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COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law

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TABLE OF CONTENTS

ARTICLE 2

Life
Positive obligations

Accidental death of civilian through explosion of anti-personnel mine: *communicated*

Avcı v. Turkey and Greece - 45067/05
[Section II]

The applicants, who are Turkish nationals, are the mother, brother and sisters of the victim, who was killed on Greek territory close to the Turkish border in 2004 when an anti-personnel mine exploded. In 2005 the applicants applied for compensation, first to the Greek and then to the Turkish Ministry of the Interior. They received no response.

This application is one of a series of six cases against Turkey (and against Greece in the instant case) concerning the accidental exposure of civilians to anti-personnel mines and other explosive devices, resulting in death and mutilation (see also applications nos. 16197/06, 20349/08, 58255/08, 29725/09 and 48888/09).

Communicated to the Turkish Government (under the substantive and procedural aspects of Article 2) and the Greek Government (under the substantive and procedural aspects of Article 2 and under Article 13).

ARTICLE 3

Degrading treatment

Failure to provide detainee with defective eyesight with glasses: *violation*

Slyusarev v. Russia - 60333/00
Judgment 20.4.2010 [Section III]

Facts – The applicant was arrested in July 1998 on suspicion of armed robbery. At some point during the arrest, his glasses were damaged. They were subsequently confiscated by the police. According to the applicant, although both he and his wife made several requests for their return, he did not recover his glasses until December 1998. In the interim, following an order by the competent prosecutor, he had been examined by an ophthalmologist in September 1998, who had concluded that his eyesight had deteriorated and prescribed new glasses, which the applicant received in January 1999.

Law – Article 3: The applicant suffered from medium-severity myopia. Accordingly, being without his glasses for several months must have caused him considerable distress in his everyday life and given rise to feelings of insecurity and helplessness. Although the Government had maintained that it had not been until early December 1998 that the applicant had requested the return of his glasses, the investigative authorities seemed to have been aware of the applicant's eyesight problems well before then, since they had given instructions in September for him to be examined by an ophthalmologist. The applicant's wife had also requested the return of his old glasses. Notwithstanding their awareness of his problems with his eyesight, it had taken the authorities two and a half months to return the glasses. Nor had the Government explained why, after the ophthalmologist had prescribed new glasses, it had taken another two and a half months to provide him with a pair. In conclusion, the treatment complained of had to a large extent been attributable to the authorities and, given the degree of suffering it had caused and its duration, had been degrading.

Conclusion: violation (unanimously).

Article 41: No claim made in respect of damage.

Extradition

Proposed extradition of convicted mercenary to Colombia: *extradition would constitute violation*

Klein v. Russia - 24268/08
Judgment 1.4.2010 [Section I]

Facts – In 2001 the applicant was convicted by a Colombian criminal court of teaching military and terrorist tactics and given a lengthy prison sentence. In 2007 he was arrested in Russia. Colombia requested his extradition. A Russian newspaper then published an article in which the Colombian Vice-President was reported as saying that "it should be ensured that [the applicant] rot in jail". Following assurances from the Colombian Government that the applicant would not be given the death penalty or ill-treated and would be indicted only in respect of the acts mentioned in the extradition request, the Prosecutor General of Russia ordered his extradition to Colombia. The applicant's appeals to the Russian courts were dismissed, *inter alia*, on the basis of the diplomatic assurances given by the Colombian Government and the fact that the Colombian judiciary was independent of the executive. The applicant's

extradition was, however, stayed pending the outcome of the proceedings before the European Court.

Law – Article 3: Reports from reliable sources indicated that the overall human-rights situation in Colombia was far from perfect. In particular, the UN High Commissioner for Human Rights and the United States Department of State had noted many recent instances of suspected human-right violations by State representatives, including extrajudicial killings, forced disappearances and arbitrary detentions. The UN Committee against Torture had also expressed concerns that people suspected of terrorism and illegal armed activities risked torture in Colombia. As to the applicant's personal situation, the Colombian Vice-President's statement that the applicant should "rot in jail" could be regarded as an indication that the applicant ran a serious risk of ill-treatment if extradited there. In addition, the Colombian Government's assurances had been rather vague and were insufficient to ensure adequate protection against the risk of ill-treatment. Lastly, the Russian courts had limited their assessment of the situation to a mere observation that, as the Colombian judiciary were independent of the executive, they would not be affected by the Vice-President's statement. In so doing, they had not duly addressed the applicant's concerns.

Conclusion: Extradition would constitute a violation (five votes to two).

Article 41: Finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage.

ARTICLE 5

Article 5 § 1 (e)

Persons of unsound mind

Fourteen days' confinement in psychiatric hospital to enable psychiatric reports to be prepared in connection with malicious-prosecution charge: *violation*

C.B. v. Romania - 21207/03
Judgment 20.4.2010 [Section III]

Facts – On 4 September 2002 at 6.30 a.m. police officers entered the applicant's home by force and arrested him. They were acting on an order issued by the public prosecutor's office the previous day in the context of proceedings against the applicant for malicious prosecution, according to which he was to be compulsorily detained for an expert psychiatric assessment. The applicant was detained for 14 days on the maximum-security ward of a psychiatric hospital. On an unspecified date he lodged a complaint against his compulsory detention. On 24 April 2003 the public prosecutor's office returned the complaint to him. The applicant was eventually acquitted of the charges against him in November 2004.

Law – Article 5 § 1 (e): The way in which the compulsory detention order had been executed had clearly been disproportionate; the Court noted that the applicant had been detained by force. The public prosecutor's order stating the need to detain the applicant had been based on the investigators' doubts as to his state of mental health and on a medical certificate produced by a general practitioner who had never seen or examined the applicant and had recorded a diagnosis of schizophrenia which had no foundation in reality. As the applicant did not have a history of psychiatric problems, it was essential for any compulsory detention order to be preceded by a psychiatrist's assessment. Furthermore, in the absence of any violent behaviour on his part or any evidence of a risk to himself or others, his detention had quite clearly not been justified on urgent grounds. In addition, there had been nothing in the referral letter from the forensic medical department to indicate that the applicant had displayed the slightest symptoms of mental illness or was dangerous. The criminal proceedings against him had been for malicious prosecution rather than for any offence sufficiently serious to suggest that he presented some kind of danger. While it was true that the applicant's detention had been aimed precisely at obtaining a medical opinion in order to assess whether he possessed the necessary discernment to be held criminally responsible, and that he had been taken to a psychiatric clinic where he was seen by doctors, there was no indication that the doctors who admitted him to the psychiatric hospital had been asked whether it was necessary to compulsorily detain him for a forensic medical examination. These considerations were all the more valid since the report of the medical commission, issued after the applicant had been detained for two weeks, concluded that he had no psychiatric problems. In addition, the Government had not offered any explanation as to why other less severe measures had not been considered or, if they had, why they had been deemed insufficient to safeguard the

personal or public interest requiring the applicant to be detained. There was nothing in the case file, either, to indicate that the applicant would have refused to undergo a psychiatric assessment of his own free will or that the medical experts had attempted to establish on the basis of the file whether the applicant was of unsound mind. Accordingly, his detention for a fourteen-day period had not been warranted and was incompatible with Article 5 § 1 (e).

Conclusion: violation (unanimously).

Article 5 § 4: The applicant's complaint concerning his detention had been returned to him by the public prosecutor's office at the first-instance court, on the ground that he had already been committed for trial and would be able to assert his rights before the court. Accordingly, his compulsory detention with a view to a psychiatric assessment, provided for by the Code of Criminal Procedure, had not been the subject of any review by the courts as to its necessity.

Conclusion: violation (unanimously).

Article 41: EUR 20,000 in respect of pecuniary and non-pecuniary damage.

ARTICLE 6

Article 6 § 1 (criminal)

Applicability

Transfer of a sentenced foreigner to his native country, under the Convention on the Transfer of Sentenced Persons, following assurances by the public prosecutor: *Article 6 applicable*

Buijen v. Germany - 27804/05
Judgment 1.4.2010 [Section V]

Facts – In 2001 the applicant, a Dutch national, was arrested in Germany on suspicion of trafficking in and importing narcotic substances. He was subsequently remanded in custody. Following negotiations with the applicant's legal representatives, the public prosecutor gave the applicant an assurance that, if he confessed to the alleged crimes, the prosecution service would institute proceedings under Article 11 of the Council of Europe Convention on the Transfer of Sentenced Persons ("the Transfer Convention") and would refrain from requesting a sentence exceeding eight years' imprisonment. In 2002, relying on this assurance, the applicant confessed in writing to the crimes specified in the arrest warrant and was convicted as charged. As he had waived his right to appeal, the judgment became final on the same day. Subsequently, the head of the prosecution service refused to endorse a transfer under Article 11 of the Transfer Convention and suggested a transfer under Article 10 instead, in accordance with the State practice in relation to the Netherlands. When invited to comment, the public prosecutor who had given the assurance to the applicant stated that he had not known the difference between Articles 10 and 11[1] of the Transfer Convention and had only expected the applicant to be allowed to serve his sentence in his home country. Accordingly, the head of the prosecution service concluded that the applicant could not claim that he had been promised a transfer under Article 11 with binding effect. The applicant unsuccessfully applied to a court of appeal and the Federal Constitutional Court. In 2003 he was handed over to the Dutch authorities under Article 10 of the Transfer Convention and served the remainder of his sentence in a Dutch prison.

Law – Article 6 § 1

(a) *Applicability*: From a technical point of view, the applicant's conviction had become final in 2002 when he had waived his right to appeal. However, under the particular circumstances of this case it had to be taken into account that the proceedings relating to the applicant's transfer request had been very closely related to the criminal proceedings and to the final determination of the sentence. Although the German court had imposed a criminal sentence, this was not to be considered as final having regard to the possibility of converting the sentence following a transfer to the applicant's home country. It would therefore be too formalistic to limit the scope of application of Article 6 under its criminal head to the proceedings which took place before the delivery of the judgment in 2002. The Court was aware of the fact that the decision taken by the Ministry of Justice on the transfer request did not solely depend on the public prosecutor's recommendations and on considerations regarding the execution of sentence, but also on considerations of foreign policy which fell within

1. Articles 10 and 11 provide for different means of serving the sentence in the State to which the sentenced person is transferred. Under Article 10 the sentenced person will continue to serve the sentence determined by the sentencing State. Under Article 11 he will serve a sentence converted under the procedures applying in the State to which he has been transferred.

the core area of public law. It was therefore acceptable for this part of the decision not to be subject to judicial review. Accordingly, the Court had previously held that Article 6 § 1 was not applicable to proceedings under the Transfer Convention. However, in the cases concerned the Transfer Convention had not prospectively influenced the course of the trial and the fixing of the sentence, because no assurance had been given by the public prosecutor before or during the criminal proceedings. It followed that Article 6 § 1 under its criminal head was, under the specific circumstances of the present case, applicable to the proceedings concerning the applicant's transfer request in so far as they related to the assurance given by the public prosecutor during the criminal proceedings.

(b) *Access to court*: The German courts had not reviewed the substance of the applicant's complaint about the refusal to institute transfer proceedings under Article 11 of the Transfer Convention. The applicant's complaint primarily fell to be examined in the light of his right of access to court. There was a dispute between the parties as to whether the applicant had had at his disposal an effective remedy which would have allowed him to challenge the refusal to initiate transfer proceedings under Article 11 of the Transfer Convention. The Government had not indicated precisely which remedy they considered to be available. Neither the Government nor the Federal Constitutional Court had cited any case-law in this respect. In the decision given on the applicant's complaint the Federal Constitutional Court had acknowledged that the possibility to appeal against the decision of the Ministry of Justice had been in dispute. Moreover, the applicant had lodged a request for review with the court of appeal which had been declared inadmissible. Consequently, in the particular circumstances of the present case, it had not been shown that there had been a possibility of bringing an action for review of the refusal to institute transfer proceedings in accordance with the relevant assurance. The applicant had therefore been denied access to a court with regard to the part of the decision on his transfer request which did not concern considerations of public policy.

Conclusion: violation (unanimously).

Article 41: EUR 5,000 in respect of non-pecuniary damage.

(See also *Smith v. Germany*, no. 27801/05, 1 April 2010)

Access to court

Inability to challenge decision to transfer a sentenced foreigner to his native country in so far as it related to an assurance given by the public prosecutor: *violation*

Buijen v. Germany - 27804/05
Judgment 1.4.2010 [Section V]

(See above, page 9)

Fair hearing

Conviction on basis of unfairly conducted identification parade: *violation*

Laska and Lika v. Albania
- 12315/04 and 17605/04
Judgment 20.4.2010 [Section IV]

Facts – The applicants were convicted, *inter alia*, of armed robbery after being picked out in an identification parade at which they had been forced to wear blue and white balaclavas, similar to those used in the robbery, while the other two participants in the parade had worn black balaclavas. The applicants' lawyer had not been present either during questioning or at the identification parade.

Law – Article 6 § 1: The applicants had been found guilty essentially on the strength of eyewitness submissions obtained during the identification parade. As the applicants had been made to wear blue and white balaclavas, similar to those worn by the robbers and in stark contrast to the black balaclavas worn by the other persons in the line, the identification parade had amounted to an open invitation to the witnesses to pick out the applicants. Even though the trial court had accepted that there had been irregularities at the investigation stage, in convicting the applicants it had relied on their positive identification at the identification parade. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during the investigation. There had been no independent oversight of the fairness of the procedure or opportunity for the applicants to protest against the blatant irregularities. The manifest disregard of the rights of the defence at the investigation stage had seriously undermined the fairness of the trial.

Conclusion: violation (unanimously).

Article 46: A retrial or the reopening of the case, if requested by the applicants, would be the most appropriate form of redress. However, since the Albanian criminal-justice system did not allow cases to be re-examined in the event of a finding by the European Court of a serious violation of an applicant's right to a fair trial, the Court ruled that the Albanian authorities should introduce a new remedy affording redress or remove any obstacles to redress in the domestic legal system. The member States' duty to organise their judicial systems in a way that enabled their courts to meet the requirements of the Convention applied also to the reopening of the applicants' case.

Article 41: EUR 4,800 to each applicant in respect of non-pecuniary damage.

Independent and impartial tribunal

Order for continued pre-trial detention based on preconceived idea of defendant's guilt: *violation*

Chesne v. France - 29808/06
Judgment 22.4.2010 [Section V]

Facts – The applicant was placed under investigation for a drugs-related offence committed as a repeat offender and was remanded in custody. He appealed against his pre-trial detention to the investigation division of the Court of Appeal, made up of three judges. In April 2003 the investigation division ruled that a court supervision measure would be ineffective and upheld the detention order. While acknowledging that the investigation revealed some inconsistencies at that stage, the judges found that the applicant had "acted very much as a professional drug trafficker, making a substantial profit in the process" and was considered as "one of the main traffickers". In June 2004 the criminal court found the applicant guilty of unauthorised purchase of drugs as a repeat offender and sentenced him to thirteen years' imprisonment. After lodging an appeal the applicant's lawyers learned that the bench of the court of appeal that would hear the case would include a judge who had been on the bench which had adopted the above-mentioned judgment in April 2003 and another judge who in July 2003 had ruled on the continuing pre-trial detention of the applicant's girlfriend and had described her as the "live-in partner of one of the main traffickers, who took over from him when he was absent". The lawyers requested the withdrawal of the judges concerned, but their request was refused. In December 2004 the Criminal Appeals Division upheld the first-instance judgment but reduced the sentence to ten years' imprisonment. In November 2005 the Court of Cassation dismissed an appeal on points of law by the applicant.

Law – Article 6 § 1: The reasons given by the investigation division of the Court of Appeal in the impugned judgments of April and July 2003 amounted to a preconceived idea of the applicant's guilt. While the investigation division could not be criticised for taking note of the fact, emphasised in the investigation file, that the only trafficking admitted by the applicant appeared to have been "on a very significant scale", by referring in clear and unequivocal terms to the precise role of the applicant, his place in the criminal network and the extent of his implication in the trafficking, the judges had nevertheless gone beyond simply describing a "state of suspicion" in his regard. By adopting such reasoning, and in particular by drawing firm conclusions from the apparent inconsistencies referred to in the judgment of April 2003 between the applicant's statements and certain items of physical evidence gathered during the investigation, the investigation division had not confined itself to a summary assessment of the acts of which the applicant stood accused in order to justify the need for his continuing detention, but instead had commented on the existence of evidence that the applicant was guilty. Accordingly, the Court was unable to conclude that the impugned decisions did not contain any reasons or assessment pertaining to the applicant's guilt. The objective impartiality of the two judges of the Criminal Appeals Division who had been members of the investigation division of the Court of Appeal which rendered the impugned judgments could therefore appear to be open to doubt.

Conclusion: violation (unanimously).

Article 41: Finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage.

Criminal trial in defamation case presided over by same judge as had sat in prior civil proceedings: *violation*

Fatullayev v. Azerbaijan - 40984/07
Judgment 22.4.2010 [Section I]

(See Article 10 below, page 15)

Article 6 § 2

Presumption of innocence

Statement by Prosecutor General prior to formal charges being brought indicating that a material element of suspected offence had been made out: *violation*

Fatullayev v. Azerbaijan - 40984/07
Judgment 22.4.2010 [Section I]

(See Article 10 below, page 15)

ARTICLE 8

Family life

Custody order effectively preventing siblings spending time together: *violation*

Mustafa and Armağan Akın v. Turkey - 4694/03
Judgment 6.4.2010 [Section II]

Facts – Following divorce proceedings, the first applicant was awarded custody of the couple's son (the second applicant) and his wife custody of their daughter. Under the terms of the court order, the parents were to exchange the children during school holidays and certain religious festivities. The first applicant appealed against that decision requesting that the children be allowed to spend some time together with one of the parents, but his request was refused.

Law – Article 8: The decision of the domestic courts interfered with the applicants' right to respect for their family life, in that the second applicant was never able to spend time with his sister and the first applicant was unable to enjoy the company of both his children at the same time. It was therefore necessary to examine whether the respondent State had complied with its positive obligations and whether the authorities had acted with a view to maintaining and developing the applicants' family ties. The Court was struck by the lack of reasoning justifying the separation of the children, in particular since neither parent had requested such an arrangement. Further, it could not accept the argument that, since they lived in the same neighbourhood, the children were able to see each other, because maintaining family ties between them was too important to be left to the discretion of their parents. The domestic courts had concluded that regular contact between the applicants and their daughter and sister would amount to an unacceptable change of environment for the latter. However, it was unclear how the siblings spending time together on weekends could have had such an impact, especially as they lived in the same area. Finally, the domestic courts had not sought the opinion of the children or based their decision on any psychological or other expert assessment. In conclusion, they had failed to have due regard to the best interests of the family.

Conclusion: violation (unanimously).

Article 41: EUR 15,000 jointly in respect of non-pecuniary damage.

Failure to ensure father's right of contact during proceedings for return of son who had been taken abroad by the mother: *violation*

Macready v. the Czech Republic
- 4824/06 and 15512/08
Judgment 22.4.2010 [Section V]

Facts – The applicant, an American national, lived in the United States with his wife and their son, who was born in December 2002. In May 2004, following a divorce petition filed by the applicant, an interim joint guardianship order was put in place. However, the mother took the child to the Czech Republic without the applicant's consent. In June 2004 she was awarded custody of the child by a decision of a Czech court that had not been informed of the boy's illegal removal. The applicant brought proceedings in the Czech Republic in October 2004 and the child's return to the United States was ordered in April 2005. Following an appeal by the mother, the court ordered an expert report. In reliance on the expert's conclusions, it overturned the judgment of the first-instance court in June 2006 on the ground that the child's return to the United States might cause him irreparable harm that risked causing a deterioration in his mental health. Appeals by the applicant were dismissed in February and September 2007. Lastly, from October 2004 onwards the applicant made a series of requests for interim measures allowing him to meet with his son during his visits to the Czech Republic. Although the mother appealed against most of the decisions, some meetings between father and son were organised up until January 2006.

Law – Article 8: The bond between the applicant and his son came within the scope of family life

within the meaning of Article 8. Furthermore, the Hague Convention on the Civil Aspects of International Child Abduction – with whose underlying philosophy the Court was in full agreement – applied to the mother's removal of the child to the Czech Republic in May 2004. In the present case more than twenty months had elapsed before the lower courts adopted the decision finally determining the question of the child's return to the United States. A period of that length had made it practically impossible to re-establish the previous position. The child would have had to be taken back to an environment from which he had been removed at the age of eighteen months and which was now no longer familiar to him. This would have been a particularly difficult experience in his case because he had been diagnosed as autistic and thus requiring stability and minimum change to his routine. Moreover, the Czech courts had had to wait for the outcome of the proceedings concerning the child's return before ruling on the question of parental responsibility. Throughout that entire period, therefore, the only means by which the applicant had been able to exercise his parental rights had been by virtue of interim measures granting him a right of contact during his visits to the Czech Republic. Those visits could only be occasional because he lived and worked in the United States. In that connection the Court was forced to the conclusion that although the courts had been informed, admittedly *ex post facto*, of the difficulties encountered by the applicant during his visits, they had not taken any appropriate measure of their own initiative to create the necessary conditions for the future to ensure that the applicant could exercise his right of contact. In the context of the case the domestic courts could have envisaged taking coercive measures against the mother or requested the assistance of social services or child psychiatrists or psychologists to facilitate contact. Those considerations sufficed to conclude that respect for the applicant's family life had not been effectively protected.

Conclusion: violation (unanimously).

Article 41: EUR 15,000 in respect of non-pecuniary damage.

Family life
Positive obligations

Failure to examine request for adoption by foster parents before declaring child free for adoption: *violation*

Moretti and Benedetti v. Italy - 16318/07
Judgment 27.4.2010 [Section II]

Facts – The first and second applicants are a married couple. In June 2004 a one-month old baby girl, who had been abandoned by her birth mother shortly after her birth, was temporarily placed with the applicants. In December 2005 she was given to a new adoptive family chosen by the court. In January 2006 a request for a special adoption order, which had been lodged by the applicants in respect of the child in March 2005, was examined and dismissed by the children's court. Subsequently the court of appeal set that decision aside. However, it went on to find, basing its decision on an expert report, that a further separation would be detrimental to the child. The adoption became final.

Law – Article 8: a) *Admissibility* – The respondent Government raised three preliminary objections. They submitted, firstly, that the applicants did not have standing to represent the child before the Court; secondly, that the applicants had not exhausted domestic remedies because they could have appealed on points of law to the Court of Cassation; and, thirdly, that the applicants could not rely on the existence of "family life" requiring protection in the present case.

(i) *Regarding the part of the application submitted on behalf of the child*: Whilst pains should be taken to avoid a restrictive or purely technical approach regarding the representation of children before the Court, in the present case the applicants did not exercise parental responsibility over the child, were not her guardians and had no biological tie with her; nor had any power of attorney been signed to allow them to represent her interests. Moreover, in the domestic proceedings the child had been represented by a guardian. In the circumstances the applicants did not have standing before the Court to represent the child.

Conclusion: preliminary objection upheld (unanimously).

(ii) *Regarding the non-exhaustion of domestic remedies*: A possible appeal on points of law would not have had the effect of remedying the applicants' complaints. As the grounds of appeal submitted by the applicants would have mainly concerned the merits of the case the Court of Cassation would have declared the appeal inadmissible.

Conclusion: preliminary objection dismissed (unanimously).

(iii) *Regarding the existence of a bond constituting family life*: The applicants had taken the baby girl

in when she was one month old and had shared the first important stages of her youth for nineteen months. During that period the child had lived with a sister and brother. The expert reports had shown that she was well integrated into the family and deeply attached to the applicants and their children. Furthermore, the applicants had fostered the girl's social development by, among other things, enrolling her in a crèche and taking her on holiday. Those factors were sufficient to find that there had been a close inter-personal bond between the applicants and the child and that the applicants had behaved in every respect like the girl's parents, so that family ties had existed *de facto* between them. At all events, although the applicants had previously, on a temporary basis, taken in children who had then been adopted by other families, in this case they had lodged a request to adopt the child, which was further evidence of the strength of the bond that had been established. Accordingly, the relationship between the applicants and the child fell within the notion of family life within the meaning of Article 8.

Conclusion: preliminary objection dismissed (majority).

(b) *Merits* – The interests with which the Court was confronted in the present case, which concerned an adoption procedure, were not easily reconcilable. On the one hand there were those of the child and on the other those of the two families concerned. In attempting to achieve a balance between those various interests, the child's best interests must be a primary consideration. The question arose as to whether the proceedings that had resulted in the interference had guaranteed the applicants protection of their interests. It had been of primary importance here that the request for a special adoption order lodged by the applicants be examined carefully and speedily. The children's court had not provided any reasons for dismissing the request in question and, moreover, had not examined it before declaring the child free for adoption and choosing the new family. The court of appeal had failed to remedy that shortcoming. After ordering an expert report, it had considered that the young girl appeared to be well integrated into her new family and that a further separation, which might traumatise her, was inappropriate. The passage of time had also had the effect of rendering the decision of the children's court final. It was regrettable that the court had not examined the adoption request lodged by the applicants before declaring the child free for adoption, and that the request had been dismissed with no reasons being stated. It was not for the Court to substitute its own reasoning for that of the national courts, which had acted in good faith regarding the measures taken to ensure the child's well-being. However, the failure to comply with the law and rules of procedure had had a direct effect on the applicants' right to family life. The shortcomings observed in the conduct of the proceedings had resulted in an infringement of the positive obligation to ensure effective respect for the applicants' right to their family life.

Conclusion: violation (six votes to one).

Article 41: EUR 10,000 jointly in respect of non-pecuniary damage.

Positive obligations

Inability to change registration of ethnic origin in official records: *violation*

Ciubotaru v. Moldova - 27138/04
Judgment 27.4.2010 [Section IV]

Facts – During the period when the Moldovan territory formed part of the Soviet Union, the Soviet authorities recorded people's ethnic origin in their identity papers. Most representatives of the main ethnic group of the Moldovan Republic were registered as Moldovans. In 2002 the applicant wrote to the local civil-registration authority requesting that his ethnicity entry be changed from Moldovan to Romanian. In reply, he was informed that this was impossible since neither of his parents had been recorded as ethnic Romanians in their birth or marriage certificates. He was advised to search the National Archives for traces of Romanian origin among his grandparents and other ancestors. The applicant then initiated proceedings against the State, but his claim was dismissed on the grounds that he had failed to prove that his parents had been of Romanian ethnic origin.

Law – Article 8: Being aware of the highly sensitive nature of the applicant's case, the Court considered it acceptable for States to require objective evidence when registering an individual's ethnic identity. When such a claim was based on purely subjective and unsubstantiated grounds, it was open to the authorities to refuse it. However, the applicant's claim had been based on more than the subjective perception of his own ethnicity; he had been able to provide objectively verifiable links with the Romanian ethnic group such as language, name, empathy and others. However, under domestic law, the applicant was required to provide evidence that his parents had belonged to the Romanian ethnic

group. Given the historical realities of Moldova, such a requirement had created an insurmountable barrier to registering an ethnic identity other than the one recorded in respect of his parents by the Soviet authorities. In preventing the applicant from having his claim examined in the light of objectively verifiable evidence, the State had failed to comply with its positive obligation to secure to the applicant effective respect for his private life.

Conclusion: violation (unanimously).

Article 41: EUR 1,500 in respect of non-pecuniary damage.

ARTICLE 10

Freedom of expression

Conviction of magazine editors for publishing information on female friend of a public official: *violation*

Flinkkilä and Others v. Finland - 25576/04
Judgment 6.4.2010 [Section IV]

Facts – The applicants worked on two nationwide magazines which in 1997 published articles about an incident involving A., who at the time was the national conciliator. The incident had concerned an altercation between A., a female friend B., and A.'s wife that had taken place outside the matrimonial home. As a consequence, B. had been fined and A. had been given a suspended prison term and dismissed from service. He and his wife had later divorced. The first article contained an interview with A. concerning the incident, his conviction and dismissal. It mentioned B.'s full name and carried a photograph of her. The second article dealt with A.'s feelings about his divorce and dismissal and mentioned B.'s name in connection with the incident. Following a complaint by B., criminal proceedings were brought against the applicants, who were ultimately convicted and ordered to pay a fine and compensation.

Law – Article 10: The Court first noted that there was no evidence or even allegation of factual misinterpretation or bad faith on the part of the applicants. Nor was there any suggestion that the details about B. had been obtained by subterfuge or other illicit means. Even though B. was a private person, through her involvement in a widely publicised incident in front of a public figure's house, she had inevitably entered the public domain. Moreover, her active involvement in the incident leading to A.'s dismissal and divorce had created a continuing element of public interest in her. The information in the two articles had mainly focused on A.'s behaviour and was voluntarily disclosed by him in the course of an interview. No details of B.'s private life were mentioned, except for her involvement in the incident and the fact that she was A.'s friend, both circumstances which were already common knowledge before the publication of the impugned articles. Notwithstanding that the event may have been presented in a somewhat colourful manner in order to boost sales of the magazines, that fact in itself could not suffice as justification for the applicants' convictions. Finally, given that B. had already been awarded amounts in respect of non-pecuniary damage for the disclosure of her identity in a television programme and in respect of other articles published in other magazines stemming from the same facts, the penalties imposed on the applicants had been disproportionate.

Conclusion: violation (unanimously).

In view of its finding that the interference had been prescribed law, the Court also held that there had been no violation of Article 7.

Article 41: EUR 22,000 jointly in respect of pecuniary damage and EUR 2,000 each in respect of non-pecuniary damage.

(See also the following judgments, adopted by the Court on the same date: *Tuomela and Others v. Finland*, no. 25711/04; *Jokitaipale and Others v. Finland*, no. 43349/05; *Iltalehti and Karhuvaara v. Finland*, no. 6372/06; *Soila v. Finland*, no. 6806/06; and *Ruokanen and Others v. Finland*, no. 45130/06)

Criminal convictions of newspaper editor for articles calling into question official version of events and government policy: *violations*

Fatullayev v. Azerbaijan - 40984/07
Judgment 22.4.2010 [Section I]

Facts – The applicant, a newspaper editor, was prosecuted in connection with two articles he had published.

In the first (and in separate postings that subsequently appeared on the Internet), he discussed a massacre that had taken place at the town of Khojaly in 1992 during the war in Nagorno-Karabakh. He made statements that could be construed as differing from the commonly accepted version according to which hundreds of Azerbaijani civilians had been killed

by Armenian armed forces with the reported assistance of the Russian army. A civil action was then brought against him, which culminated in his being ordered to publish a retraction and an apology and to pay compensation in respect of non-pecuniary damage. In separate, criminal, proceedings four Khojaly survivors and two former soldiers involved in the battle also brought a private prosecution against the applicant accusing him of defamation and of falsely accusing Azerbaijani soldiers of an especially grave crime. The trial was presided over by the same judge who had sat in the civil action. The applicant was convicted of two counts of defamation and sentenced to two and a half years' imprisonment.

The second article was entitled "The Aliyevs Go to War". In it, the applicant expressed the view that, in order for President Ilham Aliyev to remain in power in Azerbaijan, the Azerbaijani Government had sought the support of the United States in exchange for Azerbaijan's support for the US "aggression" against Iran. He speculated about a possible US-Iranian war in which Azerbaijan could also become involved, and provided a long and detailed list of strategic facilities in Azerbaijan that would be attacked by Iran if such a scenario developed. He concluded that the Azerbaijani Government should have maintained neutrality in its relations with both the US and Iran, and had not realised all the grave consequences its support of the US position entailed. The article also discussed the issue of possible unrest, in the event of a conflict with Iran, in the southern regions of Azerbaijan populated by the Talysh ethnic minority. As a result of the publication of this article, the applicant was prosecuted for the offences of threat of terrorism and inciting ethnic hostility. Before he had been formally charged, however, the Prosecutor General made a statement to the press in which he stated that the article constituted a threat of terrorism. The applicant was found guilty as charged and sentenced to a total of eight and a half years' imprisonment.

Law – Article 10: (a) *First conviction* – The Court began by explaining that its judgment was not to be understood as containing any factual or legal assessment of the Khojaly events or any arbitration of historical claims relating thereto. It acknowledged the very sensitive nature of the issues that had been raised and that the loss of hundreds of innocent civilian lives had been a source of deep national grief; it also found it understandable that the statements made by the applicant might have been considered shocking or disturbing by the public. However, it reiterated that freedom of information applied not only to information or ideas that were favourably received, but also to those that offended, shocked or disturbed. Likewise, it was an integral part of freedom of expression to seek historical truth. Various matters related to the Khojaly events still appeared to be open to ongoing debate among historians, and as such should have been a matter of general interest in modern Azerbaijani society. It was essential in a democratic society that a debate on the causes of acts of particular gravity possibly amounting to war crimes or crimes against humanity should be able to take place freely, while the press also had a vital role of "public watchdog" with a duty to impart information and ideas on political issues and on other matters of general interest.

The first article had been written in a generally descriptive style with the aim of informing Azerbaijani readers of the realities of day-to-day life in the area in question. The public had been entitled to receive information about what was happening in the territories over which their country had lost control in the aftermath of the war. The applicant had attempted to convey, in a seemingly unbiased manner, various ideas and views of both sides of the conflict. Although the article contained remarks that some of the Azerbaijani military units had shared a degree of responsibility with the perpetrators of the mass killings, it did not contain any statements directly accusing the Azerbaijani military or specific individuals of committing the massacre and deliberately killing their own civilians. Further, as the role and responsibility of the Azerbaijani authorities in either failing to prevent or contributing to the Khojaly events was the subject of ongoing debate, the applicant as a journalist had had a right under Article 10 to impart ideas concerning that matter.

In contrast, the Internet postings had contained very specific allegations that Azerbaijani fighters had killed some of the victims (though perhaps not intentionally) and mutilated the bodies. By making those statements without relying on any relevant factual basis, the applicant may have failed to comply with the journalistic duty to provide accurate and reliable information. Be that as it may, the Court did not need to reach any definitive conclusions on that issue as it found that, in any event, the domestic courts had failed to provide sufficient and relevant reasons for finding that the persons allegedly defamed (four Khojaly refugees and two former soldiers) had in fact suffered damage to their reputation. The dignity of the Khojaly victims and survivors in general and of the four refugees in particular had not been undermined as there was nothing to suggest that the applicant

had sought to deny the fact of the mass killing, to exculpate the perpetrators, or to humiliate or debase the victims. On the contrary, he had expressed sympathy with their plight. As regards the two former soldiers, it had not been convincingly established that the applicant had directly accused them of having personally committed grave crimes as the statements had related to unidentified "*provocateurs*".

Lastly, the imposition of a prison sentence for a press offence was compatible with journalists' freedom of expression only in exceptional circumstances, notably where other fundamental rights had been seriously impaired as, for example, in cases of hate speech or incitement to violence. There had been no justification for the imposition of a prison sentence in the applicant's case.

Conclusion: violation (unanimously).

(b) *Second conviction* – The article "The Aliyevs Go to War" had focused on Azerbaijan's specific role in the dynamics of international politics relating to US-Iranian relations and so had been part of a political debate on a matter of general and public concern. The applicant had criticised the Azerbaijani Government's foreign and domestic political moves and, in common with a number of other media sources at the time, had suggested that, in the event of a war, Azerbaijan was likely to be involved; he had also speculated about possible targets for Iranian attacks. He had not, however, revealed any State secrets or increased or decreased the chances of an attack, but had sought to convey a dramatic picture of the specific consequences of Azerbaijan's involvement in a possible future war. The opinions he had expressed were about hypothetical scenarios and, as such, were not susceptible of proof.

As regards the conviction for threat of terrorism, the applicant, as a journalist and private individual, had clearly not been in a position to influence or exercise any degree of control over any of the hypothetical events discussed in the article. Nor had he voiced any approval or argued in favour of any such attack. It had been his task, as a journalist, to impart information and ideas on the relevant political issues and to express opinions about the possible future consequences of specific decisions taken by the Government. The domestic courts' finding that the applicant had threatened the State with terrorist acts had thus been arbitrary. As to his conviction for inciting ethnic hostility, the issues raised in the applicant's article could be considered a matter of legitimate public concern which he had been entitled to bring to the public's attention. The mere fact that he had discussed the social and economic situation in regions populated by an ethnic minority and voiced an opinion about possible political tension in those regions could not be regarded as incitement to ethnic hostility. Although the relevant passages may have contained certain categorical and acerbic opinions and a certain degree of exaggeration in criticising the central authorities' alleged treatment of the minority group concerned, they contained no hate speech and could not be said to encourage inter-ethnic violence or to disparage any ethnic group in any way.

The domestic courts had thus failed to provide any relevant reasons for the applicant's conviction on charges of threat of terrorism and incitement to ethnic hostility. The gravity of the interference had, furthermore, been exacerbated by the particularly severe penalty that had been imposed: a heavy prison sentence when none had been justified. There had thus been a grossly disproportionate restriction on the applicant's freedom of expression.

Conclusion: violation (unanimously).

Article 6 § 1: The applicant had complained that the judge who had sat in the first set of criminal proceedings had previously sat in the civil action. The Court noted that both sets of proceedings had concerned exactly the same allegedly defamatory statements and the judge had been called upon to assess essentially the same or similar evidence. Having decided the civil case, the judge had already reached the conclusion that the applicant's statements constituted false information tarnishing the dignity of the Khojaly survivors. Accordingly, doubts could have been raised as to the appearance of impartiality of the judge at the subsequent criminal trial. In the light of the special features of the case, the applicant's fear of the judge's lack of impartiality could therefore be considered as objectively justified.

Conclusion: violation (unanimously).

Article 6 § 2: The presumption of innocence was violated if a statement by a public official concerning a person charged with a criminal offence reflected an opinion that he was guilty before he had been proved guilty according to law. While the applicant's position as a well-known journalist meant that it had been necessary to keep the public informed of the alleged offence and ensuing proceedings, the Prosecutor General should have exercised particular caution in his choice of words. However, he had unequivocally declared at the start of the investigation that the applicant's article

contained a threat of terrorism. Those specific remarks, made without any qualification or reservation, had amounted to a declaration that the applicant had committed the criminal offence of threat of terrorism and had thus prejudged the assessment of the facts by the courts.

Conclusion: violation (unanimously).

Article 46: There had been no justification for imposing a prison sentence on the applicant and it was unacceptable that he should remain in prison.

Conclusion: applicant to be released immediately (six votes to one).

Article 41: EUR 25,000 in respect of non-pecuniary damage.

Conviction of elected representative for her response to remarks made by public servant at demonstration on a particularly sensitive national issue: *violation*

Haguenauer v. France - 34050/05
Judgment 22.4.2010 [Section V]

Facts – In 2002 the applicant, who was then deputy mayor, took part in a demonstration that took place when the chancellor of a university in the city was awarded the *Légion d'honneur*. The demonstrators claimed that the chancellor had shown an indulgent attitude towards the racist and revisionist positions defended by some of the university's teaching staff. One of the university lecturers shouted at the demonstrators, telling them that what they were saying was scandalous and that he was proud to be Jewish and proud to be at the university in question. The applicant, herself of Jewish faith, replied: "You put the community to shame." The lecturer brought criminal proceedings against the applicant and another councillor for publicly insulting a civil servant. In 2003 the court held that the criminal limb of the offence was covered by an Amnesty Act and dismissed the claim for damages under the civil limb of the claim. In 2004 the court of appeal set aside that judgment and ordered the applicant to pay damages. It found that the remarks made by the applicant had been aimed at the lecturer in his capacity as a member of the university teaching staff, and thus as a representative of the administration. The Court of Cassation dismissed an appeal on points of law lodged by the applicant.

Law – Article 10: The applicant's conviction for insulting a civil servant amounted to an interference with the exercise of her right to freedom of expression that was prescribed by law and pursued a legitimate aim, namely, the protection of the reputation of others. With regard to determining whether the measure was necessary in a democratic society, the Court observed that the person in issue here, in his capacity as a university lecturer, was subject to wider limits of acceptable criticism than ordinary individuals because he had been exercising his official functions. In this case Article 10 required a high level of protection of the right to freedom of expression on two grounds: the applicant's remarks had related to matters of public concern (combating racism and revisionism) and had been uttered in the context of an extremely important public debate (the university authorities' attitude to lecturers who had aroused controversy for the views they defended), and the applicant had made the remarks in her capacity as local councillor, so they had been a form of political or militant expression. In those circumstances, the latitude available to the authorities in assessing the need to convict the applicant was particularly limited. Anyone engaging in a public debate concerning matters of general interest had to be able to have recourse to a degree of exaggeration, or even provocation. Moreover, the lecturer's incisive remarks could have influenced the tone used when replying to him. Furthermore, the remarks in question had been made orally, during a demonstration, as part of a swift and spontaneous exchange of words between the applicant, the lecturer and another person, which had made it impossible for Mrs Haguenauer to rephrase, modify or withdraw them. Lastly, and above all, it was of crucial importance to resituate Mrs Haguenauer's remarks in the context of a debate which had then been raging at the university and had even spread to national level. This was evidenced by the Ministry of Education's decision to set up a commission of historians to study the issue and by the commission's report, which had defined the issue as one of public and general scope. Lastly, the Court took note of an amnesty that had been passed in 2002 and had extinguished the criminal proceedings against the applicant. Thus only the civil action had continued, which had ended with an order to pay the civil party EUR 3,000 in damages. Accordingly, the applicant's conviction for publicly insulting a civil servant could not be regarded as proportionate and therefore necessary in a democratic society.

Conclusion: violation (unanimously).

Article 41: EUR 10,000 in respect of pecuniary and non-pecuniary damage.

ARTICLE 11

Freedom of association

Liability of non-member to pay contribution to private industrial federation: *violation*

Vörður Ólafsson v. Iceland - 20161/06
Judgment 27.4.2010 [Section IV]

Facts – The applicant was a master builder and a member of the Master Builders' Association. Under the Industry Charge Act (Law no. 134/1993 – "the 1993 Act") he was required to pay a levy known as the "industry charge" of 0.08% on his industrial activities to the Federation of Icelandic Industries ("the FII"), a private organisation with between 1,100 and 1,200 members. The applicant was not a member of that organisation and the Master Builders' Association was not affiliated to it. More than 10,000 persons paid the industry charge, the revenue from which was to be used by the FII in the promotion and development of Icelandic industry. The applicant brought proceedings in the domestic courts challenging his liability to the charge. His claims were rejected after the Supreme Court ruled, *inter alia*, that the arrangement for payment of the industry charge did not involve obligatory membership of the FII and that the legislature had not exceeded its powers as the FII was under a legal duty to use revenue generated by the charge for the promotion of Icelandic industry and, therefore, for the benefit of the activities being taxed.

Law – Article 11: The first issue was whether the statutory obligation to pay the industry charge to the FII was tantamount to compulsory membership adversely affecting the negative aspect of the applicant's freedom of association. While neither the applicant nor the Master Builders' Association to which he belonged had been compelled "to join" the FII in the sense of becoming members, the obligation to which the applicant was subject did have an important feature in common with that of joining an association, namely that of contributing financially to its funds. The applicant was obliged by statute financially to support a private-law organisation that was not of his own choosing and which advocated policies which he considered fundamentally contrary to his own political views and interests. While the individual contributions involved may have been modest, the industry-charge scheme represented a large-scale system of finance accruing to a single recipient organisation, the FII. In addition, unlike the members of other organisations, FII members were able to deduct their membership fees from the amounts they had paid by way of the industry charge. Accordingly, the FII and its members were treated more favourably than other organisations and their members. In sum, the statutory obligation on the applicant to pay the industry charge had amounted to an interference with his right not to join an association. That obligation had been prescribed by law and pursued the legitimate aim of protecting the rights and interests of others.

As to whether the interference was necessary in a democratic society, the Court accepted that relevant reasons had been given for introducing the measure, namely to promote Icelandic industry through the allocation of funds to a single broad federation (the FII) embracing a wide variety of businesses in all branches of industry rather than dispersing them between many smaller ones. As to the further issue of whether the reasons were also sufficient, the Court observed that not only did the relevant national law define the FII's roles and duties in an open-ended manner, in that it failed to set out specific obligations for the FII, there had also been a lack of transparency and accountability *vis-à-vis* non-members such as the applicant as to the use made of the revenue from the charge. The definition of the FII's role and duties ("to promote industry and industrial development in Iceland" and to "annually provide a report to the Ministry of Industry on the use of the revenues") was very broad and unspecific. There were no specific obligations owed to non-members who paid the charge. Nor was the FII subject to substantial and systematic supervision: it had unrestricted power to decide how the charge was allocated and so long as it remained within the framework of the law the Ministry of Industry, to which it was required to report, could not interfere. The Court was not therefore satisfied that there had been adequate safeguards against the FII favouring its members and placing the applicant and other non-members like him at a disadvantage. The Icelandic authorities had thus failed to give sufficient reasons for the interference with the applicant's freedom of association and had not struck a proper balance between his right not to join an association on the one hand and the general interest in promoting and developing Icelandic industry on the other.

Conclusion: violation (unanimously).

Article 41: No claim made in respect of damage.

ARTICLE 14

Discrimination (Article 8)

Prohibition under domestic law on the use of ova and sperm from donors for *in vitro* fertilisation: *violation*

S.H. and Others v. Austria - 57813/00
Judgment 1.4.2010 [Section I]

Facts – The applicants are two married couples. Both couples suffer from infertility and wish to use medically assisted procreation techniques. In the case of the first couple only *in vitro* fertilisation ("IVF") with the use of sperm from a donor would allow them to have a child of whom one of them is the genetic parent. The second couple require IVF with the use of ova from a donor if they are to have a genetically linked child. However, both of these possibilities are ruled out by the Austrian Artificial Procreation Act ("the Act"), which prohibits the use of sperm from a donor for IVF and ova donation in general. The Act does, however, allow other assisted procreation techniques, in particular IVF with ova and sperm from the spouses or cohabitating partners themselves (homologous methods) and, in exceptional circumstances, donation of sperm when it is introduced into the reproductive organs of a woman. The applicants applied to the Constitutional Court, which found that there had been an interference with their right to respect for family life; however, it considered that the interference had been justified, as the Act aimed at preventing unusual relationships (namely the division of motherhood into a biological aspect and the aspect of "carrying the child") and the exploitation of women.

Law – Article 14 in conjunction with Article 8: The right of a couple to conceive a child and to make use of medically assisted procreation for that end came within the ambit of Article 8. Article 14, taken in conjunction with Article 8, was therefore applicable. There was no uniform approach to medically assisted procreation among the State Parties to the Convention. Moreover, the use of IVF treatment gave rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments. The margin of appreciation to be afforded to the respondent State had therefore to be a wide one.

(a) *Ova donation* – The Court had to examine whether the difference in treatment between the second couple and a couple which, to fulfil its wish for a child, used artificial procreation techniques without resorting to ova donation had an objective and reasonable justification. Concerns based on moral considerations or on social acceptability were not in themselves sufficient reasons for a complete ban on a specific artificial procreation technique such as ova donation. Such reasons could be particularly weighty at the stage of deciding whether or not to allow artificial procreation in general, and there was no obligation on a State to allow artificial procreation. However, once the decision had been taken to allow artificial procreation and notwithstanding the wide margin of appreciation afforded to the Contracting States, the legal framework devised for this purpose had to be shaped in a coherent manner which allowed the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention. The risks associated with new techniques in a sensitive field like medically assisted procreation had to be taken seriously and it was in the first place for the domestic legislature to assess those risks after carefully weighing the different public and private interests involved and the dangers which might be faced. However, a complete ban on the medical technique at issue would not be proportionate unless, after careful reflection, it was deemed to be the only means of effectively preventing serious repercussions. In the present case the Court was not persuaded that a complete ban had been the only means at the disposal of the Austrian legislature. Given that the Act reserved this kind of intervention to specialised medical doctors, who had particular knowledge and experience in this field and were themselves bound by the ethical rules of their profession, and that the Act provided for further safeguards in order to minimise the risk, the Court found that the prohibition of ova and sperm donation for IVF could not be considered the only or the least intrusive means of achieving the aim pursued. As regards the risk of exploitation of women and abuse of these techniques, this was not a sufficient reason for prohibiting a specific procreation technique as a whole, as it was possible to regulate its use and devise safeguards against abuse. In particular, under Austrian law remuneration of ova and sperm donation was prohibited. As regards the health risks for the ova donor, they would be the same as in homologous IVF, which was allowed by the Act. As regards the possibility of unusual relationships, family relations, which did not follow the typical parent-child relationship based on a direct biological link, were nothing new and had already existed in the past, since the institution of adoption.

There were no insurmountable obstacles to bringing family relations which would result from a successful use of the artificial procreation techniques at issue into the general framework of family law. Moreover, the Austrian legislature could also find an appropriate and properly balanced solution between the competing interests of donors requesting anonymity and any legitimate interest in obtaining information of a child conceived through artificial procreation with donated ova or sperm. In conclusion, the Government had not submitted reasonable and objective justification for the difference in treatment between the second couple and a couple using artificial procreation techniques without resorting to ova donation.

Conclusion: violation (five votes to two).

(b) *Sperm donation* – The Court had to examine whether there was any objective and reasonable justification for the difference in treatment between the first couple who could only resort to sperm donation for IVF, and a couple lawfully using a sperm donation for *in vivo* fertilisation. This artificial procreation technique combined two techniques which, taken alone, were allowed under the Act, namely IVF with the gametes of the couple on the one hand and sperm donation on the other. Thus, a prohibition of the combination of these lawful techniques required particularly persuasive arguments. Most of the arguments put forward by the Government were not specific to sperm donation for IVF, however. As regards the argument that artificial insemination, in contrast to IVF, had been in use for some time and was easy to handle and that its prohibition would therefore have been hard to monitor, the Court found that a question of mere efficiency had to be balanced against the interests of the private individuals involved. Where a particularly important facet of an individual's existence or identity was at stake, the margin allowed to the State would be restricted. The wish for a child was one such particularly important facet and, in the circumstances of the case, outweighed arguments of efficiency. Thus, the prohibition at issue had lacked a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The difference in treatment between the first couple and a couple lawfully using a sperm donation for *in vivo* fertilisation had had no objective and reasonable justification and had been disproportionate.

Conclusion: violation (six votes to one).

Article 41: EUR 10,000 to each applicant couple in respect of non-pecuniary damage.

ARTICLE 34

Victim

Domestic court judgment acknowledging and affording appropriate and sufficient redress for Convention violation: *loss of victim status*

Floarea Pop v. Romania - 63101/00
Judgment 6.4.2010 [Section III]

Facts – In 1993 the applicant's son was placed in a secure training centre for minors. He was subsequently transferred to a prison hospital, having been diagnosed with serious health problems by the centre's doctor. He died in January 1994, after being released and admitted to a public hospital. Criminal proceedings were opened at the applicant's request, but the case was closed by the military authorities. In 1998 the applicant also sued for damages in the district court. In 2004, after various referrals and adjournments, a court of appeal ordered the Ministry of Justice and the Directorate General for Prisons, jointly and severally, to pay a sum in respect of non-pecuniary damage, finding that liability for the death lay with staff responsible for the young man's supervision and care. In 2005 the court of appeal dismissed an appeal by the Ministry and the Directorate General.

Law – Articles 2 and 3: *Admissibility in their procedural aspect* – Among other complaints, the applicant had alleged that the competent authorities had not carried out an effective, impartial and diligent investigation aimed at identifying those responsible for her son's death and at bringing them to account. The Court noted, however, that in the proceedings for damages the domestic courts had found that the reasons for her son's death had been the negligent acts and omissions of the staff responsible for the young man's supervision and care while in custody, and also that the Ministry of Justice and the Directorate General for Prisons were liable as, being the employers, they were in a position to identify those responsible. Moreover, the court of appeal had stipulated the authorities' procedural obligations and had noted a number of shortcomings in the criminal proceedings in question. The Court took the view that the findings of the domestic courts, especially the Court of Appeal, could constitute recognition, at least in substance, that there had been a violation of Articles 2 and 3 in their procedural aspect. In addition, the applicant had obtained, in respect of non-pecuniary damage, an amount which, although lower than that generally awarded by the Court in similar cases

concerning Romania, was not without any relationship of proportionality, bearing in mind that the domestic courts could not have awarded the applicant more than she herself had claimed. Accordingly, the applicant had already been awarded compensation that could be regarded as appropriate and sufficient. The Court therefore accepted the Government's preliminary objection that she no longer had victim status.

Conclusion: inadmissible (incompatible *ratione personae*).

The Court also found inadmissible the applicant's complaints under Articles 2 and 3 in their substantive aspect, and under Article 6 § 1 (access to court) and Article 13 in conjunction with Articles 2, 3 and 6 § 1 (access to court). Lastly, it found a violation of Article 6 § 1 concerning the length of the proceedings for damages and a violation of Article 13 on account of the lack of an effective remedy by which to seek redress for that complaint.

ARTICLE 35

Article 35 § 3

Competence *ratione personae*

Application lodged on behalf of minor child by foster parents: *inadmissible*

Moretti and Benedetti v. Italy - 16318/07
Judgment 27.4.2010 [Section II]

(See Article 8 above, page 13)

ARTICLE 37

Article 37 § 1

Respect for human rights
Special circumstances requiring further examination

Doubts about mental state of applicant who wished to withdraw his application to the European Court: *request to withdraw application dismissed*

Tehrani and Others v. Turkey
- 32940/08, 41626/08 and 43616/08
Judgment 13.4.2010 [Section II]

Facts – The applicants are four Iranian nationals. They were involved with the People's Mojahedin Organisation of Iran ("the PMOI") and recognised as refugees by the United Nations High Commissioner for Refugees (UNHCR). They all left their country of origin and entered Turkey illegally. Two of the applicants are currently being held in the Foreigners' Admission and Accommodation Centre in Turkey, and the other two are settled in Turkey on the basis of a temporary residence permit. They alleged that they would be at real risk of death or ill-treatment if deported to Iran. They also complained about the unlawfulness of their detention pending deportation and about the conditions of their detention pending deportation.

Law – Article 37 § 1: One of the applicants had informed the Court that he wished to withdraw his application and had asked to be deported to Iran. The Court took note of the discrepancy between the psychological-status report submitted by the applicant's representative, which indicated that the applicant needed treatment, and the brief psychiatric report submitted by the Government, which stated that the applicant did not suffer from a psychotic illness but that further diagnosis could not be carried out due to his lack of cooperation. As a rule, and in particular in cases which primarily involved a risk to the applicant's life or physical well-being, the ensuing existence of the applicant's wish to pursue his application could not be the only criterion for putting the protection mechanism of the Convention into motion. The fact that it might no longer be possible to remedy a breach of Articles 2 or 3 of the Convention had to be taken into account when considering whether the examination of an application should be continued. Accepting the applicant's wish to withdraw his application and striking the case out of its list would lift the protection afforded by the Court on a subject as important as the right to life and physical well-being of an individual. The Court attached particular importance to the doubt about the applicant's mental state and to the discrepancies between the medical reports submitted by the parties. In these particular circumstances, respect for human rights as defined in the Convention and the Protocols thereto required a continuation of the examination of his application.

Conclusion: request to withdraw application dismissed (unanimously).

(See also *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, 22 September 2009, Information Note no. 122)

ARTICLE 46

Execution of a judgment – Measures of a general character

Respondent State required to take action to afford applicants opportunity to have domestic proceedings reopened or their cases re-examined

Laska and Lika v. Albania - 12315/04 and 17605/04
Judgment 20.4.2010 [Section IV]

(See Article 6 § 1 above, page 10)

Execution of a judgment – Individual measures

Respondent State required to secure immediate release of newspaper editor whose conviction and prison sentences had violated his right to freedom of expression

Fatullayev v. Azerbaijan - 40984/07
Judgment 22.4.2010 [Section I]

(See Article 10 above, page 15)

ARTICLE 3 OF PROTOCOL No. 1

Stand for election

Inability of persons with multiple nationality to stand as candidates in parliamentary elections: *violation*

Tănase v. Moldova - 7/08
Judgment 27.4.2010 [GC]

Facts – The applicant, a well-known Moldovan politician, is the Vice-President of the Liberal Democratic Party and a member of the Chişinău Municipal Council. The Republic of Moldova is situated on territory which used to be part of Romania before World War II. The local population lost its Romanian citizenship after the territory's annexation by the Soviet Union in 1940. Following Moldova's declaration of independence in August 1991, a new law was adopted on Moldovan nationality, whereby persons living on the territory of the former Moldavian Soviet Socialist Republic before annexation became citizens of Moldova. As a descendant of such persons, the applicant obtained Moldovan nationality. In 1991 the Romanian Parliament also adopted a new law on citizenship which enabled former Romanian nationals and their descendants who had lost their nationality before 1989 to re-acquire Romanian nationality. As in 2003 the restriction on Moldovan nationals holding other nationalities had been repealed, the applicant requested and obtained Romanian nationality. In 2008 the Moldovan Parliament reformed the electoral legislation, notably by introducing a ban on those with dual or multiple nationality from becoming Members of Parliament (Law no. 273). Other important amendments included the increasing of the electoral threshold and a ban on all forms of electoral blocks and coalitions. These amendments entered into force in May 2008 and a general election was held in the spring of 2009. The applicant was elected to the Parliament. In order to be able to take his seat, he sent a letter to the Romanian Embassy in Chişinău announcing that he was forced to initiate the renunciation of his Romanian nationality, but indicating that he reserved his right to withdraw the letter after the judgment of the Grand Chamber in the present case. Taking into account this letter, the Constitutional Court validated the applicant's mandate. In 2009 the Constitutional Court found Law no. 273 to be constitutional.

It was estimated that, out of a total of 3,800,000 Moldovans, between 95,000 and 300,000 had obtained Romanian nationality between 1991 and 2001; in February 2007 some 800,000 Moldovans had applications pending for Romanian nationality. There also were approximately 120,000 Moldovans with Russian passports.

Law – (a) *Admissibility*

(i) *Victim status*: The applicant had been directly affected by Law no. 273 as he had been obliged to initiate a procedure which had put him at risk of losing his Romanian nationality. Further, the knowledge that, if elected, he would be required to take steps to renounce his Romanian nationality had undoubtedly affected him throughout the electoral campaign. He might, moreover, have lost votes since the electorate was aware that there was a chance that he would decide not to take his seat if that would mean losing his status as a dual national. Even though the Romanian Government had not yet stripped the applicant of his Romanian nationality, they were free to complete the renunciation procedure at any time. In any event, each time the applicant wished to stand for election to Parliament he would face the uncertainty of not knowing whether the Constitutional Court would

validate his mandate and whether the Romanian Government would follow up his request to renounce his Romanian nationality. The measure had therefore had a detrimental impact on him.

Conclusion: preliminary objection dismissed (unanimously).

(ii) *Non-exhaustion of domestic remedies*: The remedies proposed by the Government were not accessible to the applicant as he was unable to approach the Constitutional Court directly. In any event, as the Constitutional Court had given a ruling on the constitutionality of the law, the remedy proposed had been exhausted.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – Article 3 of Protocol No. 1: Following his election, the applicant had been required to initiate a procedure to renounce his Romanian nationality in order to have his mandate confirmed by the Constitutional Court. Accordingly, there had been an interference with his rights under Article 3 of Protocol No. 1. The Court was satisfied that Law no. 273 met the requirements of foreseeability. Although there would appear to be an inconsistency between that law and Article 17 of the European Convention on Nationality, the Court did not find it necessary to resolve the apparent conflict of norms.

As regards the aim of ensuring loyalty to the State, invoked by the parties to justify the introduction of the prohibition, this concept was not clearly defined and no explanation of its content has been provided by the parties. For its part, the Court would distinguish at the outset between loyalty to the State and loyalty to the Government. While the need to ensure loyalty to the State might well constitute a legitimate aim which justified restrictions on electoral rights, the latter could not. In a democratic State, the very role of MPs, and in particular those members from opposition parties, was to represent the electorate by ensuring the accountability of the Government in power and assessing their policies. Further, the pursuit of different, and at times diametrically opposite, goals was not only acceptable but necessary in order to promote pluralism and to give voters choices which reflected their political opinions. Loyalty required from MPs to the State, in principle, encompassed respect for the Constitution, laws, institutions, independence and territorial integrity. Any desire to bring about changes to any of those aspects had to be pursued in accordance with the laws of the State. Any other view would undermine the ability of MPs to represent the views of their constituents, in particular minority groups. The fact that Moldovan MPs with dual nationality might wish to pursue a political programme which was considered by some to be incompatible with the current principles and structures of the Moldovan State did not make it incompatible with the rules of democracy. With this in mind, the Court turned to consider whether the measure in the present case had been genuinely intended to secure loyalty to the State. Law no. 273 was one of the aspects of an electoral-reform package, whose other measures consisted of raising the electoral threshold and banning electoral blocks. All the measures proposed had had a detrimental impact on the opposition, which had previously found it difficult to secure enough votes to meet the threshold to enter the Parliament and had succeeded in doing so only through the formation of electoral blocks. The results of the April 2009 election had demonstrated the disproportionate effect of the new law. The applicant's allegation that the law exempted from its scope the residents of Transdniestria, a large number of whom held Russian nationality, raised further concerns about the true aim of the legislation. Finally, the Court considered it significant that the amendments had been introduced less than a year before a general election. The Government had been unable to provide a single example of an MP with dual nationality showing disloyalty to the State of Moldova. Other than brief references in the judgment of the Constitutional Court to movements to undermine the State of Moldova, very little explanation at all had been provided for the change in electoral policy. Further, there would appear to be evidence that the law had not been uniformly applied. In the circumstances, the Court was not entirely satisfied that the aim of the measure had been to secure the loyalty of MPs to the State.

As regards the proportionality of the measure, a review of practice across Council of Europe member States revealed a consensus that, where multiple nationalities were permitted, the holding of more than one nationality should not be a ground for ineligibility to sit as an MP, even where the population was ethnically diverse and the number of MPs with multiple nationalities could be high. However, notwithstanding this consensus, a different approach might be justified where special historical or political considerations rendered a more restrictive practice necessary. The Court emphasised the special position of Moldova, which had a potentially high proportion of dual nationals and had only relatively recently become independent.

In the light of Moldova's history, on declaring independence in 1991 a ban on multiple nationals sitting as MPs could have been justified. However, the ban had not been put in place until some seventeen years after Moldova had gained independence and some five years after it had relaxed its laws to allow dual citizenship. The Government had not provided an explanation of why concerns had recently emerged regarding the loyalty of dual nationals and why such concerns had not been present when the law had first been changed to allow dual nationality. The Court acknowledged that the number of MPs holding dual nationality was significant. However, a large proportion of citizens also held dual nationality and they had the right to be represented by MPs who reflected their concerns and political views. In the present case, there had been other means of protecting Moldova's laws, institutions and national security, such as sanctions for illegal conduct or conduct which threatened national interests, and making access to confidential documents subject to obtaining security clearance. Where an immediate threat to democracy or independence had passed, measures identifying a credible threat to the State's interests on the basis of specific information should be preferred to a blanket assumption that all dual nationals posed a threat to national security and independence. The Venice Commission, the European Commission against Racism and Intolerance (ECRI), the Parliamentary Assembly of the Council of Europe and the Honouring of Obligations Committee had been unanimous in their criticism of the prohibition. Concerns had been expressed about the discriminatory impact of Law no. 273 and its impact on the ability of a number of political forces to participate effectively in the political process. The Court further took note of Article 17 of the European Convention on Nationality and Moldova's undertaking pursuant to that provision to ensure that Moldovan nationals in possession of another nationality should have the same rights and duties as other Moldovan nationals.

Finally, any restriction on electoral rights should not be such as to exclude some persons or groups of persons from participating in the political life of the country. In this respect, the Court emphasised the disproportionate effect of the law on the opposition parties at the time of its introduction. The Court had to examine with particular care any measure which appeared to operate solely, or principally, to the disadvantage of the opposition, especially where the nature of the measure was such that it affected the very prospect of opposition parties gaining power at some point in the future. Restrictions of this nature had curtailed the rights guaranteed by Article 3 of Protocol No. 1 to such an extent as to impair their very essence and deprive them of their effectiveness. The introduction of the prohibition in the present case shortly before elections, at a time when the governing party's percentage of the vote had been in decline, further militated against the proportionality of the measure.

Conclusion: violation (unanimously).

Article 41: No claim made in respect of damage.

Exclusion of certain categories of convicted prisoners from voting in elections: *violation*

Frodl v. Austria - 20201/04
Judgment 8.4.2010 [Section I]

Facts – The applicant was serving a life sentence for murder. In his application to the European Court, he complained that he had been prevented by section 22 of the National Assembly Election Act from registering to vote in local elections. Section 22, which has since been replaced, provided that prisoners serving a term of imprisonment of more than one year for offences committed with intent forfeited the right to vote.

Law – Article 3 of Protocol No. 1: The Court reiterated that disenfranchisement could only be envisaged for a narrowly defined group of offenders serving lengthy terms of imprisonment; there should be a direct link between the facts on which a conviction was based and the sanction of disenfranchisement; and that such a measure should preferably be imposed not by operation of law but by the decision of a judge following judicial proceedings (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, 6 October 2005, Information Note no. 79). The provisions on the disenfranchisement of prisoners in the applicant's case had pursued the aims of preventing crime by punishing the conduct of convicted prisoners and of enhancing civic responsibility and respect for the rule of law. The Court found no reason to regard those aims as untenable or incompatible *per se* with the Convention. The provision for disenfranchisement set out in section 22 of the National Assembly Election Act was more detailed than the provisions that had been applicable in *Hirst*. It did not apply automatically to all prisoners but only to those given a prison sentence of more than one year for offences committed with intent. Nevertheless, it did not meet all the criteria established in *Hirst*. Under the *Hirst* test, it was essential for the decision

on disenfranchisement to be taken by a judge, taking into account the particular circumstances, and for there to be a link between the offence and issues relating to elections and democratic institutions. The essential purpose of these criteria was to establish disenfranchisement as an exception even in the case of convicted prisoners, ensuring that it was accompanied by specific reasoning given in an individual decision explaining why in the circumstances of the specific case disenfranchisement was necessary. The principle of proportionality required a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. However, no such link existed under the statutory provisions under which the applicant had been disenfranchised.

Conclusion: violation (six votes to one).

Article 41: No claim made in respect of damage.

Failure by domestic authorities to adequately investigate complaints of electoral irregularities: *violation*

Namat Aliyev v. Azerbaijan - 18705/06
Judgment 8.4.2010 [Section I]

Facts – The applicant complained of a series of irregularities in parliamentary elections in which he had been credited with 14.19% of the vote behind the winning candidate in his constituency, who was credited with 41.25%. In complaints to the Constituency Electoral Commission and the Central Electoral Commission, he alleged various irregularities – including unlawful interference, undue influence, ballot-box stuffing, the harassment of observers, inaccuracies in the electoral rolls and discrepancies in electoral protocols. In support of his allegations, he submitted to the Central Electoral Commission originals of affidavits by election observers, together with audio tapes and other evidence. The Constituency Electoral Commission rejected the applicant's complaint as unsubstantiated without further elaboration, while the Central Electoral Commission did not reply to the applicant but issued a final protocol approving the overall election results nationwide.

The applicant appealed to the court of appeal, but it dismissed his claims as unsubstantiated, after ruling that the photocopies of the affidavits he had produced were inadmissible in evidence as domestic law required production of either the originals or notarised copies. A further appeal to the Supreme Court was also dismissed. Although the applicant explained that the original affidavits were with the Central Electoral Commission, the Supreme Court noted that he had failed to establish that he had lodged a complaint with that body.

Law – Article 3 of Protocol No. 1: The Court noted, firstly, that it was not the applicant's right to win the election that was at stake, but his right to stand freely and effectively for it. It therefore rejected the Government's argument that the applicant had finished too far behind the official winner of the election for the alleged irregularities to have made any difference to the result. The irregularities alleged by the applicant were serious as, if confirmed, they were capable of thwarting the democratic process. His complaints had been examined at the domestic level, so the Court's role was limited to verifying whether that examination was effective and devoid of arbitrariness. When it dismissed the applicant's complaint the Constituency Electoral Commission appeared to have relied exclusively on the statements of local electoral officials – who, not surprisingly, had denied any wrongdoing – without explaining why their statements were considered more reliable than the much more detailed and fact-specific evidence the applicant had presented. Nor had it given any reason for finding the applicant's claims "unsubstantiated". As to the complaint the applicant had made directly to the Central Electoral Commission, it seemed simply to have been ignored, without any explanation.

The applicant's subsequent appeals to the court of appeal and the Supreme Court had not been addressed adequately either. Despite guidance in the Venice Commission's Code of Good Practices in Electoral Matters cautioning against excessive formalism in the examination of election-related appeals, both courts had rejected affidavit evidence submitted by the applicant on the grounds that the copies provided had not been duly certified. Such a rigid and overly formalistic approach had not been justified: the Central Electoral Commission, which apparently was in possession of the originals, could have been asked to confirm the authenticity of the affidavits while the applicant should have been afforded an opportunity to provide additional evidence. Since it was not only the alleged infringement of the applicant's individual rights that was at stake but also, on a more general level, the State's compliance with its duty to hold free and fair elections, the domestic courts should have taken reasonable steps to investigate the allegations without imposing unreasonable and excessively strict procedural barriers on the complainant. Further, not all the applicant's allegations had been based on the observers' affidavits.

He had also referred to apparent inconsistencies in several electoral protocols disclosing potential large-scale tampering with ballots. However, the domestic courts had not requested the electoral commissions to submit those protocols to them for independent examination and had remained silent on that section of the applicant's complaint.

In sum, States had to ensure that a genuine effort was made to address the substance of arguable individual complaints of electoral irregularities and that decisions were sufficiently reasoned. The applicant's complaints had not been effectively addressed at the domestic level and had been dismissed in an arbitrary manner.

Conclusion: violation (unanimously).

Article 41: EUR 7,500 in respect of non-pecuniary damage.

RULE 39 OF THE RULES OF COURT

Interim measures

Extradition despite interim measure

Labsi v. Slovakia - 33809/08

The applicant, an Algerian national, entered Slovakia in 2006 without any identity documents. The immigration authorities ordered his expulsion and banned him from re-entering Slovakia for ten years. The Algerian authorities subsequently requested his extradition to Algeria where he had been sentenced to life imprisonment in his absence for being a member of a terrorist organisation. On 13 August 2008 the European Court issued an interim measure under Rule 39 of the Rules of the Court indicating that the Slovakian authorities were not to extradite the applicant to Algeria pending further notice. It now appears that, despite that interim measure, the applicant was in fact extradited there on 19 April 2010. The proceedings before the European Court are still pending.

The Slovak authorities' decision has been the subject of comment by the Secretary General of the Council of Europe and by the Parliamentary Assembly Committees on Legal Affairs and Human Rights and on Migration, Refugees and Population in press releases issued on 29 April 2010.

Link to the statement of the Secretary General
Link to the press release of the Parliamentary Assembly