Ivana Roagna

Protecting **the right to respect for private and family life** under the European Convention on Human Rights

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Contents

Article 8 of the European Convention on Human Rights

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the Country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Introduction

This handbook was developed with the aim of offering an overview of the scope of application of Article 8 of the European Convention on Human Rights ("the Convention"), providing legal practitioners with a workable tool facilitating the understanding of both the Convention and the Court's case-law. This is particularly important when the Convention is fully embodied in the domestic legal systems, which is the case in most of the States Parties to this instrument. Legal professionals must understand that the Court's judgments are not merely advisory nor relevant to the respondent party only, but could be invoked directly before their national jurisdictions, particularly when the international provisions are given supremacy over ordinary domestic provisions.

In the last ten years, the European Court of Human Rights ("the Court") has considerably extended the protective scope of Article 8. The evolution recorded is inherent in the nature of the provision: Article 8 is the first of the Convention's qualified rights, whose main feature is that their application requires a balancing exercise between the protection of human rights and the Contracting States' margin of appreciation. The latter can be quite extensive, particularly when there is no European consensus on issues which have deep-rooted social and cultural connotations and for which, therefore, States Parties are considered to be best placed to assess and respond to the needs of society. Whilst providing a general overview of the principles applicable to Article 8, this handbook will also address the recent repercussions that cultural and societal changes have had on the interpretation of the provision.

The handbook is divided into four parts, all containing extensive reference to substantive case-law. Part I starts with a general introduction to Article 8. It then examines in detail the four areas of personal autonomy protected by the provisions. These are to be read and interpreted as autonomous concepts. Defining the scope of Article 8 represents the first step of the two-stage test applied by the Court when examining related complaints. Should the circumstances of the case be found to fall within the remits of the provision, then the second part of the test applies. This second stage is thoroughly examined within Part II, which focuses on the elements of the derogatory clause. Part III continues the overview by providing an insight into the positive obligations stemming from Article 8, whose development represents one of the key features of the evolutive interpretation of the Convention by the Court. The final part, Part IV, is devoted to three problem areas that have become of

growing concern because of an increased public awareness and subsequent demands brought to the attention of the Court. These are the right to environment, the application of the Convention to immigration cases and the interplay between the Article 8 and the Hague Convention on the Civil Aspects of International Child Abduction.

In the interests of readability, the text generally refers only to the title of the case, with full references of judgments cited appearing in the index of cases, page 96. All the Court's judgments, and a significant selection of decisions and reports, are published in the HUDOC database, accessible at http://hudoc.echr.coe.int/. In the analysis that follows, judgments marked with an asterisk were not yet final at the time of writing.

Part I – General overview

The purpose of the right under examination is "to protect the individual against arbitrary action by the public authorities". This purpose is achieved by shielding the four dimensions of personal autonomy of an individual – that is one's private life, family life, home and correspondence. Article 8 shares its structure with all the Convention's qualified rights: the first paragraph states the content of the guarantee whereas the derogation clause, contained in the second paragraph, sets forth both general conditions and specific grounds a State Party may invoke to restrict the operation of the rights and freedoms at stake. Whilst in most instances the Court does not challenge the legitimacy of a legal interference by the State into an individual's enjoyment of the right, it does require the party to prove that the measure which is being challenged is necessary in a democratic society, inasmuch as it meets a pressing social need and corresponds to shared values. The concept of necessity, of which proportionality to the aim pursued is an ingredient, represents therefore the battlefield on which in most instances the dispute between individuals and states is fought. The perimeter of this field, however, has varied over the years, influenced by the continuing social and economic developments of society. The practical application of Article 8 has become, therefore, a challenging exercise, as it is difficult to try and predict its implementation in socially controversial situations. In this respect it could be said that Article 8 is one of the most open-ended provisions of the Convention, which over the years has proved itself able to cover a growing number of issues and to extend its protection to a range of interests that would not fall under any other the scope of other articles. This is partly also due to the fact that the Strasbourg organs have not provided any comprehensive definition of Article 8 interests, thus making them fully adaptable to changing times. In recent years increasing attempts have been made to extend Article 8's remit to social and economic claims related to welfare, like access to medical treatment and drugs. So far the Strasbourg Court has resisted such claims, holding, for instance, that Article 8 is not engaged in relation to the provision of medical resources. Nor have states been found to have a "positive obligation" under Article 8 to enable an individual suffering from severe mental bipolar disorder to obtain, without a prescription, a substance enabling him to end his life without pain and without risk of failure.[1] The Court accepted, however, the

1. *Haas v. Switzerland.*

extension of the scope of Article 8 to include the rights of members of a national minority to have a traditional lifestyle[2] and to encompass the field of environmental law in cases where a person's life is directly affected by noise or other form of pollution.[3]

The identification of the protected rights

The analysis of the Court's case-law indicates that it is up to the applicant to spell out the right allegedly violated and convince the Court that it falls within the remits of Article 8. In *E.B.* the applicant successfully persuaded a majority of the Court that the refusal by the national authority to declare her fit for adoption was not a complaint about her right to adopt or to found a family through adoption, which would have been rejected as outside the scope of the Convention, but infringed her private life in that she was not able to develop relationships with the outside world through adoption. Should the applicant invoke more than one of the rights covered by Article 8, the Court might avoid spelling out exactly which individual right is implicated. In *Klass* the Court held that a complaint relating to the surveillance and interception of phone and mail communications fell within the scope of application of Article 8, representing an interference with private and family life and correspondence.

Does the complaint fall within the scope of application of Article 8?

In order to attract the protection of Article 8 the complaint must fall within one of the four dimensions guaranteed by the provision, namely private life, family life, home or correspondence. The meaning of the four concepts is not self-explanatory and is very much fact-sensitive. In addition, these areas are not mutually exclusive and a measure can simultaneously interfere with multiple spheres at once. The Court has avoided laying down specific rules as to the interpretation of the various facets of the dimensions and will most usually proceed on a case-by-case basis, giving the concepts an autonomous meaning. This flexibility of the Court allows for social, legal and technological developments to be taken into account, though it sometimes makes it difficult for practitioners to define precisely their content. The analysis of the case-law, and of the particular circumstances of the cases, however, provides sufficient guidance in interpreting situations from the angle of Article 8, also keeping in mind its evolutive and dynamic character.

The two-stage test

In assessing whether a complaint gives rise to a violation of the Convention, the Court adopts a two-stage test. Stages 1 and 2

2. Cases of *Chapman*, *Coster*, *Beard*, *Lee* and *Jane Smith*, all v. the United Kingdom [GC].
3. *Hatton and others v. the United Kingdom* [GC]; *Powell and Rayner v. the United Kingdom*; *López Ostra v. Spain*; *Guerra and others v. Italy* [GC]; *Taşkın and others v. Turkey*.

are interconnected: a negative answer to the first question, which aims to ascertain whether the complaint falls within the scope of application of Article 8, will inevitably decide the Court to stop the examination of the case. Conversely, not all lack of interference by the State – assessed at Stage 2 – will prompt the Court to stop the examination of the case, since unfulfilled positive obligations might be at stake. The structured approach outlined below is followed by the Court each time it applies Article 8. In many cases the Court will not discuss each point in detail: its examination of an Article 8 complaint, however, will never depart from this scheme.

Stage 1 (Article 8 §1) – Does the complaint fall within the remits of Article 8?

In order to ascertain the applicability of Article 8 to a given situation the Court will ask the following question:

- does the complaint fall within the scope of application of Article 8?

The answer will depend on whether, in the light of the specific circumstances, it is possible to conclude that the situation at stake amounts to "private life" or "family life", "home" or "correspondence" within the meaning of the provision. Should the answer be negative and Article 8 be therefore inapplicable, the complaint will not receive further examination. If, however, the Court concludes for the applicability of Article 8, then the second step applies.

Stage 2 (Article 8 §2) – Has there been an interference?

The second stage is twofold; and the aspect that becomes relevant depends on whether or not there has been an interference with the right at issue. Again, the Court uses questions to guide its assessment. In most cases, an Article 8 complaint will be about the conformity with the Convention of a deportation or removal order, a search, examination or compulsory medical treatment or, more generally, in relation to an activity put forward by the state. In such circumstances, the Court will seek the answer to the following question:

- Has there been an interference with the Article 8 rights?

If an interference has occurred, then the questions will be:

- Is the interference in accordance with law?
- Does it pursue a legitimate aim?
- Is it necessary in a democratic society?

If the Court concludes that there has been no interference with the exercise or enjoyment of the right protected under the first paragraph of Article 8, the assessment does not stop. Indeed, the Court will ascertain whether the State Party has a positive obligation to put in place measures to ensure the fulfilment of its Convention obligations. The relevant question, therefore, will be:

- Did the state have a positive obligation to protect the right invoked?

The four dimensions of Article 8

In application of the first part of the two-stage test illustrated above, the time has come to provide practical directions on the content of the four dimensions of Article 8. The following paragraphs will examine each of them in the light of the Strasbourg case-law. Although not exhaustive, the overview provides significant guidance, which must be read bearing in mind the living nature of the Convention and the fact that societal changes might soon move the boundaries of Article 8 further ahead.

What is private life?

The Strasbourg Court has never offered a clear and precise definition of what is meant by private life: in its view it is a broad concept, incapable of exhaustive definition.[4] What is clear is that the notion of private life is much wider than that of privacy, encompassing a sphere within which every individual can freely develop and fulfil his personality, both in relation to others and with the outside world. Instead of providing a clear-cut definition of private life, the Court has identified, on a case-by-case basis, the situations falling within this dimension. The result is a rather vague concept, which the Court tends to construe and interpret broadly: over the years the notion of private life has been applied to a variety of situations, including bearing a name, the protection of one's image or reputation, awareness of family origins, physical and moral integrity, sexual and social identity, sexual life and orientation, a healthy environment, self-determination and personal autonomy, protection from search and seizure and privacy of telephone conversations. In addition, the Court has held that the recognition of an individual's legal civil status comes within the scope of Article 8 and has found the provision applicable, for instance, in employment-related cases:[5] dismissal from a private-sector job and employment restrictions, imposed by law, on former members of the secret services have also been considered relevant in considering the right to respect for private life.[6] The application of Article 8 to naturalisation claims has proven to be sensitive: although the provision does not guarantee the right to acquire a particular nationality, in the *Genovese* case the Court stated that it could not be ruled out that an arbitrary denial of citizenship might, in certain circumstances, raise an issue under Article 8 of the Convention because of the impact of such a denial on the social identity aspect of the private life dimension protected by that provision.[7] An excessive delay in the registration of a marriage has also been considered to fall under the remits of the provision.[8]

4. *Costello-Roberts v. the United Kingdom*.

5. *Bigaeva v. Greece*.
6. *Rainys and Gasparavicius v. Lithuania* (dec.), recalling *Sidabras and Džiautas v. Lithuania* (dec.).
7. *Genovese v. Malta**, citing the admissibility decision in *Karassev v. Finland* (dec.).
8. *Dadouch v. Malta*.

Which relationships constitute private life?

The notion of private life has often been used by the Court in a versatile fashion, almost a catch-all clause able to provide protection to worthy situations which would not fall under the scope of family life. The first category of relationships that are covered by this concept, therefore, could be defined as quasi-familial. They include:

- the relationship between foster parents and children they have been taking care of;[9]
- relationships between unmarried couples.[10]

Until very recently relationships between same-sex partners, with or without children, had not received protection under the "private life" limb of Article 8.[11] In 2010, however, the Court, whilst clarifying that the Convention does not oblige member states either to legislate for or legally recognise same-sex marriages, accepted for the first time that homosexual relations do represent a form of "family life":

> … the Court's case-law has only accepted that the emotional and sexual relationship of a same-sex couple constitutes "private life" but has not found that it constitutes "family life", even where a long-term relationship of cohabiting partners was at stake. In coming to that conclusion, the Court observed that despite the growing tendency in a number of European states towards the legal and judicial recognition of stable de facto partnerships between homosexuals, given the existence of little common ground between the Contracting States, this was an area in which they still enjoyed a wide margin of appreciation. […] The Court notes that […] a rapid evolution of social attitudes towards same-sex couples has taken place in many member states. Since then a considerable number of member states have afforded legal recognition to same-sex couples [...]. Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of "family" […]. In view of this evolution the Court considers it 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. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.[12]

Conversely, the Court found that the following do not amount to private life:

- relationship between an owner and his pet;[13]
- relationship between a person and his corpse (exhumed for DNA testing for the purpose of establishing affiliation);[14]

9. *X v. Switzerland*.
10. *Wakerfiel v. the United Kingdom*.
11. *Kerkhoven and Hinke v. the Netherlands*.
12. *Schalk and Kopf v. Austria*.
13. *X v. Iceland*.
14. *Estate of Kresten Filtenborg Mortensen v. Denmark* (dec.).

- the written relationship between a prisoner and a correspondent of his, contacted for the purpose of launching a campaign on prison conditions.[15]

The right to establish relationships with the outside world

The right to private life does not only encompass relationships which are already established, but also extends to the possibility of "developing relationships with the outside world". This concept lies at the heart of Article 8: in 1992 the Court clarified

> that it would be too restrictive to limit the notion [of private life] to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle.[16]

Such right to enter in contacts with others, however, suffers some limitations. In *Botta,* for instance, the Court was asked to decide whether the disabled applicant had a right to access the private beaches at a given resort. The complaint was built around the fact that the resort identified by the applicant was not equipped with the facilities necessary to allow persons with disabilities to access the beach and sea, as provided by the law. The Court dismissed the application, finding that it did not fall within the scope of Article 8. It considered that the right invoked, namely to gain access to the beach and the sea at a location which was distant from the applicant's usual residence concerned interpersonal relations of such broad and indeterminate scope that there could be no direct link with the measures the state was urged to take in order to reconcile the omission of the private bathing establishment owners and the applicant's private life. Similarly, in *Friend and Countryside Alliance and others* the Court considered that, despite the obvious sense of enjoyment and personal fulfilment the applicants had derived from hunting and the interpersonal relations they had developed through it, these were too broad and indeterminate in scope, for the hunting bans to amount to an interference with their rights under Article 8.

The notion of private life enshrined in Article 8 was further elucidated and extended in 2009, in the *E.B* case. The case concerned the procedure undergone by a homosexual, single teacher, whose application for authorisation to adopt was rejected allegedly on the basis of her sexual orientation. The Court was satisfied that the complaint was not about the right to found a family or to adopt, which are not protected by the Convention,[17] but about the right of single persons, expressly granted by French legislation, to apply for authorisation to adopt. By creating such a right (a possibility open to it under Article 53 of the Convention), France had gone beyond its obli-

15. *X v. the United Kingdom* (dec.), 6 October 1982.
16. *Niemetz v. Germany.*
17. *Fretté v. France* (dec.).

gations under Article 8, and therefore the complaint could be scrutinised.

Is there a right to self-determination and personal autonomy under Article 8? Ending of life and after-death arrangements

In 2002 the Court was confronted with the issue of prohibition, within national legislation, of assisted suicide and decided on the admissibility of the Article 8 complaint by making explicit reference, for the first time, to the concept of personal autonomy.[18] The applicant, suffering from the devastating effects of a degenerative disease responsible for increasingly deteriorating conditions and cause of major physical and mental suffering, claimed the right to choose to end her life with the assistance of her husband. From the applicant's perspective, her decision on how to pass away was to be viewed as part of the act of living, which Article 8 undoubtedly protects. By deciding on the admissibility the Court stated that:

> The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity. […] The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8 §1 of the Convention.

The wishes of surviving family in relation to the burial of their relatives have been considered to fall within the remits of Article 8, although the Court often abstained from spelling out whether the interference relates to the concept of private or family life.[19] The desire to have one's ashes scattered on one's property[20] and the right of a mother to modify the last name engraved on the tomb of her stillborn child[21] were considered under the angle of private life. The excessive delay of national authorities to return to her parents the corpse of a 4-year-old girl following an autopsy was considered to infringe on both private and family life.[22] In other instances the Court has limited itself to stating that the situation gave rise to an issue under Article 8, without specifying the dimension involved: this happened when it was asked to adjudicate the entitlement of a

18. *Pretty v. the United Kingdom*.
19. *Girard v. France*.
20. *X v. Germany* (dec.).
21. *Znamenskaya v. Russia*.
22. *Panullo and Forte v. France*.

mother to attend the burial of her stillborn child, possibly accompanied by a ceremony, and to have the child's body transported in an appropriate vehicle[23] and to the refusal to allow the transfer of an urn containing the ashes of the applicant's husband.[24]

Do sexual activities fall within the scope of private life?

In an early case from the 1970s the Commission elucidated that

> The right to respect for private life is of such a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfilment of his personality. To this effect, he must also have the possibility of establishing relationships of various kinds, including sexual, with other persons.[25]

This statement makes it clear that sexual relationships and activities fall into a person's private life. A quick overview of the jurisprudence on the matter clarifies how these are considered a very important and intimate aspect of any individual, deserving the utmost protection. The need for protection is so strong that in *Dudgeon* the Court found that the very existence of legislation criminalising consensual homosexual conducts between adult males was found to affect a person's private life, even if the person had not actually been charged with a criminal offence.

Not all sexual activity carried out behind closed doors, however, comes under the protection of Article 8. The applicants in *Laskey, Jaggard and Brown* contended that their prosecution and convictions for assault and wounding in the course of consensual sado-masochistic activities between homosexual adults were in breach of Article 8. Although the Court did not enter into the merits as to whether the applicants' behaviour fell within the scope of private life, it expressed some reservations about extending the protection of Article 8 to activities involving a considerable number of people, which required the provision of specifically furnished chambers and paraphernalia, the recruitment of new affiliates and the recording of videotapes for consumption by the community. The concept was further developed in *K.A. and A.D.* There, the Court clarified that the right to entertain sexual relationships also include the right to dispose of one's body, which is an integral part of personal autonomy. This means that one's will to live according to one's wishes must extend to the possibility that the person engages in activities perceived as physically or morally damaging or dangerous.[26] This statement seems to suggest, in other words, that the notion of personal autonomy must be interpreted as including the right to make choices concerning one's body.

23. *Hadri-Vionnet v. Switzerland* (dec.).
24. *Elli Poluhas Dödsbo v. Sweden* (dec.).
25. *Brüggeman and Scheuten v. Germany* (dec.).
26. *Pretty.*

The multi-faceted notion of private life

In addition to interpersonal relationships, the notion of private life covers other situations or activities that have been identified by the Court in its case-law. What follows is a non-exhaustive illustration of the most relevant ones, divided by subject matter.

Is gender identity protected by Article 8?

The protection of and respect for human dignity and human freedom would be deprived of most of its meaning if it were to be interpreted as excluding the rights of transsexuals to personal development and to physical and moral security. Although Article 8 does not contain a right to self-determination as such, in *Van Kück* the Court clarified that it would be contrary to the Convention not to regard one's freedom to define oneself as female or male as one of the most basic essentials of self-determination.[27] Change of name and the issuing of official papers reflecting gender reassignment have therefore been found to concern the right to respect for private life under Article 8 §1.[28]

Is there a right to a name?

The issue of the applicability of Article 8 to the choice of first and last names was first examined by the Court in the early 1990s. In *Burghartz,* a case concerning the use of the wife's last name by her spouse, the Court clearly stated that despite not being explicit in Article 8, one's name, as a means of personal identification and of linking to a family, must be viewed as part of one's private and family life, which must be enjoyed without discrimination based on gender. In *Guillot,* which was about the refusal of the French authorities to register the applicant's daughter with the name "Fleur de Marie" as it was not listed in the Saints' Calendar, the Court further clarified that the choice of a child's forename by parents amounts to a personal, emotional matter and therefore comes within their private sphere.

Is there a right to ethnic identity?

The protection offered by Article 8 encompasses not only the right to ethnic identity[29] but also the right of those belonging to an ethnic minority to live according to their traditional lifestyle. The occupation by a Gypsy of her caravan was regarded by the Grand Chamber as

> an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or from their own volition, many Gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their chil-

27. Also recalled in *Schlumpf v. Switzerland.*
28. *B. v. France.*
29. *Ciubotaru v. Moldova*.

dren. Measures which affect the applicant's stationing of her caravans have therefore a wider impact than on the right to respect for home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition.[30]

Photographs of individuals

Until 2009 the right to one's image had been dealt by the Court in the context of publication of pictures in the press.[31] Subsequent applications, however, allowed to extend significantly the notion of "divulgation" of one's image. The case of *Reklos and Davourlis* concerned the taking of photographs of a new-born baby, including the face, by a professional photographer hired by the private clinic where the birth took place to prepare a photo shooting for clients. The Court clarified that the mere taking of a photograph by others, regardless of its publication or dissemination, affects a person's private life. In the case under review, the pictures had been taken in a sterile unit whose access was restricted to medical staff. In deciding that the case fell within the notion of private life, the Court stressed that a person's image reveals one's unique characteristics and constitutes one of the main features of the individual's personality. The effective protection of the latter requires that the consent of the person concerned be obtained when the picture is taken and not just when publication becomes possible.

A similar reasoning was adopted in *Georgi Nikolaishvili,* where the Court assimilated the posting of a person's picture on the public premises of several police stations in different parts of the Country to a public dissemination, as the photo could be easily accessed by the population at large. In this case the conclusion on the intrusion into the applicant's private life was also grounded in the fact that the applicant, who was not even the subject of a criminal prosecution at the material time of the posting, ought to be considered an "ordinary person", to whom no interference could have been justified by any of the legitimate aims. Lastly, the labelling of the applicant as "wanted" in connection with a murder case damaged his reputation, social identity and psychological integrity, thus infringing on the applicant's private life protected by Article 8.

The right to one's reputation

In 2007 the Court, with a judgment[32] representing a progressive step in the development on the right to respect for private life, expressly recognised that Article 8 applies to the protection of one's reputation. It stated that a reputation forms part of the individual identity and psychological integrity, imposing a duty of protection on national courts, even if the criticism is expressed in the context of a public debate.[33]

30. *Chapman*.
31. *Von Hannover v. Germany*; *Sciacca v. Italy*; *Mosley v. the United Kingdom*; *Gurgenidze v. Georgia*.
32. *Pfeifer v. Austria*.

Collection of personal data and their access

> Public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. That is all the truer where such information concerns a person's distant past.[34]

This statement of the Court illustrates how collection and storage by the state of information and data related to individuals with or without their consent, as well as their accessibility, will always concern a person's private life, thus falling within the remits of Article 8. Their eventual, subsequent use is has no bearing in this finding. Further examples include:

- official census where data on sex, marital status, place of birth, ethnic identity and other sensitive information are compulsorily collected;[35]
- recording of fingerprints, images, cell samples, DNA profiles[36] and other personal or public information by the police,[37] even if covered by confidentiality;[38]
- collection and storage of medical data and other medical records;[39]
- the compulsion to provide details of personal expenditure for fiscal purposes (thus disclosing intimate aspects of private life);[40]
- interception, recording and/or storage of telephone conversations;[41]
- a system of personal identification established for administrative and civil purposes, such as health, social and fiscal databases;
- images captured by CCTV in the public street;[42]
- a system for intercepting conversations between the detainees and their relatives in the visiting rooms of prisons.[43]

In determining whether personal information held by the authorities involves any of the private-life aspects protected by Article 8, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the duration of the storage, the way in which these records are used and processed and the results that may be obtained.[44]

In any case, whenever information about a person is in the hands of the state, the individual concerned must have speedy access to it.[45] The exercise of such right of access might suffer

33. The position was recalled in *Petrina v. Romania*.
34. *Rotaru v. Romania* [GC]. The Court noted that the situation complained of in *Rotaru,* that is lack of sufficient safeguards for the protection of individual's private lives, was still present at the time of the judgment in *Association 21 December 1989 and others v. Romania*.
35. *X v. the United Kingdom* (dec.), 6 October 1982.
36. *S. and Marper v. the United Kingdom* [GC].
37. *Murray v. the United Kingdom*.
38. *Leander v. Sweden*.
39. *Chave née Jullien v. France* (dec.).
40. *X v. Belgium* (dec.).
41. *Amman v. Switzerland*.
42. *Peck v. the United Kingdom*.
43. *Wisse v. France*.
44. *S. and Marper*.

from a number of constraints, related for instance to the presence of criminal investigations against that person or to the need to balance the individual rights with collective or individual interests.[46] In all circumstances the denial of access raises an issue under Article 8. So does the disclosure of personal information to other institutions or to the press.[47] Whether the denial of access will lead to a violation will very much depend of the reasons put forward by the state to justify such decision, and on whether the refusal can be regarded as necessary in a democratic society and proportionate to the aim pursued.[48]

Privacy in the public context

In defining the broad boundaries of the concept of "private life" the Court acknowledges that there is a zone of interaction of a person with others, even in a public context, which may fall within this notion. A number of elements will come into play in order to ascertain whether a person's private life is concerned outside the home or private premises. In this connection, reasonable expectations as to privacy may be a significant, though not necessarily conclusive, factor.[49] The use of coercive powers conferred by legislation to require an individual to submit to a detailed search of the person, his clothing and his personal belongings whilst walking in the street was found to amount to an interference with the right to respect for private life.[50] The fact that the search is undertaken in a public place does not render Article 8 inapplicable. Indeed, in the Court's view, the public nature of the search may, in certain cases, increase the invasiveness of the interference because of an element of humiliation and embarrassment. Items such as bags, wallets, notebooks and diaries may, moreover, contain personal items whose owner might feel uncomfortable to expose to the view of others. In *Foka*, where the applicant was subjected to a forced search of her bag by border guards, the Court held that

- *any search effected by the authorities on a person interferes with his or her private life.*

This might not apply to air travellers and persons entering certain public buildings, who might be seen as consenting to such searches by choosing to travel or to access certain premises, having the freedom to leave personal items behind or walk away without being subjected to a search.

Searches and surveillance of the workplace

More and more spaces that once used to be regarded as public are considered private for the purpose of Article 8. The trend was inaugurated as early as 1992 in *Niemetz*. Asked to adjudi-

45. A delay of six years in granting the applicant access to the personal file created on him by the secret service under the communist regime was found to be in breach of Article 8 in *Haralambie v. Romania*.
46. Placing the burden of proof of the state's interference on the applicant's right, particularly where the applicable rules were secret, was found contrary to the principle of equality in *Turek v. Slovakia*.
47. *Z v. Finland* and *M.S. v. Sweden*.
48. *Segerstedt-Wiberg and others v. Sweden*.
49. *P.G. and J.H. v. the United Kingdom*.
50. *Gillan and Quinton v. the United Kingdom*.

cate on the legality of the search of a lawyer's office, the Court then rejected the German Government's argument that Article 8 did not afford the protection sought by the applicant, since the activity had taken place on professional premises. The Strasbourg judges noted there was no reason of principle why the notion of "private life" should exclude professional or business activities, since it was in the course of their working lives that most people had a significant opportunity of establishing and developing relationships with others. To deny Article's 8 protection on the ground that the measure complained of related only to business could lead to an inequality of treatment, in that such protection would remain available to a person whose professional and non-professional activities could not be distinguished. The Court also relied on the fact that, in certain Contracting States, the word "home" had been accepted as extending to business premises, an interpretation which was concordant with the French text of Article 8 ("domicile"). In 2002 the Court considered that time had come for Article 8 to be construed as including the right to respect for a company's head office, branch office or place of business. In *Stés Colas Est and others* it found that the investigators had entered the applicants' premises without a warrant, which amounted to trespass against their "home".

In the case of *Peev* the Court had the opportunity to further define the scope of "private life" in the context of a search carried out in the office of a public official employed as an expert at the Supreme Cassation Prosecutor's Office, where he had his office. In the Court's view, this public official could reasonably have expected his workspace to be treated as private property, or at the least his desk and filing cabinets, where he kept personal belongings. The search thus amounted to an "interference" with his private life. Similarly in *Copland* the Court was asked to decide on the unlawful monitoring of a civil servant's telephone, e-mail and Internet usage. It held that e-mails sent from the workplace should be covered by the notions of "private life" and "correspondence", as should information obtained from monitoring of personal use of the Internet at the place of work. As the applicant had been given no warning that her calls would be liable to monitoring, she had a reasonable expectation as to the privacy of the communication and messages sent using devices present in the workplace.

Is there a right or obligation to become a parent? Application of Article 8 to abortion and reproductive rights

As early as 1976 the Commission recognised that Article 8 is applicable to abortion issues:

> […] legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus.[51]

51. *Brüggeman and Scheuten* (dec.).

A Grand Chamber judgment against Ireland further clarified[52] that while Article 8 cannot not be interpreted as conferring a right to abort, its prohibition comes within the scope of the applicants' right to respect for their physical and psychological integrity, clearly encompassed by the notion of "private life". This means also that Article 8 confers the right to have timely access to all the available diagnostic services needed to take an informed decision (and requires that such services be genuinely available); together with the right of effective access to prenatal care. In this respect states are under an obligation to ensure their services in such a way that the respect of the freedom of conscience of health professionals does not, in practice, impede the exercise of the right of access to such services by the women concerned.[53]

The termination of pregnancies, however, encompasses not only the rights of mothers-to-be, but also the fathers'. Taking a position that was to be later elaborated in *Evans* (discussed below), the Strasbourg judges concluded that the potential father's right to respect for his private and family life could not be interpreted so widely as to embrace the right to be consulted or to apply to a court about an abortion which his wife sought, since the respect for the private life of the pregnant woman – "the person primarily concerned by the pregnancy and its continuation or termination" – is interpreted as superseding any rights of the "father". As a corollary, in *Boso* the father's complaint that the decision of the wife to carry out an abortion was not shared with him was dismissed as being manifestly ill-founded.[54] The case-law seems to indicate that when the interests of two future parents are at stake, the decision not to become a parent prevails that of becoming one. Should the mother's bodily integrity be at stake, the prevalence of her autonomy rights becomes almost automatic.

Whilst in abortion cases the Court has held the rights of the father to be inferior to those of the mother, the perspective changes when the decision concerns the initiation of a pregnancy. *Evans* gave the Court an opportunity to analyse the application of human rights provisions in relation to "new reproductive technologies", and on the rights and relationships surrounding reproduction. This sensitive issue of ethical nature was decided by the Court in 2007. The case concerned the extraction of eggs from the applicant's ovaries for *in vitro* fertilisation (IVF). The applicant complained that domestic law allowed her former partner to withdraw his consent to the continued storage and use of the embryos, thus preventing her from having a child to whom she was genetically related. The Court acknowledged, in the first place, that the concept of "private life" encompassed the right to respect for such a decision to become a parent. It then underlined how both male and

52. *A, B, and C v. Ireland* [GC].
53. *R.R. v. Poland*.
54. *Boso v. Italy* (dec.). On the notion of victim of the father in cases of termination of pregnancy, *X v. the United Kingdom* (dec.), 13 May 1980.

female parties to IVF treatment deserve equal treatment, despite their different involvement in the procedure and, therefore, the storage and implantation of fertilised eggs requires the continuous consent of all parties involved.

Since the inability to beget children is not an inevitable consequence of imprisonment, Article 8 suffers no restrictions when applied to detainees.[55] The provision has recently been interpreted as encompassing also the choice of how to become a parent: in *Ternovszky* the applicant complained that she had not been able to give birth at home, rather than in hospital, as health professionals were effectively dissuaded by law from assisting her as they risked being convicted. The Court observed that

> [t]he notion of personal autonomy is a fundamental principle underlying the interpretation of the guarantees of Article 8. Therefore the right concerning the decision to become a parent includes the right of choosing the circumstances of becoming a parent. The Court is satisfied that the circumstances of giving birth incontestably form part of one's private life for the purposes of this provision.

55. *Dickson v. the United Kingdom*.

Is the determination of legal ties covered by Article 8?

The Court has held on numerous occasions[56] that paternity proceedings fall within the scope of Article 8. Although normally the Strasbourg judges will be asked to adjudicate instances where the determination of a legal or biological relationship between a child born out of wedlock and his natural father is at stake, the answer about the applicability of Article 8 will be no different where the proceedings are aimed at the dissolution in law of existing family ties.[57] In all such cases the Court will not look at the proceedings from a "family life" perspective, as in any event the right to know one's ascendants is an important aspect of one's personal identity, therefore falling within the scope of the concept of "private life".[58]

Do safety restrictions imposed by the state concern private life?

The measures taken by the states to protect the public against various dangers, such as the obligation to wear seatbelts or to use safety appliances in industry, will also fall under the scope of application of Article 8, though in most cases they will be justified under the derogation clause.

56. See, among others, *Backlung v. Finland*; *Mikulić v. Croatia*; *Jäggi v. Switzerland*.
57. *Rasmussen v. Denmark*.
58. *Anayo v. Germany*.

What does the right to physical and moral integrity mean?

As already mentioned, the notion of "private life" is rather broad. Depending on the circumstances, the notion can extend to the moral and physical integrity of the person, leading to a possible overlap with Article 3 situations particularly, for instance, when the person is detained or otherwise deprived of liberty within the meaning of Article 5 of the Convention. Non-consensual or compulsory medical treatment or examination, regardless of how minor, will certainly fall within the protective scope of private life under Article 8. Whether the interference could be justified under paragraph 2 is of course a different question that the Court will examine at a later stage. Examples of cases where physical or moral integrity were (or could have been) looked at from an Article 8 perspective include: the administration of medicaments to a severely handicapped child by hospital staff against the wishes of his mother;[59] a strip-search of all visitors of a prison, regardless of any reasonable suspicion of having committed a criminal offence;[60] forcible administration of emetics to a suspected drug trafficker in order to provoke vomiting of the psychotropic substance swallowed;[61] and the forcible gynaecological examination of a detainee.[62] Examples of psychological integrity include: the deportation of a mentally ill person to a place where his condition would go largely untreated;[63] and repeated psychiatric examinations at short intervals in connection with similar criminal cases before the same court.[64]

59. *Glass v. the United Kingdom*.
60. *Wainwright v. the United Kingdom* (dec.).
61. *Jalloh v. Germany* [GC]. Eventually the case was decided with recourse to Article 3, owing to the severity of the treatment.

Interplay between Article 8 and Article 3

The Court has been asked on many occasions to adjudicate complaints triggering both Article 3 and 8. The interplay between the two provisions is due to the fact that the notion of private life is so broad that there might be circumstances in which Article 8 could be regarded as affording a protection in relation to conditions during detention which do not attain the level of severity required by Article 3.[65] Conversely, the Court has found that in some circumstances the finding of a violation under Article 3 makes it unnecessary to examine the complaint raised under Article 8.[66] Although in *Costello-Roberts* the Court did not exclude that Article 8 could afford a protection which went beyond that given by Article 3, its position was to apply either one of them exclusively.[67] From 2003, however, the Court

62. *Y.F. v. Turkey*.
63. *Bensaid v. the United Kingdom* (dec.).
64. *Worva v. Poland* (dec.). Examples of compulsory psychiatric examination falling under the scope of Article 8 can be found in *Glass*, *Y.F.*, *Matter v. Slovakia*.
65. *Raninen v. Finland*. In *Florea v. Romania* the exposure of an already ill non-smoker applicant to passive smoking whilst in detention, in contravention to national legislation providing for separate facilities for smokers and non-smokers, was found to violate Article 3.
66. *Jalloh*; *Yazgul Yilmaz v. Turkey*, concerning a forced gynaecological examination which, in principle, would fall within the ambit of Article 8.

started to examine Article 8 and Article 3 complaints in conjunction more often. The first case in which this integrated approach was adopted was the case of *M.C. v. Bulgaria*. A 14-year-old[68] girl had been raped by two men. Since the criminal investigations found insufficient evidence that the applicant had been compelled to have sex with the accused and that intercourse was the result of the use of force or threats, proceedings were discontinued. Before the Strasbourg authority the applicant invoked, amongst others, Articles 8 and 3. She complained that Bulgarian law and practice did not provide effective protection against rape and sexual abuse, requiring evidence of active resistance by the victim. The effectiveness of investigations was also challenged. The Court reiterated that Articles 3 and 8 of the Convention require member states not only to criminalise rape, but also to apply this legislation through effective investigation and prosecution. Although proof of the use of physical force by the perpetrator and physical resistance on the part of the victim had been historically required in some systems for the crime to be proven, this was not the case at European level, where any reference to physical force had been removed from legislation and/or case-law, lack of consent rather than force being critical. Recalling the consensus reached by member states of the Council of Europe in penalising non-consensual sexual acts,[69] the International Criminal Tribunal for the former Yugoslavia's view that in international criminal law, any sexual penetration without the victim's consent constituted rape, and accepting the scientific opinion that victims of sexual abuse, in particular those under age, often respond to a rape with the so called "frozen fright" (traumatic psychological infantilism syndrome, consisting of physical shock, disorientation, and numbness), by which the terrorised victim either submits passively to or dissociates her or himself psychologically from the rape, the Court underlined the need for the law and legal practice concerning rape to reflect changing social attitudes requiring respect for the individual's sexual autonomy and for equality. As a corollary, it concluded that Articles 3 and 8 of the Convention placed on member states a positive obligation to criminalise and effectively prosecute any non-consensual sexual act, regardless of the attitude of the victim. The Court also noted that the presence of two irreconcilable versions of the facts by the victims and the accused called, in the light of relevant modern standards in comparative and international law, for a context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances which had not been conducted. Without entering into the merits of the criminal responsibility of the accused, the Court found that

67. In *López Ostra* the Court took the unanimous view that although the conditions in which the applicant and her family had lived for a number of years were very difficult (the applicant complained about the inconvenience caused by a waste-treatment plant situated a few meters away from her home), they did not reach the minimum threshold required to be examined under the angle of Article 3.
68. This is the age of consent for sexual intercourse in Bulgaria.
69. Committee of Ministers' Recommendation Rec (2002) 5 on the protection of women against violence.

the effectiveness of the investigation, particularly the features and approach of the investigations fell short of Bulgaria's positive obligations under Articles 3 and 8 of the Convention to set up and enforce a criminal-law system punishing all forms of rape and sexual abuse.

Similar conclusions were adopted in the case of *E.S. and others*. The applicant complained of her inability to obtain an order for her husband (who was later sentenced to four years' imprisonment for ill-treatment, violence and sexual abuse against his wife and children) to move out of the council flat of which they were joint tenants. According to the domestic jurisdictions, she could only be entitled to bring proceedings to terminate the joint tenancy after a final decision in the divorce proceedings. Meanwhile she could apply for an order requiring her husband to refrain from inappropriate behaviour. The Constitutional Court invested with the matter considered that there had been no violation of the applicant's rights as she had not applied for such an order. However, it held that the lower courts had failed to take appropriate action to protect the children from ill-treatment. No compensation was awarded, however, as the Constitutional Court considered that the finding of a violation provided appropriate just satisfaction. Following the introduction of new legislation, the applicant obtained two protection orders: the first preventing her ex-husband from entering the flat and the second awarding her exclusive tenancy. In the meantime, however, the applicants had had to move away from their home, family and friends and two of the children had had to change school. It was only after the divorce became final, and a year after the allegations of ill-treatment and abuse had been brought, that the applicant was in a position to apply to sever the tenancy. The Court considered that the alternative measure proposed by the Slovak Government (an order restraining the applicant's ex-husband from inappropriate behaviour) would not have provided the applicants with adequate protection against their husband and father and therefore did not amount to an effective domestic remedy.[70] In the view of the Court the nature and severity of the allegations, which were recognised by the Government, required that the applicant and her children receive immediate protection. This, however, was not provided in a timely fashion. With regard to the children, the Court also noted that the finding of a violation by the domestic Courts did not amounted to adequate redress for the damage that they had suffered. In conclusion, therefore, Slovakia was found to have failed in its obligation to protect all the applicants from ill-treatment, in violation of Articles 3 and 8.

Lengthy proceedings can also become an issue when Articles 3 and 8 of the Convention are engaged. The case of *Ebcin* brought to the attention of the Court a violent practice which was widespread between 1984 and 1995 in South-East Turkey, whereby civil servants were attacked in the public street and either killed or seriously wounded by PKK terrorists. The applicant had

70. Therefore the objection of non-exhaustion of domestic remedies raised by the Government was found to be ungrounded.

been the victim of such an attack, performed with the use of acid thrown onto her face. The incident left the applicant unable to work for a year and a half and caused permanent damages, including a lasting neck tumour. The Court decided to examine the applicant's complaints, concerning the state's obligation to protect her and ensure that those responsible for the inhuman treatment she had suffered were promptly brought to justice, under Articles 3 and 8 of the Convention. Whilst considering that the authorities could not be held responsible for any failure to take steps to protect the applicant individually (the likelihood that public servants might be threatened, attacked or killed in an area which was prey to terrorism could not be ruled out, the applicant was not a public figure and did not provide evidence of any intimidation or threat prior to the assault), the Court reached an opposite verdict in relation to the procedural obligations to investigate and prosecute the case. Taking into account the lengthy delays registered in the criminal proceedings, as well as the overall duration of the administrative proceedings for compensation, the Court found that Turkey had failed to provide adequate protection against a serious act of violence and that there had been a violation of Articles 3 and 8.[71]

71. Having regard to its findings under Articles 3 and 8, the Court considered that it was not necessary to examine separately the complaint under Article 6 §1.

The nature of family life

The first point that needs to be clarified when dealing with the "family life" component of Article 8 is the meaning given to the word "family". The notion used by the Court has developed over time in line with the changing attitudes of European society and might very well continue to do so in the light of evolving customs. The Court has time and again said in its case-law that the notion of "family life" in Article 8

> 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.[72]

The Court's flexible approach takes into account the variety of family arrangements in the Council of Europe member states, as well as the implications of their crisis and the directions of the their current developments. *De facto* family life, therefore, receives recognition under the Convention on an equal basis with formally established ties.[73] The fact that the Court decides on the existence of family life on a case-by-case basis, assessing the close personal ties existing between the parties, means that it is not possible to enumerate all the relationships which con-

72. *X, Y, and Z v. the United Kingdom*.
73. *Schalk and Kopf v. Austria*.

stitute family life. In any case, should a situation fall foul of the notion of "family life", it might very well enjoy the protection of Article 8 under the angle of "private life".

What constitutes family life for the purpose of Article 8?

The following relationships have been found to amount to family life for the purpose of Article 8:

- between children and their grandparents;[74]
- between siblings, regardless of their age;[75]
- between an uncle or aunt and his/her nephew or niece;[76]
- between parents and children born into second relationships, or those children born as a result of an extra-marital or adulterous affair, particularly where the paternity of the children has been recognised and the parties enjoy close personal ties;[77]
- between adoptive/foster parents and children.[78]

Family life is not limited to social, moral or cultural relations, but also encompasses interests of a material kind, such as the obligations[79] in respect of maintenance, inheritance rights and limitations and matters of disposition between near relatives.[80] Article 8, however, cannot be interpreted as imposing an obligation on the states to recognise religious marriages or to establish a special regime for particular categories of unmarried couples for inheritance purposes.[81]

It is interesting to note that all the above-mentioned relationships are also listed under the "private life" section of this handbook. Depending on the strength, arrangements and features of the personal tie, they will be considered under one or the other ambit covered by Article 8. The final result (protection), however, will not change.

Are marriage and cohabitation necessary or sufficient to establish family life?

The presence of a lawful and genuine marriage is sufficient to trigger the protection of Article 8 for all those involved: children, therefore, will be considered part of such relationship from the moment of their birth.[82] This means, conversely, that paper marriages-for-money, for instance those contracted to bypass immigration rules or to acquire a nationality, fall outside the scope of the provision. Whilst sufficient, a valid marriage is not necessary for family life to exist: the relationship between a mother and her child attracts the protection of the Convention regardless of her marital status.[83] In *Johnston* the Court clarified

74. *Marckx v. Belgium*.
75. *Olsson v. Sweden*; and as adults *Boughanemi v. France*.
76. *Boyle v. the United Kingdom*.
77. *X v. Switzerland*.
78. *Jolie and Lebrun v. Belgium*.
79. *Velcea and Mazăre v. Romania*. In *Pla and Puncernau v. Andorra* the Court clarified that inheritance rights between grandchildren and grandparents fell within the category of "family life", even if the testator had died before her grandson's adoption.
80. *Merger and Cross v. France*.
81. *Şerife Yiğit v. Turkey*.
82. *Berrehab v. the Netherlands*.

that unmarried couples who continuously and stably live together with their children will normally be said to enjoy family life, thus becoming indistinguishable from the same social formation based on marriage. Similarly, cohabitation is not necessary for family life to exist.[84] As the Court clarified:

> [t]he concept of family life on which Article 8 is based embraces, even when there is no cohabitation, the tie between a parent and his or her child, regardless of whether or not the latter is legitimate. Although that tie may be broken by subsequent events, this can only happen in exceptional circumstances.[85]

This means that situations such as those arising from the delay in recognition of a child by his father, his failure to support the child financially, or his decision to leave the child in the care of relatives when emigrating to a Convention State have been found to constitute exceptional circumstances which do not necessarily, as such, terminate family life. Article 8 may also extend its protection to situations where the establishment of contacts between a guardian and his child is difficult or impossible due to the conduct of the other parent. When such instances arise, the Court will assess the potential family life at stake, taking into account the surrounding, and often preceding, circumstances such as the nature of the relationship between the child's parent, their family plan, the circumstances of the family crisis, the emotional bond with the child.[86]

Are blood ties necessary or sufficient to establish family life?

The presence of a biological link between a child and a parent will not *ipso facto* constitute family life. Similarly, the absence of blood ties will not automatically preclude a relationship from falling within the concept of family. Although the Court decided not to pursue the "social rather than biological reality" approach, the truth is that it has only once found that family life existed between those without a blood link. This was in *X, Y and Z,* where it considered that the relationship between a female-to-male transsexual and his child born by artificial insemination by donor (AID) amounted to family life. The Court based its conclusion on the fact that the applicants' relationship was not otherwise distinguishable from that enjoyed by the traditional family and that the transsexual partner had participated in the AID process as the child's father. The mere presence of a biological kinship, without any further legal or factual elements indicating the existence of a close personal relationship, will not be sufficient, in the Court's view, to attract the protection of Article 8.[87]

83. *Marckx*. In *X v. the United Kingdom* (dec.), 1 July 1977, however, the Court considered that no family life existed between a mother and her son, whom she had given up for adoption two years earlier.
84. *Söderbäck v. Sweden*.
85. *Boughanemi*.
86. *Keegan v. Ireland*.
87. *G. v. the Netherlands*.

When does family life end?

When established, family ties may be broken by subsequent events, although this can happen only in exceptional circumstances. This is particularly true for adoption and expulsion. According to the Strasbourg case-law, the following events cannot alone and/or automatically put an end to family life. This can happen only in exceptional circumstances:[88]

- divorce;[89]
- interruption of life together, also following an expulsion;[90]
- decision to place a child in care;[91]
- adoption.[92]

Family life established through adoption

The case of *Wagner and J.M.W.L.* raised the issue of recognition of a fully valid foreign adoption judgment in favour of an unmarried adoptive mother. The latter had behaved as the under-age child's mother since that judgment. The Luxembourg courts' refusal to declare the foreign judgment enforceable stemmed from the absence of provisions in domestic legislation enabling single parents to adopt. The Court considered that this refusal amounted to an "interference" with the right to respect for family life, and observed that a broad consensus existed in Europe on the issue: as a matter of fact, adoption by unmarried persons was permitted without restrictions in most of the member states of the Council of Europe. Reiterating that the child's best interests had to take precedence in cases of this kind, the Court considered that the domestic courts could not reasonably disregard the legal status which had been created on a valid basis in a foreign country and which corresponded to family life within the meaning of Article 8. They could not reasonably refuse to recognise the family bond which *de facto* linked the applicant and her child and which deserved full protection.

88. *Boughanemi.*
89. *Berrehab*; *Hendriks v. the Netherlands.*
90. *Yousef v. the United Kingdom.*
91. *Margareta and Roger Andersson v. Sweden.*
92. *X v. the United Kingdom.*

What is "home"?

Under Article 8 the term *home* has been construed as an autonomous concept: this means that in order to ascertain whether a certain living place can be regarded as "home" in Convention terms the specific circumstances of the case will have to be put under scrutiny. In general, home has been identified as the place where the person lives on a permanent basis or with which the person has sufficient and continuous links.[93] The Court, considering that the two versions of the Convention differ in this very point ("home" is the term used in the English version, whereas the French refers to the broader concept of

93. *Prokopovich v. Russia* (dec.); *Gillow v. the United Kingdom* (dec.); *McKay-Kopecka v. Poland* (dec.).

"*domicile*") has opted for a more flexible interpretation.[94] The concept has been found to cover the following:

- holiday homes, second homes and hotels providing long-term accommodation;[95]
- a house belonging to another person being occupied, for a significant period or on an annual basis, by someone else;[96]
- social housing occupied by the applicant as a tenant, even though the right of occupation under domestic law may have come to an end;[97]
- business premises, when there is no clear distinction between a person's office and private residence or between private and business activities;[98]
- a company's registered office, branches or other business premises;[99]
- non-traditional residences such caravans and other non-fixed abodes;[100]
- one's living conditions (falling cumulatively under the notion of private, family life and home).[101]

Conversely, the following have not been found to amount to a home for the purpose of Article 8:

- a laundry room belonging jointly to the co-owners of a block of flats and designed for occasional use;[102]
- an artist's dressing room;[103]
- land on which the owner practices or permits a sport, for instance hunting.[104]

Issues related to the enjoyment of home, such as expropriation or rent levels are normally examined under Article 1 of Protocol No. 1 and therefore will not be dealt with in this handbook.

Is ownership necessary or sufficient to constitute a home?

Ownership is neither necessary nor sufficient for a complaint to be examined under Article 8, nor need residence have been lawfully established for a place to be considered "home".[105] However, where "home" is claimed in respect of property in which there has never, or hardly ever, been any occupation by the applicant or where there has been no occupation for some considerable lapse of time, it may be that the links to that property are so attenuated as to cease to raise any issue under Article 8.[106] In this sense, the Court clarified that the possibility of inheriting a property does not constitute a sufficiently concrete tie for it to be treated as a "home",[107] nor is the intention to

94. *Niemietz v. Germany.*
95. *Demades v. Turkey* (dec.).
96. *Menteş and others v. Turkey* (dec.).
97. *McCann v. the United Kingdom.*
98. *Niemietz.*
99. *Stés Colas Est and others v. France.*
100. *Buckley v. the United Kingdom*; *Chapman.*
101. *Moldovan and others v. Romania (no. 2).*
102. *Chelu v. Romania.*
103. *Hartung v. France* (dec.).
104. *Friend and Countryside Alliance and others v. the United Kingdom* (dec.).
105. *Buckley* , *Prokopovich.*
106. *Andreou Papi v. Turkey* (dec.).
107. *Demopoulos and others v. Turkey* [GC].

build a house on a given plot of land, where the applicant claims to have his roots.[108]

The right to correspondence: which are the forms of communication covered?

The right to respect for one's correspondence aims to protect the confidentiality of private communications and has been interpreted as guaranteeing the right to uninterrupted and uncensored communications with others. The threshold of protection is high, as there is no *de minimis* principle for interference to occur: opening one letter is enough.[109] The technological advancements registered in the field of communication have been regularly taken into account by the Court, which has adopted an evolutive interpretation of the word *correspondence*. In addition to traditional letters on paper, the following have been considered "correspondence" for the purposes of Article 8:

- older forms of electronic communication such as telexes;[110]
- telephone conversations,[111] including information relating to them, such as their date and duration and the numbers dialed;[112]
- pager messages;[113]
- electronic messages (e-mails), and information derived from the monitoring of personal Internet use;[114]
- private radio communication,[115] but not when it is on a public wavelength and is thus accessible to others;[116]
- correspondence intercepted in the course of business activities or from business premises;[117]
- electronic data seized during a search of a law office;[118]
- packages seized by customs officials.[119]

The fact that an office telephone has been used for intercepted communications was found irrelevant in determining the application of Article 8.[120]

Is the identity of the sender or recipient relevant?

Although the right to correspondence is recognised for all, the identity of the persons whose correspondence has been interfered with is relevant in determining whether the intrusion was justified under paragraph 2. The issue, therefore, will be dealt with further in the text. In general, privileged communications

108. *Loizidou v. Turkey.*
109. *Narinen v. Finland.*
110. *Christie v. the United Kingdom.*
111. *Klass*; *Malone*; *Margareta and Roger Andersson.*
112. *P.G. and J.H.*
113. *Taylor-Sabori v. the United Kingdom.*
114. *Copland v. the United Kingdom.*
115. *Camenzind v. Switzerland.*
116. *B.C. v. Switzerland* (dec.). Similarly, in *Muscio v. Italy* (dec.), the Court clarified that, although receiving "spam" messages in one's electronic inbox amounted to an interference with the right to respect for private life, e-mail users connecting to the Internet knowingly expose themselves to the risk of receiving such communications.
117. *Kopp v. Switzerland*; *Halford v. the United Kingdom.*
118. *Wieser and Bicos Beteiligungen GmbH v. Austria.*
119. *X v. the United Kingdom* (dec.), 12 October 1978.
120. *Halford.*

such as those occurring between a lawyer and his client are highly guaranteed. Depending on the circumstances, however, simple letters between individuals, even where the sender or recipient is a prisoner, will enjoy the same degree of protection.[121]

121. *Silver and others v. the United Kingdom.*

Does the content of the communication matter?

The content of the correspondence is irrelevant to the question of interference:[122] what Article 8 protects is the means or method, rather than the subject of the communication. Arguments offered by the state that, for instance, a phone conversation related to criminal activities and as such cannot be protected under Article 8 will be regularly dismissed, although might be relevant when applying the derogatory clause.

122. *Frérot v. France.*

Part II – The derogation clause

Should the complaint fall within the scope of application of Article 8, the Court will continue its structured examination. The wording of Article 8 §2 allows for a step-by-step analysis of the complaint, focused on progressive levels. A positive answer to the question

- Has there been an interference with the Article 8 right?

will inevitably lead to the following:

- Is the interference in accordance with the law?
- Does it pursue a legitimate aim?
- Is it necessary in a democratic society?

Although the Court goes through this test each time it is confronted with an Article 8 complaint, depending on the factual background of the case, the scheme is not always and necessarily discussed in detail.

What constitutes an interference with Article 8 rights?

What follows is a non-exhaustive list of what has been considered an intrusion in the enjoyment of the right at stake

- removal of children from their family and placement in public or foster care;[123]
- body and home searches;[124]
- telephone tapping[125] and, in general, interception of communications, regardless of the means used;[126]
- refusal to allow displaced persons to return to their homes;[127]
- stopping and/or review of prisoners' correspondence;[128]
- collection and storage of information on individuals;[129]
- planning decisions;[130]
- expulsion orders;
- maintenance in force of a particular statutory regime intrusive on the complainant's private life;[131]
- failure of authorities to implement judicial orders intended to afford protection from a violent person;[132]

123. *Olsson*.
124. *Murray v. the United Kingdom*; *Chappell v the United Kingdom*, *Funke v. France*.
125. *Klass*.
126. *Bykov v. Russia*, which concerned recording of conversations by means of a remote radio-transmitting device.
127. *Cyprus v. Turkey* [GC].
128. *Campbell and Fell v. the United Kingdom*.
129. *Leander*.
130. *Buckley*.
131. *Schonenberger and Durmaz v. Switzerland*; *Norris v. Ireland*.
132. *A v. Croatia*.

- removal of a worker from his office for reasons related to his private life;[133]
- broadcasting the images of a convicted person, permitted by the police;[134]
- presence of offensive smells emanating from waste tip in vicinity of prisoner's cell;[135]
- photographing of a newborn baby without prior agreement of parents, and retention of the negatives;[136]
- absence of means of ensuring reparation for bodily injuries caused by medical error in state hospital;[137]
- ineffectiveness of the procedure for gaining access to personal files held by secret services;[138]
- administration of a forcible medical treatment without the consent of the applicant or despite his contrary cultural belief, due to his ethnic origins;[139]
- unauthorised access to personal data, including medical information;[140]
- entering a name in the bankruptcy register;[141]
- impossibility to obtain the cancellation of one's name from the list of those permanently residing in given place;[142]
- refusal to renew[143] or return one's identity documents;[144]
- expulsion of a settled immigrant.[145]

133. *Özpınar v. Turkey.*
134. *Toma v. Romania.*
135. *Brânduşe v. Romania.*
136. *Reklos and Davourlis v. Greece.*
137. *Codarcea v. Romania.*
138. *Haralambie.*
139. *Matter v. Slovakia* and *V.C. v. Slovakia.*
140. *I. v. Finland.*
141. *Albanese, Vitiello and Campagnano v. Italy.*
142. *Babylonová v. Slovakia.*
143. *M. v. Switzerland.*
144. *Smirnova v. Russia.*
145. *A.A. v. the United Kingdom.*

Who bears the burden of proof that an interference took place?

In principle it is for the applicant to prove the material interference, providing evidence that an intrusion into his Article 8 rights has occurred. The evidence, however, does not necessarily have to be factual. Indeed, the presence of a certain legislation allowing the interference complained of to take place, together with the fact that the applicant has received full information about it, might satisfy the Court that an interference, though not materially proven, occurred. In other words, maintaining in force a certain regime is sufficient to demonstrate in an adequate degree of likelihood that an violation of the Convention occurred. Otherwise, the applicant would hardly bear the burden of proof in the absence of material damage, or in cases where the violation of a person's rights results in psychological harm deriving from the possible consequences of the enforcement of the law complained. This is particularly true in relation to secret surveillance measures whose presence is by definition unknown, at least at the time, to those who are under surveillance. When applicants can only claim a suspicion that

that their communications and movements have been intercepted and their lives kept under observation, with the only evidence being the existence of the legislation allowing for such interferences, the Court will assess the reasonableness of the complaint in the light of all the circumstances of the case, namely the risk that secret surveillance measures are being applied to the complainant. It will not limit its review to the existence of direct proof that surveillance has taken place, given that such proof is generally difficult or impossible to obtain.[146] In its assessment the Court will also have regard to the availability of remedies at the national level; lack of such remedies, together with the presence of widespread suspicion and concern among the general public that secret surveillance powers are being abused, will trigger the Court's scrutiny even where the actual risk of surveillance is low. In certain circumstances, therefore, the demonstration of the likelihood that the interference has occurred will suffice for the Court to be seized of the case. The "existing legislation" argument, which does not contravene the provision of Article 34 denying individuals the right to challenge the law *in abstracto* of a violation of the Convention (prohibition of *actio popularis)*, has also been successful when the allegations of interference touch upon ambits which are considered of particular importance in a person's life, such as the sexual sphere. In *Norris* the Court considered that the mere presence of legislation prohibiting homosexual acts represented an interference for the purposes of Article 8 – although the applicant had never been prosecuted nor convicted on such grounds – since it obliged the individual concerned either to modify his conduct in relation to a particularly intimate and important aspect of his personality or to risk prosecution.

146. *Kennedy v. the United Kingdom*, in which the Court recalled the approach and principles stated originally in *Klass* and *Malone*.

Is the interference justified? General observations

Once an interference by public authorities has been established, the Court has to decide whether it is justified under paragraph 2. Since the derogatory clause enables restrictions to the rights guaranteed by the Convention, its field of application must be strictly marked off. The Court, therefore, adopts a narrow approach: the exceptions form a closed list, whose interpretation must be rigorous.[147] In line with the general principle unanimously affirmed in the Strasbourg case-law, any limitation to the protection provided for by the Convention must be expressly authorised or justified by the Convention itself. According to Article 18 restrictions can only be applied for the purpose for which they are prescribed.

Was the interference "in accordance with law"?

The second stage of the Court's structured approach on the justification of the interference entails the detection of a legal basis

147. *Sidiropoulos v. Greece*.

legitimising the restriction. If the interference is in accordance with the law, the conduct complained of is compatible with Article 8 (though might not be considered necessary or proportionate at a later stage). Otherwise, the alleged restriction violates the Convention and the Court is not asked to deepen any further the examination of the case. Such condition is common to all qualified rights, even if in relation to Articles 9 to 11 the English version of the official text opts for the different phrasing "prescribed by law". Nonetheless, the Commission and the Court have always denied any concrete relevance of this difference,[148] crediting the two expressions with the same meaning also because the French wording reads "*prévue par la loi*", without making any distinction. The Strasbourg Court has established a threefold test to determine whether an interference is in accordance with the law. The scheme leads the Court to evaluate:

- the presence of a national law,
- the clearness and precision of its wording and
- the aim it pursues.

What is a law for the purpose of the Convention?

Reference to the principle of legality evokes the need that the interference is based on a national legal provision. The Court must consider the law as it is interpreted internally, unless the view expressed by national courts reveals strong reasons for disagreeing.[149] This necessary self-restraint originates from the fact that questions on the reading of national laws before the Strasbourg Court merely pertain to the facts of the case. The Court has given a wide interpretation of this criterion. The justification of an interference can be entrenched in a national statutory regime, but also in different sources, such as professional rules of conduct, common law unwritten principles, European Union regulations or international – either bilateral or multilateral – treaties. On the contrary, administrative regulations, orders, instructions and any other legal source characterised by a high degree of flexibility or discretion or not displaying binding effects, lacking accessibility, usually do not constitute sufficient legal basis for the purposes of Article 8 §2.[150]

Secondly, the Court has to consider the text of the law, the field it covers and the number and status of those to whom it is addressed, in order to assess its clearness and precision. This requirement can be defined as that of "accessibility" of the law. On the one hand, it means that the norm has to rule the specific situation interested by the case; on the other hand, from a subjective perspective,

> the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case.[151]

148. *Sunday Times v. the United Kingdom.*

149. *Roche v. the United Kingdom* [GC].
150. *Shimovolos v. Russia*.
151. *Malone.*

The third aspect, directly linked to the previous one, involves the foreseeability of the consequences of one's conduct: any individual should be able to regulate his behaviour according to the provisions of the law. It goes without saying that the search for certainty cannot result in excessive rigidity in the framing of legal texts. Laws are often couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are a question of practice. In any case, a law conferring discretionary powers must indicate the aim the choices made by public authorities tend to, so that any option can be scrutinised and potentially declared *ultra vires*. The analysis described has been a prominent issue in some categories of case, such as child-care measures, prisoners' correspondence, secret surveillance and, more recently, immigration.

Practical application of the legality principle

What follows is a non-exhaustive overview of the way the principle of legality has been applied by the Court in a number of substantive problem areas brought to its attention.

Taking children into public care

States are traditionally equipped with specific legislation in relation to taking children into care. Whilst it is rare for the complaint brought before the Court to raise the absence of a proper legal basis, the same cannot be said in relation to the objections pointing out the lack of clarity and precision of the existing legal provisions. The most common challenge brought against the national law is the excessive vagueness of the scope and powers conferred on social services to remove children from their parents or to take other decisions about children in public care.[152] In *Olsson* the domestic law was challenged in so far as it allowed the taking of children into public care on the grounds of "lack of care for him" and "any other condition in the home". The Court has proved reluctant to endorse the arguments put forward, considering that even norms expressed in "rather general" terms may satisfy the notion of law, particularly since the broad extent of the powers entrusted to social workers can be effectively balanced by setting up adequate procedural safeguards, at both administrative and judicial level. In *T.P. and K.M.* the Court considered, in addition, the degree of risk of harm to the child before the intervention of public authorities. The Court stated the necessary primacy of the effective protection of the child, which could have been unduly neutralised if the authorities' entitlement to intervene had been limited to situations of actual and concrete harm.

The interception of prisoners' correspondence and the regulation of their visits

The interception of prisoners' correspondence raises questions of public safety and individual fundamental rights in the same breath. As correspondence is the primary means through which persons deprived of their liberty communicate with the

152. *Eriksson v. Sweden*.

outside world, interferences can bear significant consequences on the prisoner's personal sphere. In relation to the principle of legality, the Court has been asked to adjudicate two main issues: the nature of the provisions imposing controls on correspondence and their level of precision.

A breach of the legality principle was found in *Silver and others,* a case involving the regulation of prisoners' correspondence via administrative guidance produced by the Secretary of State for the Prison Service. The Court held that although most of the restrictions on prisoners' correspondence could be gleaned from the content of the formal law the interference, founded on internal, non-published standing orders and circular instructions addressed to prison governors, and lacking formal legal authority, could not be considered to comply with the requirements of Article 8. Conversely, in *Enea*[153] the Court found Italy in breach of Article 8, because the Prison Administration Act, on the basis of which the monitoring of the applicant's correspondence had been imposed, did not regulate either the duration of the measure or the reasons capable of justifying it, and did not indicate with sufficient clarity the scope and manner of exercise of the discretion by the competent authorities, thus not offering the minimum degree of protection against arbitrariness required by the rule of law.

As far as the questions of accessibility and foreseeability are concerned, the complainants have sometimes objected to the impossibility of understanding or even knowing the rules covering this field, and their resulting inability to regulate their conduct coherently. In the above-mentioned *Silver*, the Court found a violation of Article 8 since the authorities had relied primarily on orders and instructions which were not available to prisoners and did not give adequate guidance on the limits imposed on the prisoners' conduct. National prison laws that permitted automatic censorship of correspondence and did not provide for sufficient information on how this power should be exercised would also lead to the finding of a violation, as it was the case in a number of applications against Poland.[154] There, the domestic regime did not draw a distinction on the depth of the controls according to the different kinds of correspondents. As a consequence, even privileged communications such as individual petitions to the Commission and the Court could be stopped and read. The lack of procedural safeguards, moreover, impeded any internal remedy and public authorities were not obliged to subordinate the interception to a formal and motivated decision.[155] In 2009, dealing for the first time with medical confidentiality in prison, the Court extended this principle also to the communications between a convicted patient and his doctor, when intercepted and checked by the medical officer of the prison.[156]

153. See also *William Faulkner v. the United Kingdom.*

154. *Niedbala v. Poland*; *Mianowski v. Poland.*
155. *Salapa v. Poland.*
156. *Szuluk v. the United Kingdom.*

In *Gülmez* a unanimous Chamber considered that legal provisions not identifying in precise terms the offences and the penalties which could underlie a decision to restrict the applicant's visiting rights could not be regarded as sufficiently clear and detailed to appropriately protect a detainee from any wrongful interference with his or her right to family life, thus leading to a violation of Article 8.

The application of secret surveillance measures

Secret surveillance measures have been the object of increasing numbers of applications. In this field, technological developments have forced the Court to match the traditional principles of Article 8 §2 with sophisticated methods of interference with private life. In 2010 the Court delivered its first judgment dealing with GPS surveillance in the context of criminal investigations.[157] In adjudicating the case the Court stressed the differences between the measure at stake and other, less intrusive, visual or acoustic means of surveillance, to which less stringent safeguards apply. In general, the Strasbourg case-law emphasises the urgent need to avoid arbitrary interferences. Therefore, any domestic provision on the matter must be clear enough to give individuals an adequate indication as to the circumstances in which public authorities are entitled to resort to such measures. Besides this common requirement, the Court has indicated further minimum safeguards. Domestic regimes must specify the offences which may justify an interception order, subjective limitations to particular categories of people, chronological limits of the monitoring, the procedure to be followed for examining, using, sharing and storing the data obtained, the precautions to be taken when communicating these data to third parties, the circumstances in which the information can be erased or destroyed,[158] and the provision of prior or *ex post facto* review by a judge or other genuinely (objectively and subjectively) impartial authority, factually and hierarchically independent from the body in charge of imposing such measures, empowered to certify that recordings were genuine and reliable. Should national legislation omit to refer to some of the above-mentioned elements, the Court will extend its assessment to domestic case-law which may be relevant to safeguarding individuals. In all circumstances, however, the approach of the Court is rather rigid, as heterointegration of the national law cannot fill all decisive gaps of the relevant legal provisions.[159]

Implementing stop and search powers by the police

In *Gillan and Quinton* the Court was asked to rule on the coercive powers conferred on the police by the anti-terrorism legis-

157. *Uzun v. Germany.*

158. *Weber and Saravia v. Germany* (dec.); *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*; *Liberty and other organisations v. the United Kingdom*.

159. *P.G. and J.H.*

lation. According to the law, police could stop and search anyone, anywhere and without notice, regardless of any reasonable suspicions of wrongdoing, provided that the uniformed officer considered the activity "expedient for the prevention of acts of terrorism". The Court considered that the wide discretion conferred by the legislation, both in terms of authorisation of the power to stop and search and its application in practice, had not been curbed by adequate legal safeguards, so as to offer the individual sufficient protection from arbitrary interference. Firstly, it noted that at the authorisation stage there was no requirement that the interference be necessary, only expedient. Although the endorsement was subject to confirmation first and renewal later, in truth since the enactment of the anti-terrorism legislation such authorisation had been continuously renewed in a "rolling programme". The presence of an Independent Reviewer was found of no relevance, as his powers were confined to reporting on the general operations of the statutory provision and he had no right to cancel or alter the authorisations. Most of all, however, the legislation conferred excessive discretion on the individual police officer, whose decision to stop and search an individual was based exclusively on a "hunch" or "professional intuition". Officers did not have to demonstrate the existence of any reasonable suspicion, nor were they required to hold any subjective suspicions about the person stopped and searched. The only condition imposed by the statutory provision concerned the purpose of the search, whose aim was to intercept articles which could have been used in connection with terrorism: meaning that, provided the purpose of the stop was to search for such articles (identified in such broad terms as to include many items normally carried by people in the streets), suspicion of their presence was not even necessary. Also, in the light of the statistical evidence showing the extent to which police officers resorted to the stop and search powers conferred on them by the law, the Court considered that the provision was not sufficiently circumscribed nor subject to adequate legal safeguards against abuse, and therefore did not meet the legality requirement set forth by Article 8.

Immigration cases

In recent years the Court was asked to decide on the legality and procedural adequacy of immigration decisions. A national statutory regime does not meet the requirement "in accordance with the law" if it enables the executive to decide, on a case-by-case basis, whether to apply or deny important procedural safeguards. This principle was affirmed in *Liu and Liu*, where an extremely wide power concerning the procedure for the deportation of a foreigner was given to public authorities. The Court hence identifies the primary link between the conditions set up by Article 8 §2 and immigration law as being the existence of a meaningful judicial review of the decisions taken by the executive. The motivation of the measures and the entitlement to seek judicial remedies then become essential for the legality principle to be met. This approach was adopted in *G.C.*, where the expulsion order had been delivered without any reference

to the factual background, on the basis of the mere "serious threat to national security" resulting from the presence of the complainant.

The legitimacy of the interference

Once the Court is satisfied with the legality of the interference, it will examine the legitimacy of the aim pursued. The aims listed in paragraph 2 form part of a closed list. It has happened, however, that the Court has taken into consideration objectives different from those explicitly elicited. In *Nnyanzi* the Court was satisfied that the maintenance and enforcement of immigration controls were a legitimate justification for the removal of the claimant from the United Kingdom to Uganda. Despite exceptions, however, the wording of the Convention appears to be comprehensive of the main interests potentially at stake, each of which is couched in broad terms. They are encompassed by all qualified rights, with the sole exceptions of the economic well-being of the country. In procedural terms, it is for the respondent state to spell out the objective pursued with the interference: generally, the Court will be satisfied with it. This means, however, that the true battle is fought over the necessity and proportionality of the measures adopted to pursue such aims.

The legitimate aims, as listed in Article 8 and as interpreted by the Court, are:

National security

This concerns protecting the state from the risk of harm resulting from internal or external enemies' conduct, such as subversion of the national government or violent attacks to the democratic system. This provision has been evoked in a handful of cases concerning secret collection of information about an individual or covert surveillance measures, allegedly necessary to counter threats stemming from alarming terrorist activities or sophisticated forms of espionage.[160] The justification was not upheld in *Smith and Grady*, concerning the less favourable treatment of homosexual personnel of British armed forces.

Public safety

This aim has rarely been invoked alone. Even when it is, the Court tends to rely at the same time on other coexistent grounds, such as national security or prevention of crime and disorder. Public safety was at the core of the Commission's judgment in *X and Y v. Switzerland*, on the limitations to family life in prison. Likewise, in *Buckley* the Court accepted public safety as one of the justifications for the British authorities' refusal to allow the claimant to live in her caravans on her land. Had the applicant been authorised to do so, there would have been a danger to road traffic, since access to her property was from a public highway.

160. *Klass*; *Leander*.

Economic well-being of the country

The careful management of public finances has been a major concern in some cases involving local policies on housing and demography. For instance, this legitimate aim was raised by the respondent state in *Gillow*: housing limitations in Guernsey were justified by the urgent need to maintain the population within limits that could permit the balanced economic development of the area.

The regulation of the labour market in relation to the demographic density of an urban area was considered a legitimate basis for the deportation of a Moroccan citizen on his divorce from a Dutch national.[161] In any case, the distinction between private and public economic interests is not always easy to draw. For instance, in *Hatton and others* the increased number of night flights was justified by the favourable general economic consequences deriving from a better transport system, but the collective interests were necessarily and deeply intertwined with those of the airlines.

Prevention of disorder or crime

This aim is twofold as it encompasses two different concepts. That of disorder, one of the most invoked legitimate aims, seems to embrace alarming situations derived from individual or collective conducts threatening peaceful social life. In relation to the "crime" component of the aim, an important distinction has to be drawn between prevention and detection of crime. The measures taken by the state can be justified only in so far as they tend to avoid the commission of a crime. After the offence has been committed, the state has to rely on different justifications. However, the distinction may be a fine one in practice. For instance, in *S. and Marper* the Court considered that a system of collection of DNA samples and fingerprints served the aim of preventing crime, albeit disproportionate in comparison to the aim it pursued. In the case of criminal investigations the Court generally refuses to accept the legitimacy of police officers' conduct when based on erroneous beliefs or evidently wrong premises, which could and should have been reasonably avoided with proper precautions.[162]

Protection of health or morals

As with the previous item, this aim too combines two autonomous interests. Health refers to the individual sphere, while the protection of morals has been usually interpreted as a synonym of sexual morality. It is clear from the case-law that morality can imply either ethical standards of a society as a whole or the sensitivity of specific social categories, such as schoolchildren. In *Dudgeon*[163] the Court addressed the criminalisation of sexual activities between consenting male adults in private, denying that the choice to criminalise such behaviour could meet the need to preserve moral standards. It reached a different conclu-

161. *Berrehab*.

162. *Keegan v. the United Kingdom*.
163. The same approach was later on confirmed in *ADT v. the United Kingdom*.

sion in *Laskey, Jaggard and Brown*: there the Court gave precedence to the protection of the health of those concerned, having regard to the possible bodily consequences of sado-masochistic activities.

Protection of the rights or freedoms of others

This aim is couched in extremely broad terms and covers a wide range of situations. On many occasions it has resulted in an open clause thanks to which various – potentially not yet clearly defined – kinds of limitations have been justified. The *Chappell* case is illustrative, as the Court extended the derogations embodied in paragraph 2 to the protection of intellectual property rights. Protection of third parties' rights and freedoms has also been successfully invoked to justify the decision to separate children from their parents.[164] In particular, the Court has adopted the "best interest of the child" formula as a key element for its judgments, even if the expression does not appear in Article 8.

The necessity requirement

The legality and legitimacy of the interference do not guarantee its compliance with Article's 8 conditions of derogation. The measure will also have to pass the necessity test, which entails a multi-faceted analysis. The term "necessity" used in the Convention epitomises the tension created by the collision between the individual and society. In assessing the necessity requirement, which inevitably implies a proportionality test, the Court might also extend its scrutiny beyond the boundaries of the right in question, extending its assessment to the democratic essence of the respondent state against a number of indicators such as pluralism, tolerance, broadmindedness, equality, liberty, right to fair trial, freedom of expression, assembly and religion.[165] As for what is meant by necessity, as usual the Court has not come out with a clear-cut definition: instead, it uses a composite and balanced notion, whereby necessity is not synonymous with indispensable, nor has it has the same flexible meaning of expressions such as reasonable, useful or desirable.[166] A glance at the case-law of the Court shows that the more important the rights in the scheme of the Convention are, the more convincing the reasons required to justify a restriction in them will be. The passage of time is also a variable that has been considered in order to conclude for the continuity of the necessity. In *Luordo* the Court considered that after fourteen years, the balance between the general interest in payment of a bankrupt's creditor and the applicant's right to correspondence was upset and therefore there was no longer need to subject the correspondence sent to him to the review of the trustee in bankruptcy. Although in the subsidiary system established by the Convention Contracting States enjoy a variable margin of appreciation on the means to reach their objectives,

164. *Margareta and Roger Andersson*.

165. *Refah Partisi (the Welfare Party) v. Turkey*.
166. *Handyside v. the United Kingdom*.

ultimately it is for the Court to assess that the interference corresponds to a pressing social need and that it is proportionate to the legitimate aim pursued and to the social need addressed.

Proportionality and the margin of appreciation

The margin of appreciation doctrine embodies the proportionality principle. The former, however, is broader than the latter and represents a "frame of reference" within which different levels of intensity of judicial review are possible. Such levels of intensity range from "rationality review",[167] where it is sufficient that the national regulator demonstrates a rational basis for passing the contested legislation, to more strict levels of scrutiny, where "compelling state interest", or "weighty reasons" should be demonstrated in order to justify a national measure.[168] The breadth of the national regulatory playground depends on both the European Court and national jurisdictions. On the part of the Court the understanding of the margin of appreciation lies at the heart of the subsidiary scheme of the Convention, which considers that Contracting Parties are normally in the best position to assess the necessity and proportionality of certain measures in the relevant cultural and socio-economic context, particularly when it comes to policies on debated moral issues or local economic development.[169] Where there is no consensus within the member states of the Council of Europe, on either the relative importance of the interest at stake or the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider; whereas if the presence of a regulatory goal or policy is perceived as "common" or "European" it will have the effect of narrowing the margin of appreciation. In most cases, when exercising their margin of appreciation, states are called upon to strike a balance between competing private/public interests and Convention rights.

As proportionality is an ingredient of the necessity requirement and of the margin of appreciation, any interference with Article 8 rights will have to be weighed on this ground: in principle it will not be considered disproportionate if it is restricted in its application and effect, and is duly attended by safeguards in national law so that the individual is not subject to arbitrary treatment.[170] *Ernst and others*[171] offers an interesting example of a judgment based on the proportionality principle. The case concerned four journalists whose offices and homes had been searched in connection with the suspicion of disclosure to the press of confidential information by members of the judiciary. In relation to the search warrants, the Court noted that they were drafted in wide terms ("search and seize any document or object that might assist the investigation") and gave no information about the investigation concerned, the premises to be

167. *Rasmussen v. Denmark*.
168. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*.
169. *Handyside*; *Rees v. the United Kingdom*.
170. *M.S. v Sweden*.
171. *Ernst and others v. Belgium*.

searched or the objects to be seized. Furthermore, the applicants, who had not been accused of any offence, were not informed of the reasons for the searches, thus giving rise to searches which could not be considered proportionate to the legitimate aims.

Whenever new moral or ethical questions have been raised before the Court, the latter has been ready to allow the respondent state a significant margin of appreciation. In *Evans*, discussed earlier, the margin of appreciation was extended to exclude any violation of the Convention. Conversely, the exceptionally broad legislative scheme adopted by the United Kingdom on the collection and retention of DNA data challenged in *S. and Marper* was found to exceed the margin of appreciation conferred to the state, thus resulting in a violation. In *Elli Poluhas Dödsbo* the Court considered that, by refusing to allow the applicant's husband's ashes to be moved to her family's burial plot on the basis of the notion of "a peaceful rest" enshrined in the law, the national authorities had acted within the wide margin of appreciation afforded to them in balancing the interest of the individual against society's role in ensuring the sanctity of graves. The boundaries of the margin of appreciation depend very much on the interests at stake: the more they involve fundamental values and essential aspects of private life, the less the Court is likely to recognise wide discretion.

Practical application of the doctrine of the margin of appreciation

What follows is a non-exhaustive overview of the way the margin of appreciation has been interpreted and applied by the Court in a number of substantive problem areas brought to its attention.

In interfering with prisoner's private and family life

The Court is satisfied that a certain degree of control over prisoners' contacts with the outside world, whatever forms these might take, is necessary. Interferences in this respect, therefore, do not automatically amount to a violation of the Convention. Nonetheless, the status of a person cannot justify a complete forfeiture of fundamental rights, and a proper balance has to be struck between competing interests. In *Dickson* the limitations on access by a prisoner to assisted reproduction were considered undue restrictions to the applicant's interest in having a child. As far as contacts with the families are concerned, the Court has constantly subordinated any censorship to objective factors displaying the proportionality of the measure: the offence committed,[172] the extent of the interference,[173] the importance of what is at stake for the prisoner concerned.[174] In

172. *Messina (No. 2) v. Italy*.
173. *Jankauskas v. Lithuania*, on widespread censorship of the prisoner's correspondence.
174. *Ploski v. Poland*. The violation of the Convention derived from the refusal to grant the applicant a temporary permit to attend the funerals of his parents.

this respect a high priority is accorded to the prisoner's right to communicate with his lawyer, as a specific aspect of the right to defence, which can be limited only in exceptional circumstances.[175] The same applies to the correspondence with a medical specialist in the context of a prisoner suffering from a life-threatening condition when the exact address, qualification and *bona fides* of the named professional are not in question.[176] Logistical problems in processing an unlimited quantity of parcels in a large penitentiary, leading to restricting parcel distribution to every sixth week, was found to respect a proper balance between protecting security and respecting inmates' right to contact with the outside world, and was thus in line with the requirements of Article 8.[177]

In interfering with the right to one's image and reputation

In testing the necessity and proportionality of the taking of photographs by public authorities, weight will be given to the private or public character of the person or situation and their use, as happened in *Friedl*, which concerned the legitimacy of pictures taken during a public demonstration. Pictures held by the public authorities may be shown to third parties for investigation purposes only.[178] The undue disclosure to the media of materials pertaining to the claimant's private life was censored in *Craxi* in the context of intercepted telephone communications. Publication, television broadcasting or other forms of diffusion may be accepted if the person involved gives his consent or his identity is masked.[179] The scrutiny of the Court is more careful when sensitive data, such as medical records, are concerned, since their confidentiality is an essential aspect of the patient's right to private life. Their illegitimate disclosure during a judicial proceeding thus breaches Article 8.[180]

In *Petrina* the Court was asked to adjudicate a case where the domestic jurisdictions had given precedence to the freedom of expression over the applicant's reputation. The complaint was brought by a politician whom a satirical journalist indicated as a collaborator of the former state security services, the Securitate. The allegations were taken further in articles that were published in one satirical newspaper. The domestic courts acquitted the journalists responsible for the publications on the grounds that their remarks had been "general and indeterminate". The applicant's civil claims were also dismissed. The Court considered that the subject of the debate in issue, that is the enactment of legislation making it possible to divulge the names of former Securitate collaborators, a subject which received considerable media coverage and was closely followed by the general public, was highly important for Romanian soci-

175. *Erdem v. Germany*, where the Court recognised that in relation to anti-terrorism measures states enjoy a wide margin of appreciation.
176. *Szuluk*.
177. Cases of *Poltoratskiy, Kuznetsov, Nazarenko, Dankevich, Aliev, Khokhlich*, all v. Ukraine.
178. *Doorson v. the Netherlands*.
179. *Peck*.
180. *L.L. v. France*.

ety. Collaboration by politicians with the Securitate was a highly sensitive social and moral issue in the Romanian historical context. Despite the satirical nature of the newspaper in which were published, however, the articles in question had been bound to offend the applicant, as there was no evidence that he had ever belonged to that organisation (and in fact at a later stage evidence showed that he never collaborated with the Securitate). As the message contained in the articles was clear and direct, with no ironic or humorous note whatsoever, thus not mirroring the "measure of exaggeration" or "provocation" journalists are normally allowed in the context of press freedom, the Court considered that the article misrepresented reality without a factual basis. By accusing the applicant of having belonged to a group that used repression and terror to serve the old regime as a political police instrument, and in a situation in which no legislative framework was in place to allow the public access to Securitate files, the Court considered that domestic jurisdictions had allowed the journalists to overstep the bounds of the acceptable.

In relation to the refusal of issuing identity documents

A unanimous Chamber considered that the refusal by the Swiss authorities to issue a new passport to a Swiss national living in Thailand, in order to oblige him to return to Switzerland for a criminal investigation, did not breach the applicant's Article 8 rights in *M. v. Switzerland*. The applicant, living in Thailand for a number of years together with a Thai partner and their three children, requested the Swiss Embassy to renew his passport to enable him to marry and to register his children, to claim child benefits in addition to his invalidity pension, and to be admitted to hospital for surgery. As criminal investigations for fraud were pending against him in Switzerland, the applicant was denied the renewal. Instead, he was offered a "laissez-passer" permitting his direct return to Switzerland. Deciding on the "necessity requirement" of such an interference and to its proportionality, the Court observed that by refusing to return to Switzerland the applicant was intentionally avoiding prosecution. Although states enjoy a wide margin of appreciation in deciding whether or not to prosecute a person suspected of having committed a crime and what investigation and prosecution measures should be taken, the Court considered that the Swiss authorities had stated the reasons for their decisions, explaining why Mr M.'s presence in Switzerland was necessary for the proper conduct of the criminal proceedings, and showing with relevant arguments that the medical certificates produced by Mr M. showed no compelling reasons why he should be unable to travel to Switzerland by one means or another. In addition, the Court observed how the the action the Swiss authorities had taken was less harsh than other steps they could equally well have taken to oblige Mr M. to co-operate with the criminal investigation, for instance issuing an international arrest warrant with an extradition request, which could have reasonably led to his detention for some time in Thailand.

Considering the importance, in the public interest, of bringing criminals to justice, and in the light of the detailed decisions of the Swiss authorities, the Court considered that a fair balance had been struck for the purpose of Article 8.

In placing children into public care

The margin of appreciation that states enjoy in the field of child protection has historically been rather wide. The reason for this, once again, is the complex and sensitive nature of these situations, which national authorities are often in a better position to solve.[181] The Strasbourg Court has often been asked to decide cases concerning the implementation of care orders and the procedural safeguards accorded to the individuals concerned. In the Court's opinion, such measures are to be seen as temporary solutions and ought to be consistent with the ultimate aim of reuniting natural parents and the child.[182] In this perspective, states are under an obligation to undertake frequent reviews of the conditions for maintaining the child in public care, in order to update the assessment of the situation of the family unit.[183] The ultimate goal of family reunification implies that any limitation on contacts and communications amongst family members be supported by strong reasons.[184] Harsh restrictions would be justified only where motivated by urgent needs pertaining to the best interest of the child.[185]

181. *Scozzari and Giunta v. Italy* [GC].
182. *Olsson*.
183. *K.A. v. Finland*.
184. *Kutzner v. Germany*.

In determining the proportionality of the restrictions imposed in pursuing an abortion

A., B. and C. v. Ireland offers an interesting perspective of the proportionality test and the margin of appreciation applied in an abortion case. Considering the acute sensitivity of the moral and ethical issues raised by the question of abortion and to the importance of the public interest at stake, the Grand Chamber recognised that State Parties enjoyed a wide margin of appreciation in striking a balance between the public interest, notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under Article 8 of the Convention. The existence of a relevant European consensus towards allowing abortion on broader grounds than accorded under Irish law (where a risk to life of the mother, including self-destruction, has to be shown for the abortion to be carried out) was not found to be a reason for narrowing the margin of appreciation, though the Court noted that the first applicant could have obtained an abortion on the grounds of health and well-being in approximately 40 Contracting States and the second applicant could have obtained an abortion on the grounds of well-being in some 35 Contracting States. In coming to this conclusion, the Court firstly referred to its finding in *Vo* that the question of when the right to life begins came within the states' margin of appreciation because there is

185. *Gnahoré v. France*.

no European consensus on the scientific and legal definition of the beginning of life; and that it is impossible to answer the question whether the unborn was "a person" within the meaning of Article 2. The rights of the foetus and those of the mother are intertwined, in protecting the rights of the unborn the state must apply its margin of appreciation also to the conflicting rights of the mother. According to the majority of the Court it followed that, even if it appears from the national laws referred to that most Contracting Parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention. Having regard to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the Court did not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life and the consequent protection to be accorded to the right to life of the unborn, exceeded the margin of appreciation accorded in that respect to the Irish State. The third applicant complained about the failure by the Irish State to implement its constitutional provision by legislation, notably, to introduce a procedure by which she could have established whether she qualified for a lawful abortion in Ireland on grounds of the risk to her life of her pregnancy. The Court concluded that the uncertainty generated by the lack of legislative implementation of the Constitution had resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on grounds of a relevant risk to a woman's life and the reality of its practical implementation, thus leading to a violation of Article 8.

In relation to artificial procreation

In *S.H. and others* the Chamber first and the Grand Chamber later were confronted with the restrictions suffered by parents-to-be in their recourse to artificial procreation technologies. The application was brought by two Austrians who wished to have recourse to *in vitro* fertilisation (IVF) using a donor ovum and donor sperm respectively. According to the applicable law such donation is prohibited under all circumstances, whereas sperm donation is allowed when the sperm is directly placed in the womb of a woman (*in vivo* artificial insemination). In 2010 a Chamber judgment found a violation of Article 14 in conjunction with Article 8. In 2011 the Grand Chamber reversed the judgment by 13 votes to 4. A large part of the judgment is taken up in determining the margin of appreciation states enjoy in regulating matters of artificial procreation. The Court considered that, whilst there is a clear trend in the legislation of Council of Europe member states towards allowing gamete donation for the purpose of IVF, it cannot be said that this emerging consensus is based on settled principles. Rather, it

reflects a stage of development within a particularly dynamic field of law, which does not affect the scope of the margin of appreciation. This is all the more true considering that IVF treatment remains a sensitive ethical issue within Austrian society. In supporting its interpretation of the issue, the Court also observed that with regard to ovum donation, all the relevant legal instruments at European level either remained silent or – in the case of the European Union Directive on safety standards for the donation of human cells – expressly left the decision on whether or not to use germ cells to the state concerned. Assessing on the one hand the choice of the state to reconcile the wish to make medically assisted procreation available and on the other the existing unease among large sections of society as to the role and possibilities of modern reproductive medicine, the Court noted that Austria had not put a total ban on artificial procreation (the procedures at issue taken alone were in fact allowed under Austrian law), nor that it prevented couples wishing to have recourse to methods not accepted within its legal framework to go abroad to seek different treatments for infertility. The very fact that whilst prohibiting the use of donated sperm or ova for IVF Austria had chosen to allow sperm donation for *in vivo* artificial insemination showed that it approached the matter carefully, seeking to reconcile social realities with its approach of principle. Lastly, the Court appreciated the public interest arguments Austria had considered when deciding to ban sperm and ovum donation for IVF:

- protection of women, since ovum donation
  might lead to problematic developments such as the exploitation and humiliation of women, in particular those from an economically disadvantaged background;
- those related to split motherhood, as IVF could lead to the creation of
  unusual relationships in which the social circumstances deviated from the biological ones, namely, the division of motherhood into a biological aspect and an aspect of "carrying the child" and perhaps also a social aspect;
- the well-being of children; and
- the need to prevent selective reproduction.

In conclusion,

> 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.

In relation to secret surveillance measures

Powers of secret surveillance of citizens are tolerated under the Convention only in so far as they are strictly functional to safeguarding the democratic institutions. The Court is satisfied that surveillance over the mail, post and telecommunications is,

under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime. In order to comply with the Convention, however, such measures must be assisted by effective guarantees against abuse. While states enjoy a wide discretion concerning the system to be used, its operation is put under scrutiny. The guarantees needed to ensure compliance with Article 8 may vary, depending on the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided under national law. In *Klass* the Court had to decide whether German legislation, which authorised letter-opening and wire-tapping in order to safeguard national security and prevent disorder and crime, violated the applicant's rights in so far as it lacked adequate safeguards against possible abuse. In relation to what protection is necessary, the Court, having underlined how in principle judicial control of surveillance is desirable, considered that the non-judicial supervisory control vested in a Parliamentary Board and a Commission appointed by the Board offered sufficient guarantees against abuse. This was because it was satisfied that both bodies were independent of the authorities carrying out the surveillance and had been given sufficient powers to exercise an effective and continuous control. The Court concluded, therefore, that taking note of technical advances in the methods of espionage and surveillance and of the development of terrorism in Europe, the German system for controlling covert surveillance met the requirements of Article 8 of the Convention.

In relation to the right to know one's origin

The right to know one's origin must be balanced against the right to have the legal presumption of his paternity reviewed in the light of biological evidence. In *Mizzi* the Court considered that the impossibility of having the 6-month time-limit reopened to allow the applicant to lodge an action to contest paternity, a right which he had acquired well after the birth of the child and following a legislative amendment, was too radical a restriction and was not "necessary in a democratic society". It found that the potential interest of Y to enjoy the "social reality" of being the daughter of the applicant could not outweigh the latter's legitimate right of having at least one occasion to reject the paternity of a child who, according to scientific evidence that he alleged to have obtained, was not his own. The Court considered that the fact that the applicant was never allowed to disclaim paternity was not proportionate to the legitimate aims pursued. The balance struck between the general interest of the protection of legal certainty of family relationships and the applicant's had not been fair. In *Mikulić* the Court underlined that in determining an application to have paternity established, national authorities were required to have regard to the basic principle of the child's interests. The national procedure available to the applicant in the case did not strike a fair balance

between the right of the applicant to know about her paternity in a timely fashion and that of her supposed father not to undergo DNA tests, leaving the applicant in a state of prolonged uncertainty as to her personal identity.

In *Odièvre* the Court was asked to scrutinize the rules governing confidentiality at birth, which prevented the applicant, put into public care due to her mother's wish to remain unknown, from obtaining information about her natural family. Having learnt about the existence of natural brothers, the applicant applied for disclosure of confidential information concerning her birth and permission to obtain copies of any documents, public records or full birth certificates. She could not obtain any information as, in line with national legislation, an application for disclosure of details identifying the natural mother is inadmissible if confidentiality was agreed at birth. The Court, faced for the first time with an application of that kind, had to reconcile a number of competing interests. In judging the complaint the Court noted that although most of the Contracting States did not have legislation comparable to that applicable in France, which prevented parental ties ever being established with the natural mother if she refused to disclose her identity, some countries did not impose a duty on natural parents to declare their identities on the birth of their children and that there had been cases of child abandonment in various other countries that had given rise to a debate about the right to give birth anonymously. In the light of the diversity of practice to be found among the legal systems and traditions and of the fact that children were being abandoned, the Court considered that states had to be afforded a margin of appreciation to decide which measures were appropriate to ensure the rights guaranteed by the Convention. The Court also observed that the applicant's request had not been totally disregarded, as she had had access to non-identifying information about her mother and natural family that had enabled her to trace some of her roots, while ensuring the protection of third-party interests. Last but not least, it ought to be taken into account that the national legislation, while preserving the principle that mothers were entitled to give birth anonymously, facilitated searches for information about a person's biological origins by setting up a National Council on Access to Information about Personal Origins through which the applicant could request disclosure of her mother's identity, subject to the latter's consent being obtained. The Court was therefore satisfied that French legislation sought to strike a balance and to ensure sufficient proportion between the competing interests. Consequently, finding a non-violation of Article 8, the Court stated that France could not be said to have overstepped the margin of appreciation which it had to be afforded in view of the complex and sensitive nature of the issue of access to information about one's origins, an issue that concerned the right to know one's personal history, the choice of the natural parents, the existing family ties and the adoptive parents.

In relation to adoption

In *Negrepontis-Giannisis* the Court criticised the wide margin of appreciation used by Greece to refuse the recognition of a full adoption of an adult by his uncle, on the basis of the religious status of the latter. In finding a violation of Article 8, the Court observed that the texts on which the Court of Cassation, sitting as a full court, had relied to dismiss the request were all ecclesiastical in nature and dated back to the seventh and ninth centuries. Monks had been allowed to marry in Greece, however, since 1982 and there was no domestic legislation preventing them from carrying out adoptions. In the case under review, the adoption order had been obtained in 1984, when the applicant was already of age. It was valid for 24 years, and the adoptive father had expressed his wish to have a legitimate son who would inherit his property. In the view of the Court the refusal to implement in Greece to the adoption order in respect of the applicant had not met any pressing social need and had not been proportionate to the aim pursued.

In handling of personal data

The inclusion of a person's details in a national database of offenders does not, as such, contravene the Convention, even when the data undergo automatic processing and are used for police purposes. In *Gardel* the Court was satisfied that the preventive aim of the database of sex offenders, into which the applicant's details were entered following a sentence of 15 years' imprisonment for the rape of a minor, could represent a way for the state to fulfil its obligation to protect vulnerable groups from particularly reprehensible forms of criminal activity. The length of data conservation was found to be proportionate in relation to the aim pursued and, in the light of the fact that the applicant had an effective possibility of submitting a request for the deletion of data and that consultation was subject to a duty of confidentiality and restricted to precisely determined circumstances, the Court unanimously held that the balance struck between private and public interests at issue was fair, thus not violating Article 8.

A unanimous Grand Chamber concluded that the United Kingdom had failed to strike a fair balance, overstepping any acceptable margin of appreciation, in the *S. and Marper* case cited above. The Court, in deciding the case, focused its scrutiny on the "necessity" ingredient of the margin of appreciation. Following a comparative analysis of the jurisdictions within Council of Europe member states, the Court noted that England, Wales and Northern Ireland were the only ones allowing the indefinite retention of fingerprints, cellular samples and DNA profiles of any person, of any age suspected (but not convicted) of any recordable offence. As the protection afforded by Article 8 would be unacceptably weakened if the use of modern scientific techniques in the criminal justice system were allowed at any cost and without carefully balancing the potential benefits of their extensive use against important private life interests, the Court observed that any state claiming a pioneer role in this field bore special responsibility for striking the right

balance in this regard. The Court was struck by the blanket and indiscriminate nature of the retention power, since the data in question could be retained irrespective of the nature or gravity of the suspected offence, regardless of age, there was no time limit and only limited possibilities to have the data removed or destroyed in the case of acquittal. The Strasbourg judges also explored the relationship between the measure in question and the presumption of innocence: although the retention of such private data could not be equated with the voicing of suspicions, nonetheless the applicants' perceptions that they were not being treated as innocent was heightened by the fact that data pertaining to them were retained indefinitely, in the same way as the data of convicted persons. This was considered particularly alarming in the case of minors (such as the first applicant), given their special situation and the importance of their development and integration into society. Particular attention, therefore, ought to be paid to the protection of juveniles from any detriment that could result from the retention by the authorities of their personal data following acquittals of a criminal charge. The cumulative effect of the above-mentioned reasons led the Court to decide that the retention in question represented a disproportionate interference with the applicants' rights to respect for private and family life and therefore could not be regarded as necessary in a democratic society.

In the context of employment

In 2010 the Court was confronted with a number of situations dealing with dismissal of individuals from their functions for reasons related to their private lives. In *Obst* the applicant held the position of Director of Public Relations for Europe of the Mormon Church; in *Schüth* the complainant was the organist and choirmaster of a Catholic parish; and in *Özpınar* the applicant was a judge. In the first two cases the dismissal had been based on the grounds of adultery; in the last it had been based on personal and professional aspects (the applicant was reproached for a close relationship with a lawyer, whose clients had allegedly benefited from favourable decisions, for her repeated lateness for work and unsuitable clothing and make-up). All cases were decided on the grounds of proportionality and the fair balance struck between the applicants' right to respect for their private life under Article 8 on the one hand and the Convention rights of the Catholic and the Mormon Church on the other.

In both cases the Federal Labour Court had found that the requirements of the Mormon Church and the Catholic Church, respectively, regarding marital fidelity did not conflict with the fundamental principles of the legal order. As regards Mr Obst, who had informed the Church of the adultery by his own initiative, the Court agreed with domestic judgments that his dismissal amounted to a necessary measure aimed at preserving the Church's credibility, having regard in particular to the nature of his post. The fact that, after a thorough balancing

exercise, the German courts had given more weight to the interests of the Mormon Church than to those of Mr Obst did not itself raise an issue under the Convention. The conclusion that Mr Obst had not been subject to unacceptable obligations was reasonable, given that, having grown up in the Mormon Church, he had been or should have been aware when signing the employment contract of the importance of marital fidelity for his employer and of the incompatibility of his extra-marital relationship with the increased duties of loyalty he had contracted towards the Church as director for Europe of the public relations department. In contrast, in relation to Mr Schüth the Court observed that the national authorities had confined themselves to stating that while he did not belong to the group of employees who in case of serious misconduct had to be dismissed, namely those working in counselling, in catechesis or in a leading position, his functions were so closely connected to the Catholic Church's proclamatory mission that the parish could not continue employing him without losing all credibility. They had made, moreover, no mention of Mr Schüth's *de facto* family life or of the legal protection afforded to it. It seemed to the Court, therefore, that the interests of the Church employer had not been balanced against Mr Schüth's right to respect for his private and family life, but only against his interest in keeping his post. While the Court accepted that in signing the employment contract, Mr Schüth had entered into a duty of loyalty towards the Catholic Church which limited his right to respect for his private life to a certain degree, his signature on the contract could not be interpreted as an unequivocal undertaking to live a life of abstinence in the event of separation or divorce. The German labour courts had given only marginal consideration to the fact that Mr Schüth's case had not received media coverage and that, after 14 years of service for the parish, he did not appear to have challenged the position of the Catholic Church. The fact that an employee who had been dismissed by a Church employer had only limited opportunities of finding another job was of particular importance. This was all the more so where the dismissed employee had special qualifications that made it difficult, or even impossible, to find a new job outside the Church, as was the case with Mr Schüth, who now worked part-time in a Protestant parish. In that connection the Court noted that the rules of the Protestant Church relating to Church musicians stipulated that non-members of the Protestant Church might only be employed in exceptional cases and solely in the context of an additional job. In the light of the above, the Court unanimously concluded that Germany had failed to weigh Mr Schüth's rights against those of the Church employer in a manner compatible with the Convention.

In the case of Ms Özpınar the dismissal decision had been taken in a situation where her right to respect for reputation was also at stake. Although the interference (represented by the dismissal and not by the criticisms concerning her conduct as a judge) could be said to have had a legitimate aim in relation to the duty of judges to exercise restraint in order to preserve their independence and the authority of their decisions, the Court

considered that the investigation that followed had not substantiated the accusations made against her. Moreover, it had taken into account numerous actions by Ms Özpınar that were unrelated to her professional activity. The lack of safeguards she had been accorded in the proceedings against her were all the more important as with her dismissal, the applicant automatically lost the right to practise law: as Ms Özpınar had appeared before the Council only at the point when she had challenged the dismissal and she had not received beforehand the reports of the inspector or of the witness testimony, the Court concluded that the interference with the applicant's private life had not been proportionate to the legitimate aim pursued.

In protecting private life

In *Hatton and others* the Court considered the essential rights of the applicants to right to rest and sleep at night as forming an integral aspect of privacy under Article 8. The Grand Chamber reversed the Chamber judgment, which had found a violation of Article 8 in that in implementing the 1993 scheme for night flights the state had failed to strike a fair balance between the United Kingdom's economic well-being and the applicants' effective enjoyment of their right to respect for their homes and their private and family lives. It observed that

> the sleep disturbances relied on by the applicants did not intrude into an aspect of private life in a manner comparable to that of the criminal measures considered in Dudgeon to call for an especially narrow scope for the state's margin of appreciation.

The Court pointed out the two aspects of the enquiry it needs to carry out in cases involving state decisions affecting environmental issues. First, there must be an assessment of the substantive merits of the government's decision to ensure that it is compatible with Article 8. Secondly, the decision-making process must be put under scrutiny to ensure that due weight has been accorded to the interests of the individual. The conflict of view on the margin of appreciation can be resolved only by reference to the context of a particular case: in relation to environmental issues falling under the scope of application of Article 8, the Court considered all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals (including the applicants) were taken into account throughout the decision-making procedure, and the procedural safeguards available. In the present case the Court weighed up the legitimate right of the state to take into account the economic interests of the country as a whole in shaping its policy, the difficulties in establishing whether the flight scheme applicable actually led to a deterioration of the night noise climate, the attention paid to the concerns of the people affected, the mechanism set up to review the effect of the scheme, the contribution that night flights gave to the general economy, and the ability of the individuals affected by what was indisputably a general measure to leave the area. It concluded that, in substance, the authorities had not over-

stepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home and the conflicting interests of others and of the community as a whole, with consequently no violation of Article 8.

In relation to environmental rights

The extent of the margin of appreciation states enjoy when dealing with the right to an environment in general and to a healthy environment in particular depends essentially on the nature of the right affected by the interferences and its importance for the applicant. Both factors play a central role in the application of the derogatory clause of Article 8, when states strike a (fair) balance between competing interests. The Court, in other words, will examine whether the complaint relates to a general aspect (such as the right to respect of the home) or whether it affects more intimate aspects of an individual, such as physical or mental health). Whilst the Court showed reluctance in favouring the individual *vis-à-vis* the wider community in the first group of cases, when facing an interference of the second type not only will it narrow the margin of appreciation of the national authorities, but it will also scrutinise carefully how national authorities have complied with their positive obligations under Article 8 of the Convention. General justifications such as the economic well-being of the country will in most cases not be sufficient to allow for an interference, unless states are able to prove that there are no other possible interferences which would be less harmful and intrusive. In *Powell and Rayner* the applicants complained of excessive noise levels in connection with the operation of Heathrow Airport. According to official measurement the home of the first applicant suffered from what was considered to be a low noise-annoyance rating. The second applicant's farm, regularly overflown during the day and to a limited extent at night, was regarded as an area of high noise-annoyance for residents. Invoking Article 8 of the Convention, the applicants complained that as a result of excessive noise generated by air traffic in and out of Heathrow Airport, they had each been victim of an unjustified interference by the United Kingdom with the right guaranteed to them under Article 8. The European Court was satisfied that

> […] In each case, albeit to greatly differing degrees, the quality of the applicant's private life and the scope for enjoying the amenities of his home have been adversely affected by the noise generated by aircraft using Heathrow Airport.

In the light of the country's economic interest of having large international airports, even in densely populated urban areas, and considering that a number of measures had been introduced by the authorities responsible to control, abate and compensate for aircraft noise at and around Heathrow Airport, which were adopted progressively in a participatory manner, the European Court unanimously held that the United Kingdom Government could not arguably be said to have exceeded the margin of appreciation afforded to them or upset the fair balance required to be struck under Article 8. Con-

versely, in *López Ostra* the Court found a violation of Article 8 in that the state had failed to strike a fair balance between the town's economic well-being and the applicant's effective enjoyment of her rights: when deciding to set up the waste-treatment plant the applicant complained of the Council could not have been unaware of its obligation to respect the applicant's home and for her private and family life. In addition, it failed to afford redress for the inconvenience suffered.

Part III – Positive obligations

The object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities. It does not, however, merely compel the state to abstain from such interference: in addition to that primarily negative undertaking, there might be positive obligations, whose discharge is functional to an effective respect for private or family life. This happens more and more often, also as a consequence of the increased awareness by the public of their rights *vis-à-vis* the state and of what can legitimately be expected from national authorities, particularly as increased availability of information on various issues makes it easier for the man in the street to know about the scientific and technical discoveries. Positive obligations under Article 8 were discussed for the first time in 1997, in *Marckx*. Then the Court observed as the word "respect" contained in the first paragraph of Article 8 suggested, the existence of positive obligations on states. Because of the nature of the provision, however, the identification of such obligations suffers from the wide margin of appreciation states are entitled to under the derogation clause. Not only may Article 8 rights be subject to the restrictions whenever the conditions set up by paragraph 2 are present; but also the notion of "respect" is somewhat abstract, especially when it is looked at as the source of positive obligations. Last but not least, the majority of Article 8 complaints relate to situations where the state is asked to adjudicate in disputes between opposing individuals or groups of individuals. In deciding such applications the Court most of the time will merely conclude that the state has not struck a fair balance between the interests involved, so giving rise to a violation of the Convention. Only exceptionally will it go as far as to indicate the appropriate measures that should have been taken to "protect" the applicant in the enjoyment of the right. The sphere of protection of Article 8, nonetheless, has grown much more complex as case-law has developed, extending to the obligation of Contracting Parties to secure protection from risks arising within individual relationships (as opposed to relationships developing between individuals and the state). In the light of the above, therefore, the analysis that follows covers all four ambits of application of Article 8.

In protecting private life

The duty to protect one's sexual sphere and interpersonal relationships is one of the positive obligations arising from Article 8. The fulfilment of such obligation requires, in the first

place, for the criminalisation of actions by private individuals that interfere with fundamental values and essential aspects of one's private life.[186] The obligation, however, cannot be interpreted to exclude the provision of unlimited civil remedies in circumstances where criminal law sanctions are in operation, even in cases when the rights of children and other vulnerable individuals are at stake.[187]

Physical and psychological integrity are covered by the notion of private life and also enjoy positive protection. The decision not to prosecute those allegedly responsible for having physically and verbally attacked the applicant, together with her *de facto* inability to initiate a private prosecution, were considered sufficient in *Janković* to find a violation of the State's positive obligation arising from Article 8. In *Tysiąc* the Court was confronted with the consequences of the application of a law prohibiting abortion except where pregnancy posed a threat to the woman's life or health. Following the refusal of the head of the hospital department to terminate her pregnancy on therapeutic grounds, the applicant lost her sight after giving birth. The Court held that there had been a violation of Article 8, as Poland had failed in its positive obligation "to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion". This obligation to protect imposes on Contracting Parties a duty to introduce regulations compelling both private and public hospitals to adopt appropriate measures for the physical integrity of their patients, whose consent, based on a full understanding and knowledge of the consequences of an operation, should be obtained before any medical intervention is performed.[188]

A lack of legal safeguards giving special consideration to the reproductive health of individuals belonging to a particularly vulnerable ethnic group (Roma) was sufficient to cause a finding of a violation of the state's positive obligations in *V.C.* The case, the first in a series of cases brought by women who had undergone the same experience, concerned the forcible sterilisation of a Roma woman during the delivery of her second child in a state hospital. As her medical records attested, shortly before delivery by caesarean section, while she was in labour and had contractions every three minutes, the medical personnel requested the applicant to sign one sentence in her medical file as "a request for sterilisation". The woman was told that the signature was needed as she and her baby were at risk. She signed, although she did not comprehend what sterilisation meant and what were the consequences. Her subsequent petitions for damages were repeatedly rejected by domestic courts. In addition to finding a violation of Article 3 –

186. *X and Y v. the Netherlands*, which concerned the impossibility for the victim to have criminal proceedings instituted against the perpetrator of a sexual assault on a minor girl aged more than sixteen (which is the age of consent) who was unable, on account of a mental handicap, to determine her wishes.
187. *Stubbings v. the United Kingdom*.
188. *Codarcea*.

since the treatment the applicant had been subject to attained the threshold of severity required to bring it within the scope of that provision – the Court also found that Slovakia had failed to fulfil its obligation under Article 8 as it did not ensure that particular attention was paid to the reproductive health of the applicant as a Roma. In reaching this conclusion the Court recalled how both the Council of Europe's Commissioner for Human Rights and the European Commission against Racism and Intolerance (ECRI) had identified serious shortcomings in the legislation and practice relating to sterilisations in general in Slovakia and had stated that the Roma community, severely disadvantaged in most areas of life, was more likely to be affected by those shortcomings. The Slovak Government-appointed experts reached similar conclusions and had made specific recommendations about training of medical staff regarding Roma. Concerning the applicant, the Court found that simply referring to her ethnic origin in her medical record without more information indicated a certain mindset on the part of the medical staff as to the manner in which the health of the applicant, as a Roma, should be managed.

Sexual identity

The positive protection of personal identity has given rise to significant developments with regard mainly to the sexual identity of transsexuals. The first time the Court was asked to consider the claims of a female-to-male transsexual whose new status was not being recognised was *Rees*. The applicant claimed that Article 8 required the Government to amend, or at the very least annotate, the civil status register to include his sexual change, and to issue a new birth certificate reflecting his new gender. Basing itself on scientific uncertainties in the matter and on differences in the legislation and practice of States Parties, the Court stated that

> it must for the time being be left to the respondent state to determine to what extent it can meet the remaining demands of transsexuals

and that, in any event, Article 8 could not be interpreted as requiring the contracting parties to alter their civil status registers, even partially. The fact that many countries (the United Kingdom included) accepted in practice sexual self-determination and had taken steps to minimise the drawbacks of the lack of legal recognition, was somehow given credit by the Court. The situation was found to be different in *B. v. France,* where the refusal of the authorities to amend the civil status register in line with the applicant's new gender was found to breach Article 8 in the light of the difficulties she was facing on a daily basis due to the recurrent need to produce civil status documentation, and the fact that the French system was intended to be updated throughout the life of the person concerned.

The Convention is, however, a living instrument. It must not therefore come as a surprise that the position of the Court on such sensitive and controversial issues has changed. In *I. v. the United Kingdom* and *Goodwin* the Court, considering the

development of scientific knowledge and international practice, together with the need for consistency amongst legal systems, and also taking into account the increasing drawbacks to the individuals provoked by the non-recognition in law of their new gender, concluded that states no longer enjoyed a margin of appreciation as regards the acknowledgement of transsexuals' status. The only margin for manoeuvre left remains in relation to the recognition procedures. Even then, recognition of their right to reimbursement of medical costs for the sex-change operation cannot be conditional on proof of the therapeutic necessity of that operation.[189] In any event, placing restrictions such as a waiting-period before gender reassignment in order to qualify for such compensation cannot be mechanically applied. Therefore, should the reflection period be too long in relation to the age of the applicant, its general application could in practice impair the freedom to gender determination and identity.[190]

Violation of the positive obligations stemming from Article 8 *vis-à-vis* transsexuals' rights can also result from a gap in the relevant legislation. This was the main point discussed in *L. v. Lithuania*, where although Lithuanian laws had recognised transsexuals' rights to change not only their gender but also their civil status, there was no law regulating full gender-reassignment surgery. Until then, no suitable medical facilities would be reasonably accessible or available to the individuals concerned. As a consequence, the applicant found himself in the intermediate position of a pre-operative transsexual: he had undergone partial surgery, with certain important civil-status documents having been changed, but until the full surgery was performed, his personal code would not be amended and, therefore, in certain significant situations in his private life, such as his employment opportunities or travel abroad, he would be considered a woman. The Court noted that the legislative gap in gender-reassignment surgery left the applicant in a situation of distressing uncertainty *vis-à-vis* his private life and the recognition of his true identity. Whilst budgetary restraints in the public health service might have justified some initial delays in implementing the rights of transsexuals under the Civil Code, the passing of over four years without the necessary legislation being adopted was judged to be excessive. Particularly bearing in mind the few individuals involved, the Court considered that the budgetary burden on the state could not be regarded as unduly heavy, thus finding a violation of Article 8.

189. *Van Kück v. Germany.*
190. *Schlumpf v. Switzerland.*

The right to know one's origin

In the *Gaskin* case the Court stated the guiding principle governing access to information about one's origin:

> everyone should be able to establish details of their identity as individual human beings.

The case in question originated in the wish of the applicant to bring proceedings against the local authority for damages for negligence in relation to the ill-treatment he had been subject to whilst in public care. His application for discovery of the local authority's case-records covering his period in care was dismissed on the ground that these records were private and confidential. After this decision, confirmed in appeal, the competent authorities adopted a resolution under which the information in the applicant's file should be made available to him if the contributors to the file gave their consent to disclosure, which they refused. While recognising that the authorities were pursuing a legitimate aim, the Court considered that

> persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development.

In balancing the interests of "informers" to maintain their anonymity, the Court noted that the setting up of an independent body tasked with deciding on such a request could have been one of the ways the United Kingdom fulfilled its positive obligations stemming from Article 8. The right of access recognised under Article 8 is not, however, absolute. Indeed, in *Gaskin* the Court reached a decision in favour of the applicant only after a thorough examination and weighing of the public interests at stake.

In the determination of legal ties

In *Krušković* the Court was confronted with the applicant's impossibility of having his paternity recognised as he had lost legal capacity. In finding a violation of Article 8 the Court observed that according to national legislation the relevant authorities could have invited the applicant's legal guardian at the time to consent to the recognition of paternity. Alternatively, the welfare centre, on whom the applicant was entirely dependent, could have taken steps to assist him in his attempts to have his paternity recognised. As none of the above options had been pursued, the applicant was left with the possibility of instituting civil proceedings. These had to be brought by the welfare centre and the applicant would have had the status of defendant, even though it was actually he who wanted his paternity recognised. There was no legal obligation under national law for the social services to bring such proceedings and no time-limit fixed, and so this option never materialised, despite the statement made by the applicant to the registry in this respect. For two-and-a-half years, therefore, he had been left in a legal void, as his claims were ignored. The Court could not accept that this was in the best interests of either the father, who had a vital interest in establishing the biological truth about an important aspect of his private life, or of the child and therefore found a violation of Article 8.

Protection of "social private life"

In the case of *Von Hannover*[191] the Court was asked to judge whether the publication of pictures of public figures (Princess Caroline, a member of Monaco's ruling family) taken other than on official occasions could be in breach of Article 8 rights. The conclusions were that it is incumbent on states to ensure that the right of persons under their jurisdiction to their image is respected by third parties, including journalists. Considering that the applicant did not hold any official position in or on behalf of the Principality of Monaco, that the pictures taken related mainly to her private life, even though she had been photographed in public places, and the fact that they were taken by paparazzi, without her knowledge or consent, the Court found that protection of private life extends beyond the private family circle and also includes a social dimension. A person, even one is known to the general public, must be able to enjoy a "legitimate expectation" of protection of and respect for their private life. As a corollary, the Court found that Germany had a duty to clarify its legislation with regard to the distinction it draws between "figures of contemporary society par excellence", whose private life is to be protected only in their private sphere, and "relatively" public figures, such as the applicant, who are entitled to broader protection. In *Mosley*, however, the Court found no violation of Article 8 on account of the publications of paper and web articles, images and videos related to the applicant's sexual activities and clarified that the provision cannot be interpreted as to compel media to give prior notice of intended publications to those concerned.

191. Another two cases from the same applicant, related to the German Courts' refusal to prohibit any further publication of two pictures showing the applicant and her family on holiday, are pending before the Grand Chamber at the time of writing.

In regulating private industry

Under Article 8 states have a duty not only to provide a proactive protection to individuals' rights, but also to ensure that the enjoyment of the right is not hampered by third parties' actions or activity. Most of the Article 8 cases examined by the Court in this respect concern allegedly harmful activities of industrial sites and the subsequent emission, voluntary or accidental, of hazardous substances into the surrounding environment. In *Fadeyeva* the applicant, who lived in a council flat, situated within a sanitary security zone around a steel plant, complained that the operation of the industry in close proximity to her home endangered her life and health and that the failure to resettle her violated the positive obligations states bore under Article 8. The Court, basing itself on the authorities' submissions, noted that the concentration of certain hazardous substances in the atmosphere within the zone largely exceeded the "maximum permitted limit" established by Russian legislation. The judicial action brought by the applicant to seek resettlement outside the zone only had the result of the applicant being put on a "general waiting list", as opposed to the "priority waiting list" which had been identified by the Court as the right

of the applicant. The Strasbourg judges, therefore, concluded that there had been a violation of Article 8 of the Convention in respect of the failure of the respondent state to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and private life. Although it was not the state that controlled or operated the steel plant, the Court observed that states' responsibility in environmental cases may arise from a failure to regulate private industry.

Should the polluting activity violate existing national laws, the state's or the general economic interest in its continued illegal operation becomes difficult to assert.[192] Delays in conducting an environmental impact assessment might engage state liability.[193] The Court, however, is not willing to accept that the scientific and technical community's lack of certainty in relation to given operations be used as justifications to postpone the adoption of effective and proportionate measures aimed at preventing a risk of serious and irreversible damage to the environment. In this respect the Strasbourg judges made it clear that the precautionary principle,[194] whose aim is to ensure a high level of protection of health, consumers safety and environment, should prevail.[195]

192. *Guerra and others* and *López Ostra*.
193. *Giacomelli v. Italy*, where the environmental impact study was carried out seven years after the a plant for the treatment of special (including hazardous) waste started to operate, despite the legal requirement that it be conducted prior to the beginning of the activities.

In providing information about environmental and health risks

In *Guerra and others* the Court found Italy in breach of Article 8, under the angle of private and family life, in that it failed to provide the local population with information about risk factors and on how to proceed in event of an accident at a nearby chemical factory. Such information had been expressly required by the applicants from the competent national authorities. It eventually was provided only after the industrial production had ceased. The cross-dimensional right to ask and receive environmental information on risks related to their place of living was also the object of *Öneryıldız v. Turkey*, where both the Chamber and Grand Chamber were satisfied about the complaint being examined under the angle of Article 2.

Non-disclosure of information related to the consequences caused to servicemen exposed to chemical experiments has led to different conclusions as to the violation of Article 8. In *McGinley and Egan* the applicants' complaint that the non-disclosure of the records of radiation in Christmas Island amounted to a violation of their rights to respect for their

194. Embodied explicitly in the Rio Declaration of 1992, the principle is seen as being part of the *acquis communautaire*. Its inclusion in the Maastricht Treaty marked the evolution of the principle from the philosophical to the juridical sphere.
195. *Tătar v. Romania*. The case was about the spillover in the surrounding environment of dangerous chemical substances used in the extraction industry of precious metals.

private and family life was dismissed. The Strasbourg judges observed that the state had complied with the positive obligation stemming from Article 8 to put in place adequate mechanisms enabling those involved in hazardous activities (i.e. nuclear experiments) to have access to all relevant and appropriate information. Any failure on the side of the applicants to activate them could not trigger the responsibility of the state, which was not found to have violated the positive aspect of Article 8. In *L.C.B.*, dealing with the effects on the health of Christmas Island veterans and their offspring, the Court observed that, in principle, it would be open to it to consider the applicant's complaint regarding the state's failure to advise her parents of its own motion and monitor her health prior to her diagnosis with leukaemia under the angle of Article 8. It did not proceed, however, as the question had already been examined under Article 2. In *Roche* a former soldier sustained that he developed high blood pressure, hypertension, chronic obstructive airways disease (bronchitis) and bronchial asthma as a result of his participation in mustard and nerve gas tests conducted under the auspices of the British Armed Forces. He applied for disability pension before the Pension Appeal Tribunal, which found that there was no reliable evidence to suggest a causal link between the tests and the applicant's claimed medical conditions, as all "medical" and "political" means activated by the applicant had only resulted in partial disclosure. Lack of information was also due to the fact that full-scale epidemiological studies on the incident had only started almost 10 years after the applicant had begun his search for records and after he had lodged his application with the Court. The Court noted that the applicant's uncertainty as to whether or not he had been put at risk through his participation in the chemical tests could reasonably be accepted to have caused him substantial anxiety and stress. The absence of any obligation to disclose and inform relevant individuals, the circumstance that the disclosure had been piecemeal and, over four years later, remained unfinished, together with the other circumstances illustrated above, all prompted the Court to find a violation of Article 8 in that the United Kingdom had not fulfilled its positive obligation to provide an effective and accessible procedure enabling the applicant to have access to all relevant and appropriate information which would allow him and the tribunal seized with the pension request to assess any risk to which he had been exposed during his participation in the tests.

The positive obligation to provide adequate information about hazardous activities also applies in relation to individuals who are forcefully obliged to live in a given place, such as detainees. In *Brânduşe* the Court had to deal with a complaint concerning the stale air and the nauseous stench coming from a site about 20 metres' distance from the prison, which had been formerly used for the disposal of household waste. The dump was managed by a company run by the city council. Despite the absence of any causal link between the deterioration of the applicant's health and the proximity of the prison to the former refuse tip, the Court decided to examine the complaint under

In providing information about environmental and health risks

Article 8. It noted that, in the light of the conclusions of the environmental studies and the length of time for which the applicant had to suffer the nuisances concerned, the applicant's quality of life, well-being and ultimately private life had been detrimentally affected in a way which could not solely be linked to the deprivation of liberty. The applicability of Article 8 was also founded on the circumstance that the complaint related to aspects – different from the conditions of detention – which affected the only "living space" available to the applicant for the number of years he served his conviction. Romania's responsibility for violation of Article 8 was based on five main points:

- the company managing the refuse tip was run by the city council, which could therefore be considered directly responsible for the offensive smell it produced;
- although the tip had remained operationally officially only for 5 years, evidence was produced showing its used thereafter by private individuals, as the authorities had not taken measures to ensure the effective closure of the site;
- the absence of a proper authorisation for operation or closure made the activity of the tip, tolerated by the authorities, illegal;
- the preliminary studies of the effects of pollution, which should have been conducted before licensing the site, were in fact only carried out three years after the abandonment of the tip, and only after a fierce fire on the site;
- the evidence that the activity was incompatible with environmental requirements set up by national legislation, provoking unacceptable levels of nuisance caused by offensive smells to inhabitants of the area.

In providing alternatives to unhealthy living places

Where the adverse environmental conditions of a given location cause heavy pollution, health problems to individuals living in it, or damage to their houses, states have a duty to resettle all those affected to ensure protection of their private and family life. As an alternative, states must identify different measures to reduce pollution below harmful levels. Failure to resettle or to implement corrective measures will result in a breach of Article 8.[196]

In protecting family life

When it comes to family life, the case-law indicates that two main types of obligation stem from Article 8: the first is to give legal recognition to family ties; the second is to act to preserve family life. What follows is an overview of the positive obligations states bear in these two areas.

In recognising family ties

In dealing with a complaint about the effect on family life of certain aspects of the Belgian illegitimacy laws, the Court took the opportunity to clarify that

196. *Dubetska and others v. Ukraine.*

> when the state determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by Article 8, respect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible, as from the moment of birth, the child's integration in its family. In this connection, the state has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 without there being any call to examine it under paragraph 2.[197]

By stating that the right to family life extends beyond formal relationships and legitimate arrangements, the Court emphasised that passing a law meeting the requirements of Article 8 is not enough, as its enforcement and interpretation are equally important. Whilst domestic courts have a duty to interpret the domestic law in conformity with the Convention, state responsibility will only arise when they have committed a manifest error of interpretation: to trigger the liability, therefore, the national courts' assessment of the facts or domestic law must be manifestly unreasonable or arbitrary or blatantly inconsistent with the fundamental principles of the Convention. Conversely, no violation will be found when Article 8 interferences are grounded in the need to protect the social reality *vis-à-vis* an empty and purely theoretical biological reality.[198] The Strasbourg case-law, however, leaves room for exceptions, the most important of which is represented by the 1997 judgment[199] that ruled the lack of legal recognition of paternity ties between an "AID child" and his social father, a female-to-male transsexual who was the mother's partner, did not amount to a violation of Article 8. Considering the living character of the Convention and the changing social perception of the issues related to transsexualism, it would not be a surprise if this position were soon to change. Indeed, with the *I.* and *Goodwin* judgments, the Court has already shifted its position in relation to the registration of sex changes for the purpose of marriage, concluding that national legislations accepting only the "biological" sex recorded at birth infringes the substance of the right to marry.

The positive obligation to respect family life implies not only that recognition of family ties should be possible, but also its converse: that none of the subjects involved should be compelled to such recognition. This means that putative fathers wishing to contest the paternity of a child, challenging legal presumptions or their previous recognition (for instance because of fresh biological evidence not available or accessible at the time of recognition) must have the possibility to do so.[200]

197. *Marckx*.

198. *Yousef v. the Netherlands*.
199. *X, Y and Z v. the United Kingdom* [GC].
200. *Phinikaridou v. Cyprus*; *Shofman v. Russia*.

In preserving family life

Once established, family life can be interrupted only in exceptional circumstances. This does not mean, of course, that the Convention prohibits separation or divorce. What it does, instead, is to put a halt to events that cause a breakdown in the parent/child relationship. The relevant case-law has set forth the various obligations, including positive ones that states bear in this respect. These are primarily procedural and relate to the process by which family members are being separated and how decisions on custody and visiting rights are enforced as well as measures facilitating the reunion of family members after a separation has taken place.[201] The procedural obligations also encompass the right to seek for judicial review of the merits of the attribution of parental authority, to be enjoyed without discrimination.[202]

Decisions to remove children from their parents, on placement and adoption constitute serious interference with family life within the meaning of Article 8, particularly when their consequences are irreversible. This explains why the Court pays particular attention to the decision-making process, although the Convention does not spell out any particular procedural requirement. It is now a well-established principle that parents must be associated in procedures of this kind, which can be either administrative or judicial. What is fundamental is that their interests are properly taken into account and weighed against conflicting stakes. Their manner of participation is not set, nor is their level of involvement, as these will very much depend on the seriousness of the measure in question.[203] Only in exceptional circumstances, for instance when action had to be taken to protect a child in an emergency or because those having custody of the child are seen as the source of an immediate threat to the child, will the Court consider decision-making processes not involving those having custody of the minor to be compliant with Article 8. In such circumstances, however, the Court must be convinced that the national authorities were entitled to consider that there existed circumstances justifying the abrupt removal of a child from the care of its parents without any prior contact or consultation. In deciding the case, particular weight would be given to whether the state had conducted an assessment of the impact of the proposed care measure on the parents and the child and whether possible alternatives were explored.[204] In any case, the guiding principle is that care orders should be regarded as temporary measures, to be discontinued as soon as circumstances permit, and that any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parent and the child. The positive duty to take measures to facilitate family reunification as soon as reasonably feasible will begin to weigh on the competent authorities with progressively increasing

201. *Olsson*.
202. *Zaunegger v. Germany*.
203. *Sahin v. Germany* [GC].
204. *Venema v. the Netherlands*.

force as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child.[205]

The positive obligation to preserve family life also encompasses the duty to facilitate contacts with siblings who have been separated by judicial decision. This is even more so when the decision was taken by the domestic jurisdiction of its own motion. In *Mustafa and Armagan Akin* the Court observed that maintaining the ties between the children was too important an objective to be left to the parents' discretion, particularly in the presence of clear indications of an obstructive behaviour on the part of one of the parents. Eventually, the lack of reasoning by the domestic courts (including the Court of Cassation) as to why the siblings had been separated and as to why the contact arrangements requested by the applicants had been dismissed, together with the inability of the judges seized of the case to find alternative suitable agreements to ensure that the siblings would see each other on a regular basis led the Court to find a violation of Article 8. In deciding the case the Court emphasised not only that the best interest of the child is to be given paramount importance in custody proceedings, but also that the voice of children must be heard:

> the Court observes that the Ödemiş Court did not only fail to seek the opinion of the children but also failed to base its decision on any evidence, such as psychological and other expert assessments, despite the fact that it was informed by the applicants that the situation had been causing them psychological problems.

Non-execution of judicial decisions granting custody or regulating access rights might also trigger the international responsibility of the state. The typical situation occurs when one of the guardians or grandparents objects to the exercise of such a right by the other parent and the state does not ensure that the court decision is enforced. The position of the Court is, in this respect, rather moderate: whilst acknowledging the presence of a positive obligation incumbent upon states, it considers that this duty is not absolute and, in particular, that it has to be balanced against the "superior interest of the child" and the latter's rights under Article 8. In every case, provided that the domestic authorities have done the necessary minimum that can reasonably be demanded in the special circumstances of each case to obtain the co-operation of the parents in executing the judicial decision, the Court has found no violation of Article 8. In all the above-mentioned situations the time element is given particular weight, the consequences of delay to those concerned being irreversible,[206] particularly when coupled with lack of opportunities for the family members to nurture their bonding, for instance because of the lack of serious and sustained efforts on the part of the social welfare authorities to facilitate reunification or due to restrictions on the guardian's right to access.

205. *K. and T. v. Finland* [GC].

206. *Pawlik v. Poland*; *Zwadka v. Poland*; *Bove v. Italy*; *Reigato Ramos v. Portugal*.

These can be indicative of the national bodies' intentions to strengthen the child's relationship with the substitute carers rather than with the family of origin which is in blatant contrast with the positive obligations stemming from Article 8.[207] Conversely, after a considerable period of time has passed since the separation, the interest of a child not to have his or her *de facto* family situation changed again may override the interests of the parents to have their family reunited.[208]

States are obliged to preserve family life whenever Article 8 is applicable: in *Moretti and Benedetti* the Court found a violation of the state's positive obligation in that the applicants' request for a special adoption order in respect of the foster-child who had been placed with their family immediately after her birth for a period of five months had not been examined carefully and speedily before the baby had been declared free for adoption and another couple had been selected. Whilst acknowledging that it is not for the Court to substitute its own reasoning for that of the national authorities regarding the measures that should have been taken in securing the child's well-being, the Strasbourg judges observed that the shortcomings in the national proceedings had had a direct impact on the applicants' family life.

Positive obligations are also often present in Article 8 cases related to the international abduction of children and in situations concerning immigrants. In the light of their alarming increase, as well as the complex implications their bear also from and international law perspective, they are examined in Part IV below, page 78.

207. *R. v. Finland.*
208. *K.A.*

In protecting from external threats

Article 8 implies a duty for the authorities to ensure that the private and family life of individuals receives the protection it needs even when potential threats come from within the family and could, therefore, be regarded as being a "private matter".[209] In the case of *Bevacqua and S.* the applicants complained that the Bulgarian authorities had failed to ensure respect for their private and family life in the difficult situation caused by Ms Bevacqua's divorce from an abusive husband, whose violence increased as soon as the applicant pressed charges against him for assault. The Court stressed that considering the dispute to be a "private matter" was incompatible with the authorities' obligation to protect the applicants' family life. The national courts' failure to adopt interim custody measures without delay in a situation which had above all adversely affected the well-being of the child, as well as the insufficient measures taken in reaction to the behaviour of the applicant's former husband led to the finding of a violation of Article 8 under the angle of family life.

209. *E.S. and others v. Slovakia.*

The private and family life aspects of Article 8 were jointly considered by the Court in the case of *A. v. Croatia,* where the Court found a violation of Article 8 under the angle of private and family life in that national authorities had failed to implement many of the measures ordered by the courts within a number of criminal proceedings to protect the applicant from her husband (a veteran who suffered from post-traumatic stress disorder, paranoia, anxiety and epilepsy) or deal with his psychiatric problems, which appeared to be the cause of his violent behaviour. The refusal of national courts to adopt a new protective measure preventing the ex-husband from stalking or harassing her on the ground that she had not shown an immediate risk to her life was also found to be in breach of the said provision. Failure by the authorities to ensure detention for psychiatric treatment of abusive family members was also found to constitute a breach of the Convention in the case of *Hajduová,* where the applicant had sought refuge with her child in a shelter after she had been attacked in public and threatened with death by her former husband. After the release of the latter from hospital without having undergone the required treatment, threats were renewed. National jurisdictions subsequently rejected the applicant's complaint about the failure to treat the man in hospital. The Court, reiterating that Slovakia had a duty to protect the physical and psychological integrity of individuals, particularly those who are in a vulnerable condition, found a violation of Article 8 under the angle of both private and family life: although the applicant's ex-husband had not actually assaulted her following his release from hospital, her fear that his threats might be carried out were well-founded and the authorities had failed in their duty to ensure his detention for psychiatric treatment.

Considering that the Internet, because of its anonymous character, can be easily used for criminal purposes, and having in mind the plague of child sexual abuse, the Court clarified that it is one of the state's positive obligations under Article 8 to dispose of a system to protect minors from being targeted by paedophiles via the web. In *K.U. v. Finland* it concluded that the state had failed to protect the applicant's private life in that, in the absence of a legal framework reconciling the confidentiality of Internet service providers with the prevention of disorder or crime and the protection of the rights of the individual, it gave precedence to the privacy of the service over the minor's physical and moral welfare.

In protecting the home

The Court has been asked to adjudicate a relatively small number of complaints related to failure by the authorities to comply with the positive obligations stemming from Article 8 of the Convention in relation to the "home". In most cases, complaints related to infringements of the right to one's domicile by other individuals or by public officials. In relation to the intrusion into someone's home by public authorities, the Court's view is clear: it does not fall within its remit to examine national legislation and policy in abstract, even when its appli-

cation would hinder the traditional lifestyle of those belonging to an ethnic minority.[210] As a corollary, it is possible to affirm that states are not obliged to implement a given policy on housing. The Court, however, whilst dealing with cases related to the interferences in the enjoyment of one's home by third parties, was able to identify the following as situations that can give rise to a breach of the positive obligations enshrined in Article 8. These are:

- A negligent application of the law. In *Novoseletskiy* the Court was not satisfied that the domestic jurisdictions charged with the case had used all the means at their disposal to protect the applicant's private and family life during the 3-year-long proceedings over his occupancy right. The Court was particularly struck by the fact that the national jurisdictions had dismissed the applicant's claim for damages on the ground that "compensation for non-pecuniary damage in landlord-and-tenant disputes [was] not provided for by law", whereas the applicant's claim went beyond the strictly landlord-and-tenant relationship, as he had asked the courts to deal with the loss he had suffered as a result of the his prolonged inability to occupy his flat. Digging into the judgment of the domestic authorities, the Court also found that the national judge had not looked into the legality of making the flat available in the applicant's absence, although the importance of that question was clear and undeniable, nor had the prosecution service taken any interest in the matter.
- A prolonged and unjustified delay in the execution of a court decision concerning the right of ownership or occupancy. In *Surugiu* the Court did find particularly striking the fact that it was only one and a half years after the third party's title had been revoked that an administrative penalty was imposed on him, whereas his infringements of the applicant's right to peaceful enjoyment of his home appeared to have been a daily occurrence.
- Absence of state supervision over housing stocks described in the national legislation. In *Novoseletskiy*, cited above, the applicant eventually recovered a flat which was unfit for human habitation. The body tasked with the possession and management of the state's housing stocks had neither undertaken the work needed to repair the damages as quickly as possible nor taken steps to establish what had happened and prosecute those responsible for the serious damage to part of its housing stock).

In *Moreno Gómez* the applicant, unlike *López Ostra* and *Hatton and others,* complained that her right to respect for her home had been infringed due to the authorities' remaining passive *vis-à-vis* the severe loss of amenity caused to the applicant's home by the persistent noise at night caused by nearby nightclubs. The inaction had caused, over a number of years, serious disturbance to the applicant's sleep. Here not only did the Court find a violation of Article 8, but also made a statement of

210. *Chapman*.

principle in that the right to respect for one's home as protected by Article 8 should be understood "not just the right to the actual physical area, but also to the quiet enjoyment of that area", which can be hampered not only by concrete or physical breaches, but also by noise, emissions, smells or other forms of interference. The Court observed that the nightclubs had been authorised by the municipality despite an expert's opinion which it had commissioned that concluded that there was a situation of "acoustic saturation" generated by a noise-level well beyond the legal limits. It therefore found a violation by the municipality of the positive obligations stemming from Article 8 of the Convention.

The efforts required of Contracting Parties in order for their positive obligations under Article 8 to be fulfilled, however, very much depend on the specific circumstances of the case. It is therefore difficult to identify a threshold valid in all situations. Length of time and intensity of the exposure to noise, smell or odour have proven to be critical in determining the state's responsibility, overriding considerations of the complexity of the case, for instance involving infrastructure issues and the striking of a balance between equally important interests, such as those of road users and of the residents of a certain urban area.[211]

211. *Deés v. Hungary.*

In 2005, in an important case concerning Roma,[212] the Court considered the applicants' living conditions under the notions of private, family life and home and found Romania in breach of, amongst other provisions, Article 8 for failing to provide justice in connection with a violent attack. The case involves the killing by a mob (amongst which were members of the local police) of three Roma men and the subsequent destruction of fourteen of their houses and possessions, as well as the degrading circumstances in which the victims were forced to live after the event. Having been hounded from their village and homes, the applicants were then obliged to live, and some of them still live, in crowded and unsuitable conditions (cellars, hen-houses, and stables) and frequently changed address, moving in with friends or family in extremely overcrowded conditions.

Considering whether the national authorities took adequate steps to put a stop to breaches of the applicants' rights, the Court noted, among other things, that

- despite the involvement of state agents in the burning of the applicants' houses, the Public Prosecutors' Office failed to institute criminal proceedings against them, preventing the domestic courts from establishing the responsibility of those officials and punishing them;
- the domestic courts refused for many years to award pecuniary damages for the destruction of the applicants' belongings and furniture;

212. *Moldovan and others.*

- it was only ten years after the events that compensation was awarded for the destroyed houses, although not for the loss of belongings;
- in the judgment in the criminal case against the accused villagers, discriminatory remarks about the applicants' Roma origin were made;
- the applicants' requests for non-pecuniary damages were also rejected at first instance, the civil courts considering that the events – the burning of their houses and the killing of some of their family members – were not of a nature to create any moral damage;
- when dealing with a request from one applicant for a maintenance allowance for her minor child, whose father was burnt alive during the incident, the regional court awarded an amount equivalent to a quarter of the statutory minimum wage, and decided to halve that amount on the ground that the deceased victims had provoked the crimes;
- three houses were not rebuilt and the houses rebuilt by the authorities were uninhabitable; and
- most of the applicants did not return to their village, and lived scattered throughout Romania and Europe.

In the Court's view, these elements taken together indicated a general attitude on the part of the Romanian authorities which perpetuated the applicants' feeling of insecurity following the riot and affected their rights to respect for their private and family life and their homes. Having regard to the direct repercussions of the acts of state agents on the applicants' rights, the Court considered that the Government's responsibility was engaged regarding the applicants' subsequent living conditions. The Court concluded that that attitude, and the repeated failure of the authorities to put a stop to breaches of the applicants' rights, amounted to a serious violation of Article 8 of a continuing nature.

In protecting correspondence

Intrinsic to the detainees' right to respect for correspondence, as guaranteed by Article 8 of the Convention, is the right to be supplied with the necessary writing materials. The rule was set up quite clearly in *Cotlet,* which brought to the attention of the Court the situation whereby a detainee was entitled to two free envelopes a month, a quantity which proved insufficient for his need to correspond with the Strasbourg Court. As a matter of fact, the Court had received several letters in which the applicant had related the difficulties he was experiencing in getting envelopes from other prisoners. The Court, in the light of the specific circumstances illustrated above and considering that the applicant had placed repeated requests that were systematically turned down, found that the authorities had not discharged their positive obligation to supply the applicant with all the necessary material to correspond with the Court thus, breaching Article 8. This does not mean, however, that detainees have an unlimited right to have access to a choice of writing material or that all prisoners' correspondence costs must be borne by the state. However, the restrictions must not be such

as to hinder in practice the right to correspondence. The positive obligations also extend to preventing the disclosure of such private exchanges.[213]

213. *Craxi v. Italy (no. 2)*.

Part IV – Selected problem areas

The present section offers an overview of the application of Article 8 to three problem areas – namely environment, international abduction of children and immigration. These have been selected as they are becoming of growing concern to the Court, due to the increasing number of relevant cases brought to its attention.

Environmental protection under the Convention

Article 8 and the right to environment

Article 8 has been invoked in various cases involving environmental concern, yet it is not violated every time that environmental deterioration occurs: no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention. In *Kyrtatos,* the Court noted that

> Neither Article 8 nor any of the other articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect.

This statement, which is still valid, suggests that a cautious approach be adopted when dealing with protection under the Convention of the individual's rights to an environment. The analysis of the case-law on the subject reveals that, on the one hand and in the first place, the protection of the environment constitutes a general interest which can thus justify interferences in the exercise of certain rights and freedoms guaranteed by the Convention. On the other hand, however, it represents an individual interest, giving rise to situations where the guarantees of the Convention, mostly enshrined by Article 8, have been breached because of bad environmental conditions.

In relation to the first aspect, the Court accepts that that states enjoy a wide margin of appreciation when striking a balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. National authorities will not need to provide "sufficient" reasons, implying the practical lack of less grievous means by which the legitimate aim could be reached. The collective interest in the environment, therefore, represents a legitimate aim justifying individual restrictions on the rights guaranteed by Article 8. In the case of *Buckley* the applicant, a British citizen of Gypsy origin, lived with her three children in caravans parked on her own land. As the family of the applicant's sister was granted personal, temporary planning permis-

sion on a nearby site for one living unit, comprising of two caravans, the applicant applied retrospectively to the district council for planning permission for the three caravans on her site. Her application was dismissed for the reason, among others, that the planned use of the land would detract from the rural and open quality of the landscape, contrary to the aim of the local development plan which was to protect the countryside from all but essential development. Noting that town and country planning schemes involve the exercise of discretionary powers in the implementation of policies adopted in the interest of the community, the Court recognised that national authorities enjoy a wide margin of appreciation in determining, out of a multitude of local factors inherent in the choice and implementation of planning policies, the best planning policy or the most appropriate individual measure in planning cases.

Article 8 and the right to a *healthy* environment

There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8. In order for this, the interference must directly affect the applicant's home, family or private life. In *Fadeyeva* the Court reiterated that the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8. The assessment of that minimum is relative and very much fact-sensitive, depending on the intensity and duration of the nuisance, its physical or mental effects. The general environmental context should be also taken into account. There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent in life in every modern city. In order to fall under Article 8, therefore, complaints relating to environmental nuisances have to show, first, that there was an actual interference with the applicant's private sphere, and, second, that a level of severity was attained. In *Moreno Gómez* the applicant invoked the violation of the right to respect for private life, in that her right to sleep at night had been infringed over a period of years by the inaction of the municipal authorities in Valencia, which had failed to put a stop to the night-time disturbances. The Court considered that the applicant lived in an area that, indisputably, was subject to night-time disturbances, particularly at weekends, and observed that the municipality tolerated, and even contributed to, the repeated flouting of the rules which it itself had established, with volume of noise at night beyond permitted levels, which unsettled the applicant as she went about her daily life. It concluded that Spain had failed to discharge its positive obligation to guarantee the applicant's right to respect for her home and her private life, in breach of Article 8 of the Convention.

The general deterioration of the environment is not sufficient, alone, to trigger state responsibility under Article 8. In *Kyrtatos,* which related to the failure of the authorities to comply with two judicial decisions annulling two permits for the construction of buildings near their property, thus causing the destruc-

tion of their physical environment and affecting their life, the Court distinguished two aspects. Whilst rejecting the argument that urban development had destroyed the swamp which was adjacent to their property and that the area where their home was had lost all of its scenic beauty, it stated that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, even without a serious danger to health. For Article 8 to be engaged, however, a harmful effect on a person's private or family sphere must exist: in the given circumstances the Court found that disturbances in the applicants' neighbourhood due to the urban development of the area had not reached a sufficient degree of seriousness to be taken into account for the purposes of Article 8.[214]

The national authorities' refusal to comply with the judicial decisions protecting the applicants' right to respect for their private and family life can trigger an Article 8 responsibility as it deprives the procedural safeguards protecting the applicants of all useful effect. This was, in sum, the key point in *Taşkın,* where the complaint related to the activity of a limited company having been granted a permit to operate a goldmine using a poisonous process. The breach was found as the administrative court decisions setting aside the permits to on the grounds of health risks and the risks of pollution of the underlying waterstream and destruction of the local ecosystem, had been not applied following direct instructions by the Ministry of the Environment and Forestry.

Application of Article 8 to immigration cases

The application of Article 8 to immigration cases is of particular importance: continental Europe, particularly its borders, has become in recent years the destination for a massive influx of economic and forced immigrants, a growing number of which have lodged complaints to the Court in relation to their status, thus stimulating the development of human rights law. Faced with a number of significant cases related to the status of long-term foreign residents, the Court has progressively recognised the human rights implications of such situations in determining the scope of application of Article 8. This has had an obvious impact on the condition of legal and illegal immigrants living in Council of Europe member states. Considering that in recent years many European countries have tried to restrict not only the right of access but also, and most importantly, the right to regularise one's position in a foreign territory, the position of the Court becomes of particular interest, as it reflects the significant changes that societies are undergoing because of the entry into play of new actors. In its initial application by the Commission it was clear that no claim could ever been accepted in relation to the denial of family reunification in the host country, as foreigners were expected to establish their

214. Failure to enforce a decision to close down a noisy computer club operating next to the applicant's flat led to a violation of Article 8 in the case of *Mileva and others v. Bulgaria*.

family life in their home, rather than in the receiving, country.[215] However, in line with its nature as a living instrument, over the years the Convention's concept of family life has evolved, thus extending to many immigration-related issues, which for political reasons had been originally left outside the Convention.[216] For the purpose of this work, the swift development in the application of the notion of family life is interesting in that the Convention is becoming a tool to provide protection particularly to the long-term resident status of second-generation immigrants, who have either been born in the European country of destination of their parents or arrived in Europe when they were children, never returning to their countries of origin.

Expulsion and deportation

The preliminary statement that the Court normally makes when dealing with immigration cases concerns the recognition that states have, "as a matter of well established international law and subject to their treaty obligations, the right to control the entry, residence and expulsion of aliens".[217] The analysis of the case-law, particularly of the most recent jurisprudence examined below, shows that in practice the Court insists on having a say in the exercise of this right, particularly when it comes to residence and expulsion. In 1991 the Court was asked, for the first time, to deal with the deportation of a foreigner from the standpoint of Article 8.[218] It was only after a decade, however, that the Strasbourg judges elaborated out of that provision the obligation of states to grant family reunion of aliens with a family member living abroad.[219] Recent judgments show that the Court has entered a new phase, granting more and more protection to immigrants' rights. The first occurrence of this tendency is *Slivenko and others,* a case concerning the difficult situation of the Russian-speaking minority in the Baltic states. The applicants, a former Soviet Union army officer and his family, had been living in Latvia most of their lives. After their claims for residence rights under the 1994 Russo-Latvian Treaty on troop withdrawal had been rejected, they challenged their deportation before the European Court. Unlike the cases that had been reaching Strasbourg until then, since the whole family had been expelled it could not be said, relying on the previous, well-established case-law of the Court, that the applicants' joint family life had been affected. Nonetheless, the Court concluded that the deportation amounted to a violation of Article 8 as it represented a break-up of the applicants' private life and home. Since the applicants

215. *X and Y v. Liechtenstein* (dec.).
216. Reference here is to the right to asylum.
217. This standard formula was used for the first time in *Moustaquim v. Belgium*.
218. *Moustaquim*. Despite the substantial number of the applicant's convictions, the Court concluded there was an unjustified interference with the applicant's right to be with his parents and his siblings who were all born in Belgium. Almost simultaneously, in *Cruz-Varas v. Sweden* the Court extended the extraterritorial application of Article 3 decided in the *Soering* case on extradition to expulsion and deportation of aliens.
219. *Sen v. the Netherlands*.

> were thus removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of every human being […], the Court cannot but find that the applicants' removal from Latvia constituted an interference with their "private life" and their "home" within the meaning of Article 8 paragraph 1 of the Convention […]. [T]he existence of "family life" could not be relied on by the applicants in relation to the first applicant's elderly parents, adults who did not belong to the core family and who have not been shown to have been dependent members of the applicants' family, the applicants' arguments in this respect not having been sufficiently substantiated.

The judgment on the one hand restricted the notion of what had always been defined as the "core" or "nuclear family", composed of spouses and under-age children. On the other hand, however, it broadened the protection afforded by Article 8 as to also include the whole network of social, personal and economic relations that make up a person's life.

Expulsion orders might be based solely on information which had not been disclosed to the applicant, for instance classified as "secret", or else not subjected to some form of adversarial proceedings before an independent authority or court actually able to effectively scrutinise the reasons for the expulsion measures and to review the relevant evidence, if need be with appropriate limitations in the use of classified information. In such instances, the Court is likely to find a violation of the principle of legality set up in the first paragraph of Article 8, in that the law does not afford protection against arbitrary action by the public authority.[220] The same conclusions would be reached where the national courts confine themselves to a purely formal examination of the decision to expel a foreigner.[221]

Expulsion following a criminal conviction: the "Boultif criteria" and their evolution

On many occasions the Court has been seized of the question whether the expulsion and deportation of a foreigner, particularly after a criminal conviction, would infringe on the family right of the person, preventing the cohabitation of the family members.[222] Up to 2003 the Court had decided only to a limited extent on cases where the main obstacles to expulsion were the difficulties for the spouses to stay together and, in particular, for a spouse and/or children to live in the other's country of origin. The opportunity to clarify this controversial point was provided by *Boultif,* in which the Court elicited the guiding principles to be used in assessing whether the expulsion of a foreigner convicted for a criminal offence would infringe on its family life rights. The so-called "Boultif criteria" were identified

220. The national legislation was found to run counter to the rule of law if the margin of appreciation granted to the executive was unlimited in *Musa and others v. Bulgaria*; *Lupsa v. Romania*; *Kaya v. Romania*; *C.G. and others v. Bulgaria*.
221. *Kaushal v. Bulgaria*.
222. *Moustaquim*. In *Cruz-Varas* the Court considered that responsibility for the resulting separation of the family could not be imputed to the State but to the applicant himself.

by the Court as the elements against which weighting the deportation order. These include:

- the seriousness of the criminal offence;
- the length of stay in the host country;
- the time elapsed since the offence was committed and the conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation;
- whether the spouse knew about the offence when they entered into the relationship;
- the age of children;
- the seriousness and difficulties the spouse is likely to encounter in the country of origin.

First the Court took into account the extent to which the offence committed by the applicant indicated the level of danger posed to public order and security. In this respect, it noted that before the applicant commenced serving his prison sentence, he had obtained professional training as a waiter and worked as a painter. His conduct in prison was impeccable, and indeed he was released early. Upon his reintegration into society the applicant worked for two years, with the possibility of continuing employment. As a result, whilst the offence committed (violent robbery and damage to property) could have given rise to certain fears that for the future he might constitute a danger to public order and security, the circumstances of the case *de facto* mitigated such concerns. The analysis continued with the assessment of the possibility of the applicant and his wife, a Swiss national, to establish family life elsewhere. The Court considered in the first place whether the couple could live together in Algeria (the applicant's country of origin). Although the spouse could speak French and had had contacts by telephone with her mother-in-law in Algeria, she had never lived there, she had no other ties with that country, and she did not speak Arabic. In these circumstances, therefore, it could not be reasonable to expect that she follow her husband to Algeria. As for the alternative to live elsewhere, notably in Italy where the applicant had stayed before entering Switzerland and where he was residing, although not legally, at the time of the examination of the case in Strasbourg, the Court considered that it had not been established that both the applicant and his wife could obtain the authorisation to reside there lawfully and, as a result, to lead their family life there. The Court therefore concluded that the applicant had been subjected to a serious impediment to establish family life, since it was practically impossible for him to live his family life outside Switzerland, although at the time the authorities refused his continuing stay in the country, he presented only a comparatively limited danger to public order. The decision of the Swiss authorities, therefore, constituted a disproportionate interference in the family life of the applicant which breached Article 8 of the Convention.

Should the family situation be subject to changes between the expulsion/ban order and the adjudication of the case by the Strasbourg Court, the Court will make its assessment in the

light of the position when the order became final. In *Onur* the Court did not find that the expulsion of the applicant, a Turkish national convicted for robbery, fell foul of Article 8 as it was satisfied that he, his (British) partner and their very young children could have all settled in Turkey without exceptional difficulties. In this respect although the Court

> would not wish to underestimate the practical difficulties entailed for the applicant or his partner in relocating to Turkey, no evidence has been adduced which would indicate that it would be either impossible or exceptionally difficult for them to do so.

In *Omojudi*, however, the Court noted that

> the applicant's wife was an adult when she left Nigeria and it is therefore likely that she would be able to re-adjust to life there if she were to return to live with the applicant. She has, however, lived in the United Kingdom for twenty-six years and her ties to the United Kingdom are strong. Her two youngest children were born in the United Kingdom and have lived there their whole lives. They are not of an adaptable age and would likely encounter significant difficulties if they were to relocate to Nigeria. It would be virtually impossible for the oldest child to relocate to Nigeria.

The expulsion of the applicant charged with sexual assault (a crime which, in the view of the Court, is not at the most serious end of the spectrum of sexual offences) committed after the applicant was granted indefinite leave to remain could not be considered proportionate to the legitimate aim pursued. The reasoning followed the one already elaborated in *Beldjoudi*. In *A.W. Khan* the Court spelled out that the severity of the offence must always be balanced with the overall behaviour of applicants and with their criminal record, circumstances which are fundamental in establishing the risk the subject poses to society, and which must be given equal weight as the other criteria.

The case-law on the expulsion of non-nationals was reviewed by the Grand Chamber in 2006, in *Üner*. In deciding whether such a decision violated the applicant's right to respect for family life, the Grand Chamber elaborated two of the criteria already implicit in *Boultif*:

> the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of social, cultural and family ties with the host country and the country of destination.

In relation to the first point the Court noted that

> this is already reflected in existing case-law […] and is in line with Committee of Ministers' Recommendation Rec (2002) 4 on the legal status of persons admitted for family reunification.[223]

With regard to the second point

> although the applicant in the case of Boultif was already an adult when he entered Switzerland, the Court has held the

> "Boultif criteria" to apply all the more so (à plus forte raison) to cases concerning applicants who were born in the host country or who moved there at an early age.

The reasons for such an approach lie in the assumption that the longer a person has been residing in a state, the stronger his ties with that country and the weaker those with the country of nationality, particularly when the alien arrived in early childhood and was educated there. A need to ensure stronger protection to private life was therefore deemed necessary, especially having in mind that not all migrants, regardless of how long they have been living in the host country, necessarily enjoy family life within the meaning of Article 8. Depending on the specific circumstances of the case, therefore, the Court might also focus on the individual social identity of settled immigrants in order to establish whether the expulsion following their criminal conviction is compatible with the Convention.

In another Grand Chamber decision[224] the Court further elaborated on the issue and observed that

> while the criteria which emerge from its case-law and are spelled out in the *Boultif* and *Üner* judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case […] In a case like the present one, where the person to be expelled is a young adult who has not yet founded a family life of his own, the relevant criteria are: the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he or she is to be expelled; the time elapsed since the offence was committed and the applicant's conduct during that period; the solidity of social, cultural and family ties with the host country and with the country of destination.[225]

In the case under scrutiny the applicant had entered Austria lawfully at the age of 6. He was expelled after serving a period of slightly less than 3 years' imprisonment. Although underlining the importance attached to the young age at which the applicant committed the offences (between 14 and 15 years old) and to their non-violent nature, the Court looked in detail at all the relevant criteria before concluding that

223. The Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers invite member states, *inter alia*, to guarantee that long-term migrants who were born or raised in the host country cannot be expelled under any circumstances. Whilst the Strasbourg Court rejected the concept of absolute protection, recognising that there is a balance to be struck under Article 8, it emphasised the need for the proper appreciation of the special situation of those who have been in the host country since childhood.

224. *Maslov v. Austria* [GC].

225. The age of the person concerned is not totally irrelevant in the application of the criteria, particularly when assessing the nature and seriousness of the offences, as a more lenient attitude must be adopted in cases of juveniles. See also *Jakupovic v. Austria*.

> the imposition of an exclusion order, even of limited duration, was disproportionate to the legitimate aim pursued, "the prevention of disorder or crime".

Should there be clear evidence of an exemplary conduct of the applicant aimed at rehabilitation and reintegration following a crime committed when under age, the Court would require the state to provide substantive arguments supporting its contention that the applicant can reasonably be expected to cause disorder or to engage in criminal activities, such as to render the deportation necessary in a democratic society.[226]

The cases cited above make it clear that in considering whether the deportation or exclusion order of a criminal offender is compatible with the Convention, due regard will have to be paid to all elements and a fair balance will have to be achieved. The decision, eventually, is very much fact-sensitive. As an example, in *Benhebba* the applicant's claim was dismissed as the Court found that the measure complained of had been proportionate to the aims pursued. Indeed, the applicant was a serious recidivist, who had been sentenced to nearly 7 years' imprisonment over a period of 8 years. Although he had reached France when he was 2, and had lived, worked and received education there, forming most of his social and family ties, having no links with the country of origin other than his nationality, the Court considered that relations between adults were not necessarily covered by Article 8 of the Convention unless there was evidence of additional forms of dependency going beyond normal emotional ties. In spite of the strength of the applicant's ties with the host country, but having regard to the temporary nature of the measure and the seriousness of the offences committed (drug trafficking) the Court concluded that the temporary exclusion order imposed on him could legitimately be regarded as necessary for the prevention of disorder and crime. Similarly, in *Grant,* although the offences committed by the applicant when an adult were not particularly grave, the Court gave significant weight to the fact that the applicant had showed a serious pattern of offending. Conversely, in *Nunez* the Court gave significant precedence to the well-being of the children in finding a violation of Article 8 if the applicant were to be expelled and prohibited from entering the country for two years. There the case was about a Dominican Republic national who had entered Norway at the age of 22. Subsequently expelled, she breached the two-year ban on her re-entry by returning to Norway four months after. In order to gain re-entry, she had intentionally given misleading information about her identity, her previous stay in Norway and earlier convictions, and had thus managed to obtain residence and work permits to which she had not been entitled. She had lived and worked in Norway unlawfully since she had re-entered the country and, therefore, had not been able to reasonably expect to remain lawfully there. In Norway she had a relationship with another Dominican Republic national and had two children. Examining the applicant's children's best interest, the Court

226. *A.A.**

noted that Ms Nunez had been the one who had primarily cared for them since their birth until 2007 when their father had been granted custody. Further, in accordance with the domestic courts' decision, the children would have remained in Norway where they had lived all their life and where their father, a settled immigrant, lived. In addition, the children had certainly suffered as a result of their parents' separation, from having been moved from their mother's home to that of their father, and from the threat of their mother being expelled. It would then be difficult for them to understand the reasons if they were to be separated from their mother. Moreover, although Ms Nunez had admitted to the police that she had entered Norway unlawfully, the authorities had ordered her expulsion almost four years later, which could not be seen as swift and efficient immigration control. In view of the children's long-lasting and strong bond to their mother, the decision granting their custody to their father, the stress they had experienced and the long time it had taken the authorities to decide to expel Ms Nunez and ban her from re-entry into the country, the Court concluded that "in the concrete and exceptional circumstances of her case", if Ms Nunez were expelled and prohibited from entering the country for two years, it would have an excessively negative impact on her children. Such a decision, therefore, would not mirror the fair balance between the public interest in ensuring effective immigration control and Ms Nunez's need to remain in Norway in order to continue to have contact with her children, as imposed by Article 8.

The right of immigrants to reunite with their families

The Convention does not explicitly include the right to family reunification, nor does it require states to respect choice of matrimonial residence, authorise family reunification in their territory, or guarantee to individuals a right to choose the most suitable place to develop family life.[227] In limited circumstances, however, the obligation to ensure certain aspects of family life as mentioned above arises. The positive obligation of states to ensure respect for the rights of migrants to reunite family members will be rather stringent where the applicant can prove that there are insurmountable, objective obstacles preventing the realisation of family life elsewhere. In this context the Court will also take into consideration the reasons for departing one's country of origin or residence without other members of the family: fleeing war and/or seeking asylum have generally proved to be strong arguments.[228] The requirement of demonstrating sufficient independent and lasting income or to provide for the basic costs of subsistence of the family members with whom reunification is sought have not been found unreasonable by the Court under Article 8.[229]

The first family reunification case decided by the Court was that of *Abdulaziz, Cabales and Balkandali*. The application was lodged by three female migrants permanently and lawfully settled in the United Kingdom whose husbands were refused

227. *Gül v. Switzerland*.
228. *Tuquabo-Tekle and others v. the Netherlands*.
229. *Haydarie and others v. the Netherlands* (dec.).

permission to remain with them or join them in the United Kingdom, due to the stricter immigration rules introduced by the Home Office in relation to entry and residence of a husband or male fiancé for the purposes of joining or remaining with his partner resident in the United Kingdom. Previously, any such male applicant would normally have been allowed to settle after a qualifying period. Subsequent to the introduction of the new discipline, however, the authorisation to enter or remain would only normally be granted to spouses of United Kingdom nationals and the wives of male alien migrants permanently settled in the United Kingdom. The Government's main argument before the Court was that, since all three applicants could resettle with their husbands in Portugal, the Philippines and Turkey respectively, they were in fact claiming a right to choose their country of residence. The Court eventually sanctioned the discriminatory practice between male and female spouses enforced by the British Government, but did not find a violation of Article 8 itself. It did not completely rule out, however, that Article 8 may, on a case-by-case basis, impose an obligation upon the state to allow the entry of a non-national for the purposes of family reunification. It seems, therefore, that whether Article 8 enabled an applicant to claim a right to family reunification would depend on the particular circumstances of the case, namely on the difficulties the individuals would face in establishing their family life outside the host country.

In general, it can be said that the Court has always been more willing to protect family rights in relation to expulsion/deportation than in relation to entry. The so called "elsewhere approach" (implying that the family is reasonably expected to pursue family life in another state) was very strictly applied in *Gül*, which concerned a Turkish national residing in Switzerland on humanitarian grounds. The applicants' request for reunification with his two sons to join him in Switzerland was refused, mainly on the grounds that his flat was unsuitable and his means insufficient to provide for his family. The Court considered that by leaving Turkey when one of his sons was only 3 months old the applicant bore personal responsibility for the interruption of the family relationship. The visits he had recently made to him showed that his initial reasons for applying for political asylum in the destination country were no longer valid. In addition, according to the Government, by virtue of a social security convention concluded between Switzerland and Turkey, the applicant could continue to receive his ordinary invalidity pension if he returned to his home place. The relocation of the applicant's wife to Turkey, a country that she had been visiting with her husband, was more problematic, but it was not established that she could not receive the needed medical treatment there. Furthermore, although the applicant and his wife were lawfully resident in Switzerland, they did not hold a permanent right of abode. There were, strictly speaking, no obstacles preventing them from establishing family life in their country of origin, where their minor son had always lived. While acknowledging that the Gül family's situation was very difficult from the human point of view, the Court found that

Switzerland had not interfered in the applicant's family life. There had therefore been no breach of Article 8. In *Ahmut*[230] the Court considered that the decision of a father to leave his child in the country of origin, arranging for him to go to the boarding school there, indicated that the guardian had planned for the child to be fully taken care of there, thus the refusal by the national authorities to grant a residence permit to the minor did not disclose a breach of Article 8. Five years on from *Gül* the Strasbourg Court softened its approach, obliging a Contracting Party to grant family reunion with a family member living in the country of origin. In *Sen* the applicants complained about the rejection of their application for a residence permit for their daughter, who was therefore prevented from joining the remainder of the family (parents and two other children) in the host country. The Court acknowledged that the Dutch authorities had a positive obligation to authorise the girl to live with her parents on their territory: although she was very young when the application was made, and she had spent her whole life in Turkey and had strong links with the linguistic and cultural environment of her country in which she still had relatives, there was a major obstacle to the rest of the family's return to Turkey. The first two applicants had settled as a couple in the Netherlands, where they had been legally resident for many years, and two of their three children had always lived in the Netherlands and went to school there. Therefore, the applicant's interest to reunite the family should have been given precedence *vis-à-vis* the state's competing one in controlling immigration.

When family reunification between adults and children is at stake, the European Court will normally have regard to the age of the children concerned, their situation in their country of origin and the extent to which they are dependent on their parents. In *Tuquabo-Tekle* the Court found that an "insurmountable obstacle" to family life outside the host country existed because the mother seeking family reunification with her child who had been left in the country of origin also had a second child in the country of destination who had been raised there. Considering the difficulties that a resettlement of the whole family in the country of origin would have caused to the second child, the Court found that the reunification in the destination country would have been the most adequate solution to develop a family life.

Should a refugee or a person in need of international protection request family reunification, the Committee of Ministers of the Council of Europe recommends that applications be treated "in a positive, humane and expeditious manner" and that a remedial impartial and independent review mechanism be established.[231] Asylum programmes assigning mandatory residence in one particular region of the country, based on equitable distribution of refugees within the country for economic reasons,

230. *Ahmut v. the Netherlands*.

231. Committee of Ministers' Recommendation R (99) 23.

hindering significantly the maintenance of family links between two refugees, have been considered to be in breach of the right to family life under Article 8.[232]

Conditions for granting residence permits and regularisation of long-term illegal residents: is Article 8 applicable?

The conditions for granting residence permits and the regularisation of long-term illegal immigrants represent the last frontiers that the Court explores when dealing with the practical application of Article 8 to immigrants. The first case in which the Court extended the application of Article 8 in this direction is represented by *Aristimuño Mendizabal.* The applicant was a Spanish national who had been granted refugee status in France in 1976. The status was later revoked following the political changes of her home country. The applicant then continued to receive temporary residence permits, whose duration varied from a few weeks to a year. Over the period of 14 years brought to the attention of the Court, she had totalled 69 renewals. Eventually, she was granted a *carte de séjour*, as an intra-Community worker. The complaint brought to the attention of the Court was not about the breach of family life (her husband, an alleged member of the ETA terrorist group had been extradited to Spain) nor the right to stay in France. Instead, it focused on the conditions for the granting of the residence permit. In the 1980s and 1990s the complaint would have probably been dismissed as inadmissible *ratione materiae*. In 2006, however, the Court took a different position. Although the judgment recalls the *leitmotiv* of the Court in these matters, that is that Article 8 of the Convention

> does not guarantee the persons concerned the right to a particular type of residence permit (indefinite, temporary or other), as long as the solution proposed by the authorities allows for the effective exercise of their right for private and family life,

the complaint was found to be worth examination under the angle of the effects that the precarious and uncertain situation that the applicant sustained for a long period and which had important consequences for her in material and psychological terms (such as precarious and uncertain employment, social and financial difficulties, impossibility of starting a commercial activity). The implications and possible repercussions of this judgment are clear, although the Court did not engage in an extensive analysis of the arguments under the proportionality test, as the case depicted a clear malfunctioning of the French system (the denial of the *carte de séjour* was in violation of Community Law).

The Grand Chamber in *Sisojeva,* however, rejected the claim that the regularisation offered by the Latvian authorities by means of renewable temporary residence permits was insufficient:[233]

232. *Mengesha Kimfe v. Switzerland*.

> Article 8 cannot be construed as guaranteeing, as such, the right to a particular type of residence permit. Where the domestic legislation provides for several different types, the Court must analyse the legal and practical implications of issuing a particular permit. If it allows the holder to reside within the territory of the host country and to exercise freely there the right to respect for his or her private and family life, the granting of such a permit represents in principle a sufficient measure to meet the requirements of that provision. In such cases, the Court is not empowered to rule on whether the individual concerned should be granted one particular legal status rather than another, that choice being a matter for the domestic authorities alone.

The potential of Article 8 in securing long-term illegal residents the right to regularise their position was highlighted in *Rodrigues da Silva and Hoogkamer*. The case concerned a typical situation of illegal immigration: the first applicant entered the country with a tourist visa, which she overstayed. She was then joined by her son. Following a relationship with a Dutch national, a girl (the second applicant) was born. The daughter, recognised by the father, acquired Dutch citizenship. Following the deterioration of the relationship, the father was granted child custody, on the basis of an expert report which stated that it would be a traumatic experience for the child to be uprooted from the Netherlands and separated from her father and paternal grandparents. The applicant, in fact, had negligently omitted to regularise her position whilst in the relationship and all further attempts to obtain a residence permit had been rejected on the grounds that the applicant, who was working illegally, did not pay taxes or social security contributions. National courts considered that the interests of the economic well-being of the country outweighed the applicant's right to reside in the Netherlands. Despite being ordered to leave, the first applicant had continued to reside and work in the Netherlands, jointly caring for her daughter, in alternation with the father's parents. She applied to the Court in Strasbourg claiming that the refusal to grant her a residence permit could, among other things, lead to a separation from her daughter, thus breaching Article 8. The Court noted that the factual care of the baby by the mother could be sufficient for granting the situation a protection under Article 8, the concept of family life being of substance rather than form (custody of the child). As for the merits of the case, the Court found that the applicant's expulsion would have far-reaching consequences on her family life with her young daughter (who was 3 at that time) and that it was clearly in the child's best interests for her mother to stay in the Netherlands. The Court therefore considered that the economic well-being of the country did not outweigh the applicants' rights under Article 8, despite the fact that the first applicant was residing illegally in the Netherlands when her daughter was born. In its reasoning the Court identified some

233. The applicants claimed that they were entitled to unconditional residence rights under the Russo-Latvian Treaty on troop withdrawal.

general standards for family reunification, similar to the "Boultif criteria" developed with respect to the expulsion and deportation of foreigners. The standards include the consideration

> whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious.

If this is the case, then

> it is likely only to be in in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8.

Whilst reiterating that anyone who

> without complying with the regulations in force, confronts the authorities of a Contracting State with his or her presence in the country as a fait accompli [... has] no entitlement to expect that a right of residence will be conferred upon them

the Court recognised some leeway. In balancing the different interests at stake, the Strasbourg judges noted, in particular, that the child had been raised jointly by her mother and her paternal grandparents and had very close ties with them. Her mother's expulsion, therefore, would make it impossible for her to maintain regular contact, which was a serious problem. The far-reaching consequences on the applicant's family life were weighed carefully by the Court, which unanimously decided that it corresponded clearly to the child's interest that her mother remain in the Netherlands, clearly outweighing the reasons considered pre-eminent by the national bodies.

Interplay between Article 8 and the Hague Convention on the Civil Aspects of International Child Abduction

The unilateral removal of children across borders, usually by one of the parents, as well as their retention across international borders, is an aspect of globalisation that has been cause of growing concern and that has been increasingly brought to the attention of the Court. As most of the Council of Europe states are also parties to the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the Hague Convention), the Court has been asked more and more often to rule on the compatibility with the Convention of actions and/or inactions put in place in compliance with the Hague obligations. The Hague Convention contains mainly procedural provisions and it is not meant to provide substantive regulation to custody. Its main purpose is to combat the illicit transfer and non-return of children abroad, securing a prompt return of those who have been illegally retained or wrongly removed, re-establishing the status quo, and ensuring that in all States Parties to the Hague Convention rights of custody and access receive full implementation. By preventing forum shopping, the Hague Convention also serves as a deterrent for parents. Although the Strasbourg organs have no juris-

diction over the Hague Convention, the truth is that the Convention's machinery is in a position to state whether internal decisions adopted pursuant to the Hague Convention are also compliant with the European Convention on Human Rights. In most cases the complaints are about compliance with Article 8 of the domestic decisions and steps taken following the abduction of a child by one parent. The lack of consensus at European level concerning childcare and the legitimacy of interferences have lead to recognition of the wide margin of appreciation that states normally enjoy when dealing with such cases. The margin of manoeuvre, however, is at variance with the seriousness of the situation and the interests at stake: it seems that the margin of appreciation is greater in circumstances related to need to place a child in public care and smaller when the issues are the right of access or other legal safeguards needed to preserve the right to family life.

From 1980 until its dismantlement the Commission examined only six cases involving the Hague Convention. The limited number of cases decided by the Commission did not allow for a trend to be identified. What emerges from the case-law of that period is that the Commission gave a rather extensive interpretation of the margin of appreciation, thus never finding a breach of the Convention. In contrast, the full-time Court's numerous findings of violations have contributed to the creation of a dynamic case-law related to the 1980 Hague Convention, mainly related to the enforcement of return orders, custody and access rights. Following the *Ignaccolo-Zenide* case, in which the Court clarified that Article 8 of the Convention must be interpreted in the light of the 1980 Hague Convention (provided that the state concerned had ratified the latter[234]), in *Bianchi* the Court concluded for a breach of Article 8 by Switzerland due to its failure to take adequate measures to give effects to the aims and objectives of the 1980 Hague Convention after the abduction of a minor by his mother, thus preventing the reunion of the minor with his father. In *Monory* the Court went so far as to intervene in the domestic application of the Hague Convention, sanctioning its misuse by the domestic authorities under Article 8 of the Convention. The centrality recognised to the Hague Convention by the Court is such that the latter will be guided by it even when the Hague Convention was never invoked at domestic level.[235]

In recent times the Court has had many opportunities to stress the positive obligations stemming from Article 8 in both child abductions and transfrontier contact cases. It found violations where states failed to take all necessary steps to facilitate the execution of Hague Convention return orders or for not having acted expeditiously to enforce a return order. Conversely, parents' challenges that enforcement measures, including coercive steps, have interfered with their rights to a family life have been dismissed to give priority to safeguarding the best interest of the child, which is a principle firmly established in the Stras-

234. *Bajrami v. Albania.*
235. *Iglesias Gil and A.U.I v. Spain.*

bourg case-law.[236] The Court's examination concentrates on the aspect of the procedure that can be scrutinised *a posteriori*, such as the diligence of the authorities, the opportunities accorded to the persons concerned to defend their interests, procedural fairness, the giving of sufficient and adequate reasons for interfering with respect for family life. Only in rare cases has the Court directly criticised the actual decision on the merits as adopted by the national authorities.[237]

The leading authority in this respect is represented by the recent Grand Chamber judgment in *Neulinger and Shuruk,* where the Court gave a very detailed and comprehensive definition of the best interest principle. The case was brought by a mother and her young son, who was born in Israel and who had been unlawfully removed by the mother at the age of 2. After their return to Switzerland, the father had sought the child's return but the mother argued that she herself could not return to Israel, since she would run the risk of prosecution and conviction for abduction. So if the boy were to be returned, it would be alone. As he had not seen his father for two years, and the father's behaviour was, to say the least, problematic, this would be contrary to the best interests of the child. Eventually the Federal Court, overturning previous decisions, ordered the return within nine days. In deciding, the Federal Court considered that the exceptions to the return provided for in the Hague Convention were to be interpreted restrictively, and that the mother had not discharged her burden of proof, not having substantiated her claims about prosecution and of having no means of support in Israel. In January 2009 a Chamber of the Court gave judgment, finding, by a majority of 4 to 3, that there had been no violation of Article 8. In July 2010 the Grand Chamber, to which the case was referred for re-hearing, overturned the Chamber's conclusion. The Grand Chamber did directly review the facts of the case, and did, effectively, prevent the return of the boy to Israel. Time was the crucial factor in this case. Similarly to when it deals with deportation orders, the Court adopted a contemporaneous perspective, considering the applicants' situations and interests at the time of its judgment, which came nearly 3 years after the Federal Court ruling and 5 years after the illegal removal of the boy.

The Court has, in effect, incorporated the speed and diligence requirements spelled out in the Hague Convention into its Article 8 case-law, aware of the negative and often irremediable significance that the passage of time takes on in child abduction situations.[238] In *Neulinger and Shuruk*, however, there was no suggestion of a lack of diligence on the part of the Swiss, or Israeli, authorities. In fact, most of the waiting time was when

236. *Hokkanen v. Finland*; *Pini and Bertani and Manera and Atripaldi v. Romania*; *Voleski v. the Czech Republic*; *Bove*, where the finding of a violation was grounded either on shortcomings in the domestic law or on failure by the domestic authorities to use the machinery of the Hague Convention of 25 October 1980.

237. *Haase v. Germany.*

238. *Sylvester v. Austria*. In *Maire v. Portugal*, the Court went as far as to identify in six weeks the time limit beyond which a failure to act may give rise to a request for a statement of reasons for the delay.

the case was being considered by the Chamber and Grand Chamber in Strasbourg. The Court, evidently, considered that it would have been unfair to make the applicants bear the consequences of this, as the situation was not really of their making. With the best interests of the child uppermost in its mind, the Grand Chamber considered the boy's current situation and the consequences that his return would cause. On the other side of the scale, the benefits to the child of being returned without his mother to a rather uncertain family situation in Israel were scant. By a majority of 16 to 1, the Grand Chamber held that the return of the child to Israel would not be in his best interests, thus in the event of enforcement of the Federal Court's judgment, there would be a violation of Article 8 of the Convention. The Court also emphasised how, in such cases, the domestic courts must conduct an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin. In line with *Neulinger and Shuruk*, the Court found no violation in *Raban,*[239] considering that the domestic court had taken the correct decision in carefully weighing the children's successful integration into their new surroundings in their mother's country.

239. The applicant's request of referral to the Grand Chamber, unusually supported by two states (Germany and the United Kingdom, which considered that the case bore important implications in terms of positive obligations possibly inconsistent with the Hague Convention) was rejected.

Index of cases

Cases are cited with the date of the judgment or, where appropriate, the decision (dec.). Where both decision and judgment are referred to in the text, each date appears in the index entry. Cases not final at the time of writing are marked with an asterisk.

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C

D

N

O

P, Q, R

S

T, U, V

W, X, Y, Z

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