EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law

No. 151 April 2012

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

The Information Note, compiled by the Court's Case-Law Information and Publications Division, contains summaries of cases examined during the month in question which the Registry considers as being of particular interest. The summaries are not binding on the Court. In the provisional version the summaries are normally drafted in the language of the case concerned, whereas the final single-language version appears in English and French respectively. The Information Note may be downloaded at <www.echr.coe.int/echr/NoteInformation/en>. A hard-copy subscription is available for 30 euros (EUR) or 45 United States dollars (USD) per year, including an index, by contacting the publications service via the on-line form at <www.echr.coe.int/echr/contact/en>.

The HUDOC database is available free-of-charge through the Court's Internet site (<www.echr.coe.int/ECHR/EN/hudoc>). It provides access to the full case-law and materials on the European Convention on Human Rights, namely the decisions, judgments and advisory opinions of the Court, the reports of the European Commission of Human Rights and the resolutions of the Committee of Ministers.

European Court of Human Rights
(Council of Europe)
67075 Strasbourg Cedex
France
Tel: 00 33 (0)3 88 41 20 18
Fax: 00 33 (0)3 88 41 27 30
publishing@echr.coe.int
www.echr.coe.int

ISSN 1996-1545

TABLE OF CONTENTS

ARTICLE 2

Positive obligations
Life

Non-fatal shooting of a waiter by police officer on unauthorised leave of absence: *violation*

Sašo Gorgiev v. "the former Yugoslav Republic of Macedonia" - 49382/06
Judgment 19.4.2012 [Section V]

Facts – The applicant, a waiter in a bar, was shot and wounded at point-blank range by R.D., a police reservist, who had taken unauthorised leave of absence while on night duty. R.D. was subsequently convicted of serious crimes against security after the trial court found that he had unintentionally pulled the trigger while under the influence of alcohol. He was given a suspended prison sentence. In separate proceedings, the civil courts dismissed an action in damages the applicant had brought against the State/Ministry of the Interior on the grounds that R.D. had not been acting in the course of his official duties when the incident occurred.

Law – Article 2: Irrespective of whether there had been any intention to kill, the applicant had been the victim of conduct which, by its very nature, had put his life at risk. Article 2 was thus applicable. Although, as a police reservist, R.D. was a State agent, he was not acting in the course of his duties at the time of the shooting. In determining whether the State could nonetheless be held responsible for his unlawful actions, the Court had to assess the totality of the circumstances and consider the nature and circumstances of his conduct.

The incident had occurred during R.D.'s working hours, when he was supposed to be on duty at the police station. Although it was undisputed that he had left his post without authorisation and in a state of intoxication, he was in uniform and had shot the applicant with his service weapon. While the authorities could not have objectively foreseen R.D.'s behaviour, the State had a duty to put in place and rigorously apply a system of adequate and effective safeguards to prevent its agents, especially temporary mobilised reservists, misusing weapons made available to them in the context of their official duties. The Government had not referred to any such regulations, but the Court noted that section 26 of the Internal Affairs Act required State agents to perform their duties "at all times, whether on or off duty", which in practice meant they were required always to have their service weapons on them. The Government had not given any indication either of whether any assessment had been made of R.D.'s fitness to serve in the police and to carry a weapon, when that should have been a matter subject to particular scrutiny. In the light of these circumstances, R.D.'s actions were imputable to the respondent State.

Conclusion: violation (unanimously).

Article 41: EUR 12,000 in respect of non-pecuniary damage; EUR 3,390 in respect of pecuniary damage.

(See also *Gorovenky and Bugara v. Ukraine*, nos. 36146/05 and 42418/05, 12 January 2012, Information Note no. 148)

ARTICLE 3

Positive obligations
Inhuman treatment

Failure adequately to account for fate of Polish prisoners executed by Soviet secret police at Katyń in 1940: *violation*

Janowiec and Others v. Russia - 55508/07 and 29520/09
Judgment 16.4.2012 [Section V]

Facts – The applicants are relatives of Polish officers and officials who were detained in Soviet camps or prisons following the Red Army's invasion of the Republic of Poland in September 1939 and who were later killed by the Soviet secret police without trial, along with more than 21,000 others, in April and May 1940. The victims were buried in mass graves in the Katyń forest. Investigations into the mass murders were started in 1990 but discontinued in 2004. The text of the decision to discontinue the investigation has remained classified to date and the applicants have not had access to it or to any other information about the investigation. Their repeated requests to gain access to that decision and to declassify its top-secret label were continuously rejected by the Russian courts. The Russian authorities also refused to produce a copy of the decision to the European Court on the grounds that the document was not crucial to the applicants' case and that they were prevented by domestic law from disclosing classified information. The applicants' requests for rehabilitation of their relatives were rejected by both the Chief Military Prosecutor's Office and the Russian courts.

Law – Article 38: The reasons given by the Government for not complying with the Court's request to produce a copy of the 2004 decision discontinuing the investigation were not valid. As to the argument that the decision did not contain crucial information, the Court had absolute discretion to determine the evidence it needed for the examination of the case. Compliance with the procedural obligation to furnish all necessary facilities for the conduct of the Court's investigation was a condition *sine qua non* for the effective conduct of the proceedings before the Court and had to be enforced irrespective of any findings that might be made in the proceedings and their eventual outcome.

The argument that the Government were precluded by domestic law from communicating classified information also failed. Since, pursuant to Article 27 of the Vienna Convention on the Law of Treaties, internal law could not be invoked as justification for a Contracting State's failure to perform a treaty, the Government could not rely on domestic legal impediments to justify their failure to furnish the facilities necessary for the Court's examination of the case. It was noteworthy too that the Government had at no point explained the exact nature of their concerns. For its part, the Court was unable to discern any legitimate security considerations. In particular, it was not convinced that a public and transparent investigation into the crimes of a previous totalitarian regime could have compromised the national-security interests of contemporary democratic Russia, especially bearing in mind that the Soviet authorities' responsibility for that crime had been acknowledged at the highest political level. Moreover, the decision to classify appeared to be at variance with the requirements of section 7 of the State Secrets Act which expressly precluded the classification of information about human-rights violations by State officials. In any event, even assuming legitimate security considerations existed, they could have been accommodated with appropriate procedural arrangements, including restricted access to the document (Rule 33 of the Rules of Court) and, *in extremis*, the holding of a hearing behind closed doors.

Conclusion: failure to comply with Article 38 (four votes to three).

Article 2 (*procedural aspect*): The Court reiterated that States had a well-established obligation to investigate unlawful or suspicious deaths effectively. That obligation had evolved into a separate and autonomous duty even when the death took place before the entry into force of the Convention in respect of the respondent State (the critical date). However, the Court's temporal jurisdiction in such cases was not open-ended. Where the death occurred before the critical date, only procedural acts and/or omissions occurring after that date could fall within the Court's temporal jurisdiction and there had to be a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligation to come into effect. Accordingly, a significant proportion of the procedural steps required by Article 2 will or ought to have been carried out after the critical date. However, it was not excluded that in certain circumstances the connection could also be based on the need to ensure that the guarantees and underlying values of the Convention were protected in a real and effective manner.[1]

In the instant case, in the absence of any evidence that they might somehow have escaped from the Soviet prison camps in which they were detained, the applicants' relatives had to be presumed to have died in the 1940 massacre. Russia had ratified the Convention on 5 May 1998. The period of 58 years between the deaths and Russian ratification of the Convention was many times longer than the periods that had been found to trigger the procedural obligation under Article 2 in previous cases that had come before the Court. It was also excessively long in absolute terms to establish any genuine connection between the deaths and the entry into force of the Convention in respect of Russia. Further, a significant proportion of the Katyń investigation appeared to have taken place before ratification and there was no indication that any important procedural steps had taken place after ratification. Accordingly, the criterion triggering the coming into effect of the procedural obligation imposed by Article 2 had not been fulfilled.

However, it was also necessary to examine whether the circumstances of the case were such as to justify finding that the connection between the deaths and the ratification could be based on the need to ensure the effective protection of the guarantees and the underlying values of the Convention. The reference to the underlying values of the Convention indicated that, for such a connection to be established, the event in question had to be of a larger dimension than an ordinary criminal offence and constitute a negation of the very foundations of the Convention, such as for instance, war crimes

1. See *Šilih v. Slovenia* [GC], no. 71463/01, 9 April 2009, Information Note no. 118.

or crimes against humanity. Nevertheless, the States did not have an unceasing duty to investigate crimes even of that gravity. Rather, the procedural obligation could be revived if information purportedly casting new light on the circumstances of such crimes came into the public domain after the critical date. Should new material come to light in the post-ratification period and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the Court would have temporal jurisdiction to satisfy itself that the respondent State has discharged its procedural obligation under Article 2 in a manner compatible with the principles enunciated in its case-law.[1] While the mass murder of Polish prisoners by the Soviet secret police had the features of a war crime, no evidence of a character or substance which could revive a procedural obligation of investigation or raise new or wider issues had been produced or uncovered after Russian ratification. There were, therefore, no elements capable of providing a bridge between the distant past and the recent post-ratification period, and no special circumstances justifying a connection between the deaths and ratification. The Court thus had no temporal jurisdiction to examine the merits of this complaint.

Conclusion: preliminary objection upheld (four votes to three).

Article 3: The authorities' obligation under Article 3 was distinct from that under Article 2 both in substance and in temporal outreach. While both obligations were of means, not of result, the procedural obligation under Article 2 required the authorities to take specific legal action capable of leading to the identification and punishment of those responsible, whereas the obligation imposed by Article 3 was of a more general humanitarian nature and required them to react to the plight of the missing men's relatives in a humane and compassionate way. The Court could assess compliance with this latter obligation even in cases where the original taking of life escaped its scrutiny because of a procedural bar such as a lack of temporal jurisdiction, provided the complaint was introduced within six months of the final domestic decision. Accordingly, the court had jurisdiction in the instant case to examine the Russian authorities' reactions and attitudes from the moment of ratification until the Supreme Court's decisions of 24 May 2007 (application no. 55508/07) and 29 January 2009 (application no. 29520/09) respectively.

1. See *Brecknell v. the United Kingdom*, no. 32457/04, 13 November 2007, Information Note no. 102.

However, only the closest relatives of the men killed in 1940 could claim to be victims of an Article 3 violation. These were the widow of one of the men, and nine other applicants who were children in their formative years when their fathers went missing. The remaining five applicants had never had personal contact with their missing fathers or other relatives, and so had not experienced mental anguish such as would fall within the ambit of Article 3.

These ten closest relatives had suffered a double trauma: losing their relatives in the war and not being allowed to learn the truth about their death for more than 50 years because of the distortion of historical fact by the Soviet and Polish communist authorities. In the post-ratification period, they had not been given access to the investigation materials, nor had they otherwise been involved in the proceedings or officially informed of the outcome of the investigation. They had been explicitly prohibited from seeing the 2004 decision to discontinue the investigation on account of their foreign nationality.

Thus, although the institution of the Katyń proceedings had given the applicants a spark of hope in the early 1990s, this had been gradually extinguished in the post-ratification period when they were confronted with the attitude of official denial and indifference in face of their acute anxiety to know the circumstances of the deaths of their close family members and their burial sites. They were excluded from the proceedings on the pretence of their foreign nationality and barred from studying the materials that had been collected. They received curt and uninformative replies from the Russian authorities and the findings that had been made in the judicial proceedings were not only contradictory and ambiguous but also contrary to the historic facts which, nonetheless, were officially acknowledged at the highest political level. The Russian authorities had not provided the applicants with any official information about the circumstances surrounding the deaths of their relatives or made any earnest attempts to locate their burial sites, despite these being obligations under Article 3. Further, by acknowledging that the applicants' relatives had been held prisoner in the Soviet camps but declaring that their subsequent fate could not be elucidated, the Russian courts had denied the reality of summary executions that had been carried out in the Katyń forest and at other mass murder sites. That approach was contrary to the fundamental values of the Convention and must have exacerbated the applicants' suffering. In sum, the Russian authorities had demonstrated

a flagrant, continuous and callous disregard for the applicants' concerns and anxieties amounting to inhuman treatment.

Conclusion: violation in respect of ten applicants (five votes to two).

Article 41: In the exceptional circumstances of the present case, the finding of a violation of Article 3 constituted sufficient just satisfaction.

Inhuman treatment
Degrading treatment

Spraying of tear gas into applicant's face after arrest: *violation*

Ali Güneş v. Turkey - 9829/07
Judgment 10.4.2012 [Section II]

Facts – The applicant took part in a demonstration related to the 2004 NATO summit in Istanbul. According to his account of the events, police officers grabbed him and other protesters by the arms, sprayed them with tear gas and beat them up. According to the Government, the protesters had refused to leave the demonstration area after reading a press communiqué and had attacked the police with sticks and stones. As a result, the police had used tear gas to disperse the crowd. The applicant and a number of other protesters were taken into custody, where they were kept for some eleven hours before being released. The applicant was examined by two doctors, who concluded that he had hyperaemia in both eyes. The incident was widely reported in the national press, which published a photograph of the applicant being held by two police officers, one of whom was spraying gas into the applicant's nose and eyes from very close range.

Law – Article 3 (*substantive aspect*): The Court had already examined the issue of the use of tear gas for law-enforcement and noted the effects it could produce. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) had expressed concerns over the use of tear gas in law-enforcement activities and called for clear directives in national law on that subject. The Court agreed with the CPT's concerns and stressed, in particular, that there could be no justification for the use of tear gas against an individual who had already been taken under the control of the law-enforcement authorities, as in the applicant's case. The Government had not sought to justify the spraying of the applicant with tear gas after he had already been arrested. It must have subjected him to inhuman and degrading treatment.

Conclusion: violation (unanimously).

The Court also found unanimously that there had been a violation of the procedural aspect of Article 3 on account of the failure to carry out an investigation into the applicant's allegations.

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

Prolonged imposition of "dangerous detainee" regime: *violation*

Piechowicz v. Poland - 20071/07
Judgment 17.4.2012 [Section IV]

Facts – In October 2007 the applicant, who faced charges of drug-trafficking and leadership of a criminal organisation, was classified as a "dangerous detainee" and placed in a cell all parts of which including the sanitary facilities were constantly monitored *via* closed-circuit television. He was subjected to a body search every time he left and entered the cell, which in practice meant that he had to strip naked in front of prison guards, who would also perform an anal inspection. Whenever he was outside the cell, he was supervised by two prison guards and made to wear joined shackles on his hands and feet. On several occasions another inmate was placed in his cell for brief periods of time. Visits from his family members were also restricted and his correspondence was monitored. The decision to classify the applicant as a "dangerous detainee" was reviewed at three monthly intervals and consistently upheld on account of the nature of the charges. He was released in July 2010.

Law – Article 3 (*substantive aspect*): Although the applicant was never convicted of any violent crime, he was convicted of a number of serious crimes, including belonging to an organised criminal group, and his initial placement in the "N" regime could be considered legitimate. However, the Court could not accept that the continued, routine and indiscriminate application of the full range of measures that the authorities were obliged to apply under that regime for two years and nine months had been necessary for maintaining prison security. The applicant was subjected to only limited social isolation, since he shared his cell at times, maintained daily contact with the prison staff, was entitled to receive family visits, and had access to television and the prison library. However, the authorities had failed to provide "N" ward inmates

with appropriate stimulation and adequate human contact. They denied the applicant's requests to take part in the training, workshops, courses and sports activities organised for ordinary inmates and refused to allow him to have his own sports equipment, computer games or a CD player in his cell. In addition, the negative psychological and emotional effects of his social isolation were further aggravated by the routine application of other special security measures, in particular the shackling and strip searches. The Court was not convinced that systematic shackling every time the applicant left his cell had been necessary. Likewise, the strip-searches involving an anal inspection were carried out routinely and were not linked to any concrete security needs or specific suspicions and notwithstanding the other security measures the applicant was constantly subject to such as supervision via CCTV and prison guards. Even though strip-searches might be necessary on occasion to ensure prison security or to prevent disorder or crime, the Court was not persuaded that such systematic, intrusive and exceptionally embarrassing checks performed on the applicant daily, or even several times a day, had been necessary to ensure safety in prison. Lastly, while the gravity of the applicant's alleged crimes could justify his initial classification as a "dangerous detainee" and the imposition of the "N" regime, it could not serve as the sole justification for its prolonged continuation. Given the cumulative effects on the applicant of the strict prison regime that had been imposed, the Court found that its duration and the measures taken had exceeded the requirement of prison security and had not been necessary.

Conclusion: violation (unanimously).

The Court also found violations of Article 5 § 3 (length of pre-trial detention), Article 5 § 4 (lack of equality of arms) and Article 8 (restriction on the applicant's contact with his family and censorship of his correspondence).

Article 41: EUR 18,000 in respect of nonpecuniary damage.

Effective investigation

Violence in prison by fellow inmates in reprisal for cooperating with the police: *violation*

J.L. v. Latvia - 23893/06
Judgment 17.4.2012 [Section III]

Facts – The applicant alleges that, after he gave evidence for the prosecution in proceedings against another prisoner, he was physically and sexually assaulted by fellow inmates following his arrival at the Central Prison to start a prison sentence. However, according to the applicant, the prison doctor who rendered him medical assistance refused to draw up a medical report and a prison guard refused to initiate an investigation into the assault. The applicant was then transferred to another cell and some two months later to a different prison, where he complained about his ill-treatment in the Central Prison to the Ombudsman. Following an inquiry, the Central Prison informed the Ombudsman that the applicant had never complained of any ill-treatment there.

Law – Article 3 (*procedural aspect*): It was undisputed that the applicant had collaborated with the police in investigating a serious crime, while he himself was due to stand trial. The authorities should therefore have taken measures to ensure his safety as a collaborator of justice. However, there was no information that any reasonably expected measures – such as informing the prosecutor and the prison authorities of his cooperation – were taken before he was transferred to prison. On the facts, the applicant had an arguable claim of ill-treatment, which under domestic law both the prosecutor and the prison administration authorities were obliged to investigate. The prison administration had requested the Central Prison to carry out the investigation, but it was flawed in a number of ways: no medical examination was carried out, no statements were taken from the applicant or the prison doctor, and the applicant was never informed of the results. That investigation could not therefore be regarded as independent or intended to establish what actually happened. In fact, despite the Office of the Prosecutor's broad powers to supervise places of detention and to review complaints by individuals with restricted capacity to protect their rights, the applicant's complaints of ill-treatment had been left unexamined. Finally, the Court noted the general lack of coordination among the investigators, the prosecution and the prison authorities in preventing possible ill-treatment of detainees who, owing to their cooperation in the disclosure of criminal offences, were particularly vulnerable and prone to prison violence. The conduct of the national authorities in the applicant's case and the manner in which they had applied the domestic law in reply to his claim of ill-treatment had therefore failed to comply with the State's procedural obligation under Article 3.

Conclusion: violation (unanimously).

Article 41: EUR 10,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Rodić and Others v. Bosnia and Herzegovina*, no. 22893/05, 27 May 2008, Information Note no. 108; and *Premininy v. Russia*, no. 44973/04, 10 February 2011, Information Note no. 138)

Extradition

Conditions of detention in super-max US prison: *extradition would not constitute a violation*

Babar Ahmad and Others v. the United Kingdom
- 24027/07 et al.
Judgment 10.4.2012 [Section IV]

Facts – The applicants were indicted on various charges of terrorism in the United States, which requested their extradition. They complained before the European Court about the risk of serving their prison term in the US in ADX Florence, a super-max prison, where they would be subjected to special administrative measures, and of being sentenced to irreducible life sentences.

Law – Article 3

(a) *Prison conditions at ADX Florence*: Although the applicants' detention at ADX Florence would not be inevitable, the Government accepted that there was a real risk of their detention there if they were extradited and convicted in the US. It seemed undisputed that the physical conditions at ADX Florence – the size of the cells, the lighting and sanitary facilities – met the requirements of Article 3. However, the applicants complained of a lack of procedural safeguards before their placement there and the ADX's restrictive conditions and lack of human contact. As to the first complaint, the US authorities had shown that not all inmates convicted of international terrorism offences were serving time at ADX Florence. Instead, the Federal Bureau of Prisons seemed to apply accessible and rational criteria when deciding whether to transfer an inmate to that facility. Moreover, a hearing was held before such transfers were made and the inmates could bring a claim in the federal courts under the due process clause of the Fourteenth Amendment to the US Constitution. As regards the second complaint, even though the applicants were not physically dangerous, the US authorities would be justified in considering them as posing a significant security risk justifying limitations on their ability to communicate with the outside world. It further seemed that well-established procedures were in place for reviewing an inmate's security classification. It was undisputed that conditions at ADX Florence, in particular in the special security unit, were highly restrictive as they sought to prevent all physical contact between the inmates and with staff. However, a great deal of in-cell stimulation was provided through television and radio channels, frequent newspapers, books, hobby and craft items and education programmes. Indeed, the range of activities and services provided went beyond what was provided in many prisons in Europe. Moreover, even the inmates under special administrative measures had the right to regular telephone calls, social visits and correspondence with their families. While in their cells, inmates could only communicate with other inmates through the ventilation system, but during recreation periods they were free to communicate without impediment. All of these factors showed that the isolation experienced by ADX inmates was partial and relative.

Conclusion: no violation (unanimously).

(b) *Possible life imprisonment*: It was not certain that, if extradited, the applicants would be convicted or that a discretionary life sentences would be imposed on them. However, even if such a sentence was imposed on the applicants, given the gravity of their charges, the Court did not consider that they would be grossly disproportionate. Moreover, as the Court had observed in previous cases, in respect of a discretionary life sentence, an Article 3 issue would only arise when it could be shown: (i) that the applicant's continued incarceration no longer served any legitimate penological purpose; and (ii) the sentence was irreducible *de facto* and *de iure*. Since none of the applicants had yet been convicted or started serving their sentence, the Court considered that they had not shown that, upon extradition, their incarceration in the US would not serve any legitimate penological purpose. It was further uncertain whether, should that point ever be reached, the US authorities would refuse to avail themselves of mechanisms available in their system to reduce the applicants' potential sentences.

Conclusion: no violation (unanimously).

The Court decided to adjourn the examination of complaints made by the second applicant, who suffers from schizophrenia, and to examine them at a later date under a new application number.

(See also *Ramirez Sanchez v. France* [GC], no. 59450/00, 4 July 2006, Information Note no. 88; and *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, 17 January 2012, Information Note no. 148)

ARTICLE 6

Article 6 § 1 (civil)

Civil rights and obligations

Prison board's repeated refusal, with no right of appeal to the administrative courts, to grant prisoner temporary leave: *no violation*

Boulois v. Luxembourg - 37575/04
Judgment 3.4.2012 [GC]

Facts – The applicant was sentenced to fifteen years' imprisonment. Between 2003 and 2006 he submitted six requests for temporary leave of absence ("prison leave") on the grounds, in particular, that he wished to carry out administrative tasks and take courses in order to gain qualifications. His requests were all refused by the Prison Board. The applicant lodged an application for judicial review of the first two refusals with the Administrative Court, which declined jurisdiction to examine the application. That judgment was upheld by the Higher Administrative Court.

In a judgment of 14 December 2010 (see Information Note no. 136), a Chamber of the Court held, by four votes to three, that there had been a violation of Article 6 § 1 on the grounds that the absence of any decision on the merits of the application for judicial review had nullified the effect of the administrative courts' review of the Prison Board's decisions. Furthermore, the legislation in force did not provide prisoners with any other remedy.

Law – Article 6 § 1: Article 6 § 1 of the Convention was not applicable under its criminal head, as the proceedings concerning the prison system did not relate in principle to determination of a "criminal charge". The Court therefore had to consider whether the applicant had had a "civil right", in order to assess whether the procedural safeguards afforded by Article 6 § 1 were applicable to the proceedings concerning his requests for prison leave. It first had to be determined whether the applicant had possessed a "right" to prison leave. The domestic legislation defined prison leave as permission to leave prison either for part of a day or for periods of twenty-four hours. This was a "privilege" which "[might] be granted" to prisoners in certain circumstances. It had clearly been the legislature's intention to create a privilege in respect of which no remedy was provided. The competent authorities enjoyed discretion as to whether or not to grant leave, even where the prisoner concerned formally met the required criteria. As to the interpretation of the legislation by the domestic courts, the administrative courts had declined jurisdiction to examine the applicant's application for judicial review. Accordingly, the applicant could not claim, on arguable grounds, to possess a "right" recognised in the domestic legal system.

Furthermore, although the Court had recognised the legitimate aim of a policy of progressive social reintegration of persons sentenced to imprisonment, neither the Convention nor the Protocols thereto expressly provided for a right to prison leave. The same was true in relation to a possible principle of international law. Lastly, no consensus existed among the member States regarding the status of prison leave and the arrangements for granting it. In any event, the respondent State was far from indifferent to the issue of resettlement of prisoners, as testified by the existence of prison leave and the legislative reform which was under way concerning the execution of sentences.

In view of all these considerations, the applicant's claims did not relate to a "right" recognised in Luxembourg law or in the Convention. Accordingly, Article 6 was not applicable.

Conclusion: no violation (fifteen votes to two).

Fair hearing

Posthumous finding of guilt engaging liability of heirs: *violation*

Lagardère v. France - 18851/07
Judgment 12.4.2012 [Section V]

Facts – In December 1992 a company lodged a complaint against Jean-Luc Lagardère, the applicant's father, for misappropriation of corporate assets, and applied to join the criminal proceedings as a civil party. In June 1999 the father was brought before the criminal court, which declared the prosecution time-barred. In January 2002 the Paris Court of Appeal upheld all the provisions of that judgment. The company appealed on points of law. Jean-Luc Lagardère died in March 2003. In October 2003, after declaring that the prosecution had lapsed as a result of the accused's death, the Court of Cassation quashed and annulled the civil provisions of the judgment of the Paris Court of Appeal and fixed a new, later date at which time had started to run for the purposes of the limitation period. The Versailles Court of Appeal, to which the case was referred for fresh examination, found that the constituent elements of the offence of misappropriation

of corporate assets were established and ordered Jean-Luc Lagardère's heirs to pay approximately fourteen million euros to the civil party. The applicant appealed on points of law, arguing that there had been a violation of Article 6 of the Convention because the criminal court had no authority to judge the matter after his father's death. The Court of Cassation rejected the appeal.

Law – Article 6 § 1: The applicant complained that he had been ordered, as his father's successor, to pay damages because of his father's criminal conduct even though his father's guilt had not been established prior to his death, but only posthumously, by the Versailles Court of Appeal, to which the case was referred in order to examine the civil case.

First of all, the Court noted that the discussion between the parties had focused largely on whether a decision on the merits had been reached in the criminal proceedings while Jean-Luc Lagardère was still alive, which was a necessary condition under French law for the criminal court to be able to rule on the civil action. It was therefore the Court's task to determine whether, on the whole, the proceedings in this case had been fair. Prior to the applicant's father's death the Criminal Court and the Paris Court of Appeal had declared the criminal prosecution time-barred. However, the Versailles Court of Appeal, after having expressly stated that criminal proceedings were extinguished by the death of the person against whom they had been brought, had considered that the two earlier decisions of the trial courts finding that the prosecution was time-barred – decisions reached prior to the applicant's father's death – concerned the merits of the case and permitted the civil proceedings to continue. The Versailles Court of Appeal had accordingly concluded that it had jurisdiction to determine whether the elements of the offence of misappropriation of corporate assets were established against the accused. It had expressly found the elements of the offence established and declared Jean-Luc Lagardère guilty, based on his conduct. That finding had been mentioned in the operative provisions of the judgment of the Court of Cassation. In finding, after his death, that the elements of the offence with which the accused was charged were established, the Versailles Court of Appeal had, in no uncertain terms, found him guilty posthumously. That first finding of guilt in the proceedings was made by that court when the case was referred to it for re-examination, with no respect for the adversarial principle or the rights of the defence, as the accused had died two years earlier. In that connection, the European Court noted that it had held on several occasions that a denial of justice occurred where a person convicted *in absentia* was unable subsequently to obtain a hearing for a fresh determination of the merits of the charge, in respect of both the legal and factual aspects of the case. There was no doubt that this jurisprudence applied with even greater relevance in cases involving a finding of guilt after death. The Court noted that the applicant's civil liability as his father's successor was the direct result of the father's posthumous conviction. The applicant had therefore not been in a position to validly challenge the existence or the value of the sums he was ordered to pay. In the circumstances, the applicant had not been able to defend his case in keeping with the principle of a fair trial, having been deprived of any opportunity to challenge the merits of the case against him – which was based on his father's posthumous conviction – and placed at a clear disadvantage compared with the opposing party.

Conclusion: violation (unanimously).

Article 6 § 2: The applicant had been ordered to pay damages in the civil proceedings not so much in recognition of his criminal liability but more in order to compensate the victims for their losses. Clearly, neither the purpose nor the amount of the compensation made the measure a criminal penalty for the purposes of Article 6 § 2. In this respect the claim for damages did not amount to a new "criminal charge" against the applicant's father.

The accused had died before his guilt had been lawfully established by a "tribunal", so prior to his death he had been presumed innocent. Although the civil action was only accessory to the criminal prosecution, the Versailles Court of Appeal had nevertheless set out to establish the guilt of the late accused and the profit he had made, so that it could then rule on the civil action and order the applicant to pay compensation. That link between the criminal proceedings and the civil action was considered to justify extending the scope of Article 6 § 2 to the civil proceedings. Accordingly, in terms of both the language it had used and the reasoning it had given, the Versailles Court of Appeal had declared the applicant's father guilty of the charges against him even though the prosecution had lapsed as a result of his death and no court had ever found him guilty during his lifetime. It had therefore violated his right to be presumed innocent.

Conclusion: violation (five votes to two).

Article 41: EUR 10,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

Article 6 § 1 (civil) (criminal)

Fair hearing

Confiscation of property of an accused's widow: *no violation*

Silickienė v. Lithuania - 20496/02
Judgment 10.4.2012 [Section II]

(See Article 6 § 2 below, page 16)

Article 6 § 1 (criminal)

Determination of a criminal charge
Fair hearing

Alleged lack of fairness of proceedings to have police report annulled following change in legislation: *no violation*

Nicoleta Gheorghe v. Romania - 23470/05
Judgment 3.4.2012 [Section III]

Facts – On the basis of a police report drawn up in May 2004 the applicant was ordered to pay a fine for causing a disturbance in the block of flats where she lived, amounting to a breach of the peace. She contested the police report before the court of first instance, which dismissed her claims as unsubstantiated. The applicant then lodged an appeal against that judgment, which was dismissed as unfounded by the county court.

Law – Article 6 § 1

(a) *Admissibility* – The new admissibility criterion provided for by Article 35 § 3 (b) of the Convention was not applicable, since respect for human rights required examination of the application to be continued notwithstanding the amount of the fine (approximately EUR 17) giving rise to the complaint. In that regard, the application raised the issue of the applicability of Article 6 in its criminal aspect to a set of criminal proceedings concerning the minor offence of breach of the peace. This was the first case which the Court had been called upon to examine since the changes to the relevant domestic law and practice previously held by the Court to be contrary to Article 6 on the ground that they did not provide sufficient safeguards, particularly with regard to respect for the presumption of innocence. A ruling by the Court on this question of principle would provide the domestic courts with guidance as to the scope of the guarantees which should be afforded at domestic level to persons committing the minor offence of breach of the peace. As to applicability, the general nature of the statutory provision infringed by the applicant and the deterrent and punitive purpose of the penalty imposed were sufficient to demonstrate that the offence in question was of a criminal nature for the purposes of Article 6, which was therefore applicable.

(b) *Merits* – There was no evidence that the courts before which the applicant had contested the police report had had preconceived ideas as to her guilt, despite the fact the judgment of the court of first instance made clear that they expected the applicant to adduce evidence to contradict the facts established by the police officer. The legislation on minor offences was applied in conjunction with the Code of Civil Procedure, which, with regard to evidence, was subject to the principle that the burden of proof lay with the person making the allegation. The Court noted in that connection that presumptions of fact or of law operated in every legal system and that, while the Convention did not prohibit them in principle, it did require the Contracting States to remain within certain limits regarding criminal law.

As to the seriousness of what had been at stake, in view of the changes made to the legislation on minor offences during the proceedings brought by the applicant, she had faced at most a fine, which, even in the event of non-payment, could not then be converted into a custodial sentence.

With regard to the preservation of her defence rights, the applicant had merely added documents to the case file by way of evidence and had not requested that any persons be summoned to appear, although that option had been available to her. Article 6 did not prevent persons from waiving of their own free will the guarantees enshrined therein. However, any waiver had to be made in an unequivocal manner and must not run counter to any important public interest. By stating at a public hearing before the national courts that she did not wish to request the production of other evidence, the applicant had knowingly laid herself open to the risk of being convicted on the basis of the evidence in the case file, including the police report which she herself had produced before the court of first instance and in respect of which there had been a rebuttable presumption that it was well-founded.

Furthermore, the domestic courts that had examined the applicant's challenge against the police report had enjoyed full jurisdiction and could have annulled the report had they considered it to be

void or unfounded. There was nothing to suggest arbitrariness or a lack of fairness. The fact that the courts, on the basis of reasoned decisions, had assessed the grounds of nullity relied on by the applicant and had decided not to annul the report as the applicant would have wished was not sufficient to cast doubt on the fairness of the proceedings in question or, more specifically, on the courts' compliance with the principle of presumption of innocence.

Conclusion: no violation (unanimously).

Article 6 § 2

Presumption of innocence

Confiscation of property of an accused's widow: *no violation*

Silickienė v. Lithuania - 20496/02
Judgment 10.4.2012 [Section II]

Facts – The applicant's husband M.S., who had been a high-ranking tax police officer, was charged with forming and leading a criminal organisation for smuggling. In 2000 the authorities froze certain assets belonging to M.S., his mother and the applicant as they suspected that the property had been acquired as a result of criminal activities. M.S.'s mother appealed and some of her assets were released. The applicant, however, did not lodge any appeal. In 2003 M.S. committed suicide and the applicant and M.S.'s mother requested continuation of the criminal proceedings in order to seek his rehabilitation. The court decided to continue the proceedings in so far as they concerned the activities of the criminal association organised by M.S. and appointed a lawyer to defend his interests. In 2004 the court held that there were no grounds to exculpate M.S. since the available evidence suggested that he was guilty of the offences. However, in view of his death, it discontinued the proceedings against him, while at the same time convicting some of his co-accused. The court also ordered confiscation of certain property, including the applicant's apartment and shares she held in a telecommunications company, on the grounds that it had been acquired as a result of M.S.'s criminal activities. The appeals against that judgment were dismissed, *inter alia*, on the grounds that the applicant's property had been acquired through the criminal organisation's illegal activities as the applicant had doubtlessly been aware.

Law – Article 6 § 1: The applicant argued that she had been unable to defend her rights in the criminal proceedings against her husband which had resulted in the confiscation of her property. The Court thus had to determine whether, in the light of the severity of that measure, the domestic legal procedure had afforded the applicant an adequate opportunity to put her case to the courts. While it was true that the applicant was not a party to the criminal proceedings against the criminal organisation, the system in question had not been without safeguards. Firstly, the applicant could have sought judicial review proceedings of the initial 2000 seizure measure. She could also have explained the origin of her property had she chosen to testify in the criminal proceedings, but had not availed herself of that opportunity either. Lastly, after M.S.'s death the court had appointed a lawyer to represent his interests in the criminal proceedings and, following the first-instance judgment, his family had hired another lawyer to represent their interests, including the applicant's proprietary interests. In those circumstances, even though in principle persons whose property was confiscated should have been formally granted the status of a party to the proceedings resulting in such measures, the Court accepted that in the particular circumstances of the applicant's case the Lithuanian authorities had *de facto* afforded her a reasonable and sufficient opportunity to adequately protect her interests.

Conclusion: no violation (unanimously).

Article 6 § 2: The Court reiterated that criminal liability did not survive the suspect's death and that imposing criminal sanctions on the living in respect of acts apparently committed by a deceased called for its careful scrutiny. In the applicant's case, as explained by the appellate court, which had direct knowledge of the facts, the confiscated property had not been acquired through the criminal acts of M.S. alone, but rather from the illicit proceeds of the criminal activities of an entire criminal organisation, whose members had ultimately been convicted. Moreover, the trial court had established that in order to purchase the confiscated apartment the applicant had taken a loan from unexplained sources and that the confiscated shares had been purchased through an off-shore company used by the criminal organisation to launder the illegally obtained money. The applicant had accordingly not been punished for the criminal acts of her late husband, and had not inherited his guilt.

Conclusion: no violation (unanimously).

Article 1 of Protocol No. 1: The confiscation of the property, which had been in accordance with the law, had pursued the legitimate aim of ensuring

that the use of the property at issue did not procure the applicant a pecuniary advantage to the detriment of the community. What remained to be determined was whether a fair balance was struck between that aim and the applicant's fundamental rights, bearing in mind, *inter alia*, her behaviour. In that connection, the Court noted the appellate court's finding that the applicant had direct knowledge that the confiscated property could only have been purchased with the proceeds of the criminal organisation's unlawful enterprise and in separate criminal proceedings had confessed to having committed crimes with a view to helping her husband escape criminal liability while he was detained. The impugned confiscation proceedings concerned both the legality of and the justification for the measure and had established that all the confiscated property had been purchased with the proceeds of illegal activities. Lastly, given the scale, systematic nature and organisational level of the criminal activity at issue, the confiscation measure complained of may have appeared essential in the fight against organised crime. Given the margin of appreciation afforded to the States in combating the most serious crimes, the interference with the applicant's property rights had not been disproportionate to the legitimate aim pursued.

Conclusion: no violation (unanimously).

Posthumous finding of guilt engaging civil liability of heirs: violation

Lagardère v. France - 18851/07
Judgment 12.4.2012 [Section V]

(See Article 6 § 1 above, page 13)

ARTICLE 8

Respect for private life

Conviction of university professor for refusing to comply with court order requiring him to grant access to research materials: *Article 8 inapplicable; inadmissible*

Gillberg v. Sweden - 41723/06
Judgment 3.4.2012 [GC]

Facts – The applicant, a university professor, was responsible for a research project on hyperactivity and attention-deficit disorders in children that was carried out between 1977 and 1992. According to the applicant, the university's ethics committee had made it a precondition for the project that sensitive information about the participants would be accessible only to him and his staff, and he had therefore promised absolute confidentiality to the patients and their parents. In 2002 a researcher from another university and a paediatrician requested access to the research material. After their requests were refused by the university they appealed to the administrative court of appeal, which found that they had shown a legitimate interest and should be granted access to the material on conditions which included restrictions on its use and a ban on removing copies from the university premises. The applicant refused to hand over the material, however, and it was eventually destroyed by colleagues. The applicant was subsequently prosecuted and convicted of misusing his office. He was given a suspended sentence and a fine of the equivalent of EUR 4,000. His conviction was upheld by the court of appeal, which held that he had wilfully disregarded the obligations of his office by failing to comply with the judgments of the administrative court of appeal.

In a judgment of 2 November 2010 (see Information Note no. 135) a Chamber of the Court held by five votes to two that there had been no violation of Article 8 of the Convention and no violation of Article 10. In reaching that conclusion it left open the question whether the complaint fell within the scope of Article 8 and Article 10.

Law – The applicant's complaints that his rights under Articles 8 and 10 of the Convention had been violated by the administrative court of appeal's judgments requiring him to make the research material available to the two researchers had been declared inadmissible by the Chamber as being out of time. Accordingly, the Grand Chamber's jurisdiction was confined to his complaints concerning his criminal conviction for misuse of office for refusing to comply with those orders.

Article 8: The Court had to determine whether the applicant's conviction for misuse of office amounted to interference with his "private life" within the meaning of Article 8. In that connection, it noted that the applicant was a public official exercising public authority at a public institution. He was not the children's doctor or psychiatrist and did not represent the children or the parents.

In response to the applicant's allegations that his conviction had prejudiced his honour and reputation and adversely affected his moral and psychological integrity, the Court reiterated that Article 8 could not be relied on in order to complain of a

loss of reputation or other repercussions that were the foreseeable consequences of one's own actions and, in particular, the commission of a criminal offence. There was no Convention case-law in which the Court had accepted that a criminal conviction in itself constituted interference with the right to respect for private life.

The applicant's conviction had not been the result of an unforeseeable application of the domestic law and the offence of which he was convicted (misuse of office) had no obvious bearing on the right to respect for "private life" but, on the contrary, concerned professional acts and omissions by public officials in the exercise of their duties. Nor was there any indication that the conviction had had any repercussions on the applicant's professional activities that went beyond the foreseeable consequences of the offence of which he was convicted. His conviction had had no negative bearing on his position at the university and he had not established any causal link between his conviction and his dismissal by the Institute of Public Health. In any event, any economic loss he may have suffered as a result of the loss of that job or of not being able to pursue his book-publishing activities for want of time while the criminal proceedings were pending also constituted foreseeable consequences of the commission of the offence. Accordingly, the applicant's rights under Article 8 had not been affected and that provision was not applicable.

Conclusion: preliminary objection upheld (unanimously).

Article 10: The Court did not rule out that a "negative" right to freedom of expression was protected under Article 10. It noted, however, that the material the applicant had refused to make available belonged to the university and consisted of public documents subject to the principle of public access under the Freedom of the Press Act and the Secrecy Act. Under the legislation, it was impossible for a public authority to enter into an agreement with a third party in advance exempting official documents from the right to public access. For this reason, the criminal courts had held when convicting the applicant that the assurances of confidentiality he had given to the participants in the study had gone further than was permitted by law. The criminal courts had, in any event, been bound by the administrative courts' judgments, which had settled the question of whether and on what conditions the documents were to be released to the two researchers. The applicant had not submitted any convincing evidence to support his allegation that his assurances of confidentiality to the research participants had been a requirement of the university's ethics committee. In reality, the applicant had not been prevented from complying with the administrative courts' judgments by any statutory duty of secrecy or any order from his public employer, but rather by his personal belief that the judgments of the administrative courts were wrong.

In these circumstances, the crucial question was whether the applicant, as a public employee, had an independent negative right under Article 10 not to make the research material available, even though it belonged not to him but to the university and despite the fact that the university had intended to comply with the administrative court's judgments. In the Court's view, finding that the applicant had such an independent "negative" right would run counter to the university's property rights and also impinge on the two researchers' rights to receive information (Article 10) and to have a final court judgment implemented (Article 6). The Court noted also that the applicant's situation could not be compared to that of journalists protecting their sources as the information diffused by a journalist based on his or her source generally belonged to the journalist or the media, whereas in the applicant's case the research material was owned by the university and was in the public domain. Nor, since he had not been mandated by the research participants as their doctor, had the applicant owed any duty of professional secrecy towards them.

In sum, the applicant's rights under Article 10 had not been affected and that provision was not applicable.

Conclusion: preliminary objection upheld (unanimously).

Adoption of child following mother's deportation, despite father's opposition: *violation*

K.A.B. v. Spain - 59819/08
Judgment 10.4.2012 [Section III]

Facts – The applicant is a Nigerian national. He emigrated in 2001 to Spain with his partner and their one-year-old son. Later that year the partner was deported from Spain and barred from returning for ten years. Her lawyer had pleaded before the investigating judge that her thirteen-month-old baby was in Spain but the deportation nevertheless went ahead on 24 October 2001. The child was taken in by friends of the couple, as the applicant

was in another city for work-related reasons. Eight days later an investigation was opened by the prosecutor responsible for minors. The child was declared abandoned on 16 November 2001 and placed in a children's home. On 30 November 2001 the applicant went to the Child Protection Department and, claiming to be the child's biological father, said that he disagreed with the placement. He expressed his intention to undergo a paternity test. However, the test did not take place as the applicant could not pay for it. In the absence of further news from the applicant, the child was placed in a foster family and an adoption procedure was initiated. However, the applicant successfully brought an action to establish paternity, which was recognised in 2005, and he then started proceedings to challenge the adoption. In 2006 his challenge was rejected on the ground that he had justifiably been deprived of parental authority and therefore his agreement to the adoption was not required. The court relied in particular on the fact that the applicant had lived only briefly with the child, that he had not taken any action since 2001 to prove that he showed any interest in the child's welfare and that he had waited for two years before claiming paternity. That judgment was upheld on appeal and the applicant's *amparo* appeal was declared inadmissible. The adoption of the applicant's son by his foster family was authorised by the Family Court. Appeals by the applicant were dismissed.

Law – Article 8: The present case was about the relationship between a child born out of wedlock and the biological father. The lack of family ties between the applicant and his son was not entirely attributable to the applicant himself, considering that he had not seen his son since the mother's deportation. The formalities undertaken by the applicant, bearing in mind his precarious situation, were sufficient to show that he wished to recover the child. It could not be excluded that the applicant's intention to regain contact with his son was covered by the protection of "family life". In any event, the decisions of the Spanish courts, refusing any contact or possibility of reunion with his son, had constituted interference with his right to respect for, at least, his private life.

The Court examined the case from the perspective of the State's positive obligations under Article 8. In view of the child's age, the Court found particularly serious the fact that, between his mother's deportation and the declaration of his abandonment, the child had remained for almost one month in a state of legal limbo. The declaration of abandonment had triggered the subsequent proceedings leading to the child's adoption by the Spanish couple, who had initially received him on a pre-adoption basis. However, the situation of abandonment had at least partly been caused by the authorities themselves, as they had deported the mother without prior verification and without taking into account the information provided to the judge about the existence of her baby. No satisfactory explanation had been forthcoming to justify the urgency of the deportation. Nevertheless, at no point in the proceedings had the authorities' responsibility been invoked. In particular, the Family Court, without taking into account the applicant's vulnerability in 2001, had found that the applicant was himself fully responsible for the loss of contact with his son. In reality, the applicant had not been informed of the payment that he was supposed to make for the paternity test, nor of the fact that the test could be covered by the State under the legal-aid scheme. Lastly, despite the fact that the Child Protection Department had the applicant's name and address, they had not tried to make contact with him, allegedly because his paternity had not been established. Even after the applicant had gone to the relevant family authority in 2003, the adoption procedure was nevertheless pursued for one year before being suspended on account of the application to establish paternity.

Thus, the passage of time – resulting from the authorities' inaction –, the deportation of the child's mother without the necessary prior verification, the failure to assist the applicant when his social and financial situation was most fragile at the earlier stage, together with the failure of the courts to give weight to any other responsibility for the child's abandonment and the finding that the applicant had lost interest in his son's welfare, had decisively contributed to preventing the possibility of reunion between father and son. The national authorities had therefore failed in their duty to act particularly swiftly in such matters and had not made appropriate or sufficient efforts to ensure respect for the applicant's right to be reunited with his son.

Conclusion: violation (six votes to one).

Article 41: EUR 8,000 in respect of non-pecuniary damage.

Conviction for incest: *no violation*

Stübing v. Germany - 43547/08
Judgment 12.4.2012 [Section V]

Facts – At the age of three the applicant was placed in foster care. He was eventually adopted and had no further contact with his family of origin. Following his biological mother's death in 2000, the applicant re-established contact with his family of origin and began having consensual sexual intercourse with his biological sister S.K., then aged 16. They lived together for several years and had four children. The applicant was convicted of incest several times and sentenced to imprisonment. S.K. was found to be suffering from a serious personality disorder and mild learning disabilities and was therefore not given a sentence. The applicant's appeals against his convictions were dismissed. In dismissing the applicant's constitutional complaint, the Constitutional Court gave a detailed decision why it considered that sexual relations between siblings could adversely affect the family structure and society as a whole as well as carry consequences for the children resulting from such relations.

Law – Article 8: It was common ground that he applicant's conviction constituted an interference with his private life, which included his sexual life. The conviction was further in accordance with domestic law, namely section 173 § 2 of the Criminal Code, which prohibited consensual sexual intercourse between consanguine adult siblings and which aimed at the protection of morals and the rights of others. What remained to be examined was whether the applicant's conviction had been necessary in a democratic society, regard being had to the fair balance that had to be struck between the relevant competing interests and the margin of appreciation enjoyed by the State. In respect of the latter, the Court noted that there was no consensus among the Council of Europe member States as to whether or not the consensual commitment of sexual acts between adult siblings should be criminally sanctioned. However, a majority of twenty-four of the forty-four States reviewed provided for criminal liability in such cases and all legal systems – including those which did not impose criminal liability – prohibited siblings from getting married. Thus, there was a broad consensus that sexual relations between siblings were neither accepted by the legal order or by society as a whole. The domestic authorities therefore enjoyed a wide margin of appreciation in how to confront incestuous relationships between consenting adults, notwithstanding that their decision concerned an intimate aspect of an individual's private life. Having carefully examined all the arguments for and against, the Federal Constitutional Court had concluded that the imposition of criminal liability was justified for the protection of the family, self-determination and public health. It also considered that sexual relations between siblings might seriously damage family structures and consequently society as a whole. In addition, the Court noted that S.K. had first entered into a sexual relationship with the applicant at the age of sixteen, following the death of their biological mother. She suffered from a serious personality disorder, which had led her to become considerably dependent on the applicant. Having particular regard to the Constitutional's Court careful consideration of the applicant's case, as well as to the wide margin of appreciation enjoyed by the State, the Court concluded that the domestic courts had not overstepped their margin when convicting the applicant of incest.

Conclusion: no violation (unanimously).

Respect for private life
Respect for family life
Respect for home

Planned eviction of Roma from established settlement without proposals for rehousing: *eviction would constitute a violation*

Yordanova and Others v. Bulgaria - 25446/06
Judgment 24.4.2012 [Section IV]

Facts – The applicants live in a Roma settlement situated on municipal land in Sofia. The land was first occupied by Roma families in the 1960s and 1970s, with more recent arrivals occurring in the 1990s. The homes are makeshift and were built without authorisation. There is no sewage or plumbing. It is undisputed that the applicants' homes do not meet the basic requirements of the relevant construction and safety regulations and could not be legalised without substantial reconstruction.

In the early 1990s, tension grew in several regions of Sofia between Roma settlements and their non-Roma neighbours. The issue of Roma settlements was widely debated and a number of leading politicians spoke of the need to empty the "Roma ghettos" in Sofia. However, neither the State, nor the municipal authorities attempted to remove the applicants and their families until 17 September 2005, when the district mayor ordered their forcible removal. The domestic courts held that that order was lawful. The mayor publicly stated that

it was not possible to find alternative housing for the settlement's inhabitants, because they had not been registered as people in need of housing and the municipality could not give them priority over others who had been on the waiting list for many years. The eviction was, however, stayed following intervention by the European Parliament and the issue of an interim measure by the European Court under Rule 39 of its Rules.

Law – Article 8: The applicants' expulsion from the makeshift houses they and their families had occupied for many years as part of a community of several hundred people was liable to affect their lifestyle and social and family ties and so constituted interference with their right to respect for their homes, private lives and family lives. Such interference had a valid basis in domestic law and pursued the legitimate aims of securing the economic well-being of the country and protecting health and the rights of others.

The Government had not, however, established that the impugned measures had been necessary in a democratic society. While the authorities were in principle entitled to recover municipal land that was being occupied unlawfully, they had tolerated the unlawful Roma settlement for several decades thus allowing the applicants to develop strong links with the neighbourhood and to build a community life there. The principle of proportionality required that situations where a whole community and long period were concerned be treated as being entirely different from routine cases of removal of an individual from unlawfully occupied property. Under the relevant domestic law at the time, however, the municipal authorities had not been required to have regard to the various interests involved or consider proportionality and, relying on that legal framework, had given no reasons for the decision to expel the applicants other than to state that they occupied the land unlawfully. The domestic courts had expressly refused to hear arguments based on proportionality and the length of time the applicants had occupied the land undisturbed. While it was undisputed that most of the applicants' houses did not meet basic sanitary and building requirements, the Government had not shown that alternative methods of dealing with these problems, such as legalising buildings where possible, constructing public sewage and water-supply facilities and providing assistance to find alternative housing where eviction was necessary, had been considered. Nor had the authorities considered the risk of the applicants becoming homeless. Instead they had attempted to enforce the order in 2005 and 2006 regardless of the consequences. The Government had not shown that the land was urgently needed for the public need they had mentioned. Lastly, the authorities had refused to consider approaches specially tailored to the needs of the Roma community on the grounds that that would amount to discrimination against the majority population. That argument failed, however, to recognise the applicants' situation as an outcast community and socially disadvantaged group potentially in need of assistance to be able effectively to enjoy the same rights as the majority population. The underprivileged status of the applicants' group had to be a weighty factor in considering approaches to dealing with their unlawful settlement and, if their removal was necessary, in deciding on its timing, modalities and, if possible, arrangements for alternative shelter. This factor had not been taken into account in the present case.

While it was true that in the years since September 2005 the Government and the local authorities had declared on several occasions that they planned to find a solution to the applicants' housing problem by providing them with alternative shelter, the discussions and programmes concerned had not been part of a formal procedure before a body empowered to modify the order for their removal and had not resulted in any concrete legal act concerning the applicants. The removal order remained in force and was still enforceable.

In sum, the 2005 removal order had been based on legislation and issued and reviewed under a decision-making procedure which did not require the examination of proportionality and did not offer safeguards against disproportionate interference.

Conclusion: violation (unanimously).

Article 46: General measures should include amendments to the relevant domestic law and practice so as to ensure that orders to recover public land or buildings, where liable to affect Convention-protected rights and freedoms, should, even in cases of unlawful occupation, identify clearly the aims pursued, the individuals affected and the measures in place to secure proportionality.

The individual measures required were either the repeal of the removal order of 2005 or its suspension pending measures to ensure that the authorities had complied with the Convention requirements, as clarified in the judgment.

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

Respect for family life

Refusal to grant long-term cohabitee privilege against testifying in criminal proceedings against partner: *no violation*

Van der Heijden v. the Netherlands - 42857/05
Judgment 3.4.2012 [GC]

Facts – The applicant was summoned as a witness in connection with a criminal investigation into a fatal shooting, but refused to testify before the investigating judge on the grounds that her fifteen-year cohabitation with the principal suspect by whom she had two children entitled her to the same testimonial privilege as was accorded to spouses and registered partners of suspects under the Code of Criminal Procedure. She was subsequently detained for thirteen days for failure to comply with a judicial order to testify. On appeal the Supreme Court ruled that testimonial privilege as laid down in the domestic law sought to protect "family life" between spouses and registered partners only, not between other partners, even if long-term cohabitees. Any difference in treatment to which that situation could be said to give rise was objectively and reasonably justified by the need for the truth to be uncovered and for legal certainty when making exceptions to the statutory duty to testify.

Law – Article 8: The attempt to compel the applicant to give evidence against her long-term partner had interfered with her right to respect for her family life. That interference had been "in accordance with law" and had pursued the legitimate aim of the prevention of crime.

As to whether the interference had been necessary in a democratic society, the wide variety of practices followed by member States regarding the compellability of witnesses militated in favour of allowing the States a wide margin of appreciation when balancing the two competing public interests at stake: prosecuting serious crime and protecting family life from State interference.

The Netherlands was among the many member States to have elected to create a statutory testimonial privilege for certain categories of witness. Since the right not to give evidence constituted an exemption from a normal civic duty acknowledged to be in the public interest, it could, where recognised, be made subject to conditions and formalities, with the categories of its beneficiaries clearly set out. Netherlands law had done this in a "clear and workable manner" by limiting the exemption to close relatives, spouses, former spouses, registered partners and former registered partners of suspects, thus restricting its exercise to individuals whose ties with the suspect could be objectively verified. The member States were entitled to set boundaries to the scope of testimonial privilege and to draw the line at marriage or registered partnerships. The Court did not accept that the applicant's suggestion that her relationship with her partner, albeit equal to a marriage or registered partnership in societal terms, should attract the same legal consequences as formalised unions. The determining factor was not the length or supportive nature of the relationship but the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature. The absence of this legally binding agreement made the applicant's relationship with her partner fundamentally different from that of a married couple or a couple in a registered partnership. Were the Court to hold otherwise, it would create a need either to assess the nature of unregistered non-marital relationships in a multitude of individual cases or to define the conditions for assimilating to a formalised union a relationship characterised precisely by the absence of formality.

Even though some member States, including the Netherlands, treated married couples and those in marriage-like relationships equally for other purposes, including social security and taxation, these issues were governed by different considerations unrelated to the important public interest of prosecuting serious crime. There was no suggestion that the applicant and her partner had been prevented from getting married or entering into a registered partnership. She was not to be criticised in any way for choosing not to. However, having made that choice, she had to accept the legal consequence that flowed from it, namely that she remained outside the scope of the "protected" family relationship to which the "testimonial privilege" exception attached. In these circumstances, the Court did not consider that the alleged interference with her family life had been so burdensome or disproportionate as to imperil her interests unjustifiably. Nor had her thirteen-day detention been disproportionate as the domestic law had contained sufficient procedural safeguards.

Conclusion: no violation (ten votes to seven).

ARTICLE 9

Freedom of religion

Refusal to adjourn a hearing scheduled on a Jewish holiday: *no violation*

Francesco Sessa v. Italy - 28790/08
Judgment 3.4.2012 [Section II]

Facts – The applicant, who is Jewish and a lawyer by profession, represented a complainant at a hearing before the investigating judge on the production of evidence. As the judge was prevented from sitting, his replacement asked the parties to choose between two dates for the adjourned hearing – either 13 or 18 October 2005 – in accordance with a timetable previously determined by the investigating judge. The applicant submitted that both dates fell on a Jewish holiday (Yom Kippur and Sukkoth respectively) and that his religious obligations would prevent him from attending the hearing. The judge set the hearing down for 13 October 2005. The applicant lodged an application with the investigating judge for an adjournment of the hearing and also lodged a criminal complaint against the judge. His application was rejected. The applicant's criminal complaint was discontinued in 2008 on the ground that there was no evidence in the case of an intention to infringe his right to freely manifest his Jewish faith or to offend his dignity on grounds of his religious belief.

Law – Article 9: The investigating judge decided not to allow the applicant's request for an adjournment, basing his decision on the provisions of the Code of Criminal Procedure according to which an adjournment of hearings concerning the immediate production of evidence was justified only where the prosecutor or counsel for the defendant was absent (the presence of counsel for the complainant not being necessary). The Court was not convinced that setting the case down for hearing on a date which coincided with a Jewish holiday and the refusal to adjourn it to a later date amounted to a restriction on the applicant's right to freely manifest his faith. Firstly, it was not in dispute between the parties that the applicant had been able to perform his religious duties. Furthermore the applicant, who should have expected that his request for an adjournment would be refused on the basis of the statutory provisions in force, could have arranged to be replaced at the hearing in question to ensure that he complied with his professional obligations. He had not shown that pressure had been exerted on him to change his religious belief or to prevent him from manifesting his religion or beliefs. In any event, even supposing that there had been an interference with the applicant's right guaranteed under Article 9 § 1, such interference, which was prescribed by law, had been justified on grounds of the protection of the rights and freedoms of others – and in particular the public's right to the proper administration of justice – and the principle that cases be heard within a reasonable time. The interference had observed a reasonable relationship of proportionality between the means used and the aim pursued.

Conclusion: no violation (four votes to three).

ARTICLE 10

Freedom of expression

Conviction of university professor for refusing to comply with court order requiring him to grant access to research materials: *Article 10 inapplicable; inadmissible*

Gillberg v. Sweden - 41723/06
Judgment 3.4.2012 [GC]

(See Article 8 above, page 17)

Imposition of suspended sentence and ban on journalist for refusing to grant right to reply or provide reasons for the refusal: *violation*

Kaperzyński v. Poland - 43206/07
Judgment 3.4.2012 [Section IV]

Facts – The applicant published a newspaper article criticising the local authority for failing to take steps to remedy alleged defects in the sewage and sanitary system. The mayor wrote to the newspaper to contest the allegations and to request publication of a rectification under section 32 of the Press Act. The applicant did not publish or reply to the letter and was subsequently found guilty of an offence under section 46 of the Act. He was given a suspended sentence of four months' restriction of liberty in the form of 20 hours' community service per month and banned from working as a journalist for two years.

Law – Article 10: The sanction imposed on the applicant had interfered with his right to freedom of expression. The interference had been prescribed

by domestic law at the material time (although the relevant provisions had subsequently been found to be incompatible with the Constitution) and pursued the legitimate aim of protecting the reputation or rights of others.

As to whether the sanction had been necessary in a democratic society, the subject of the article – the health risks posed by the municipal sewage system – was indisputably a matter of general interest for the local community. The criticism it contained of the local authorities' and mayor's performance had a solid factual basis, did not amount to a personal attack and was not insulting or frivolous. There had therefore been little scope for imposing restrictions on the applicant's freedom of expression. Nevertheless, a legal obligation to publish a rectification or reply was a normal element of the legal framework governing the exercise of freedom of expression by the print media and could not, as such, be regarded as excessive or unreasonable. Likewise, an obligation to inform the party concerned in writing of the reasons for a refusal to publish a reply or rectification was not of itself open to criticism, as among other things it enabled an aggrieved party to present his reply in a manner compatible with the newspaper's editorial practice. In that connection, the Court accepted the domestic courts' findings that the applicant had failed to comply with his statutory obligation to publish the mayor's reply or to provide reasons for his refusal to do so.

Nevertheless, the interference with the applicant's freedom of expression had been disproportionate. A criminal sentence had been imposed for an offence that was essentially of a procedural nature (unrelated to the substance of the impugned article) under legislation which prevented the applicant from making or the domestic courts taking into account considerations based on freedom of expression. In addition to receiving a suspended restriction of liberty the applicant had been banned for working as a journalist for two years; that sentence was not only very harsh, it also had an enormous dissuasive effect on open and unhindered public debate on matters of public interest. Lastly, it was relevant too that the Polish Constitutional Court had, in a separate case, found the scope and modalities of the exercise of the right of reply under the Press Act to be deficient. In these circumstances, the interference had not been necessary in a democratic society.

Conclusion: violation (unanimously).

Article 41: EUR 3,000 in respect of non-pecuniary damage.

ARTICLE 13

Effective remedy

Ineffectiveness of new remedy, introduced following pilot judgment of the European Court, in cases of non-enforcement of domestic judgments ordering authorities to provide housing: *violation*

Ilyushkin and Others v. Russia - 5734/08 et al.
Judgment 17.4.2012 [Section I]

Facts – The applicants are former members of the armed forces. At the end of their careers they obtained judgments in their favour ordering the military authorities to provide them with housing. Most of the judgments had not been fully enforced by the date of delivery of the present judgment by the Strasbourg Court. As a follow-up to the Court's pilot judgment in the case *Burdov (no. 2)*,[1] Russia enacted a Compensation Act which introduced a new remedy in respect of excessively long judicial proceedings or delays in the enforcement of court decisions given against the State. Two of the applicants brought proceedings under the Act complaining of the failure to enforce the judgments in their favour. Their claims were dismissed on the ground that the new Act was not applicable to cases concerning the provision of housing.

Law – Article 13 in conjunction with Article 6 § 1 of the Convention and Article 1 of Protocol No. 1: It was clear from both the wording of the Compensation Act and its interpretation by the Supreme Court that the new legislation applied only to non-enforcement of judgments establishing pecuniary obligations and not to those imposing obligations in kind. Accordingly, the Court could only note once again that there currently existed no effective remedy in Russian law – either preventive or compensatory – by which to expedite the enforcement of a judicial decision delivered against the State or obtain compensation for delayed enforcement, except in cases falling within the scope of the Compensation Act introduced in the wake of the pilot judgment. The Court, to its great regret, concluded that the problem of the lack of a domestic remedy, described in the pilot judgment as structural and persistent, continued with regard to a wide category of cases of the kind under consideration, with the result that the applicants were

1. *Burdov v. Russia (no. 2)*, no. 33509/04, 15 January 2009, Information Note no. 115.

obliged to have recourse to the Strasbourg Court in order to secure effective defence of their rights.

Conclusion: violation (unanimously).

The Court also found a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 on account of the prolonged failure to enforce the judgments in the applicants' favour.

Article 41: The Court awarded the applicants sums ranging from EUR 3,100 to EUR 9,000 in respect of non-pecuniary damage. It also made awards to three of the applicants in respect of pecuniary damage.

ARTICLE 14

Discrimination (Article 1 of Protocol No. 1)

Difference in treatment between Evangelical Church ministers and Catholic priests as regards number of years of pastoral activity taken into account when calculating pension rights: *violation*

Manzanas Martín v. Spain - 17966/10
Judgment 3.4.2012 [Section III]

Facts – The applicant was a minister of the Evangelical Church from November 1952 until he retired in June 1991. During his years as a minister he received remuneration from the Permanent Commission of the Evangelical Church. However, the latter did not pay any social-security contributions on the applicant's behalf as there was no provision for this in the legislation in force. The applicant had worked as an employee before being ordained, and had also been in paid employment for part of his time as a minister. When he applied to the National Social Security Agency ("the INSS") for a retirement pension, his application was refused on the ground that he had not completed the minimum period of pensionable service. He subsequently brought proceedings against the INSS in the employment tribunal, alleging that he had been discriminated against in so far as Spanish law allowed Catholic priests to receive a retirement pension because they were covered by the general social-security scheme. In December 2005 the employment tribunal ordered the INSS to pay the applicant a retirement pension. It found that the national legislature had given Catholic priests preferential treatment as compared with Evangelical Church ministers. The INSS appealed against that decision. In July 2007 the High Court of Justice set the decision aside. The applicant unsuccessfully lodged an *amparo* appeal with the Constitutional Court.

Law – Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1

(a) *Applicability* – The Court had to determine whether, had it not been for the precondition in question, the applicant would have had a right, which he could assert before the domestic courts, to receive the pension in question. The applicant complained that he had been deprived of a retirement pension on discriminatory grounds, namely, his religious creed. Under domestic law, only Catholic priests could have their previous years of service taken into consideration in calculating the statutory minimum period of fifteen years necessary to be eligible for a retirement pension on condition that they paid the corresponding capital payments. Accordingly, the applicant's pecuniary interests fell within the scope of Article 1 of Protocol No. 1 and the right to peaceful enjoyment of possessions guaranteed under that provision, which was sufficient to render Article 14 of the Convention applicable.

(b) *Merits* – The applicant considered that Evangelical Church priests were treated differently and discriminated against under domestic law as compared with Catholic priests in so far as the latter had been admitted to the general social-security regime twenty-two years earlier and had thus been able to comply with the minimum period of pensionable service in order to benefit from a retirement pension by bringing into account their earlier years of service.

The Court observed that none of the possibilities afforded to Catholic priests to bring into account their years of pensionable service pre-dating their integration into the social-security scheme had been granted to Evangelical Church ministers under Spanish law. That prejudicial difference in the rules amounted to an unjustified difference in treatment based on the applicant's religious beliefs compared with the treatment of Catholic priests, in so far as the applicant had no means of having his earlier years of service as an Evangelical Church minister – prior to the integration of Evangelical Church ministers into the social-security scheme – taken into account for the calculation of his retirement pension. Whilst the reasons for the delay in integrating ministers into the general social-security scheme fell within the States' margin of appreciation, the reasons for maintaining a difference in treatment between similar situations,

based solely on grounds of religious belief, were unjustified.

Conclusion: violation (unanimously).

Article 41: EUR 3,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage reserved.

ARTICLE 33

Inter-State case

Alleged pattern of official conduct by Russian authorities resulting in multiple breaches of Georgian nationals' Convention rights: *relinquishment in favour of the Grand Chamber*

Georgia v. Russia (II) - 38263/08
[Section V]

As in the case of *Georgia v. Russia (I)*, which is currently pending before the Grand Chamber (application no. 13255/07, Information Note no. 120 and no. 125), the application was lodged in the context of the armed conflict between Georgia and the Russian Federation in August 2008 following an extended period of ever-mounting tensions, provocations and incidents that opposed the two countries. The applicant Government submitted that, in the course of indiscriminate and disproportionate attacks by Russian forces and/or by the separatist forces under their control, hundreds of civilians were injured, killed, detained or went missing, thousands of civilians had their property and homes destroyed and over 300,000 people were forced to leave Abkhazia and South Ossetia. In their submission, these consequences and the subsequent lack of any investigation engaged Russia's responsibility under Articles 2, 3, 5, 8 and 13 of the Convention, Articles 1 and 2 of Protocol No. 1 and Article 2 of Protocol No. 4.

The Court declared the application admissible by a decision of 13 December 2011 (see Information Note no. 147).

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies – Turkey

Change in case-law enabling persons deprived of title to forestry commission land to seek compensation: *inadmissible*

Altunay v. Turkey - 42936/07
Decision 17.4.2012 [Section II]

Facts – In 1999 a plot of land classified as agricultural land was entered in the land register in the applicant's name. However, in 2004 the Forestry Commission brought judicial proceedings to have the applicant's document of title to the land in question declared void on the ground that the land had been part of the public forest estate at the time of its registration. At final instance, in a judgment of 27 March 2007, the Court of Cassation upheld the ruling of the first-instance court, which had declared the applicant's document of title void and had ordered the registration of the land as State forest belonging to the Treasury.

Law – Article 35 § 1: The fact that some forty judgments had been delivered on this subject since the *Turgut and Others*[1] judgment indicated that the invalidation, without compensation, of documents of title issued in due form was a systemic problem. Moreover, hundreds of cases concerning the same issue were still pending before the Court.

An examination of the domestic legislation and case-law revealed that a compensatory remedy was available to persons who had been deprived of property forming part of the public forest estate. Following the Court's judgments on the subject, in November 2009 the Court of Cassation had reversed its position on the application of Article 1007 of the Civil Code, thus allowing compensation to be paid to those who had been deprived of such property. The Court of Cassation had confirmed that approach in several subsequent judgments. It had later adopted a position on the time-limit for bringing a compensation claim and the method for calculating the amount to be awarded. Thus, a claim for compensation corresponding to the real value of the property could be brought within ten years from the date on which the judgment declaring the document of title void had become

1. *Turgut and Others v. Turkey*, no. 1411/03, 8 July 2008, Information Note no. 110.

final. This remedy was now regularly used. Accordingly, the claim for compensation had by now acquired a sufficient degree of legal certainty to enable and oblige applicants to use it for the purposes of Article 35 § 1.

It remained to be determined whether the applicant, whose document of title had been declared void in a judgment which had become final on 27 March 2007, could take advantage of this change of approach to claim compensation, given that the assessment of whether domestic remedies had been exhausted was normally carried out with reference to the date on which the application was lodged with the Court. However, that rule was subject to exceptions. In the present case, it was appropriate to depart from the general principle in view of the large number of similar applications pending before the Court that ran the risk of overburdening it and hence weakening the protection mechanism set up by the Convention. Accordingly, the applicant could bring a claim for compensation within ten years from 27 March 2007.

In the light of these considerations, the Court held that Article 35 § 1 required the applicant to apply to the appropriate domestic courts within ten years from 27 March 2007 in order to claim compensation for the damage he had suffered as a result of the annulment of his title to the property.

Conclusion: inadmissible (non-exhaustion of domestic remedies).

Article 35 § 3

Competence *ratione temporis*

Court's temporal jurisdiction in respect of deaths that occurred 58 years before the Convention entered into force in respondent State: *preliminary objection upheld*

Janowiec and Others v. Russia - 55508/07 and 29520/09
Judgment 16.4.2012 [Section V]

(See Article 3 above, page 7)

Abuse of the right of petition

Failure of applicant's representatives to submit observations or to inform the Court of crucial events in his case: *preliminary objection upheld*

Bekauri v. Georgia - 14102/02
Judgment (preliminary objection) 10.4.2012 [Section II]

Facts – The applicant was convicted to life imprisonment for murdering a police officer. After communicating the application in 2005, the applicant's lawyer did not submit any observations on his behalf despite being granted extensions of time for doing so. Even after the applicant appointed new lawyers to represent him in 2006, they failed to submit any observations. After the case was declared admissible in 2010, the Government informed the Court that the applicant's sentence had been commuted to sixteen years' imprisonment.

Law – Article 35 § 3 (a): According to Rule 47 § 6 of the Rules of Court, applicants were under a continuous obligation to keep the Court informed of all important circumstances concerning their pending application. Applications might be rejected as abusive if they were knowingly based on untrue facts, or if incomplete or misleading information was provided. The applicant's first representative's actions were deplorable – not only had she failed to submit observations on the admissibility and merits of the case, she had also lost the case materials twice and failed to cooperate with the applicant's new legal representatives. All of these omissions had resulted in an additional gratuitous workload for the Court. The representative's negligent attitude had culminated in her failing to inform the Court of the commutation of the applicant's prison sentence, which related to the very core of the subject-matter of his application. As regards the applicant's new representatives, the Court could not accept that they had not learnt of the commutation of their client's sentence in 2007 until the end of May 2010 as they claimed. In any event, it was for the applicant and his representatives to inform the Court of such crucial matters, but both had failed to do so. The Court therefore concluded that the conduct of the applicant and in particular of his first representative amounted to a "vexing manifestation of irresponsibility", incompatible with the right of individual petition as provided for in the Convention. Such conduct also significantly impeded the proper functioning of the Court. The Court stressed that lawyers must show a high degree of professional prudence and meaningful cooperation with the Court by sparing it from the introduction of unmeritorious complaints and by meticulously abiding by all the relevant rules of procedure once proceedings were instituted.

Conclusion: preliminary objection upheld (abuse of the right of petition).

Article 35 § 3 (b)

No significant disadvantage

Failure to communicate opinion of Attorney-General's Department at Supreme Administrative Court to complainant: *inadmissible*

Liga Portuguesa de Futebol Profissional v. Portugal - 49639/09
Decision 3.4.2012 [Section II]

Facts – Following non-payment by professional football clubs of amounts due to the tax authorities, an agreement was signed with the applicant association, the organiser of professional football championships, and the Portuguese Football Federation; one of its clauses provided that if the amounts paid to the tax authorities by the clubs were insufficient to cover half the amounts owed, the applicant association and the Federation would be liable to pay the outstanding amount. In December 2004 the tax authorities informed the applicant association that it was liable to pay approximately twenty million euros. In April 2005 the applicant association brought an action in the Central Administrative Court for annulment of that clause. The applicant association's claims were rejected in November 2006 and it lodged an appeal with the Supreme Administrative Court. In March 2007 the official of the Attorney-General's Department at the Supreme Administrative Court submitted his opinion, which concluded that the appeal was ill-founded. The applicant association was not notified of the opinion. In May 2007 the Supreme Administrative Court rejected the appeal. On learning from the judgment of the existence of the opinion of the Attorney-General's Department, the applicant association lodged an application for the judgment to be set aside on the grounds that there had been a violation of the principle of a fair trial. That application was rejected, as was the ensuing appeal to the Constitutional Court.

Before the European Court, the applicant association complained of a violation of the adversarial principle on the ground that it had not been provided with the opinion of the representative of the Attorney-General's Department at the Supreme Administrative Court.

Law – Article 35 § 3 (b): The sum claimed by the tax authorities and giving rise to the proceedings could not be deemed to constitute a "disadvantage" within the meaning of Article 35 § 3 (b). The question was whether the failure to communicate the opinion of the representative of the Attorney-General's Department at the Supreme Administrative Court could have caused the applicant association a potentially significant disadvantage. That succinct opinion had merely considered that the decision at issue had correctly interpreted the applicable law. No new issue that might have called for comments by the applicant association had been raised. The applicant association had not been able to demonstrate that it would have been able to provide any new and relevant elements in response to the opinion for the purposes of consideration of the case. In those circumstances, the applicant association had not suffered a "significant disadvantage" in the exercise of its right to participate adequately in the proceedings at issue.

The respondent State had taken general measures to ensure that parties were provided with opinions of the Attorney-General's Department. In those circumstances, and given that the Court had on various occasions ruled on the issue raised in this case,[1] it could not be held that the application raised serious issues concerning the application or interpretation of the Convention, or serious issues of domestic law. Consequently, respect for human rights did not require an examination of the application.

The applicant association's objections concerning the rights and obligations arising out of the implementation of the order at issue in respect of it had been raised in three domestic courts. Furthermore, the requirement that the case be "duly examined" could not be interpreted as strictly as the requirement that the proceedings be fair, since Article 35 § 3 (b) did not contain the term "examined fairly". Therefore, the applicant's case had been duly examined.

Conclusion: inadmissible (no significant disadvantage).

ARTICLE 46

Pilot judgment – General measures

Respondent State required to provide within one year domestic remedy for length of proceedings before the criminal courts

1. See, in particular, *Ferreira Alves v. Portugal (no. 3)*, no. 25053/05, 21 June 2007, Information Note no. 98.

Michelioudakis v. Greece - 54447/10
Judgment 3.4.2012 [Section I]

Facts – In February 2003 criminal proceedings were brought against the applicant for incitement to commit perjury. In February 2006 the Criminal Court found him guilty and sentenced him to twenty-two months' imprisonment. The applicant appealed. In March 2007 the Court of Appeal reduced the sentence to nine months. In May 2007 the applicant appealed to the Court of Cassation. In November 2008 the Court of Cassation quashed the judgment and remitted the case to the Court of Appeal. In March 2009 the Court of Appeal reduced the sentence to seven months. In September 2009 the applicant appealed to the Court of Cassation, which dismissed the appeal in a judgment certified in March 2010.

Law – Article 6 § 1: Since the present case had not raised any complex factual or legal issues, the Court found that the overall length of the proceedings (more than seven years) had been excessive and failed to satisfy the "reasonable time" requirement.

Conclusion: violation (unanimously).

Article 13: It had not been shown that the remedy which the applicant could have used in the administrative courts had been effective and available in theory and in practice.

Conclusion: violation (unanimously).

Article 46

(a) *Application of the pilot-judgment procedure* – A large number of judgments delivered before the present case had been brought before the Court provided ample evidence of the problem of the excessive length of criminal proceedings in Greece. Having regard in particular to the chronic and persistent nature of such problems and the large number of people in Greece affected by them, and also to the urgent need to afford rapid and adequate redress at national level to those concerned, the Court considered it appropriate to apply the pilot-judgment procedure in the present case.

(b) *Whether or not there was a practice incompatible with the Convention* – The fault in the Greek legal system relating to the excessive length of proceedings in the administrative courts, as established in the *Vassilios Athanasiou and Others* judgment,[1] was not limited to that category of proceedings but reflected a systemic problem of excessively lengthy proceedings, including in the criminal courts. In that connection, despite the various efforts made in terms of domestic legislation, the Greek legal system had still not introduced a remedy or set of remedies enabling persons facing criminal charges to enforce their right to a hearing within a reasonable time. Since the adoption of the 2007 Interim Resolution,[2] the Court had delivered more than 40 judgments in which it had found violations of Article 6 § 1 on account of the length of criminal proceedings, as a result either of particularly lengthy proceedings at first instance or of considerable delays in scheduling appeal hearings. It had also found numerous violations of Article 13 on account of the lack of access to an effective remedy within a reasonable time. In addition, more than 250 length-of-proceedings cases against Greece were currently pending before the Court, more than 50 of which related solely to criminal proceedings. In the light of these considerations, this situation had to be viewed as reflecting a practice that was incompatible with the Convention.

(c) *General measures to be adopted* – Although the best remedy in absolute terms was prevention, a remedy to expedite proceedings in order to prevent them from becoming excessively lengthy would be the most effective solution. However, the introduction of other types of remedies was also conceivable, for example a compensatory remedy or the possibility of reducing a sentence on account of the excessive length of criminal proceedings. Accordingly, while recognising the efforts made by Greece to improve its judicial system, the Court considered that the national authorities should, within one year, introduce an effective domestic remedy, or set of remedies, capable of affording adequate and sufficient redress for the unreasonable length of criminal proceedings.

(d) *Procedure to be followed in similar cases* – Pending the adoption by the Greek authorities of the necessary measures at national level, adversarial proceedings in all cases relating solely to the length of criminal proceedings in the Greek courts were to be adjourned for a period of one year from the date on which this judgment became final. This would not be to the detriment of the examination in good time of the cases pending before the Court.

Article 41: EUR 3,000 in respect of non-pecuniary damage.

1. *Vassilios Athanasiou and Others v. Greece*, no. 50973/08, 21 December 2010, Information Note no. 136.

2. Interim Resolution CM/ResDH(2007)74, in which the Committee of Ministers urged the Greek authorities to remedy the problem of excessive length of proceedings in the administrative courts.

General measures

Respondent State required to implement laws in order to secure payment of pensions to insured persons in Kosovo

Grudić v. Serbia - 31925/08
Judgment 17.4.2012 [Section II]

Facts – The applicants, two Serbian nationals, were granted disability pensions by the Kosovo Branch Office of the Serbian Pensions and Disability Insurance Fund ("the Fund"). They regularly received their pensions until June 1999 and January 2000 respectively when the monthly payments stopped without any explanation. In May 2004 and March 2005 the Fund formally decided to suspend the payment of their pensions from the dates the payments had stopped on the grounds that Kosovo was under international administration. In 2006 a district court annulled the Fund's decisions after noting that they did not refer to the relevant law. The Fund's subsequent appeals were rejected by the Supreme Court. In 2008 the Fund suspended the proceedings brought by the applicants for the resumption of payment of their pensions until such time as the entire issue was resolved between the Serbian authorities and the international administration in Kosovo.

Law – Article 1 of Protocol No. 1: The suspensions of payment of the applicants' pensions had not been in accordance with the relevant domestic law.

Conclusion: violation (unanimously).

Article 46: In view of the large number of potential applicants, the respondent Government were required to take all appropriate measures to ensure that the competent Serbian authorities implemented the relevant laws in order to secure payment of the pensions and arrears in question, it being understood that certain reasonable and speedy factual and/or administrative verification procedures might be necessary.

Respondent State required to take measures to ensure proportionality when enforcing orders for recovery of public land

Yordanova and Others v. Bulgaria - 25446/06
Judgment 24.4.2012 [Section IV]

(See Article 8 above, page 20)

ARTICLE 1 OF PROTOCOL No. 1

Possessions

Imposition of pollution tax on import of second-hand cars from European Union Member State: *inadmissible*

Ioviţoni and Others v. Romania - 57583/10, 1245/11 and 4189/11
Decision 3.4.2012 [Section III]

Facts – The applicants, who wished to register in Romania vehicles purchased in other member States of the European Union, had been charged pollution tax to register their vehicles, on the basis of the original version of Government Emergency Ordinance no. 50/2008. Having paid that tax to register the vehicles, they had later taken action to recover it, arguing in particular that it had been in breach of European law, namely Article 110 of the Treaty on the Functioning of the European Union (TFEU) on the free movement of goods, which was directly applicable in Romanian law, in so far as it had been charged exclusively on imported cars. Their action for the return of that tax was rejected by the domestic courts.

Law – Article 1 of Protocol No. 1: A claim against the State in respect of wrongly paid tax could be treated as an asset and accordingly deemed to be a "possession" within the meaning of the first sentence of Article 1 of Protocol No. 1. More particularly, when such a tax was charged in breach of European Union law, a problem could arise under Article 1 of Protocol No. 1 (see *S.A. Dangeville v. France*, no. 36677/97, 16 April 2002, Information Note no. 41). In this case, the Court had to ascertain whether, when they brought their action in the domestic courts, the applicants had had a "claim that was sufficiently established to be enforceable" for the purposes of Article 1 of Protocol No. 1, in respect of the pollution tax they had had to pay and which the Court of Justice of the European Union (CJEU) had found in its judgment of 7 April 2011 in the case of *Tatu* (C-402/09) to be in breach of European Union law as being indirectly discriminatory. The domestic courts, which had delivered their final decisions before the date of that judgment, had ruled that they did not.

The applicable provision of European Union law, as identified by the CJEU, was Article 110 of the TFEU, the "aim of which is to ensure the free movement of goods between the Member States in normal conditions of competition [by] eliminating all forms of protection which may result

from the application of internal taxation that discriminates against products from other Member States". It was a much more general provision than that applicable in the case of *S.A. Dangeville*, which had established a VAT exemption for a specific category of commercial activity. It was true that the CJEU's interpretation of a provision of European Union law clarified and specified the meaning and scope of that provision as it should or ought to have been understood and applied from the date of its entry into force. Prior to the *Tatu* judgment, however, the views of the domestic courts had diverged as to whether or not the Government Emergency Ordinance complied with the principle of the free movement of goods. There had been no easy answer to that legal question, which indeed had necessitated the intervention of the CJEU. As a consequence, the Court found it hard to accept that, prior to 7 April 2011, the applicants' claim had been based on a rule of European Union law that was perfectly clear, precise and directly applicable. Except in the event of manifest arbitrariness, the Court was unable to deal with errors of law made by the domestic courts, which were primarily responsible for interpreting and applying domestic law. There had been nothing to suggest that the decisions criticised by the applicants had been manifestly unreasonable or arbitrary. It followed that Article 1 of Protocol No. 1 was not applicable.

Conclusion: inadmissible (incompatible *ratione materiae*).

Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: As regards the claims of discrimination, given that the applicants could not be considered to have a "possession" or a "claim that was sufficiently established to be enforceable" for the purposes of the Court's case-law, that aspect of the applications did not fall within the scope of Article 14 of the Convention and Article 1 of Protocol No. 1 taken together.

Conclusion: inadmissible (incompatible *ratione materiae*).

Positive obligations
Deprivation of property

Unlawful distribution of assets of private bank by liquidator: *no violation*

Kotov v. Russia - 54522/00
Judgment 3.4.2012 [GC]

Facts – The applicant had a savings account at a private bank which went into liquidation in 1995. As a member of the first class of creditors he was entitled to payment out of the bank's assets *pro rata* the value of his claim and ahead of other classes of creditor. However, the creditors' body of the bank created a special group of "privileged" creditors (comprising the disabled, war veterans, the needy and those who had participated actively in the winding-up operation) within the first class who would receive full satisfaction of their claims before other first-class creditors. As a result, almost all the banks' assets were used to repay the "privileged" creditors in full, while the applicant received less than 1% of his claim. In April 1998 the applicant brought proceedings challenging the manner in which the assets had been distributed. Although the courts found that there had been a breach of the law and directed the liquidator to remedy the situation, the applicant was unable to enforce the judgment because of the bank's lack of assets. In 1999 the applicant also sued the liquidator personally for damages, but the action failed on the grounds, firstly, that it had been brought before the commercial courts instead of the courts of general jurisdiction and, secondly, that it had been brought before the bank had been wound up and so entailed a risk of "double recovery" if the applicant was successful in both actions.

In a judgment of 14 January 2010 (see Information Note no. 126) a Chamber of the Court held unanimously that there had been a violation of Article 1 of Protocol No. 1, after finding that the liquidator's acts had engaged the responsibility of the State and that the applicant had been unlawfully deprived of his property.

Law – Article 1 of Protocol No.1

(a) *Admissibility – Temporal jurisdiction*: The distribution of the bank's assets to the "privileged" creditors was an instantaneous act which had taken place before 5 May 1998, when the Convention entered into force in respect of Russia. Accordingly, it fell outside the Court's jurisdiction *ratione temporis*. However, the applicant nevertheless had a defendable tort claim when the Convention entered into force in respect of Russia and that claim outlived the original tort. The central question was why his attempt to restore his rights had failed after the entry into force of the Convention. The Court therefore had temporal jurisdiction to examine whether his rights under Article 1 of Protocol No. 1 were properly secured in the two sets of proceedings in 1998 and 1999 (*Broniowski v. Poland*[1] applied).

Conclusion: admissible (sixteen votes to one).

1. *Broniowski v. Poland* (dec.) [GC], no. 31443/96, 19 December 2002, Information Note no. 50.

(b) *Merits* – It was common ground that the original court award had amounted to the applicant's "possession", that the liquidator had acted unlawfully by failing to distribute the bank's assets according to rank and that the applicant had received much less than he could legitimately have expected. He had thus been deprived of his possessions by an unlawful act of the liquidator.

(i) *State agent* – The question arose, however, whether the liquidator had been acting as a State agent or, as the Government alleged, in a private capacity that did not engage the State's responsibility. While the domestic law at the material time stated that a liquidator was not a public official, it was necessary to determine – by reference to the liquidator's method of appointment, his supervision and accountability, objectives, powers and functions – whether that formal status corresponded to the reality of the liquidation process.

At the relevant time liquidators in Russia were private professionals chosen on the open market by the creditors' body, a self-interested entity which paid the fees, which were fixed freely. Although a judge was required to validate the liquidator's appointment by the creditors' body, his role was merely to verify that the liquidator satisfied the eligibility criteria and did not entail any State responsibility for the way in which the liquidator discharged his duties. Liquidators were accountable only to the creditors' body or individual creditors, not to any regulatory body. They did not receive any public funding. The domestic courts had only limited powers of review of compliance with the insolvency rules and no power to verify whether the liquidator's decisions were justified from an economic or business perspective. Essentially, their role was much the same as in any other private dispute. As regards objectives, the liquidator's task was similar to that of other private businessmen. The mere fact that his services might also be socially useful did not turn him into a public official acting in the public interest. Most importantly, the liquidator's powers were limited to the operational control and management of the insolvent company's property. There was no formal delegation of powers by any governmental authority. Unlike a bailiff, the liquidator had no coercive or regulatory powers in respect of third parties. At the material time, therefore, liquidators enjoyed a considerable amount of operational and institutional independence. The State's involvement was confined to establishing the legislative framework, defining the functions and powers of the creditors' body and the liquidator, and overseeing observance of the rules. The liquidator in the instant case had accordingly not acted as a State agent and the respondent State could not be held directly responsible for his wrongful acts.

(ii) *Positive obligations*: The liquidator's wrongdoings had been serious and had occurred in an area where the State's negligence in combating malfunctioning and fraud could have devastating effects on the economy, affecting a large number of individual property rights. The State had therefore been under a duty to set up a minimum legislative framework to enable people in the applicant's position to assert their property rights effectively.

The applicant had instituted two sets of proceedings with a view to having his rights restored. The first, against the liquidator in his capacity as manager of the bank, had proved ineffective owing to a lack of assets.

The second, against the liquidator personally, had also failed, both on jurisdictional grounds and because it was considered to have been premature. As to the first of these grounds, the Court found that the statutory rules on jurisdiction at the time had been unclear and the commercial courts had examined the applicant's claim at three levels of domestic jurisdiction before the question of jurisdiction arose. Consequently, any mistake the applicant had made over jurisdiction could not be held against him. As to the second ground, the Court accepted that that there was a rationale in the domestic courts' refusal to deal with the applicant's claims against the liquidator while the liquidation proceedings were still pending, as there was a danger of his being compensated twice for essentially the same financial loss. It was not unreasonable for an aggrieved creditor to have to wait until the debtor company ceased to exist before being able to claim damages from the liquidator in person. In the applicant's case, the liquidation had been completed just eight days after the applicant's claim against the liquidator was dismissed. At any point thereafter the applicant could have brought an action in damages against the liquidator, but had not done so. In sum, the law had provided for a "deferred" compensatory remedy which the applicant had failed to use. That temporary limitation on his right to seek redress against the liquidator personally had not affected the essence of his rights and remained within the State's wide margin of appreciation in dealing with competing private interests in bankruptcy proceedings.

The legal framework in place at the material time had thus complied with the State's positive obli-

gation to provide a mechanism to protect the applicant's rights under Article 1 of Protocol No. 1.

Conclusion: no violation (twelve votes to five).

Control of the use of property

Confiscation of property of an accused's widow: *no violation*

Silickienė v. Lithuania - 20496/02
Judgment 10.4.2012 [Section II]

(See Article 6 § 2 above, page 16)

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

Georgia v. Russia (II) - 38263/08
[Section V]

(See Article 33 above, page 26)

COURT NEWS

1. Brighton Conference on the future of the Court

A high level Conference on the future of the Court was organised by the United Kingdom in Brighton on 18-20 April 2012, following the Interlaken (2010) and Izmir (2011) Conferences where the member States of the Council of Europe agreed unanimously that reform of the Court is needed in order to ensure the continuing effectiveness of the Convention system.

The aim of the Brighton Conference was to agree on a package of concrete reforms to ensure the Court would be able to dispose of the outstanding clearly inadmissible applications pending before it by 2015. The Declaration adopted at the end of the Conference set out a series of proposed reforms. These included reducing the time-limit for making an application to the Court from six to four months and encouraging the States to improve implementation of the Convention at domestic level and to act quickly and effectively on the Court's judgments in order both to meet their obligations and cut the Court's backlog by putting a stop to repetitive applications.

Link to the homepage of the Brighton Conference (<www.echr.coe.int> – The Court – The reform of the Court)

2. Election

On 24 april 2012 the Parliamentary Assembly of the Council of Europe elected Paul Lemmens as judge to the Court in respect of Belgium. Paul Lemmens was elected, with an absolute majority of votes cast, for a term of office of nine years starting on 13 September 2012.

RECENT PUBLICATIONS

1. Practice Direction on just satisfaction claims

The Court's Practice Direction on just satisfaction claims is now available on the Court's Internet site in the following languages: Dutch, English, French, German, Italian, Russian and Turkish (<www.echr.coe.int> – Basic Texts).

2. Thematic factsheets in German and Russian

The thematic factsheets on the Court's case law are available in German and Russian, courtesy of funding from the German Government. They can be downloaded from the Court's Internet site (<www.echr.coe.int> – Press).

Informationsblätter zur Rechtsprechung (deu)

Информационно-тематический листок (rus)

3. The Court in 50 questions

This booklet, which provides general information about the Court, is now available in Greek and Spanish, having previously been translated into Chinese, Czech, Estonian, German, Italian, Russian, Turkish and Ukrainian. The various linguistic versions can be downloaded from the Court's Internet site (<www.echr.coe.int> – The Court).

Το ΕΔΔΑ σε 50 ερωτήσεις (ell)

El TEDH en 50 preguntas (spa)

4. Annual Report 2011: execution of judgments of the European Court of Human Rights

The Committee of Ministers' fifth annual report on the supervision of the execution of judgments of the European Court of Human Rights was issued in April 2012. The report includes detailed statistics highlighting the main tendencies of the evolution of the execution process in 2011 and a thematic overview of the most important developments in the execution of the cases pending before the Committee of Ministers. It can be downloaded from the Internet site of the Council of Europe's Directorate General of Human Rights and Rule of Law.