence at Mr Lubanga Dyilo’s trial as a defence witness, which he did on various dates between 30 March and 7 April 2011.

On 1 June 2011 the applicant lodged an asylum request with the Netherlands authorities – he had declared that he feared reprisals upon his return to the Democratic Republic of the Congo. On the same day he asked the ICC to order a stay of his removal to this country. In its decision the ICC (Trial Chamber I) recognised that it had an obligation to return the applicant to his country once he had completed his evidence, which was the case. It further observed that it was for the Netherlands authorities, not for the ICC, to consider the applicant’s asylum request and to decide whether it would take control of Mr Djokaba Lambi Longa during the proceedings. The Netherlands’ position
was that the applicant was to remain in custody of the ICC pending the consideration of his asylum application.

On 4 September 2012 Mr Djokaba Lambi Longa withdrew his asylum request.

2. Decision of the Court

Relying on Articles 5 (right to liberty and security) and 13 (right to an effective remedy), the applicant complained that he had been unlawfully held on Dutch soil and denied an opportunity to seek his release. The application was lodged with the European Court of Human Rights on 1 June 2012.

Preliminary observation

Although it was unclear whether the applicant wished the European Court of Human Rights to address the merits of his case, as he had withdrawn his asylum request, the Court observed that his application touched on essential aspects of the functioning of international criminal tribunals having their seat within the territory of a Contracting State and invested with the power to keep individuals in custody. The Court therefore decided not to strike this case out of its list.

Articles 5 and 13

The Court first recalled that Convention liability normally arose in respect of an individual who was “within the jurisdiction” of a Contracting State, in the sense of being physically present on its territory (Article 1 of the Convention), even if the Court had recognised exceptions in its case-law.

The Court, in its decisions in the cases of Galić v. the Netherlands and Blagojević v. the Netherlands, had concluded that it was not self-evident that a criminal trial engaged the responsibility under public international law of the State on whose territory it was held.

Moreover it would be unthinkable in the Court’s view for any criminal tribunal, domestic or international, not to be invested with powers to secure the attendance of witnesses and to keep them in custody. The power to keep them in custody, either because they were unwilling to testify or because they were detained in a different connection, was a necessary corollary.

The applicant had been brought to the Netherlands as a defence witness in a criminal trial pending before the ICC. He was already detained in his country of origin and remained in the custody of the ICC. The fact that Mr Djokaba Lambi Longa was deprived of his liberty on Dutch soil did not of itself suffice to bring questions touching on the lawfulness of his detention within the “jurisdiction” of the Netherlands as that expression is to be understood for purposes of Article 1 of the Convention.

The Court concluded that there was no legal vacuum in this regard as the ICC was in fact waiting to comply with its obligation to return the applicant to the Democratic
Republic of the Congo. As long as he was neither returned to this country nor handed over to the authorities in the Netherlands at their request, the legal ground of Mr Djokaba Lambi Longa’s detention remained the arrangement entered into by the ICC and the authorities of the Democratic Republic of the Congo under the Statute of the ICC.

Turning to the question of the human rights guarantees offered by the ICC, the Court noted that the ICC had powers under its Rules of Procedure and Evidence to order protective measures, or other special measures, to ensure that the fundamental rights of witnesses were not violated. The ICC had in fact made use of these powers through its Victims and Witnesses Unit.

Finally, in view of its case-law, the Court could not agree with Mr Djokaba Lambi Longa’s argument that since the Netherlands had agreed to examine his asylum request, this country had taken it upon itself to review the lawfulness of his detention on the premises of the ICC. The Court recalled in this regard that Contracting States had the right to control the entry, residence and expulsion of aliens, that the Convention did not guarantee a right to enter, reside or remain in a State of which one was not a national and that States were under no obligation to allow foreign nationals to await the outcome of immigration proceedings on their territory.

Consequently, the Court declared the application inadmissible as the alleged violation was not attributable to a Contracting State (incompatibility ratione personae).

3. Comment

Strasbourg, in France, and the Hague, in the Netherlands, are two of the “meccas” of international law. The Council of Europe, including the European Court of Human Rights, is based in Strasbourg, and some sessions of the European Parliament are held there. The Hague is home to the International Court of Justice, The Permanent Court of Arbitration, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC), amongst other institutions. Here we can see how these two cities and the fundamental issues that are decided there can be connected, although in this case the Court found it could not rule on the merits of the applicant’s case.

The present case follows on from the admissibility decisions in Blagojevic v. Netherlands, 9 June 2009, and Galic v. the Netherlands, also 9 June 2009. In these cases the applicants complained about issues connected to their trials before the ICTY. The European Court of Human Rights found that as the ICTY was a subsidiary organ of the United Nations Security Council, it could not in itself be held responsible under the European Convention of Human Rights. Neither could the Netherlands be held responsible, as the sole fact that the ICTY was based there was not a sufficient basis for jurisdiction, in particular as the ICTY formed part of the United Nations, an international organisation based on respect for fundamental human rights. Applying similar reasoning, the European Court found in the present case, Djokaba Lambi Longa,
that the applicant did not fall under the jurisdiction of the Netherlands. Neither did the Court accept the applicant's argument, following on from the case of *Bosphorus Airways v. Ireland* (Grand Chamber judgment of 30 June 2005, reported in *Bulletin Issue July 2005*), that as the ICC did not itself protect his fundamental rights, the state of the Netherlands could be held responsible.

An interesting aspect of this case is that the applicant had in fact withdrawn his asylum application to the Netherlands authorities, but not informed the European Court whether or not he wished to pursue the case there. With the European Court as overburdened with cases as it is, it would in most cases strike such an application off its list. However, here it chose, under Article 37 of the Convention, to continue with its examination, which clearly indicates the importance of the questions before it.

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The AIRE Centre is a non-governmental organisation that promotes awareness of European law rights and provides support for victims of human rights violations. A team of international lawyers provides information, support and advice on European Union and Council of Europe legislation. It has particular experience in litigation before the European Court of Human Rights in Strasbourg and has participated in over 120 cases. Over the last 15 years the AIRE Centre has conducted and participated in a number of seminars in Central and Eastern Europe for the benefit of lawyers, judges, government officials and non-governmental organisations. The AIRE Centre has been focusing on the countries of Western Balkans in particular, where it is conducting a series of long-term projects focused on the rule of law and full recognition of human rights.

Council of Europe

The Council of Europe, based in Strasbourg, is an international organisation bringing together 47 member states (all European countries except Belarus). Its main objectives include the protection of human rights, improvement of global democracy and promotion of respect for the rule of law. In order to standardise social and legal practice in member states, more than 200 international conventions in various fields such as human, minority and social rights, media, legal cooperation, healthcare, education, culture, sport, youth, local governments, interstate cooperation and regional planning have been adopted under the aegis of the Council of Europe. Defence is the only area where Council of Europe has no jurisdiction.

The European Convention on Human Rights is the most important instrument of the Council of Europe. Since the 1980s, every country hoping to join the organisation had to ratify the Convention. Convention rights are to be protected by local government and courts in the first instance, but in case this fails, the European Court of Human Rights ensures that member states respect their Convention obligations. The European Court, which has the same number of judges as the member states, protects rights and liberties of more than 800 million people, regardless whether they are citizens of one of the member states.