JUSTICE

CHARTER OR CONVENTION?
AN UPDATE FROM EUROPE

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JUSTICE ANNUAL HUMAN RIGHTS LAW CONFERENCE 2016
FRIDAY 14 OCTOBER 2016
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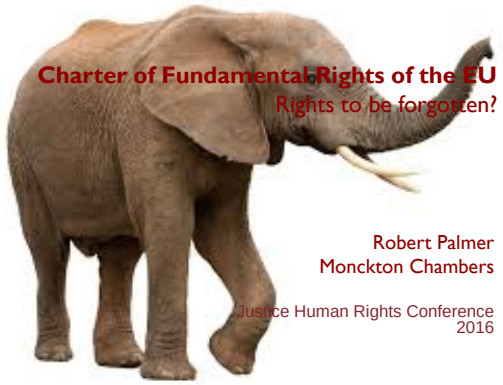

Charter of Fundamental Rights of the EU
Rights to be forgotten?

Robert Palmer
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Justice Human Rights Conference 2016

Great expectations

- "It seems to me that Article 6(1) and (3) TEU merely represents what the United Kingdom terms in its observations a 'codification' of the pre-existing position. They encapsulate, to put it another way, a political desire that the provisions they seek to enshrine and to protect should be more visible in their expression. They do not represent a sea change of any kind."
  - Case C-396/11 *Radu*, Opinion of Advocate General Sharpston, 18 October 2012, at [51]. ECLI:EU:C:2012:648

The starting point

- Article 6(1) TEU
  - The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the EU … which shall have the same legal value as the Treaties
  - The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties
  - The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

The starting point

- Article 6(3) TEU: "Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall contribute general principles of the Union's law"

Preamble to the Charter

- This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the [ECHR], the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Reaffirm what?

As listed in Chalmers, Davies, Monti, 'European Union Law' (CUP, 2014)

- Pre- Lisbon Treaty, the Court had already recognised civil rights including:
  - the right to respect for family and private life (Case 136/79 *National Panasonic)*
  - protection of the child (Case C-540/03 *Parliament v Council*)
  - Freedom of religion (Case 130/75 *Prais*)
  - Freedom of trade union activity (Case 175/73 *Union Syndicale*)
  - Freedom of expression (Case C-260/89 *ERT*)
  - Protection of personal data (Case C-101/01 *Lindqvist*)
  - Access to basic personal data (Case C-553/07 *College van Burgemeester*)
  - Equality (Case C-43/75 *Defrenne*)
  - Freedom from torture or subjection to inhuman and degrading treatment (Case C-457/07 *Elgafaji*)

Reaffirm what?

- And to recognise economic rights, including:
  - The right to trade (Case 240/83 IADBHU)
  - The right to own property (Case 44/79 *Hauer*)
  - The right to carry out an economic activity (Case 230/78 *Eridania*)
- And to recognise rights of defence, including:
  - The right to an effective judicial remedy (Case 222/84 *Johnston v RUC*)
  - The presumption of innocence (Case C-344/08 *Rubach*)
  - The right to be informed of charges (Case C-14/07 *Weiss*)
  - The right to legal assistance and privilege (Case 155/79 *AM & S*)
  - The right to be heard in defence before imposition of any measure (Case 17/74 *Transocean Marine Paint*)
  - Protection from self-incrimination (Joined cases 374/87 and 27/88 *Orkem & Solvay*)

And there's more

- And to recognise the principle of non-discrimination (Case C-144/04 *Mangold*)
- And that international human rights treaties were a source of fundamental rights in EU law (Case C-4/73 *Nold*)
  - including the ECHR (Case 36/75 *Rutili;* Case 299/95 *Kremzow)*
- And that national measures were subject to EU fundamental rights
  - Where a Member State is acting within the scope of Union law (Case C-309/96 *Annibaldi)*
  - where a Member State was transposing a directive (Case 5/88 *Wachauf*)
  - where a Member State invoked an exception to EU law, including in relation to all public interest exceptions to free movement (Case C-260/89 *ERT*)

Title VII – General provisions governing the interpretation and application of the Charter

- Article 51 Field of application

(1) The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

(2) The Charter does not extend the field of the application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Title VII – General provisions governing the interpretation and application of the Charter

- Article 52 Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Title VII – General provisions governing the interpretation and application of the Charter

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

The Explanations - examples

- Article 7 CFR: "Everyone has the right to respect for his or her private and family life, home and communications."
- Explanation
  - The rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. To take account of developments in technology the word 'correspondence' has been replaced by 'communications'.
  - In accordance with Article 52(3), the meaning and scope of this right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR: [sets out Article 8 in full, including Article 8(2)]

The Explanations - examples

- Explanation for Article 8 CFR (Protection of personal data)

This Article has been based on Article 286 of the Treaty establishing the European Community and Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31) as well as on Article 8 of the ECHR and on the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has been ratified by all the Member States. Article 286 of the EC Treaty is now replaced by Article 16 of the Treaty on the Functioning of the European Union and Article 39 of the Treaty on European Union. Reference is also made to Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1). The above-mentioned Directive and Regulation contain conditions and limitations for the exercise of the right to the protection of personal data.

Remember the Protocol?

- Nothing in Protocol (No 30) affects Article 6(3) TEU at all. The general principles of law are part of the primary law of the EU (Case C-402/05 *Kadi)*
- The principle laid down in Article 51(1) – that Member States are bound by the Charter when implementing Union law – "is to be regarded as a confirmation of the Court's previous case law on respect by the Member States for the fundamental rights defined in the context of the EU. … Article 1(1) of Protocol No 30 … merely reaffirms the normative content of Article 51 of the Charter of Fundamental Rights, which seeks to prevent precisely such an extension of EU powers or of the field of application of EU law. Article 1(1) of the Protocol does not therefore, in principle, call into question the validity of the Charter of Fundamental Rights for the United Kingdom and for Poland." Opinion of A-G Trstenjak, Joined Cases C-411/10 and C-493/10 *NS,* at [76], [169]
- The Court agreed. "Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions." Judgment, *NS,* at [120]

So

- Protocol (No 30) raises no practical bar to reliance on the Charter in the UK courts.
- The practical bar is instead whether the matter under challenge falls within the material scope of EU law, e.g.:
  - Implementation of the Treaty or a directive – Case C-617/10 *Akerberg Fransson*
  - Derogation from fundamental freedom of movement, whether on the basis of public policy provisions of the Treaty (*ERT;* Case C-390/12 *Pfleger*), general interest objectives (Case C-368/95 *Familiapresse*), or by secondary legislation (Case C-482/01 *Orfanopoulos*)
  - Horizontal effect of principle of non-discrimination (*Mangold;* Case C-555/07 *Kucukdeveci*)

Data protection rules

- C-293/12 Digital Rights Ireland, 8 April 2014
- C-131/12 Google Spain, 13 May 2014
- C-362/14 Schrems v Data Protection Commissioner, 6 October 2015
- C-698/15 Davis and Watson without the Davis, 19 July 2016
- Opinion 1/15, Advocate General Opinion, 8 September 2016
- Schrems II?

Other recent application in Luxembourg

- Article 4 (torture)
  - Case C-404/15 *Pal Aranyosi*, 5 April 2016
- Article 6 (liberty)
  - Case 601/15 PPU *J.N.,* 15 February 2016
  - Case 294/16 *JZ*, 28 July 2016
- Article 7 (private and family life)
  - Case 438/14 *Bogendorff von Wolffersdorff* , 2 June 2016
- Article 11 (freedom of expression)
  - C-157/14 *Neptune Distribution,* 17 December 2015
  - *C-547/14 R (Philip Morris Brands SARL) v S/S Health,* 4 May 2016
  - C-160/15 *GS Media,* 8 September 2016

Other recent application in Luxembourg

- Articles 16 and 17 (business and property)
  - C-477/14 *R (Pillbox 38 (UK) Ltd) v S/S Health*, 4 May 2016
- Article 19 (protection against expulsion)
  - Case C-182/15 *Petruhhin*, 6 September 2016
- Article 21 (non-discrimination)
  - C-441/14 *Dansk Industri*, 19 April 2016
- Article 39 (right to vote in EP elections)
  - Case 650/13 *Delvigne,* 6 October 2015

Recent domestic examples

- Once that bar is crossed, the effects of the direct application of the Charter can be dramatic: by making the rights more "visible", the Charter effectively sharpens their teeth.
  - See *R (David Davis MP and Tom Watson MP) v SSHD* [2015] EWHC (Admin) 2092: disapplication of primary legislation on the basis of incompatibility with Articles 7 and 8 CFR. Data protection and data retention within scope of EU law. Substantive effect of Articles 7 and 8 on necessary safeguards determined by *Digital Rights Ireland;* primary legislation may not be inconsistent
  - NB confirms at [10] that Protocol No 30 is ineffective to prevent the court from defining the extent of rights contained in the Charter.

Disapplication of primary legislation by domestic courts

- *R (Davis and Watson) v SSHD* [2015] EWHC (Admin) 2092
- *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33: disapplication of the State Immunity Act 1978 in respect of employment claims by service staff of a foreign diplomatic mission. SIA held to be incompatible with Article 6 ECHR, but no effective relief available beyond a declaration of incompatibility. However, insofar as claims fell within scope of EU law (race discrimination, breach of Working Time Regulations – but not e.g. unfair dismissal), Article 47 CFR – to like effect as Article 6(1) ECHR and requiring an effective remedy – required disapplication.
  - *NB Article 47 CFR held to have horizontal effect on the grounds that, applying Kucukdeveci and* AMS, it did not depend on its definition in national legislation to take effect and reflected "a general principle of EU law", and so by definition could have horizontal effect. This reasoning may be open to doubt, even if the result is correct.

Disapplication of primary legislation by domestic courts

- *Google v Vidal-Hall* [2015] EWCA Civ 311: disapplication of section 13(2) Data Protection Act 1998, in order to allow compensation to be recoverable for any damage suffered as a result of contravention by a data controller of the DPA. Section 13(2) conflicted with the rights guaranteed by Articles 7 and 8 CFR. It could not be interpreted compatibly with the Directive under the *Marleasing* principle. Article 47 demanded a remedy, and, applying *Benkharbouche,* had horizontal effect.

- NB Disapplication of primary legislation will is not an automatic consequence. Cf Lord Mance in *R (Chester) v S/S for Justice* [2013] UKSC 63: disapplication would not be appropriate where the result was that choices would have to be made in order to devise a substituted scheme.

Limits

- *United States of America v Nolan* [2016] AC 463; [2015] UKSC 63
  - Leaves open the question of whether article 21(2) of the Charter can apply in favour of member states
  - Leaves open the question of whether, if so, it would be open to a member state to rely on it horizontally as against a complainant
  - Not clear how far and when the principles in *Mangold* and *Kucukdeveci* apply in cases not involving age discrimination, given *AMS*
  - Since Article 21(2) applies only within the scope of EU law, a non-member state is not within its protection in any circumstances

What nexit?

- What future for the Charter post-Brexit?
- Application in EFTA court?
- Interpretation of UK-EU Brexit agreement?

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Review of ECHR Case Law 2015-16

Recent developments in law and practice

- Deirdre Fottrell QC,
- Tom Wilson

14th October 2016

1 Garden Court FAMILY LAW CHAMBERS

Overview

- ECHR Statistics 2015-16
- Review of Recent case law

Statistics

- In 2015 – 40,650 new applications (decrease of 28% from 2014 – 56,000)
- Of the new cases 27,050 were classified as single judge cases
- 13,600 were chamber or committee cases
- 45,576 cases were disposed of during the year 2015 judicially
- Pre allocation cases – 10,000 – in December 2015 (previous year 19,050)

Statistics….2

- Number of applications disposed of administratively over 2015 was 32400 – increase of 29% -
- In 2015 – 43,135 cases were declared in admissible or struck out by a single judge, chamber or committee
- Single judges decided – 36, 314 cases
- Judgments were delivered in 2441 cases however because many were joined – 823 judgments delivered

And more….

- 65% of the judgments are delivered by a 3 judge committee
- Interim measures granted in 161 cases under Rule 39 (dismissed in 630 cases)
- 22 cases to the Grand Chamber

UK cases before the Court

- 575 Cases from the UK allocated to Judicial formation
- 256 applications active
- 26 went to single judge or committee
- 125 awaiting committee or chamber decision
- 7 unilateral or friendly settlements

Article 1 - Jurisdiction

- **Case of Chiragov v Armenia [GC] No 13216/05**
- A defence force drawn from the population of NK could not have occupied the region without external support
- An agreement existed between Armenia and NK about military co-operation

Jurisdiction

- Other reports (media and other sources) that there was a military involvement and presence which undermined the presence, equipment and expertise were involved from an early date – which impacted directly on the conquest of relevant territory and retention of control thus it exercised effective control within the meaning of Article 1

Article 2

- *Armani Da Silva v United Kingdom*
- No violation of Article 2
- Interpretation of the procedural obligations in respect of investigation
- What is the correct test in respect of the planning
- Objective detached observed – was rejected as a stance

Article 2

- Revisited the McCann subjective test
- What is meant by an 'honest and genuine belief' by an officer
- What is subjectively reasonable – interplay between these concepts
- Convention test and UK Domestic test in respect of self defence were similar

Investigation

- Case law from eg Mc Cann– an investigation should be capable of leading to the identification and punishment of those responsible
- Evolved to obligation to punish would apply if appropriate
- Focus was not on prosecutorial decision but the institutional deficiencies

Test for prosecution

- Realistic prospect of conviction
- Test was a matter for domestic authorities
- No institutional deficiencies –
- Court noted extensive investigations
- Recommendations of PCC were made
- Family adequately involved

Lambert v France

- Review of procedure and decision making in respect of end of life treatment
- No way of ascertaining wishes of patient
- Framework had to be transparent, consultative, involve medical personnel and reviewable by a court

Article 3

- Murray v Netherlands – life sentence for murder in 1980 – reviewed in 2011 – pardoned in 2014 – then died.
- Claim was that as a matter of fact the life sentence had been irreducible
- GC – rehab of a prisoner must be programmed and facilitated from the outset for any review to be real and effective

Article 3

- Individualised progamme may be necessary to satisfy article 3
- Treatment of mental health was a pre condition for review
- Lack of treatment meant that review and rehab were not realistic options
- No defacto reducible – therefore breach

Basenko v Ukraine

- Dispute over ticket on a tram
- Ticket inspector assaulted applicant
- Took five years to prosecute the inspector and the applicant was not sufficiently involved
- Breach of procedural obligations under Article 3

Elberte v Latvia

- Removal of body tissue from Husband's body
- No consent or consultation
- Investigation and no prosecution
- Emotional suffering of wife and failure to properly investigate and prosecute breached article 3

Article 4

- LE v Greece – ineffective domestic procedures to investigation an allegation of forced prostitution of applicant
- Meier v Switzerland – 70 year old prisoner forced to work beyond retirement age – margin of appreciation to the State

Article 5

- Doherty v UK – life sentence for murder in 1982 – released in 1996
- Arrested breach licence in 1997 –
- Reviews five times between 1998-200
- Judicial reviews
- 3 appeals to life sentence review Comm – breach of article 5(4) because the process was not 'speedy'

Article 6

- Dvorkski v Croatia – court appointed lawyer – not of his choosing
- Former police man – complained it was not fair process
- Confession and pressure - breach of article 6(1)

Article 6

- Hammerton v UK [2016]
- In family proceedings breached an injunction and committed
- Lack of legal representation breached article 6(1) – criminal proceedings
- Schatschaschvilli v Germany – non attendance of key witnesses because of PTSD – breach of 6.1 and 6.3.d

Article 6 and 7

- Fazia Ali v UK - Housing dispute – factual issues – was review by housing officer and JR sufficient – no violation
- Dallas v UK – juror undertook research on line – convicted of contempt
- Not a breach of article 7 because it was development of the law rather than a new offence

Article 8

- Kahn V germany – photgraphs of children of famous person used – court concluded that no breach as there had been fines but no compensation
- RE v UK – vulnerable adult – arrested without proper safeguards- covert recording of legal advice consultations
- Violation if not clear or transparent

Article 8

- Parillo v Italy – use of embryos for research – wide margin and no violation if they were destroyed despite the views of the app
- Controversial decision based on lack of consensu

1 Garden Court

Article 10

- Kalda v Estonia – lack of access to the internet for a prisoner to do research – violation of article 10
- Bedat v Switzerland –Journalis published details of an accident – material from a party to a court case- prosecuted
- NO a breach of article 10 – impact on judicial process

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JUSTICE HUMAN RIGHTS CONFERENCE
14TH OCTOBER 2016

A REVIEW OF KEY CASES OF THE ECtHR 2016

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THOMAS WILSON

ONE GARDEN COURT

Overview

1. In this paper we will review the case law of the ECtHR over 2015 and 2016. There are 64,000 cases pending at the ECtHr.

2. The statistics for the Court make for interesting reading[1];
   i. In 2015 – 40,650 new applications (decrease of 28% from 2014 – 56,000)
   ii. Of the new cases 27,050 were classified as single judge cases
   iii. 13,600 were chamber or committee cases
   iv. 45,576 cases were disposed of during the year 2015 judicially
   v. Pre allocation cases – 10,000 – in December 2015 (previous year 19,050)
   vi. Number of applications disposed of administratively over 2015 was 32400 – increase of 29% - 45 % disposed of under Rule 47
   vii. In 2015 – 43,135 cases were declared in admissible or struck out by a single judge, chamber or committee
   viii. Single judges decided – 36, 314 cases
   ix. Judgments were delivered in 2441 cases however because many were joined – 823 judgments delivered
   x. 65% of the judgments are delivered by a 3 judge committee
   xi. Interim measures granted in 161 cases under Rule 39 (dismissed in 630 cases)
   xii. 22 cases to the Grand Chamber

3. The UK statistics as at January 2016 were as follows;
   i. 575 Cases from the UK allocated to Judicial formation
   ii. 256 applications active
   iii. 26 went to single judge or committee
   iv. 125 awaiting committee or chamber decision
   v. 7 unilateral or friendly settlements

4. The priority policy under which the resources of the Court are concentrated on priority applications, introduced in 2010 under Rule 41. Focus of the Court's work is on 3 categories of cases;
   i. Applications which raise questions capable of having an impact on the effectiveness of the Convention System – ie structure or systematic abuses which have not been examined)
   ii. Important questions of general interests
   iii. Complaints under the Core Rights – Articles 2,3,4 or 5(1) – direct threats to the physical integrity of persons

[1] *See* 'Analysis of Statistics', European Court of Human Rights, January 2016

5. The pilot judgment procedure has resulted in a streamlining so as to reduce repetitive applications. It aims to take the following approach;

   i. Determine whether there has been a violation in the particular case
   ii. Identify the dysfunction under national law that is at the root of the violation
   iii. Give clear indications as to how it can eliminate the 'dysfunction'
   iv. Bring about the creation of a domestic remedy with similar cases – including those pending before the Court and awaiting the pilot judgement – or bring about settlement of pending cases

Issues of Jurisdiction

Case of Chiragov v Armenia [GC] No 13216/05

Concerned the jurisdiction of A in respect of Nagorno Karabakh – and adjacent occupied territories. Convention responsibility for the violations alleged by Azerbaijani Kurds who were displace. Six applicants were displaced since fleeing conflict between Armenia and Azerbaijan in 1992.

Court considered whether Armenia exercised 'effective control' so as to be able to exercise jurisdiction under Article 1.

Applied the framework set out in Al Skeni v UK and Ilascu v Russia – 'effective control depends primarily on military involvement but also on other indicators such as political and economic control'.

Armenia denied any military presence in the affected area in 1992 or thereafter but the Court also accepted that there was no conclusive evidence of it having such a presence. However it relied on certain assumptions namely that;

- A defence force drawn from the population of NK could not have occupied the region without external support
- An agreement existed between Armenia and NK about military co-operation
- Other reports (media and other sources) that there was a military involvement and presence which undermined the Government's bald assertion that its military did not have effective control at the relevant time
- Concluded that its presence, equipment and expertise were involved from an early date – which impacted directly on the conquest of relevant territory and retention of control thus it exercised effective control within the meaning of Article 1

Decision was primarily concerned with control over territory when that territory was disputed.

ARTICLE 2

Armani Da Silva v United Kingdom (Application No. 5878/08) (30 March 2016)

Applicant's cousin shot dead, in error, by Firearms officers while on the London Underground following 7/7 bombings. CPS decided not to prosecute the officers involved and there was a detailed inquest. Both decisions were subject to judicial review. Applicant complained of a breach of article 2.

- The court provides a comprehensive outlined of the procedural investigative requirements in cases that concern the use of lethal force by State agents.

- The court clarified the test for determining whether the use of lethal force was justified, as set out in *McCann v United Kingdom* and, in particular, the meaning of the phrase *'an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken'*. The court did not seek to determine whether the use of lethal force was objectively reasonable, but rather placed itself in the position of the officer and took account of whether the individual officer's belief was 'subjectively reasonable'. The court indicated that, if the use of force was not subjectively reasonable, it would be difficult to establish that the belief was honestly and genuinely held.

- The court held that the case-law in relation to the procedural requirements of an investigation following the use of lethal force had evolved. While it initially stated that an investigation should be capable of leading to the identification and punishment of those responsible, it now recognised that the obligation to punish would only apply if appropriate.

Lambert and Others v France [GC] Case No 46043/14 ECHR 2015

Vincent Lambert victim of RTA in 2008. Left in a PVS receiving nutrition and hydration. Treating physicians in 2014 decided to withdraw nutrition. Family claimed a breach of Article 2. Victim left no instructions as to how he wished such a situation to be resolved. Q of the positive obligation under Article 2 arose.

- Court decided that the applicants – who were relatives – had no standing
- Lambert was alive and vulnerable but his wishes were not known and not ascertainable
- Conflict between family members as to whether the nutrition could or should be withdrawn
- Court view was that the criteria when making a complaint were
    - A risk that the direct victim would be deprived of protection of their rights
    - Was there a conflict of interests between the patient and the applicants
- No risk as as the applicants could invoke the right to life of VL on heir own behalf
- The medical decisions could not be regarded (because of ambiguity) as inconsistent with VL's wishes – therefore no convergence between the applicants and VL

- Central issue was applicants view that the relevant procedure as to decision making was not clear and in particular that the final decision was made by the treating physician after consultation

- Court view that it was not a challenge to assisted suicide or euthanasia or the option of life sustaining treatment and its withdrawal

- Court reviewed the positive obligation under Articles 2 and 8 and the interplay between autonomy and right to life

- Did the regulatory framework comply with Article 2 – transparent, consultative, medical expertise and possibility of court review were sufficient safeguards

ARTICLE 3

***Murray v The Netherlands* (Application No. 10511/10) (26 April 2016)**

The applicant was convicted on murder in 1980 and sentenced to life imprisonment. A procedure to review life sentences was first introduced in 2011 and, in his first review in 2012, he was refused release. He was pardoned in March 2014 on the grounds of ill-health and was released. He later passed away and the application was continued by his son and sister.

The applicant alleged a violation of Article 3 on the basis that his life sentence was *de facto* irreducible. The court upheld this complaint.

- The court developed its case law in relation to the need for life sentences to be *de facto* reducible. The court held that there is a positive obligation on the State to provide "prison regimes" to life prisoners which are compatible with the aim of rehabilitation and enable them to progress towards it. Without doing so, the life sentence could be rendered *de facto* irreducible.

- The court found that a prisoner's rehabilitation must be programmed and facilitated from the outset for any review of a life sentence to be considered useful. A prisoner sentenced to life imprisonment had to have a real opportunity to make progress towards rehabilitation, such that he had a hope of one day being eligible for release. The court indicated that this could be achieved by setting up and periodically reviewing and individualised programme encouraging the prisoner to rehabilitate themselves.

***Blokhin v Russia* (Application No. 47152/06) (23 March 2016)**

The applicant, a minor, was placed in a juvenile detention centre following his suspected extortion of money from another minor. He was below the age of criminal responsibility and was not prosecuted, although he was brought before a court which ordered his placement in temporary detention for 30 days.

- The court found a violation of article 3 on the ground of inadequate medical treatment. It set down specific standards for the protection of the health of juvenile detainees.

- The court found that the applicant's detention was a violation of Article 5(1). It had not been for the purpose of "educational supervision" and was not otherwise justified. In so holding, the court clarified the definition of "educational supervision" as containing a core schooling aspect so that *'schooling in line with the normal school curriculum should be standard practice...even when they are placed in a temporary detention centre.'*

- The court found violations of Article 6(1) and (3), relying on relevant international and regional juvenile justice standards. The court applied to procedural guarantees of article 6 to the proceedings that led to the applicant's detention, even though no criminal proceedings had been initiated. The nature of the offence and severity of the penalty were such to engage the criminal limb of article 6.

Basenko v Ukraine **(Application No. 24213/08) (26 November 2015)**

The Applicant was a passenger on a tram and entered into a dispute with S, a ticket inspector, as to the validity of his ticket. Both agreed to travel to the depot to resolve the dispute but, on the way, S assaulted the Applicant causing a knee fracture. The Applicant informed the authorities in February 2002. On 18 December 2002, criminal proceedings were initiated. The investigation was suspended three times between 2003 and 2005. It was suspended twice further between 2005 and 2006. The charges were subsequently dropped and then re-applied in October 2007. S pleaded guilty in November 2007. The Applicant was not kept informed of any of these developments.

The court found that there had been procedural and substantive violations of Article 3.

- The court decided of its own motion to examine the procedural limb of article 3, as it had previously done in cases such as *Msut Deniz* and *Aleksandr Nikonenko*. The court emphasised the previous jurisprudence concerning the State's positive obligation to inform the Applicant of the progress of the investigative and criminal process.

- The court found that S, a State agent who was neither a member of the police or military but rather a tram inspector, breached article 3. The court found that the actions of S were directly related to the exercise of his powers and duties as a ticket inspector. This appears to depart from previous cases where the actions of State agents in breach of their rules of employment were not directly related to their official duties (i.e. *Reilly*).

Elberte v Latvia Case No 61243/08 ECHR 2015

Removal of tissue from the body of the applicants deceased husband who had died in an accident. Done without her knowledge or consent. Sent to a biomedical company in Germany to create bioimplants. Learned of this two years after his death. Led to investigation within the state of widespread practice of removing tissue from cadavers. Caused her significant emotional distress and suffering.

- Lack of clarity as to what had happened and how
- Criminal investigation but no prosecutions as time barred
- Domestic law required consultation with relatives as to use and removal of tissue but was unclear and inconsistently applied –and interpreted.
- Breach of article 3 because;
    - It was only within the ECtHR application that she learned – in the government observations of what had been done to her husband's body and the amount of tissue removed
    - Increasing anxiety during the criminal investigation about the presentation of his body on its return to her
    - Domestic law led to a lack of clarity as to authority to remove and obligation to consult
    - Denied redress via criminal procedure
    - Object of the treaty was to protect persons born – their identity, dignity and humanity
    - Suffering of App – breached article 3

ARTICLE 4

***LE v Greece* (Application No. 71545/12) (21 January 2016)**

The Applicant, a Nigerian woman, was trafficked into Greece and forced into prostitution by DJ. She was arrested for prostitution and made a criminal complaint against DJ. The state prosecutor examined the allegation, but did not have the benefit of all the evidence. The Athens Criminal Court dismissed the complaint. It was subsequently re-instated and DJ was arrested and prosecuted in May 2011. The Applicant claimed a breach of articles 4, 6(1) and 13.

- The court found that there had been a breach of Article 4 and, in particular, held that article 4 imposed positive obligations on the State including the adoption of effective legal and regulatory frameworks, protective operational measures and effective investigations. The court noted, however, that such obligations should not place an undue or excessive burden on the State.

- The court found that the delays within the proceedings constituted a violation of article 6(1) and the lack of an effective remedy to challenge these delays constituted a violation of article 13.

Meier v Switzerland **(Application No. 10109/14) (9 February 2016)**

The Applicant, a 70-year-old prisoner, was required to work pursuant to provisions of domestic law. Having reached normal retirement age, the Applicant requested to be exempted from compulsory work. This was denied and he subsequently refused to work. As a result, he was sanctioned with a stricter prison regime and withdrawal of certain benefits.

The Applicant alleged a violation of article 4. The court unanimously found no such violation.

- This was the first case in which the court had to assess whether compulsory work in prison beyond retirement age involved 'forced or compulsory labour'. The court found that it did, but that it fell into the exception within article 4(3). In so doing, the court proposed four criteria by which such cases should be examined: the purpose, the nature, the extent of the compulsory work and the manner in which it had to be performed.

- The court examined differing approached among Member States and emphasised that there was insufficient consensus on the issue (it examined 28 out of the 27 States). The court concluded that the domestic authorities should therefore enjoy a considerable margin of appreciation.

ARTICLE 5

Doherty v United Kingdom **(2016) 63 E.H.R.R. 11 (Application No. 76874/11) (18 February 2016)**

Applicant sentenced to life imprisonment for murder in September 1982 and given mandatory life sentence. He was released on licence in April 1996. His licence was revoked in 1997 following his arrest for indecent assault and gross indecency. The Applicant was charged with these offences, but the charges were subsequently withdrawn. His case was reviewed by the Review Board on five occasions between 1998 and 2000, but on each he was refused release on the basis of a risk that he would commit further acts of indecency. Two such decisions were the subject of unsuccessful judicial reviews. Between 2001 and 2008 three separate Life Sentence Review Commissioners panels were convened. The first two were successfully appealed by the Applicant on the basis of a number of issues, including the decision to determine the allegations without the opportunity for the Applicant to cross-examine the complainant. The third appeal was unsuccessful. The panel subsequently directed the Applicant's release on conditional licence.

The court found unanimously that there had been a violation of article 5(4) in relation to the 'speediness' of the reviews between November 2001 and October 2008.

- The court reiterated that Article 5(4) provides certain minimal procedural guarantees to a detainee. One such guarantee is that the adjudication on the lawfulness of detention should be conducted "speedily". This in itself can be considered a *'virtue*

of value' and an Applicant cannot be said to have suffered no significant disadvantage as a result of a failure to conduct a "speedy" adjudication simply because such an adjudication would not have resulted in an earlier release date.

Buzadji v The Republic of Moldova **(Application No. 23755/07) (5 July 2016)**

The Applicant, a businessman, was detained pending criminal investigation in relation an unsuccessful attempt at fraud. His initial detention on remand was extended a number of times, during which the terms of his detention were altered to house arrest. He was detained for a period of 10 months prior to being released on bail. The Applicant was eventually cleared of all charges.

The court upheld the Applicant's complaint that he had suffered a violation of his rights under article 5(3).

- The court extended its case law in relation to the need for there to be alternative grounds for detention in such circumstances than simply a 'reasonable suspicion' that the detainee committed the crime. The current case law provides that alternative grounds must be relied upon after a *'certain lapse of time'*. The court for the first time defines this phrase, stating that 'reasonable suspicion' will only justify the initial arrest and that alternative *'relevant and sufficient'* reasons must be given at the stage of the first 'judicial control' of the detention on remand. The effect of this decision is that the practice of six Member States (Belgium, Serbia, Germany, Austria, Switzerland and Turkey) is no longer compatible with the ECHR.

- The court reiterated that the form of detention, in this case house arrest, is immaterial to the obligation outlined above. Requesting house arrest cannot be considered a waiver of the right to liberty.

ARTICLE 6

Rywin v Poland **(Application No. 6091/06) (18 February 2016)**

The Applicant, a film director, became embroiled in a scandal arising from allegations that persons in power had engaged in corrupt practices during parliamentary proceedings on the reform of audio-visual legislation. The Applicant was charged with criminal offences and convicted. At the same time, Parliament set up a commission of inquiry concerning the same allegations. Following his conviction, but prior to determination of the Applicant's appeal, the Parliamentary commission reported and named the Applicant as someone who had played a role in the corruption. The Applicant claimed that the publication of the report at a time when his conviction was not yet final infringed his right to the presumption of innocence pursuant to Article 6(2). The court found that the provision had not been breached.

- This is the first case in which the court considers the presumption of innocence in the context of parallel criminal proceedings and an official inquiry. The court determined that parliamentary commissions of inquiry were also required to respect the guarantee contained within Article 6(2) in relation to their terms of reference, the discharge of their mandate and the publication of their conclusions.

- In the context of this case, the court examined the impugned expressions and determined that the Applicant had not been directly targeted by the report. The report had not referred to the criminal proceedings and offered no view on his criminal liability.

***Dvorski v Croatia* (2016) 63 E.H.R.R. 7 (Application No. 25703/11) (20 October 2015)**

Applicant questioned about triple murder, armed robbery and arson. He was represented in interview by a state-appointed lawyer who was a former chief of police. The pre-interview consultation was short and the applicant and confessed to the crimes by way of a signed statement. The applicant claimed that he had done so without access to a lawyer of his choice and while under the influence of drugs. The Applicant repeatedly requested the representation of a lawyer instructed by his parents, GM, but was told by the police that he could not be contacted. In fact, the police denied GM access to the Applicant. The Applicant was subsequently convicted on the basis of his confession and other evidence. The court found by 16 votes to 1 that there had been a violation of articles 6(1) and (3)(c).

- The court reaffirms that article 6(1) requires that, as a rule, access to a lawyer should be provided from the first interrogation by the police unless it is demonstrated that there are compelling reasons to restrict this right. Where the complaint is that the Applicant was not afforded access to a lawyer of his own choosing, the more lenient standard of 'relevant and sufficient' reasons applies.

- The right to counsel is one that requires special protection and the concept of the 'knowing and intelligent waiver' applies to any alleged waiving of the right. In this case, the alleged waiver cannot have been effective because the applicant did not know that GM had been instructed and attended the police station.

- Where it is alleged that the appointment of a particular lawyer had influenced or led an individual to make an incriminating statement, careful scrutiny by the authorities, and particularly national courts, is called for.

The court underlined the importance of the investigation stage for the preparation of criminal proceedings, and emphasised that even at this stage the accused should be given the opportunity to have recourse to legal assistance of his or her own choosing. Where it is alleged that the appointment or choice of a lawyer has influenced a decision.

Hammerton v United Kingdom **[2016] ECHR 272 (Application no. 6287/10) (17 March 2016)**

Within family proceedings, the Applicant was committed to prison for contempt of court for the breach of an undertaking and an injunction. He was unrepresented at the hearing, due to his legal aid certificate being reviewed. The Applicant appealed out of time and the Court of Appeal held that there were grave procedural errors. The Applicant's subsequent claim for damages under the Human Rights Act was dismissed.

- Where a domestic court finds against an individual in civil proceedings that fall under the criminal limb of Article 6, there has been the 'determination of a criminal charge' for the purposes of Article 6 and that determination amounts to a finding of guilt for the purposes of Article 5(1)(a).

- It is for the domestic courts to apply and interpret domestic law, and for the court to exercise a certain power of review. In this case, the court considered its role to be subsidiary given the detailed scrutiny given by the High Court.

- The Court of Appeal had already held that the failure to ensure that the Applicant had a lawyer was a violation of Article 6. This did not of itself, however, render the ensuing detention unlawful under Article 5(1). The 'gross and obvious irregularity' test for breaches of Article 5(1) was a stringent one and not met in this case.

- The domestic remedies were not 'fully effective' since they did not fully redress the prejudice suffered. The Court of Appeal had acknowledged that the lack of legal representation may well have resulted in a longer prison sentence and therefore the decisions of the High Court and Court of Appeal did not constitute adequate just satisfaction.

Schatschaschwili v Germany **(2016) E.H.R.R. 14 (Application No. 9154/10) (15 December 2015)**

The Applicant was convicted by the German Regional Court of a number of criminal offences. Two of his victims were Latvian nationals and were questioned by the police and the investigating judge, in the absence of the applicant or his lawyer. The prosecuting authorities made attempts to secure the two victims' attendance at the trial, but they were unwilling to attend on medical grounds, namely post-traumatic stress disorder. The court accepted the credibility of the victims' statements and, relying on these and other evidence, convicted the applicant.

The court held by nine votes to eight that there had been a violation of articles 6(1) and (3)(d).

The court was invited by the Czech government, intervening, to reconsider the guidance given in *Al-Khawaja v United Kingdom*, namely that the following three steps apply to considering whether the admission of evidence from an absent witness was compatible with Articles 6(1) and 3(d): (i) whether there was a good reason for the non-attendance of the witness; (ii) whether the evidence of the absent witness was the 'sole or decisive' basis for the applicant's conviction; (iii) whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicap caused to the defence.

- As a rule, it is appropriate to examine each of the three *Al-Khawaja* steps in order. However, all are interrelated and it may be appropriate, in a given case, to examine the steps in a different order. The court was required to consider all three steps, even where the answer to step (ii), whether the evidence was the 'sole or decisive' basis for the conviction, is answered in the negative.

- In relation to step (i), it is incumbent on the domestic courts to take 'positive steps' to enable the defendant to examine the witnesses against him. The court declined to compile a list of specific measures, but reiterated that the domestic courts must carefully scrutinise the reasons given for non-attendance.

- In relation to step (ii), whether evidence is 'decisive' will depend on the strength of the corroborative evidence. The court will review the domestic courts' evaluation of the strength of the untested evidence and, if the domestic courts do not indicate their position as to this, the court will make its own assessment.

- In relation to step (iii), the counterbalancing factors must permit a fair and proper assessment of the reliability of the evidence. Examples are given at [125] – [131].

***Ibrahim and Others v United Kingdom* (Application Nos. 50541/08; 50571/08; 50573/08; 40351/09) (16 September 2016)**

The first three Applicants, together with a fourth man not party to the proceedings, were involved in an attempted terrorist attack shortly after the 7/7 bombings. The fourth Applicant sheltered the fourth man while he hid from the police. All four were arrested and subject to "safety interviews" under the Terrorism Act 2000, in which they were delayed access to legal assistance. The first three Applicants sought to have their "safety interviews" excluded as evidence in their criminal trial, but were refused. The fourth Applicant sought to have a witness statement he had signed during his interview excluded. This was refused. All four were convicted.

The court found no violation in relation to the first three Applicants, but found that there had been a violation in relation to the fourth Applicant as the government had not demonstrated the existence of compelling reasons for restricting his right to early legal assistance.

- The court outlined a number of general points in relation to Article 6, including that the minimum rights contained within article 6(3) should be considered as *'specific aspects of Article 6(1)'*.

- The court sought to clarify the test set out in *Salduz v Turkey*, stating that there were two stages, namely: (i) restriction of the right to legal assistance would only be compliant with article 6 when there were compelling reasons for the temporary restrictions on the applicants' access to legal advice; and, (ii) when the admission of the comments made during the "safety interviews" did not render the criminal proceedings as a whole unfair. The court rejected the assertion that a lack of compelling reasons would amount to an automatic violation.

- The court stated that what would amount to *'compelling reasons'* must be considered on a case-by-case basis, having regard to the fundamental importance of early access to legal advice and the principle that restrictions are only permissible in *'exceptional circumstances'*, must be temporary and based on an individual assessment.

- There are strident and notable criticisms of the majority's approach in a number of different partly dissenting and dissenting judgments.

Fazia Ali v UK No.40378/10 20th October 2015

Independence of the tribunal under Article 6 (1)

App was homeless and was notified that the LA had discharged its statutory duty to provide her with accommodation since she refused to accept an offer of accommodation sent to her in writing.

She disputed that she had received an offer and complained. LA official reviewed her complaint and decided that she had received a written offer. JR dismissed because it raised a factual issue which the Administrative court could not resolve.

- Was the LA official an independent tribunal
- Did the JR provide sufficient review so as to compensate for any lack of independence
- Court view not an 'independent' tribunal
- Key issue was whether the proceedings taken as a whole provided a proper and full inquiry into the factual issue in dispute
- The LA official had no personal interest in the matter
- The domestic court could review the substantive and procedural regularity of the decision
- This was sufficient to meet the requirements of the Convention – which did not include a full review of the facts
- Emphasis on fairness in light of the social and economic disadvantage of the claimant and the objective of the scheme itself

ARTICLE 7

***Dallas v United Kingdom* (Application No. 38395/12) (11 February 2016)**

The Applicant was convicted of contempt of court for researching the criminal history of a Defendant during a trial in which she had been selected as a juror, in breach of the trial judge's direction. The trial was aborted and the jury discharged. The domestic courts found that the Applicant had not merely risked causing prejudice to the administration of justice, but had caused such prejudice on the basis that she had shared her research with the other jurors. The Applicant alleged a violation of Article 7, on the basis that she had been found guilty of a criminal offence on the basis of an act which did not constitute a criminal offence at the time it was committed. The court found no violation of Article 7.

- The court accepted that disobedience of a judge's direction to a jury may give rise to criminal sanctions. Whether or not an issue arises under Article 7 will depend on the extent to which the domestic law fulfils the qualitative requirements of accessibility and foreseeability.

- The decision of the court complements previous decisions highlighting the importance attached to the nature of a judge's direction to a jury as a means of securing the fairness of the proceedings (see *Beggs v United Kingdom* and *Abdulla Ali v United Kingdom*).

- The court reaffirmed that Article 7 will not be breached where judicial development of the law in a particular case is consistent with the essence of the offence and could be reasonably foreseen (see *Del Rio Prada v Spain*).

ARTICLE 8

***Kahn v Germany* (Application No. 16313/10) (17 March 2016)**

Applicants were children of a famous national sportsman. They successfully obtained an injunction restricting a publisher from publishing photographs of them. This was breached on three occasions and punished with fines, albeit for lesser sums than advocated by the Applicants and payable to the State. The Applicants' civil proceedings seeking compensation.

The Applicants' claim that their article 8 rights had been violated by the dismissal of their compensation claim was dismissed.

- The court stressed the margin of appreciation available to States when determining their response to the unauthorised publication of photographs of minors. The court noted that Article 8 should not be construed as requiring financial compensation in

all cases involving a breach of personality rights. It was open to States to envisage other methods of redress, such as that in the present case.

Roman Zakharov v Russia **(Application No. 4713/06) (4 December 2015)**

The Applicant was a publisher and chairman of a non-governmental organisation concerned with media freedom. He claimed a violation of article 8 in relation to domestic law which required mobile phone networks to install equipment that permitted the security services to intercept all communication.

- The court examined two competing lines of case law concerning victim status in cases concerning secret surveillance. The court adopted a harmonised approach based on the decision in *Kennedy v United Kingdom*, determining that an applicant can claim to be a victim of a violation if they are covered by the scope of the legislation permitting secret surveillance measures and has no remedies available to challenge such covert surveillance.

- Even if such remedies exist, the applicant can claim to be a victim if they can show that, due to their personal situation, they are potentially at risk of being subjected to such measures. The court will adjust the level of scrutiny based upon the effectiveness of the domestic remedies.

- The court repeated the interrelatedness of "lawfulness" and "necessity" in this context, determining that domestic law must be framed so as to only be applied when necessary. This should be achieved my creating adequate and sufficient safeguards.

- The court considered that a risk of abuse is inherent in any system of secret surveillance and, while the facts of this case were peculiar to the Russian system which involved mass surveillance without any form of judicial oversight, the court's findings are not specifically tied to the circumstances before it.

Szabo and Vissy v Hungary **(2016) 63 E.H.R.R 3; Application No. 37138/14 (12 January 2016)**

Application by two staff members of a non-governmental "watchdog" organisation in relation to the establishment of the Anti-Terrorism Task Force (TEK), a specialised branch of the police force statutorily vested with powers of surveillance. The Applicants asserted that the second basis of exercising such powers, namely national security, infringed their right to privacy on the basis that it involved insufficient safeguards and only required authorisation by the Minister responsible for justice. The court held that there was a breach of Article 8.

- **Admissibility:** Applying *Zakharov v Russia*, the application was admissible and the applications had victim status. The legislative provisions were so broad that any person within Hungary could have their communications intercepted if deemed appropriate by the Minister and there was no opportunity for an individual to lodge a complaint with an independent body against the interception of their communications.

- **Foreseeability:** Foreseeability in the context of interception of communications cannot be the same as in many other fields, it cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt accordingly [62]. The court considered that, in this context, the requirement of foreseeability does not require a State to enact legislative provisions listing in detail all circumstances that may prompt a decision to launch secret surveillance operations, but that the discretion granted to the executive must not be unfettered. It must indicate the scope of such discretion.

- **Necessity:** A measure such as this will only satisfy this requirement if it is 'strictly necessary' for obtaining vital intelligence or safeguarding democratic institutions. While such surveillance need not be authorised by a judicial officer, a non-judicial officer charged with authorising such measures must be sufficiently independent from the executive. Control by a judge with special expertise should be the rule and substitute solutions should be subject to close scrutiny. Any such surveillance authorised by a non-judicial body should be subject to a *post factum* review as a rule.

***RE v United Kingdom* (2016) 63 E.H.R.R. 2 (Application No. 62498/11) (27 October 2015)**

The applicant had been arrested and interviewed in connection with the murder of a policeman. He was assessed as vulnerable and requiring an appropriate adult. He was interviewed in the absence of a solicitor or appropriate adult and gave information leading to the recovery of the gun used. He was released and re-arrested. The police refused to confirm or deny whether consultations with his solicitor/appropriate adult were being covertly recorded, as permitted by the Regulation of Investigatory Powers Act 2000 ("RIPA").

The court held that there had been a violation of Article 8 in relation to surveillance of legal consultations, but not in relation to surveillance of consultations with the appropriate adult.

- This case confirms that covert surveillance of legal consultation is, in principle, permissible. The court emphasised, however, that this represents an extremely high level of intrusion and accordingly merits *'strengthened protection'*. The requirement of foreseeability does not require the State to set out exhaustively by name the specific offences that may give rise to such surveillance. The relationship between a detained person and their appropriate adult was not legally privileged and did not therefore merit the *'strengthened protection'* outlined above.

- The provisions of RIPA concerning the examination, use and storage of data obtained by covert surveillance of legal consultations did not provide sufficient safeguards for the protection of such material. To this limited extent, a violation of Article 8 was found.

Private Life
Parillo v Italy [GC] No6339/05 ECHR 2015
Complaint concerned a prohibition on donating frozen embryos to research. App and her partner had five embryos frozen. He died and she did not wish to proceed with pregnancy but did wish to donate embryos to research.

Complained under Article 8 and Article 1P1. First consideration of use of embryos which are not to be implanted.

- Central to the issue was the consent of the parties to the creation, storage, use and retention of embryos which fell squarely within private life
- Prohibition fell within protection of morals and rights and freedoms of others (ie others including embryos)
- Wide margin to be accorded to the State as a lack of consensus generally around this issue
- Depth of parliamentary debate and consideration behind the ban and the lack of clarity justified a wide margin of appreciation.

ARTICLE 9

***İzzettin Doğan and Others v. Turkey* (Application no. 62649/10) (26 April 2016)**

The Applicants were followers of the Alevi faith, to whom the State had refused to provide the same religious public service as the majority of the population who follow the Sunni branch of Islam (i.e. designated places of worship). The Applicants complained that this implied an assessment of the Alevi faith by State authorities in breach of its obligation of neutrality and impartiality. The court found a violation of article 9 both taken alone and in conjunction with article 14.

- The court emphasised that the obligation of neutrality and impartiality excludes a State from exercising any discretion as to whether the religious beliefs or means used to express such beliefs are legitimate. Nevertheless, the State is permitted to assess certain objective elements, such as the *'level of cogency, seriousness, cohesion and importance'* of a particular belief.

- The court held that the effect of this obligation is that responsibility for determining the religious affiliation of a religious community is a task for its highest spiritual authorities alone. Only when justified by the most serious and compelling reasons is State intervention permissible.

ARTICLE 10

***Kalda v Estonia* (Application No. 17429/10) (19 January 2016)**

The Applicant, a prisoner, was refused access to several internet sites during the period of his detainment and was thereby prevented from undertaking legal research. The websites included that of the local information office of the Council of Europe and certain State-run databases concerning legislation and judicial decisions.

The court found a violation of Article 10 and the Applicant's freedom to receive and impart information.

- The court reiterated remarks in previous cases that the internet plays an important role in enhancing the dissemination of information in general.

- The court determined that Article 10 cannot be interpreted as imposing a general obligation on States to provide access to the internet, or to specific internet sites, for prisoners. However, where a State permits access to the internet for prisoners, but not to specific sites, there may be a violation of Article 10 if relevant and sufficient reasons are not provided for any restrictions imposed.

***Bédat v Switzerland* (2016) 63 E.H.R.R. 15 (Application No. 56925/08) (29 March 2016)**

The Applicant was a journalist who published an article concerning a set of proceedings against MB, a motorist who had been remanded in custody following a tragic car accident. The article contained significant details of the proceedings, including the questions asked, statements made, photographs of evidence and MB's demeanour. The Applicant had been provided with a copy of the case file following its loss by a party to the proceedings. The Applicant was prosecuted for publishing secret documents and convicted.

The court held by 15 votes to 2 that there had been no violation of article 10.

- The national court found that, although the article did not take a specific stance on the intentional nature of the offence, it painted a highly negative picture of the applicant and adopted an almost mocking tone. It was therefore capable of influencing the proceedings. The government did not have to provide evidence of actual influence, the existence of a risk of influence was sufficient to justify a prohibition.

- Publications concerning the functioning of the judiciary related to matter of public interest. The nature of the information provided, namely records of interview and letters to the investigating judge, did not contribute to public debate.

- The national authorities had been correct to have initiated criminal proceedings to fulfil their positive obligation to protect MB's article 8 rights. The existence of civil law remedied to MB did not release the State from its positive obligation under

article 8 in relation to a person accused within criminal proceedings. At the time of publication, MB was vulnerable, being detained in prison and highly likely to be unaware of the article's publication. His position had to be distinguished from a public figure who voluntarily exposed himself to publicity.

***Perinçek v Switzerland* (2016) 63 E.H.R.R. 6 (Application No. 27510/08) (15 October 2015)**

The applicant was Chairman of the Turkish Workers' Party and made public statements at three events in 2005 regarding the Armenian genocide of 1915, in breach of national law regarding genocide denial. He was found guilty of racial discrimination. He appealed, claiming that the court had not conducted a sufficient examination of whether the facts justified classifying the events of 1915 as a genocide.

The court held by 10 votes to 7 that there had been a breach of article 10.

- The court considered that it had to balance the Applicant's right to freedom of expression against the rights of Armenians to respect for their ancestors' dignity under article 8.

- The context and content of the statements cannot be said to be intended to stir up hatred or to be abusive or contemptuous. They concerned events which had taken place 90 years earlier on the territory of the Ottoman Empire. They concerned a matter of public interest and were entitled to heightened protection under article 10.

- In cases such as this, the historical context was relevant when assessing the pressing social need. There was no direct link between Switzerland and the events in 1915, save for the presence of an Armenian community in Switzerland. It was not necessary in a democratic society to impose a criminal penalty to protect the rights of Armenians in view of the content of the remarks.

ARTICLE 14

***Biao v Denmark* (Application No. 38590/10) (24 May 2016)**

The first Applicant lived much of his formative years in Ghana before moving to Denmark in 1993 and acquiring Danish nationality in 2002. He married the second Applicant in Ghana, but she was refused a residence permit on the basis that the Applicants' aggregate ties were closer to Denmark were not as strong as their attachment to Ghana. There was an exception in domestic law to this 'attachment requirement', which did not apply here, for those who had been Danish nationals for 28 years.

The Applicants' complained of a violation of article 8 when taken in conjunction with article 14. The court upheld this complaint.

- The court confirmed that, while article 8 does not impose a general family reunification obligation, a domestic measure to control immigration compatible with article 8 may nonetheless amount to discrimination and a violation of article 14.
- In assessing whether a measure constitutes a violation of article 14, the court will look behind the text and aim of the measure and examine whether it has a disproportionately prejudicial effect on a particular group. It will constitute a violation if there is no *'objective and reasonable justification'*, even if the measure was not aimed at the particular group or intended to be discriminatory.

- In a modern, democratic society, no difference in treatment based exclusively or decisively on a person's ethnic origin was justified. Difference in treatment on the basis of nationality is only permitted for *'compelling or very weighty reasons'*.

***Pajić v Croatia* (Application No. 68453/13) (23 February 2016)**

The Applicant was a Bosnian national in a same-sex relationship with a woman living in Croatia. She sought a Croatian residence permit on the basis of family reunification and the intention to establish a household with a partner and start a business. The permit was refused on the basis that domestic law expressly restricted the right to a temporary residence permit to heterosexual couples.

The court found a violation of article 14 taken in conjunction with article 8.

- The court extended the *Vallianatos v Greece* case-law in relation to non-cohabiting same sex couples living in the same country, applying it to couples of different nationalities who are unable to cohabit due to immigration restrictions. As a result, the fact that a same sex couple are not cohabiting does not prevent them from falling within the scope of 'family life'.

- The court confirmed that States must justify domestic immigration measures proscribing different treatment on the basis of sexual orientation in accordance with the its case law. This applies notwithstanding the wide margin of appreciation enjoyed by States in matters relating to immigration.