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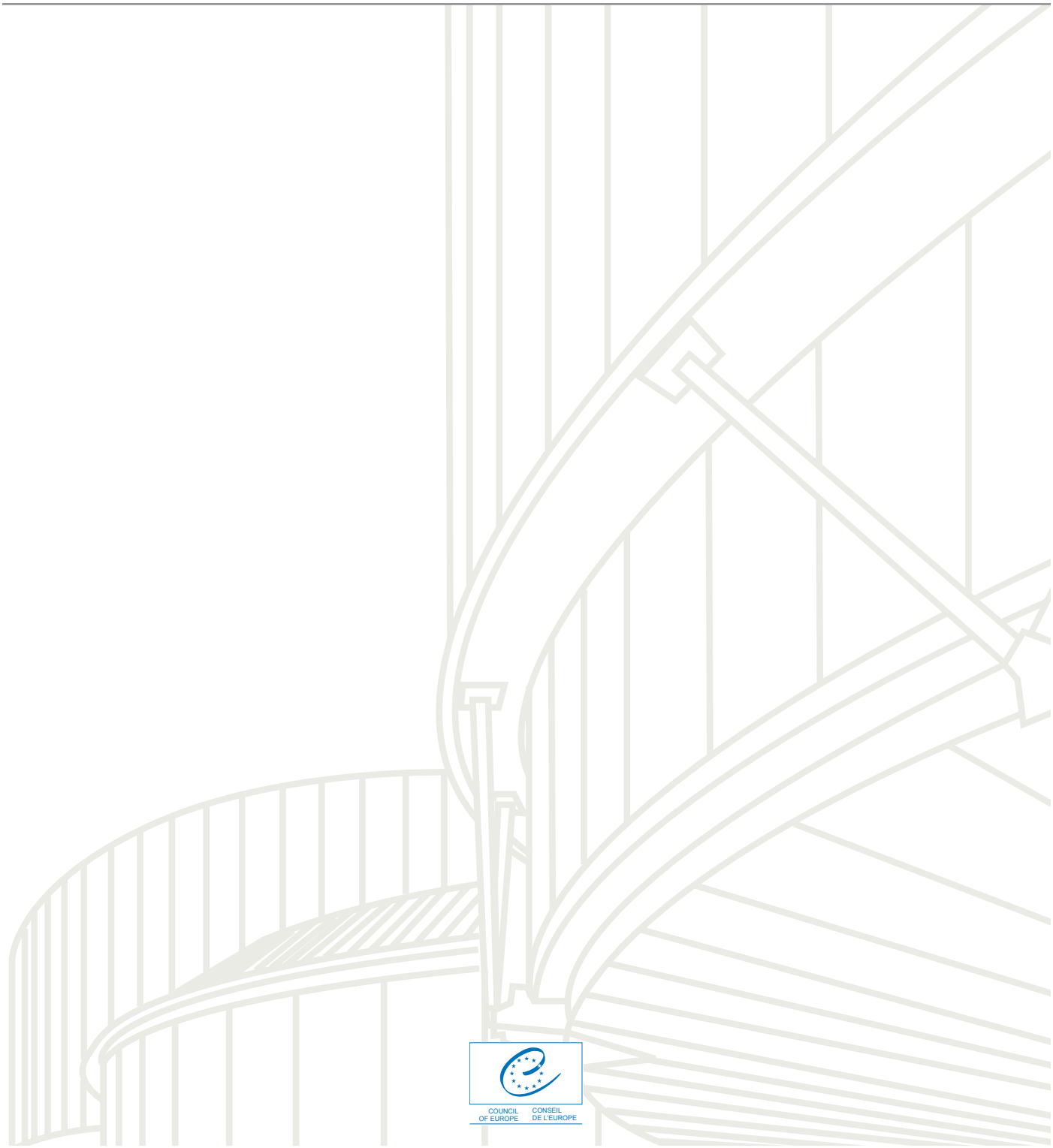

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Failure to conduct effective investigation into fate of Greek Cypriots missing since Turkish military operations in northern Cyprus in 1974: *violation*

Varnava and Others v. Turkey - 16064/90 et al.
Judgment 18.9.2009 [GC]

Facts – The applicants were relatives of nine Cypriot nationals who disappeared during Turkish military operations in northern Cyprus in July and August 1974. The facts were disputed. Eight of the missing men were members of the Greek-Cypriot forces and it is alleged by the applicants that they disappeared after being captured and detained by Turkish military forces. Witnesses had testified to seeing them in Turkish prisons in 1974 and some of the men were identified by their families from photographs of Greek-Cypriot prisoners of war that were published in the Greek press. The Turkish Government denied that the men had been taken into captivity by Turkish forces and maintained that they had died in action during the conflict. The ninth missing man, Mr Hadjipanteli, was a bank employee. The applicants alleged that he was one of a group of people taken by Turkish forces for questioning in August 1974 and who had been missing ever since. His body was discovered in 2007 in the context of the activity of the United Nations Committee of Missing Persons in Cyprus (CMP). The CMP was set up in 1981 with the task of drawing up comprehensive lists of missing persons on both sides and specifying whether they were alive or dead. It has no power to attribute responsibility or to make findings as to the cause of death. Mr Hadjipanteli's remains were exhumed from a mass grave near a Turkish-Cypriot village. A medical certificate indicated that he had received bullet wounds to the skull and right arm and a wound to the right thigh. The Turkish Government denied he had been taken prisoner, noting that his name was not on the list of Greek Cypriots held in the alleged place of detention, which had been visited by the International Red Cross.

In a judgment of 10 January 2008 (see Information Note no. 104) a Chamber of the Court held that there had been continuing procedural violations of Articles 2 and 5, and a violation of Article 3. It found no substantive violation of Article 5.

Law

(a) *Preliminary objections* – The respondent Government challenged the Court's jurisdiction to examine the case on several counts. Firstly, they submitted that there was no legal interest in determining the applications as the Court had already decided the question of the disappearances of all missing Greek Cypriots in the fourth inter-State case (*Cyprus v. Turkey* [GC], no. 25781/94, 10 May 2001, Information Note no. 30). Secondly, the applications fell outside the Court's temporal jurisdiction as the missing men had to be presumed to have died long before Turkey's acceptance of the right of individual petition on 28 January 1987 and there could be no freestanding procedural obligation, divorced from the factual origin of the complaints. In any event, the procedural obligation under Articles 2 and 3 was a recent jurisprudential development and could not be regarded as binding the States beforehand. Lastly, the applications had been lodged on 25 January 1990, more than six months after Turkey's acceptance of the right to individual petition, and so were out of time.

(i) *Legal interest*: For the purposes of Article 35 § 2 (b) of the Convention, an application was only "substantially the same" as another which had already been examined if it concerned substantially not only the same facts and complaints but was introduced by the same persons. An inter-State application did not, therefore, deprive individual applicants of the possibility of introducing, or pursuing, their own claims. As to the question whether the applications should be struck from the Court's list under Article 37 § 1 (c), the findings in the fourth inter-State case had not specified in respect of which individual missing persons they were made. Moreover, in individual applications, the Court had the competence to issue just satisfaction awards to individual applicants and to indicate measures under Article 46. A legal interest therefore remained in pursuing the examination of the applications.

Conclusion: preliminary objection dismissed (sixteen votes to one).

(ii) *Temporal jurisdiction*: The procedural obligation to carry out an investigation into deaths under Article 2 had evolved into a separate and autonomous duty and could be considered a "detachable obligation" capable of binding the State even when the death took place before the entry into force of the Convention (see *Šilih v. Slovenia* [GC], no. 71463/01, 9 April 2009, Information Note no. 118). It was immaterial that that procedural obligation had only developed in the Court's case-law after Turkey's acceptance of the right of individual petition as case-law was a means of clarifying pre-existing texts to which the principle of non-retroactivity did not apply in the same manner as to legislative enactments.

As to the argument that the missing men had to be presumed dead long before any temporal jurisdiction had arisen in 1987, the Court distinguished between the making of a factual presumption and the legal consequences that flowed from it. The procedural obligation to investigate disappearances in life-threatening circumstances could hardly come to an end on discovery of the body or the presumption of death as an obligation to account for the disappearance and death, and to identify and prosecute any perpetrator of unlawful acts, would generally remain. Accordingly, even though a lapse of over thirty-four years without any news could provide strong circumstantial evidence of intervening death, this did not remove the procedural obligation to investigate.

Further, there was an important distinction to be drawn between the obligation to investigate a suspicious death and the obligation to investigate a suspicious disappearance. A disappearance was a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there was a lack of information or even a deliberate concealment and obfuscation of what had occurred. It was not an "instantaneous" act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gave rise to a continuing situation, with the procedural obligation potentially persisting as long as the fate of the missing person was unaccounted for, even where death was presumed. In that connection, the requirement for proximity of the death and investigative steps to the date of entry into force of the Convention (see *Šilih*) applied only in the context of killings or suspicious deaths.

Conclusion: preliminary objection dismissed (sixteen votes to one).

(iii) *Six-month rule*: Applicants in disappearance cases had to make proof of a certain amount of diligence and initiative and introduce their complaints without undue delay. While the standard of expedition expected of relatives should not be too rigorous in view of the serious nature of disappearance offences, applications could be rejected where there had been excessive or unexplained delay by applicants who were, or should have been, aware that no investigation had been instigated or that it had lapsed into inaction or become ineffective and that there was no immediate, realistic prospect of an effective investigation in the future. When that stage was reached depended on the circumstances of the particular case.

In the exceptional circumstances of the instant case, which involved an international conflict with no normal investigative procedures available, it had been reasonable for the applicants to await the outcome of the Government and United Nations initiatives, as these could have resulted in steps being taken to investigate known sites of mass graves and provided the basis for further measures. While it must have been apparent by the end of 1990 that those processes no longer offered any realistic hope of progress in either finding bodies or accounting for the fate of their relatives in the near future, the applicants had applied to the Court in January of that year. Accordingly, they had, in the special circumstances of the case, acted with reasonable expedition.

Conclusion: preliminary objection dismissed (fifteen votes to two).

(b) *Merits*

Article 2: The Court was satisfied that there was an at least arguable case that the missing men had last been seen in an area under, or about to come under, the control of the Turkish armed forces. Whether they had died or been taken prisoner, those men still had to be accounted for. Article 2 had to be interpreted in so far as possible in the light of the general principles of international law, including the rules of international humanitarian law, which played an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict. In a zone of international conflict Contracting States were under obligation to protect the lives of those not, or no longer, engaged in hostilities. That obligation also extended to the provision of medical assistance

to the wounded, the proper disposal of remains and the provision of information on the identity and fate of those concerned. The respondent Government had not produced any evidence or convincing explanation to counter the applicants' claims that the missing men had disappeared in areas under the former's exclusive control. As the disappearances had occurred in life-threatening circumstances where the conduct of military operations was accompanied by widespread arrests and killings, Article 2 imposed a continuing obligation on the respondent Government to account for the missing men's whereabouts and fate.

On the question of compliance with that obligation, the Court fully acknowledged the importance of the CMP's ongoing exhumations and identifications of remains and gave full credit to the work being done in providing information and returning remains to relatives. It noted, however, that while the CMP's work was an important first step in the investigative process, it was not sufficient to meet the Government's obligation under Article 2 to carry out effective investigations. From the materials provided in respect of one of the missing men, Mr Hadjipanteli, it appeared that the procedure on identification of remains was to issue a medical certificate of death, briefly indicating the fatal injuries. There was, however, no report analysing the circumstances or even the dating of death and no investigative measures to locate or question witnesses. Thus, even though the location of the body had been established it could not be said that any clear light had been shed on how the victim had met his fate.

While recognising the considerable difficulty in assembling evidence and mounting a case so long after the events, the Court reiterated that to be effective an investigation had to be capable of leading to a determination of whether the death was caused unlawfully and, if so, to the identification and punishment of those responsible. There was no indication that the CMP had gone beyond its limited terms of reference and no other body or authority had taken on the role of determining the facts or collecting and assessing evidence with a view to a prosecution. While an investigation might prove inconclusive, such an outcome was not inevitable and the respondent Government could not be absolved from making the requisite efforts. The fact that both sides in the conflict may have preferred a "politically-sensitive" approach and that the CMP with its limited remit was the only solution which could be agreed under the brokerage of the UN could have no bearing on the application of the Convention. There had thus been a continuing failure to effectively investigate the fate of the nine missing men.

Conclusion: continuing procedural violation (sixteen votes to one).

Article 3: The Court found no reason to differ from its finding in the fourth inter-State case that the Turkish authorities' silence in the face of the real concerns of the applicants over the fate of their missing relatives could only be categorised as inhuman treatment.

Conclusion: continuing violation (sixteen votes to one).

Article 5: There was an arguable case that two of the missing men, both of whom had been included on International Red Cross lists as detainees, had last been seen in circumstances falling within the control of the Turkish or Turkish-Cypriot forces. However, the Turkish authorities had not acknowledged their detention, nor had they provided any documentary evidence giving official trace of their movements. While there had been no evidence that any of the missing persons had been in detention in the period under the Court's consideration, the Turkish Government had to show that they had carried out an effective investigation into the arguable claim that the two missing men had been taken into custody and had not been seen subsequently. The Court's findings above in relation to Article 2 left no doubt that the authorities had also failed to conduct the necessary investigation in that regard.

Conclusion: continuing violation in respect of two of the missing men (sixteen votes to one).

Article 41: EUR 12,000 in respect of non-pecuniary damage to each of the applicants, in view of the grievous nature of the case and decades of uncertainty the applicants had endured. The Court explained that it did not apply specific scales of damages to awards in disappearance cases, but was guided by equity, which involved flexibility and an objective consideration of what was just, fair and reasonable in all the circumstances.

Failings of investigation into fatal shooting of a demonstrator by a member of the security forces at a G8 summit: *violation*

Giuliani and Gaggio v. Italy - 23458/02
Judgment 25.8.2009 [Section IV]

(See below, page 10)

Use of force

Fatal shooting of a demonstrator by a member of the security forces at a G8 summit: *violation*

Giuliani and Gaggio v. Italy - 23458/02
Judgment 25.8.2009 [Section IV]

Facts: The applicants are the parents and sister of Carlo Giuliani, who died while he was taking part in clashes at the G8 summit held in Genoa from 19 to 21 July 2001.

During an authorised demonstration, extremely violent clashes broke out between anti-globalisation militants and law-enforcement officers. Under pressure from the demonstrators, a group of about fifty *carabinieri* withdrew on foot, leaving two vehicles exposed. One of them, with three *carabinieri* inside, was unable to move and was surrounded and violently attacked by a group of demonstrators, some of whom were armed with iron bars, pickaxes, stones and other blunt implements. One of the *carabinieri*, suffering the intoxicating effects of the tear-gas grenades he had fired earlier, had been given permission to get into the jeep to get away from the scene of the earlier clashes. Crouched down in the back of the jeep, injured and panicking, and defending himself on one side with a riot shield while shouting to the demonstrators to leave "or he would kill them", he drew his firearm and, after giving a warning, fired two shots outside the vehicle. Carlo Giuliani was fatally wounded by a bullet in his face. In attempting to move the vehicle away, the driver twice drove over the young man's motionless body. When the demonstrators had been dispersed, a doctor arrived at the scene and pronounced the victim dead. An investigation was opened immediately by the Italian authorities. Criminal proceedings for intentional homicide were instituted against the officer who had fired the shots and the driver of the vehicle. An autopsy performed within twenty-four hours of the death revealed that the victim had been killed by the bullet wound and not by the attempts to drive the vehicle away. The public prosecutor gave permission for Carlo Giuliani's body to be cremated and ordered three expert reports. In 2003 the proceedings were discontinued by the investigating judge.

Law – Article 2: (a) *Allegedly excessive use of force* – In the light of the investigation's findings and in the absence of any other evidence to the contrary, the Court had no reason to doubt that the officer who fired the shots had honestly believed his life to be in danger; it took the view that he had used his weapon as a means of defence against the attack targeting the jeep's occupants, including himself, perceiving a direct threat to his own person. This was one of the circumstances enumerated in the second paragraph of Article 2 in which the use of lethal force could be legitimate; however, it went without saying that there had to be a balance between the aim and the means. The officer who fired the shot, using a powerful weapon, had run out of tear-gas grenades and there was no judicial finding to the effect that he had had a riot shield with which to defend himself. Before shooting, he had called out and had held his weapon in such a way that it was visible from outside the jeep. The officer had been confronted with a group of demonstrators conducting a violent attack on the vehicle he was in, who had ignored his warnings to leave. In the circumstances of the case the use of lethal force, although highly regrettable, had not exceeded the limits of what was absolutely necessary in order to avert what the officer honestly perceived to be a real and imminent threat to his life and the lives of his colleagues. In view of those considerations, there had been no disproportionate use of force.

Conclusion: no violation (unanimously).

(b) *Obligation to protect life* – Firstly, the Court had to consider whether there was a direct link between possible shortcomings in the preparation and conduct of the operation carried out by the law-enforcement agencies and the death of Carlo Giuliani. In that connection the Court observed that the vehicle in which the officer who fired the shot was travelling had become blocked during the withdrawal of the *carabinieri* after they had attacked a group of particularly aggressive demonstrators. The police officers stationed nearby had not intervened to assist the occupants of the vehicle and the latter had perceived themselves to be in grave danger, with the result that one of them had made use of his firearm. A number of questions certainly needed to be asked: (i) whether the officer who fired the shots, who had been in a particular state of mind induced by a high level of stress and panic, would have acted in that way if he had had the benefit of appropriate training and experience; (ii) whether better coordination between the law-enforcement agencies present at the scene would have enabled the attack on the jeep to be warded off without claiming any victims and (iii) lastly, and above all, whether the tragedy could have been prevented if care had been taken not to leave the unequipped jeep right in the middle of the clashes,

particularly since there were injured officers on board who were still carrying weapons. The answers to those questions were not provided either by the investigation conducted at national level or by the other evidence in the file. Furthermore, unlike in some other cases, the risk of disturbances had been unpredictable and had depended on how the situation developed. Consequently, the operation had been very broad-ranging and the situation somewhat ill-defined. In addition, the events in question had occurred at the end of a long day of public-order operations during which the law-enforcement agencies had come under enormous pressure. In view of these considerations and the fact – which it deplored – that no domestic investigation had been conducted in that respect, the Court was unable to establish the existence of a direct and immediate link between the shortcomings that may have affected the preparation and conduct of the public-order operation and the death of Carlo Giuliani. As to the applicants' allegation that, after Carlo Giuliani had fallen to the ground, the authorities had delayed summoning and organising assistance, there was nothing to indicate that the ambulance had arrived with undue delay in the circumstances. In view of these considerations, it was not established that the Italian authorities had failed in their duty to protect the life of Carlo Giuliani.

Conclusion: no violation (five votes to two).

(c) *Compliance with the procedural obligations arising out of Article 2* – An autopsy had been performed the day after Carlo Giuliani's death by two doctors appointed by the public prosecutor's office. However, this had not led to the determination of the precise trajectory of the fatal bullet or to the recovery of a metal fragment which a scan had clearly shown to be lodged in the victim's skull. Furthermore, the bullets fired by the officer had not been found, nor was there any indication that attempts had been made to find them. The autopsy that had been carried out and the findings of the autopsy report could not be said to have been capable of providing the starting point for an effective subsequent investigation or of satisfying the minimum requirements of an investigation into a clear case of homicide, as they had left too many crucial questions unanswered. Those shortcomings were to be regarded as particularly serious given that Carlo Giuliani's body had subsequently been released to the applicants and authorisation had been given for its cremation, thereby rendering it impossible to conduct any further analyses, in particular of the fragment of metal lodged in the body. It was also highly regrettable that the cremation of the body had been authorised well before the results of the autopsy were known, although the public prosecutor described the autopsy report as "superficial". Given the shortcomings in the forensic examination and the fact that the body had not been preserved, it was not surprising that the judicial proceedings had culminated in a decision not to prosecute. Accordingly, the authorities had not conducted an adequate investigation into the circumstances of the death of Carlo Giuliani.

Secondly, the domestic investigation had been confined to assessing the responsibility of the persons immediately involved. At no point had any attempt been made to examine the overall context and consider whether the authorities had planned and managed the public-order operations in such a way as to prevent incidents of the kind that caused the death of Carlo Giuliani. In particular, the investigation had not sought to establish why the officer who had fired the shot – whom his superior officers had judged unfit to continue on duty owing to his physical and mental state – had not been taken straight to hospital, had been left in possession of a loaded weapon and had been placed in a jeep which had no protection and which was cut off from the contingent it had been following. In other words, the investigation had not been adequate in that it had not sought to determine who had been responsible for that situation.

Conclusion: violation (four votes to three).

Article 41: EUR 15,000 to the victim's parents and EUR 10,000 to his sister in respect of non-pecuniary damage.

ARTICLE 3

Inhuman treatment

Silence of authorities in face of real concerns about the fate of Greek Cypriots missing since Turkish military operations in northern Cyprus in 1974: *violation*

Varnava and Others v. Turkey - 16064/90 et al.
Judgment 18.9.2009 [GC]

(See Article 2 above, page 7)

Positive obligations

Failure to provide adequate protection against domestic violence: *violation*

E.S. and Others v. Slovakia - 8227/04
Judgment 15.9.2009 [Section IV]

Facts – In March 2001 the first applicant left her husband and petitioned for divorce. The following month she lodged a criminal complaint against her husband alleging that he had ill-treated her and the children (the second, third and fourth applicants) and sexually abused one of the daughters. In May 2001 she sought an interim injunction requiring her husband to move out of their jointly rented council flat. However, the district court dismissed that application on the grounds that it had no power to restrict the husband's right to use the property. The applicants were therefore forced to move away from their home, family and friends and two of the children had to change school. The district court's decision was upheld on appeal, after the regional court had noted that the first applicant would be entitled to terminate the joint tenancy after a final decision in the divorce proceedings and, in the meantime, could apply for an order requiring her husband to "refrain from inappropriate behaviour". The first applicant was granted a divorce in May 2002 and later obtained custody of the three children. In June 2003 the husband was convicted of ill-treatment, violence and sexual abuse and given a four-year prison sentence. Following a constitutional complaint by the applicants that they had not received proper protection, the Constitutional Court ruled that there had been no violation of the first applicant's constitutional rights (as she could have applied for an order requiring her husband to refrain from inappropriate behaviour), but that the lower courts had failed to take appropriate action to protect the children. It made no award of compensation as it considered that the finding of a violation provided sufficient just satisfaction. In July 2003, following the introduction of new legislation in January 2003, the first applicant obtained an order excluding her husband from the flat.

Law – Articles 3 and 8: (a) *Admissibility* – The Government had argued that, by not applying for an order restraining the husband from inappropriate behaviour, the first applicant had failed to exhaust domestic remedies. In the Court's view, however, such an order would not have constituted an effective remedy. The husband stood accused of physical assault and sexual abuse. An order restraining the husband from inappropriate behaviour would only have required him to refrain from acts already prohibited by the criminal law, which had not proved an adequate deterrent in the past. It would also have afforded substantially less protection than an exclusion order.

Nor did the Court accept the Government's submission that the children had received adequate redress through the Constitutional Court's decision. They had not been awarded any financial compensation. Nor was there much force in the Government's submission that, by not applying for the correct form of order, the first applicant was partly responsible for the situation, as the Constitutional Court itself had found that the courts below should have granted the application for an exclusion order of their own initiative in order to protect the children. Neither the husband's conviction more than two years later nor the subsequent amendment to the Code of Criminal Procedure had afforded adequate redress to three minors who had been forced to leave the family home because of the State's protracted failure to protect them from an abusive parent.

Conclusion: admissible (unanimously).

(b) *Merits* – Given the nature and severity of the allegations, the first applicant and the children had required protection immediately, not one or two years later. The first applicant had been unable to apply to sever the tenancy until her divorce was finalised in May 2002, or to apply for an order excluding her former husband from the matrimonial home until after the law was amended in January 2003. She had been without effective protection for herself and the children during the interim. The respondent State had therefore failed to discharge its positive obligations towards them.

Conclusion: violation (unanimously).

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

Alleged failure to prosecute Government ministers following death of detainees in fire: *inadmissible*

Van Melle and Others v. the Netherlands - 19221/08
Decision 29.9.2009 [Section III]

Facts – In October 2005 eleven aliens who were being held in a detention centre pending deportation

were killed in a fire. Technical investigations led to the finding that one of the detainees had started the fire by negligently tossing a burning cigarette into a waste paper basket. A letter was subsequently sent to the regional court public prosecutor calling for the prosecution of the Minister of Justice and Minister for Immigration and Integration. No prosecution was brought, however, as under domestic law a Royal Decree or decision of the Lower House of Parliament was required for the prosecution of a government minister. In the interim, an independent body, the Investigation Committee for Safety Issues, investigated the case. In a report it submitted to the Lower House of Parliament in September 2006, it stated that extensive testing indicated that the fire could well have been started by a cigarette end and that technical failure was so unlikely a cause as to be excluded. It nevertheless found fault with three Government institutions, including the Ministry of Justice (which was responsible for the technical specifications and for securing the safety of the detainees), but not the Ministry for Immigration and Integration. Following the publication of the report, which included recommendations to the three ministries found to have been at fault, two ministers, including the Minister of Justice, resigned on grounds of political responsibility. The detainee found to have set the waste paper basket alight, was tried for having started the fire through criminal negligence and convicted both at first instance and on appeal. An appeal to the Supreme Court is pending.

Law – Article 3: The application was lodged by a total of forty-two applicants (an NGO, survivors and relatives of the deceased) and complained of the failure to prosecute the Minister of Justice and Minister for Immigration and Integration. The complaints of all but two of the applicants were declared inadmissible *ratione personae* or as being outside the six-month time-limit.

As to the complaints of the remaining two applicants, who were next of kin, the Court noted that the existence of a credible assertion of treatment infringing Article 3 (which for present purposes, the Court assumed) did not necessarily entail an obligation to prosecute the persons whom the applicants wished to see held to account. More generally, where an infringement of the right to life or to physical integrity was not caused intentionally, the positive obligation imposed by Article 3 to set up an effective judicial system did not necessarily require the provision of a criminal-law remedy in every case.

In the applicants' case, moreover, an independent committee had investigated and produced a detailed, highly critical report, which the Court was prepared to accept as reliable, specifically identifying the Government institutions responsible for the failure to ensure the detainees' safety. As a result, two of the ministers responsible had resigned on grounds of political responsibility. Accordingly, in so far as they were addressed directly to members of the Government at ministerial level, the procedural requirements of Article 3 had been satisfied. There was nothing in the application to suggest that the Minister of Justice – one of those who had resigned over the matter – and the Minister for Immigration and Integration had personally disregarded their duties to the point of criminal responsibility warranting prosecution.

Conclusion: inadmissible (manifestly ill-founded).

Expulsion

Risk of ill-treatment in event of expulsion: *violation if expelled*

Abdolkhani and Karimnia v. Turkey - 30471/08
Judgment 22.9.2009 [Section II]

Facts – The applicants were Iranian nationals and members of the People's Mojahedin Organisation ("the PMOI"). They left Iran on unspecified dates and stayed in a PMOI camp in Iraq until they decided to leave the PMOI and entered a refugee camp set up by the United States forces in Iraq. They were recognised as refugees by the United Nations High Commissioner for Refugees (UNHCR), which considered that their links to the PMOI and their political opinions put them at risk of arbitrary deprivation of life or detention and ill-treatment in Iran. They then tried to enter Turkey. An initial attempt ended in their arrest and return to Iraq without their being able to explain their situation to border officials or, it would appear, any formal decision being taken to deport them. They immediately re-entered Turkey, but on 21 June 2008 were re-arrested and detained. Although they made statements to both the gendarmerie and the court explaining that they feared for their lives in Iran, they were convicted of illegal entry into Turkey, with sentence deferred for five years, and the Turkish authorities made an (unsuccessful) attempt to deport them to Iran on 28 June 2008, without notifying them of the decision or the reasons for their deportation. Two days later the applicants obtained an interim

measure from the European Court under Rule 39 of the Rules of Court. They were transferred to a Foreigners' Admission and Accommodation Centre in September 2008.

Law – Article 3: As regards the risks of ill-treatment in the event of deportation to Iran, the Court noted reports from Amnesty International, Human Rights Watch and the UNHCR Resettlement Service about PMOI members in Iran either being executed or found dead in suspicious circumstances in prison. Unlike the Turkish authorities, the UNHCR had interviewed the applicants and had had the opportunity to test the credibility of their fears and the veracity of their account and had found that they risked arbitrary deprivation of life, detention and ill-treatment in their country of origin. There were thus serious reasons to believe that former or current PMOI members and sympathisers could be killed and ill-treated in Iran and that the applicants had been affiliated to that organisation. As to the risks in Iraq, it was noted that the removal of Iranian nationals to that country by the Turkish authorities was carried out in the absence of a proper legal procedure. Furthermore, evidence before the Court from various sources indicated a strong possibility that persons perceived to be affiliated to the PMOI were removed from Iraq to Iran.

There was, therefore, a real risk of the applicants being subjected to treatment contrary to Article 3 if they were returned to Iran or Iraq. In that connection, the fact that PMOI members might create a risk to national security, public safety and order in Turkey was irrelevant, given the absolute nature of the protection afforded by Article 3. In any case, the applicants had left the PMOI and were now UNHCR recognised refugees.

Conclusion: violation if deported (unanimously).

Article 13: Both the administrative and judicial authorities had remained totally passive regarding the applicants' serious allegations of a risk of ill-treatment if they were returned to Iraq or Iran. Moreover, by failing to consider the applicants' requests for temporary asylum, to notify them of the reasons for not taking their asylum requests into consideration and to authorise them to have access to legal assistance (despite their explicit request for a lawyer) while in police detention, the national authorities had prevented the applicants from raising their allegations under Article 3 within the relevant legislative framework. What was more, the applicants could not even apply to the authorities for annulment of the decision to deport them as they had not been served with the deportation orders or notified of the reasons for their removal. In any event, judicial review in deportation cases in Turkey could not be regarded as an effective remedy since an application for annulment of a deportation order did not have suspensive effect unless the administrative court specifically ordered a stay of execution. The applicants had not therefore been provided with an effective and accessible remedy in relation to their Article 3 complaints.

Conclusion: violation (unanimously).

Article 5 § 1: In the absence of clear legal provisions establishing the procedure for ordering and extending detention with a view to deportation and setting time-limits for such detention, the national system had failed to protect the applicants from arbitrary detention and, consequently, their detention could not be considered "lawful".

Conclusion: violation (unanimously).

Article 5 § 2: The applicants had been arrested on 21 June 2008 and subsequently detained in police custody. On 23 June 2008 they had been convicted of illegal entry. Yet they had not been released and from then on had not been detained on any criminal charge, but in the context of immigration control. In the absence of a reply from the Government or any document in the case file to show that the applicants had been informed of the grounds for their continued detention after 23 June 2008, the Court concluded that the national authorities had never actually communicated the reasons to them.

Conclusion: violation (unanimously).

Article 5 § 4: Given the findings that the applicants had been denied legal assistance and had not been informed of the reasons for their detention, the applicants' right to appeal against their detention had been deprived of all effective substance. Nor had the Government submitted that the applicants had at their disposal any procedure through which the lawfulness of their detention could have been examined by a court. The Court therefore concluded that the Turkish legal system had not provided the applicants with a remedy whereby they could obtain judicial review of their detention.

Conclusion: violation (unanimously).

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

ARTICLE 5

Article 5 § 1

Liberty of person

Failure to conduct effective investigation into arguable claim that missing Greek Cypriots may have been detained during Turkish military operations in northern Cyprus in 1974: *violation*

Varnava and Others v. Turkey - 16064/90 et al.
Judgment 18.9.2009 [GC]

(See Article 2 above, page 7)

ARTICLE 6

Article 6 § 1 (civil)

Access to court
Fair hearing

Right of access to court of prisoner held in high-security wing of prison to assert rights of a civil nature: *violation*

Enea v. Italy - 74912/01
Judgment 17.9.2009 [GC]

Facts – The applicant had been sentenced to thirty years' imprisonment for, among other offences, membership of a Mafia-type criminal organisation. In August 1994, in view of the danger posed by the applicant, the Minister of Justice issued a decree ordering that he be subject for one year to the special prison regime provided for in the second paragraph of section 41 *bis* of the Prison Administration Act and applied for reasons of public order and safety. The decree imposed various restrictions in terms of visits, activities and monitoring of the applicant's correspondence. Application of the special regime was extended until late 2005 by means of nineteen decrees, each valid for a limited period. The applicant lodged several appeals with the court responsible for the execution of sentences, which on three occasions decided to ease some of the restrictions imposed on him. One of the appeals was declared inadmissible on the ground that the period of validity of the decree in question had expired and the applicant therefore no longer had any interest in having it examined. The court eventually ordered the application of the special regime to be discontinued, and in March 2005 the applicant was placed in a high-supervision unit, where certain very dangerous prisoners are held separately from other inmates. The decision *per se* to place a prisoner in a high-supervision unit is not amenable to appeal.

The applicant had a number of health problems and was obliged to use a wheelchair. Between June 2000 and February 2005 he served his sentence in the section of the prison's hospital wing reserved for prisoners detained under the special regime. In October 2008 the court responsible for the execution of sentences ordered a stay of execution of the applicant's sentence on health grounds. He has been under house arrest since that time.

Law – Article 3: The restrictions imposed under the special prison regime had been necessary in order to prevent the applicant, who posed a danger to society, from maintaining contacts with the criminal organisation to which he belonged. However, the courts responsible for the execution of sentences had lifted or eased certain of those restrictions. Furthermore, the domestic authorities had fulfilled their obligation to protect the applicant's physical well-being by monitoring his state of health carefully, assessing the seriousness of his health problems, providing him with the appropriate medical care and ordering his admission to hospital where necessary. Accordingly, the treatment to which he had been subjected had not exceeded the unavoidable level of suffering inherent in detention.

Conclusion: no violation (fifteen votes to two).

Article 6 § 1: (a) *Restrictions on the right to a court during the period of application of the special prison regime* – Prisoners subjected to the special prison regime had ten days from the date on which the ministerial decree was served in which to lodge an appeal, which did not have suspensive effect, with the court responsible for the execution of sentences. The latter in its turn had to give a ruling within ten days; that time-limit was imposed on account of the serious impact of the special regime on prisoners' rights and the fact that the impugned decision remained valid for only a limited time. The court had dismissed one of the applicant's appeals more than four months after it was lodged, on the ground that the validity of the impugned decree had expired. Hence, in the absence of any decision on the merits, the courts' review of the decree in question had been deprived of its substance.

Conclusion: violation (unanimously).

(b) *Restrictions on the right to a court during the period of detention in a high-supervision unit*

(i) *Admissibility*: Article 6 § 1 was not applicable under its criminal head, as the proceedings concerning the prison system had not related in principle to determination of a "criminal charge". On the other hand, the question of access to a court with jurisdiction to rule on placement in a high-supervision unit and the restrictions liable to accompany it fell to be examined under the civil head of Article 6 § 1. Most of the restrictions to which the applicant had allegedly been subjected related to a set of prisoners' rights which the Council of Europe had recognised by means of the European Prison Rules, set forth in a Recommendation of the Committee of Ministers. Although that recommendation was not legally binding on the member States, the great majority of them recognised that prisoners enjoyed most of the rights to which it referred, and provided for avenues of appeal against measures restricting those rights. Accordingly, a "dispute" (*contestation*) over a "right" could reasonably be said to have existed in the instant case. In addition, some of the restrictions alleged by the applicant, such as those limiting his contact with his family and those which affected his pecuniary rights, clearly fell within the sphere of personal rights and were therefore civil in nature. That being said, it was essential for States to retain a wide discretion with regard to the means of ensuring security and order in the difficult context of prison. Nevertheless, any restriction affecting those individual civil rights had to be open to challenge in judicial proceedings, on account of the nature of the restrictions and their possible repercussions. By that means it was possible to achieve the fair balance which had to be struck between the constraints facing the State in the prison context on the one hand and the protection of prisoners' rights on the other. Accordingly, this complaint was compatible *ratione materiae* with the provisions of the Convention since it related to Article 6 under its civil head.

Conclusion: admissible (sixteen votes to one).

(ii) *Merits*: While it was true that a prisoner could not challenge the merits of a decision to place him or her in a high-supervision unit *per se*, an appeal lay to the courts responsible for the execution of sentences against any restriction of a civil right (affecting, for instance, a prisoner's family visits or his or her correspondence). Given that in the instant case the applicant's placement in the unit had not entailed any restrictions of that kind, even the possible lack of such a remedy could not be said to amount to a denial of access to court.

Conclusion: no violation (unanimously).

Article 8: (a) *August 1994 to July 2004* – There had been interference by a public authority with the exercise of the applicant's right to respect for his correspondence. The monitoring of the applicant's correspondence between August 1994 and July 2004 had not been in accordance with the law, in so far as the law applied in the present case did not regulate either the duration of the measure or the reasons capable of justifying it, and did not indicate with sufficient clarity the scope and manner of exercise of the discretion exercised by the competent authorities. The Court saw no reason to depart in the instant case from its existing case-law, designed to ensure that all prisoners enjoyed the minimum degree of protection to which citizens were entitled under the rule of law in a democratic society.

Conclusion: violation (unanimously).

(b) *Period thereafter* – With regard to the period from July 2004 until the stay of execution of the applicant's sentence, the Court simply observed that there were no documents in the case file to support the assertions of the applicant's representatives.

Conclusion: no violation (unanimously).

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

Access to court

State immunity in civil action for torture: *communicated*

Jones v. the United Kingdom
- 34356/06 [Section IV]
Mitchell and Others v. the United Kingdom
- 40528/06 [Section IV]

The applicants allege that they were subjected to torture while in custody in the Kingdom of Saudi Arabia. The first applicant (Mr Jones) subsequently commenced civil proceedings in the English High Court against the Kingdom, the Saudi Ministry of Interior and an individual officer. The other three applicants issued proceedings against four individuals: two police officers, a deputy prison governor and the Saudi Minister of the Interior. The High Court ruled that all the defendants were entitled to immunity under the State Immunity

Act 1978 and refused the applicants permission to serve the proceedings outside the jurisdiction. On appeal, the Court of Appeal drew a distinction between immunity *ratione personae* (which applied to the State, the serving head of State and diplomats) and immunity *ratione materiae* (which applied to ordinary officials, former heads of State and former diplomats). It upheld the High Court's decision in respect of the Kingdom and the Ministry, but allowed the applicants' appeal in respect of the individual defendants. The issue then went to the House of Lords, which agreed with the High Court that all the defendants were entitled to immunity, even where the allegation against them was one of torture. The applicants complain of a violation of their right of access to court.

Communicated under Article 6 § 1.

Independent and impartial tribunal

Decision of appellate court not to discontinue proceedings after withdrawal of one of the judges on objective impartiality grounds: *no violation*

Procedo Capital Corporation v. Norway - 3338/05
Judgment 24.9.2009 [Section I]

Facts – On an appeal in litigation between the applicant company and a broker over securities dealings, the high court invited the parties to propose the names of two financial experts to sit as lay members on the bench. The broker proposed the appointment of A., a partner in a large accountancy firm; the applicant company did not object within the specified time-limit. Accordingly, when the hearing of the appeal began, the bench was composed of three professional judges and two lay experts, including A. A few days into the hearing, just after the applicant company's counsel had made his opening address, A. informed the parties that his firm had been engaged on an assignment for the broker's parent company in connection with a stock-exchange listing. The high court ordered A. to withdraw from the case, but rejected a motion by the applicant company for the case to be discontinued after finding that A.'s disqualification did not disqualify the remaining judges. Before the European Court, the applicant company complained that the high court had not been impartial.

Law – Article 6 § 1: There had been no evidence of personal bias on A.'s part, but there had been legitimate, if not particularly strong, reasons for doubting his objective impartiality, in view of his position as a partner in a consultancy firm that had provided auditing and accounting services to the parent company of one of the parties to the proceedings. However, the high court had unanimously upheld the applicant company's request to order A. to withdraw and his presence had been limited to, and terminated after, a relatively early phase of the hearing. The Court was not convinced that the high court as composed after A.'s withdrawal failed to satisfy the impartiality requirement. The suggestion that A. may have influenced the high court's decision to sever the applicant company's counterclaim from the main action was unpersuasive as it had been reached in A.'s absence and in substance had endorsed the applicant company's own position on that point. Any misgivings stemming from the possibility that A. might have exerted influence on other members of the bench by taking part in informal exchanges with them had been adequately addressed by their unanimous order that he withdraw and unanimous decision that his disqualification did not disqualify them. Following A.'s withdrawal, the high court had heard an additional eleven days of argument from both parties and had deliberated for two days before issuing its decision. It could not therefore be said that A. had been involved directly or indirectly in determining the dispute. The nature, timing and short duration of his involvement in the proceedings were not capable of causing the applicant company to have legitimate doubts as to the impartiality of the high court as a whole. Accordingly, the high court had not been under an obligation to discontinue the proceedings and to reconvene in a different composition.

Conclusion: no violation (unanimously).

Article 6 § 1 (criminal)

Fair hearing

Statutory change depriving applicant of an advantage that had been instrumental in his choice of summary proceedings: *violation*

Scoppola v. Italy (no. 2) - 10249/03
Judgment 17.9.2009 [GC]

(See Article 7 § 1 below, page 20)

Fair hearing
Defence through legal assistance

Discontinuance of legally represented applicant's criminal appeal due to one day's absence from hearing: *violation*

Kari-Pekka Pietiläinen v. Finland - 13566/06
Judgment 22.9.2009 [Section IV]

Facts – The applicant was convicted of aggravated fraud and given a conditional twenty-month prison sentence. On appeal he was summoned to attend an oral hearing on specified dates. The summons stated that he was required to appear in person on all the days of the hearing, under penalty of a fine, and that his absence from the main hearing without a valid excuse would result in his appeal being discontinued. The applicant did not attend the first day of the hearing, but was represented by counsel. As a result of the applicant's absence the appeal court discontinued his appeal. The applicant subsequently notified the appeal court that he had been absent because of illness and produced a medical certificate. However, the appeal court rejected his request for the proceedings to be reopened as the medical certificate was dated after the date of the hearing and, in any event, his illness had not been such as to prevent his attending. The Supreme Court refused leave to appeal.

Law – Article 6 § 1 in conjunction with Article 6 § 3 (c): The appeal court had been under a duty to allow the applicant's counsel to defend him at the hearing, even in his absence. Although the scope of the hearing on the day in question was not entirely clear, it apparently did not concern issues for which the applicant's attendance in person was strictly necessary, as the witnesses were not due to be heard until a later date. Nor had it been indicated in the summons that just one day's absence would be regarded as absence from the entire hearing. Discontinuing the appeal had therefore constituted a particularly rigid and severe sanction, which could not be considered justifiable.

Conclusion: violation (unanimously).

Article 41: EUR 2,500 in respect of non-pecuniary damage.

Article 6 § 3 (c)

Defence through legal assistance

Lack of personal contact prior to appeal hearing with legal-aid counsel who had to plead the applicant's case on the basis of submissions of another lawyer: *case referred to the Grand Chamber*

Sakhnovskiy v. Russia - 21272/03
Judgment 5.2.2009 [Section I]

In 2001 the applicant was convicted of murder and sentenced to a term of imprisonment. In 2002 the Supreme Court dismissed his appeal. In 2007 the Presidium of the Supreme Court granted a request for supervisory review, quashed the appeal decision and remitted the case for fresh examination. In the new appeal proceedings the applicant followed the hearing from a detention facility by video link as the Supreme Court rejected his request to attend it in person. Before the start of the hearing he was introduced to his new legal-aid counsel who was present in the courtroom and they were allowed fifteen minutes of confidential communication by video link. The applicant attempted to refuse the assistance of the counsel on the grounds that he had never met her in person. The Supreme Court rejected his objection to the counsel's assistance as unreasonable, noting that the applicant had not requested replacement counsel or leave to retain counsel privately. In a separate decision the Supreme Court decided that it would not accept a new statement of appeal from the applicant and would consider his position on the basis of the submissions made by his former counsel before the previous appeal hearing in 2002. On the same day the Supreme Court examined the merits of the case and upheld the judgment of 2001.

In a judgment of 5 February 2009 a Chamber of the Court held unanimously that there had been a violation of Article 6 §§ 1 and 3 (c), as the timing of the counsel's appointment had made it difficult, if not impossible, for her to agree with the applicant on the line of defence she would pursue at the hearing. The absence of personal contact with the applicant at the hearing and the absence of any discussion with him in advance of the hearing, combined with the fact that she had had to plead the case on the basis of the points of appeal lodged five years earlier by another lawyer, had reduced the counsel's appearance at the appeal hearing to a mere formality. The applicant's dissatisfaction with the manner in which his legal assistance had

been organised had been made sufficiently clear to the Supreme Court. In the circumstances, the Chamber considered that the reasons given by the applicant for his refusal to be assisted by the counsel in question were legitimate and justified in the circumstances. Consequently, his conduct did not relieve the authorities of their obligation to take further steps to guarantee the effectiveness of his defence.

On 14 September 2009 the case was referred to the Grand Chamber at the Government's request.

Use in evidence of confession made in police custody in absence of a lawyer: *violation*

Pishchalnikov v. Russia - 7025/04
Judgment 24.9.2009 [Section I]

Facts – In December 1998 the applicant was arrested on suspicion of aggravated robbery. He was interrogated – both on the day of his arrest and the following day – in the absence of a lawyer, although he had clearly indicated the name of defence counsel he wished to represent him. During the interrogations the applicant confessed to having taken part in the activities of a criminal group which included murder, kidnapping, hijacking and unlawful possession of weapons. During subsequent interrogations between January and August 1999 the applicant refused legal assistance. He was then assigned legal-aid counsel. On being interrogated in counsel's presence, he retracted statements he had made to the investigating authorities on his arrest and continued to deny their veracity at the trial and on appeal. In 2002 he was convicted of various offences, including aggravated murder, torture, kidnapping, theft and robbery. He appealed to the Supreme Court, which upheld the convictions in part and sentenced him to twenty years in prison. The applicant was not assisted by a lawyer during his appeal. The courts used the statements the applicant had made on his arrest as evidence to convict him and excluded from evidence all the subsequent statements he had made in the absence of legal assistance, finding that counsel's presence during the interrogations had been mandatory and that the applicant's refusals of legal assistance could not be accepted.

Law – Article 6 § 3 (c): The applicant had made his intention to be assisted by counsel sufficiently clear to make it imperative for the investigating authorities to give him the benefit of legal assistance, unless there existed compelling reasons justifying the denial of access to a lawyer. Even assuming that the lawyer in question had been unavailable, there was no evidence showing that the applicant had even been informed of the investigator's allegedly unsuccessful attempts to contact him. The Government had not argued that the applicant had been advised to find another lawyer or that he had been offered assistance by legal-aid counsel. No justification had been given for not providing the applicant with access to a lawyer. Nor had the Government argued that the lack of access to a lawyer was in accordance with domestic law. In the Court's view, when an accused had invoked his right to be assisted by counsel during interrogation, a valid waiver of that right could not be established by showing only that he had responded to further police-initiated interrogation even after being advised of his rights. Moreover, the Court was of the opinion that an accused such as the applicant in the present case, who had expressed the desire to participate in the investigation only through counsel, should not be subject to further interrogation by the authorities until counsel had been provided, unless the accused himself initiated further communication with the police or prosecution, which was not the case here. Furthermore, it was possible that the applicant, who had had no previous encounters with the police, had not understood what was required to stop the interrogation. Without legal assistance, he had been unable to make a correct assessment of the consequences his decision to confess would have on the outcome of the proceedings. The Court therefore found that the applicant's statements, which were made without access to counsel, did not amount to a valid waiver of his right to legal assistance. As regards his subsequent refusals of assistance, although there was no evidence that they had not been made voluntarily and knowingly, it was inexplicable that during purely formal procedural investigative steps the applicant should have been assisted by legal-aid counsel, but was usually refused legal assistance when called upon to answer the investigators' questions. In the absence of assistance, the applicant was unable to make full and knowledgeable use of his rights. Moreover, his already difficult situation was compounded by the fact that he was surrounded by the police and prosecution authorities, who were experts in the field of criminal proceedings and well-equipped with various, often psychologically coercive, interrogation techniques which facilitated, or even prompted, the receipt of information from an accused. Being mindful of the applicant's anxious and emotional state after intense interrogations, the Court did not therefore

find it surprising that the day following his confessions he had repeated his statements, still without the benefit of legal advice. Although the applicant's statements on his arrest were not the sole evidence on which his conviction was based, they were nevertheless decisive. In sum, the lack of legal assistance to the applicant at the initial stages of police questioning had irretrievably affected his defence rights and undermined the appearance of a fair trial and the principle of equality of arms. The nature of the detriment he had suffered was such that neither effective assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could remedy the defects which had occurred in police custody.

Conclusion: violation (unanimously).

Article 41: EUR 5,500 in respect of non-pecuniary damage.

(See also *Salduz v. Turkey* [GC], no. 36391/02, 27 November 2008, Information Note no. 113)

ARTICLE 7

Article 7 § 1

Nulla poena sine lege

Implicit recognition by Article 7 of retroactivity of the more lenient criminal law: *violation*

Scoppola v. Italy (no. 2) - 10249/03
Judgment 17.9.2009 [GC]

Facts – In 1999 the applicant killed his wife and injured one of his children. After an investigation the prosecution service requested that he be committed to stand trial on charges of murder, attempted murder, ill-treatment of his family and unauthorised possession of a firearm. At the time when the offences were committed they attracted a sentence of life imprisonment with daytime isolation. At the hearing before the preliminary hearings judge the applicant was granted his request to be tried under the summary procedure, a simplified process which entailed a reduction of sentence in the event of conviction. In the version in force at that time Article 442 § 2 of the Code of Criminal Procedure ("the CCP") provided that, if the crime committed by the defendant was punishable by life imprisonment, the appropriate sentence should be thirty years. The preliminary hearings judge found the applicant guilty and noted that he was accordingly liable to life imprisonment; however, as the applicant had opted for the summary procedure, the judge sentenced him to a term of thirty years. The Public Prosecutor's Office at the Court of Appeal appealed on points of law against the preliminary hearings judge's judgment, arguing that he should have applied Article 7 of Legislative Decree no. 341 of 24 November 2000, which had entered into force on the very day when the applicant was convicted. The prosecution contended in particular that the said Article 7 had amended Article 442 of the CCP and now provided that, in the event of trial under the summary procedure, life imprisonment was to be substituted for life imprisonment with daytime isolation if there were "cumulative offences" or a "continuous offence". In 2002 the Assize Court of Appeal sentenced the applicant to life imprisonment, ruling firstly that the new procedural rule was applicable to all pending proceedings, and secondly that the applicant could have withdrawn his request to be tried under the summary procedure and have stood trial under the ordinary procedure. An appeal by the applicant on points of law was dismissed in 2003.

Law – Article 7: (a) *Interpretation of Article 7 of the Convention in the Court's case-law* – In its *X v. Germany* decision (no. 7900/77, 6 March 1978) the European Commission of Human Rights had expressed the opinion that, unlike Article 15 § 1 *in fine* of the United Nations Covenant on Civil and Political Rights, Article 7 of the Convention did not guarantee the right to a more lenient penalty provided for in a law subsequent to the offence. Repeating that ruling, the Court had reiterated that Article 7 does not afford the right of an offender to application of a more favourable criminal law. However, since 1978, a consensus had gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, had become a fundamental principle of criminal law. In reaching that finding the Court referred to the American Convention on Human Rights, the European Union's Charter of Fundamental Rights, the case-law of the Court of Justice of the European Communities, the Statute of the International Criminal Court and the case-law of the International Criminal Tribunal for the former Yugoslavia. It was also significant that the legislation of the respondent State had recognised that principle since 1930. In the Court's opinion, it was consistent with the principle of the rule of law, of

which Article 7 formed an essential part, to expect a trial court to apply to each punishable act the penalty which the legislator considered proportionate. Inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean applying to the defendant's detriment the rules governing the succession of criminal laws in time. In addition, it would amount to disregarding any legislative change favourable to the accused which might have come in before the conviction and continuing to impose penalties which the State – and the community it represented – now considered excessive. The Court noted that the obligation to apply, from among several criminal laws, the one whose provisions were the most favourable to the accused was a clarification of the rules on the succession of criminal laws, which was in accord with another essential element of Article 7, namely the foreseeability of penalties. The Court accordingly took the view that it was necessary to depart from the case-law established by the Commission in the case of *X v. Germany* and affirm that Article 7 § 1 of the Convention guaranteed not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle was embodied in the rule that where there were differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment was rendered, the courts were required to apply the law whose provisions were most favourable to the defendant.

(b) *Whether Article 442 of the CCP contained provisions of substantive criminal law* – Article 442 was part of the CPP, whose provisions normally governed the procedure for the prosecution and trial of offenders. However, paragraph 2 of Article 442 was entirely concerned with the length of the sentence to be imposed after a trial conducted in accordance with the simplified procedure. In addition, there was no doubt that the penalties mentioned in Article 442 § 2 of the CCP were imposed following conviction for a criminal offence, that they were qualified as "criminal" in domestic law and that their purpose was both deterrent and punitive. Moreover, they constituted the "penalty" imposed for the acts with which the defendant was charged, and not measures concerning the "execution" or "enforcement" of that penalty. The Court therefore considered that Article 442 § 2 of the CCP was a provision of substantive criminal law concerning the length of the sentence to be imposed in the event of conviction following trial under the summary procedure. It therefore fell within the scope of the last sentence of Article 7 § 1 of the Convention.

(c) *Whether the applicant was granted the benefit of the more lenient criminal law* – The amendment of Article 442 of the CCP so as to provide that in the event of conviction following trial under the summary procedure, "life imprisonment [was to be] replaced by thirty years' imprisonment" amounted to a subsequent criminal-law provision prescribing a more lenient penalty. Article 7 of the Convention, as interpreted by the Grand Chamber, therefore required the applicant to be granted the benefit thereof, and that was what had happened when the preliminary hearings judge sentenced the applicant to thirty years' imprisonment. However, the application of Article 442 § 2 in favour of the accused had been set aside by the Rome Court of Appeal and the Court of Cassation. But, as amended, Article 442 of the CCP did not contain any particular ambiguity; it clearly stated that life imprisonment was to be replaced by thirty years' imprisonment. Consequently, the applicant had been given a heavier sentence than the one prescribed by the law which was most favourable to him, and the respondent State had therefore failed to discharge its obligation to grant the applicant the benefit of the provision prescribing a more lenient penalty which had come into force after the commission of the offence.

Conclusion: violation (eleven votes to six).

Article 6: The applicant complained that although he had opted for a simplified trial – the summary procedure – he had been deprived of the most important advantage stemming from that choice under the law in force at the time when he had made it, namely the replacement of life imprisonment with a thirty-year sentence. The summary procedure provided for in the Italian Code of Criminal Procedure, which entailed undoubted advantages for the defendant, nevertheless also entailed a diminution of fundamental procedural safeguards. By requesting the adoption of the summary procedure the applicant – who was assisted by a lawyer of his choice, and was therefore in a position to ascertain what the consequences of his request would be – had to unequivocally waive his rights to a public hearing, to have witnesses called, to produce new evidence and to examine prosecution witnesses. He could therefore legitimately expect that, thanks to the procedural choice he had made, the maximum sentence to which he was liable was a

term of imprisonment not exceeding thirty years. But that legitimate expectation on the applicant's part was frustrated by Legislative Decree no. 341 of 2000, which provided that, where a judge considered that the appropriate sentence should be life imprisonment with daytime isolation, the penalty to be imposed should be life imprisonment without isolation. That change in the rules on fixing of sentence was applied, however, not only to defendants making new requests for trial under the summary procedure but also to persons who, like the applicant, had already made that request and stood trial at first instance before the publication of Legislative Decree no. 341 in the Official Gazette. It was contrary to the principle of legal certainty and the protection of the legitimate trust of persons engaged in judicial proceedings for a State to be able to reduce unilaterally the advantages attached to the waiver of certain rights inherent in the concept of fair trial. In the present case application of the provisions of Legislative Decree no. 341 after the end of the first-instance proceedings had deprived the applicant of an essential advantage which was guaranteed by law and which had prompted his decision to elect to stand trial under the summary procedure.

It remained to be determined whether the applicant's right to withdraw his request for adoption of the summary procedure was capable of remedying the prejudice he had suffered. The Court observed that, if the applicant had withdrawn his request for adoption of the summary procedure, he would not have been able to compel the State to honour the agreement previously entered into. But it would be excessive to require a defendant to give up the possibility of a simplified procedure accepted by the authorities which had resulted at first instance in his obtaining the advantages he had hoped for, namely reduction of his sentence to thirty years' imprisonment. Moreover, that legitimate expectation had been frustrated by factors beyond his control, such as the length of the domestic proceedings and the adoption of Legislative Decree no. 341 of 2000.

Conclusion: violation (unanimously).

Article 46: Having regard to the particular circumstances of the case and the urgent need to put an end to the breach of Articles 6 and 7 of the Convention, the Court considered that the respondent State was responsible for ensuring that the applicant's sentence of life imprisonment was replaced by a penalty consistent with the principles set out in the judgment, namely a sentence not exceeding thirty years' imprisonment.

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

ARTICLE 8

Private life
Home

Alleged nuisance caused by opening of dental surgery in a residential block of flats: *inadmissible*

Galev and Others v. Bulgaria - 18324/04
Decision 29.9.2009 [Section V]

Facts – The applicants were residents in a four-storey block of flats. When a fellow resident started works to convert her second-floor flat into a dental surgery, they objected on the grounds that their consent was required. However, following various appeals their objection was ultimately rejected by the Supreme Administrative Court on the grounds that, once granted, a building permit could only be invalidated on certain limited grounds that did not apply in their case. In their application to the European Court, the applicants' complained, *inter alia*, that the noise, smell and health hazard caused by the surgery interfered with their Article 8 rights.

Law – Article 8: The first issue was whether the alleged nuisance had attained the minimum level of severity required to amount to an interference with the applicants' rights to respect for their private lives and their homes. The assessment of that minimum was relative and depended on all the circumstances: the intensity and duration of the nuisance, its physical or mental effects, the general context, and whether the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city. It could not be assumed that the noise emanating from a dental surgery – whether from the medical equipment or from patients' entering and leaving – would rise above the usual level of noise in an apartment block in a modern town. In this respect the applicants' case could be distinguished from cases involving either constant or night-time noise. Any noise was likely to be restricted to office hours and unlikely to reach very high levels. The case file did not contain any noise tests or similar material showing that noise levels in the building had risen above acceptable levels. Similarly, it could not be assumed that any smells

coming from a dentist's surgery would be above acceptable levels. There was no evidence to show that the applicants had been unduly affected by either noise or smells or to indicate that the stream of patients created any health hazard in the building. Lastly, there had been no national proceedings addressing the key issue (the existence of a nuisance) in the applicants' case, although this had not been because of a lack of appropriate remedies in domestic law. The lack of a fact-finding exercise at the domestic level and of proof that the operation of the dental surgery had unduly interfered with the applicants' private lives and the enjoyment of their homes prevented the Court from concluding that the alleged nuisance had reached the minimum level of severity.

Conclusion: inadmissible (manifestly ill-founded).

Private and family life

Refusal of authorisation for medication to enable severely disabled person to commit suicide: *communicated*

Koch v. Germany - 497/09 [Section V]

The applicant's wife, who was almost completely paralysed and had needed artificial ventilation and constant care and assistance since an accident in 2002, wished to end her life. The applicant requested authorisation from the Federal Institute for Drugs and Medical Devices for her to obtain a fatal dose of medication so that she could commit suicide at home. This was refused on the grounds that medication could only be granted for life-supporting or life-sustaining purposes, not to help a person end his or her life. The applicant's wife subsequently committed suicide in Switzerland, with the aid of the assisted-suicide organisation, Dignitas. An application by the applicant for a declaration that the Federal Institute had acted unlawfully in refusing authorisation was dismissed by the domestic courts. The administrative court of appeal found, in particular, that the right to protection of marriage and family life under Article 6 § 1 of the Basic Law and Article 8 § 1 of the Convention did not confer a right to have the spouses' marriage terminated by the suicide of one of them and that the decisions of the Federal Institute had not interfered with the applicant's right to respect for private life as, even if the right to die existed, its very personal character meant that it could not be relied on by third parties. The Federal Constitutional Court subsequently declared a constitutional complaint by the applicant inadmissible as he could not rely on a posthumous right of his wife to human dignity.

The applicant complains to the European Court under Article 8 of the Convention that the Federal Institute's refusal to grant his wife authorisation to obtain the lethal dose of medication infringed her right to respect for her private and family life, in particular her right to a dignified death and his own right to respect for private and family life as he was forced to travel to Switzerland to enable his wife to commit suicide. He further complains under Article 13 that the German courts had violated his right to an effective remedy when denying his right to challenge the Federal Institute's refusal to grant his wife the requested authorisation.

Communicated under Articles 8 and 13.

Family life

Refusal of courts to grant a woman married in a religious ceremony benefit of the social security and pension rights of her deceased husband, the father of her children: *case referred to the Grand Chamber*

Şerife Yiğit v. Turkey - 3976/05
Judgment 20.1.2009 [Section II]

In this case the applicant complained of the courts' refusal to grant her the benefit of the social security and pension rights of her deceased partner, with whom she had entered into a religious marriage, because the domestic law recognised only civil marriages.

In a judgment of 20 January 2009 a Chamber of the Court held, by four votes to three, that there had been no violation of Article 8, on the ground that the difference in treatment between married and unmarried couples with regard to survivors' benefits was aimed at protecting the traditional family based on the bonds of marriage and was therefore legitimate and justified. According to Turkish law, a religious marriage celebrated by an imam did not give rise to undertakings vis-à-vis third parties or the State. It was therefore not unreasonable for Turkey to afford protection only to civil marriage.

On 14 September 2009 the case was referred to the Grand Chamber at the applicant's request.

(See Information Note no. 115 for further details)

Family life
Positive obligations

Insufficient action by authorities to secure the return of a child abducted by her mother: *violation*

Stochlak v. Poland - 38273/02
Judgment 22.9.2009 [Section IV]

Facts – The applicant, his wife and their daughter lived in Canada. In 1996, at the end of holidays spent in Poland, the mother, a Polish national, decided to remain there with their daughter. The applicant brought various sets of proceedings from January 1997, one of which resulted in a final decision in October 1998 ordering his child's return. However, he was not reunited with his daughter until April 2003.

Law – Article 8: Proceedings relating to the granting of parental responsibility, including execution of the decision delivered at the end of them, required urgent handling as the passage of time could have irremediable consequences for relations between a parent and his or her child. In the instant case, it was clear in January 1997, when the applicant contacted the Ministry of Justice concerning the abduction, that the child had been unlawfully removed. Yet a year and seven months had elapsed between the district court's first decision and the final judgment on points of law, ordering the child's return to her father. Furthermore, in the context of the civil enforcement proceedings, during the three years following the decision of December 1998 ordering the applicant's wife to return the child within three weeks, no activity by the authorities could be discerned for the purpose of obliging her to comply with that order. It was only in January 2003 that a meeting was organised to ensure effective cooperation between the various State bodies responsible for action to bring about the child's return. Finally, the authorities had twice traced the mother, without ever succeeding in recuperating the child. The appropriate authorities should have imposed adequate sanctions in respect of the mother's lack of cooperation, which was the cause of many of the difficulties encountered. Although criminal proceedings had been brought against her three times in seven years, they had never resulted in any sanction, either because the act in question was not an offence under domestic legislation or because the authorities considered that the act had very little adverse social effect. Nor was any coercive measure imposed in the context of the civil enforcement proceedings. Having regard to the foregoing, and notwithstanding the respondent State's margin of appreciation in the matter, the Polish authorities had failed to make adequate and effective efforts to enforce the applicant's right to the return of his child and had thereby breached his right to respect for his family life as guaranteed by Article 8.

Conclusion: violation (unanimously).

Article 41: EUR 7,000 in respect of non-pecuniary damage.

ARTICLE 9

Manifest religion or belief

State intervention in a conflict between members of a religious community: *violation*

Miroļubovs and Others v. Latvia - 798/05
Judgment 15.9.2009 [Section III]

Facts – At the material time the three applicants were active members of the religious community to which they belonged. The first applicant was an Old Orthodox "spiritual master", while the other two were respectively the head and an ordinary member of the council of the Riga Grebenščikova Old Orthodox parish ("the RGVD"). The RGVD is the largest of Latvia's sixty-nine Old Orthodox communities.

In 1995 the adoption by the community of new statutes – found by the Ministry of Justice to be lawful – led to a split between the parishioners and to violent incidents. In 2001 a new registration certificate was issued to the RGVD by the Religious Affairs Directorate ("the Directorate"), which in May 2002 also approved the new statutes adopted by the RGVD which stressed its complete independence from other religious organisations. In July 2002 an extraordinary general meeting of the RGVD took place. In parallel with that meeting, which was held in the temple in Riga and in which the applicants participated, another meeting gathered outside attended by, among others, Old Orthodox spiritual masters. The two rival groups each claimed to constitute the legitimate general meeting of the community. The outside meeting decided to elect new members and change the RGVD's statutes on the ground that the first applicant and his followers, by inviting a Russian Orthodox priest to celebrate the liturgy in the RGVD church, had renounced their Old-Rite

beliefs and had effectively converted to the Orthodox Church, thereby forfeiting all their rights as members of the community. Both factions requested formal approval from the Directorate. The latter recognised the outside meeting as legitimate, formally approved it and registered it as the new RGVD parish council. The applicants and their fellow worshippers were expelled by force from the temple and no longer admitted. From that point on they operated informally under the name of "the RGVD in exile". In 2003 the court of first instance granted the applicants' request to set aside the Directorate's decisions. The Directorate appealed against that judgment and the regional court found in its favour. An appeal by the applicants on points of law was dismissed by the Senate of the Supreme Court.

Law – Article 35 § 3: *Alleged abuse of the right of individual petition* – In 2008 two letters questioning the professional competence and integrity of the head of the Directorate at the time of the facts complained of by the applicants were sent to the Prime Minister. The letters referred to the correspondence between the Court's Registry, the applicants and the Government's Agent on the subject of a possible friendly settlement of the instant case. Attached to the letters, moreover, were copies of three documents – confidential for the purposes of Article 38 § 2 of the Convention and Rule 62 § 2 of the Rules of Court – from the Government and the Registry, including a draft friendly-settlement declaration prepared by the latter. However, while the fact of communicating to a third party the content of documents relating to a friendly settlement could in principle constitute an "abuse" within the meaning of Article 35 § 3, this did not mean that there was a complete and unconditional prohibition on showing or mentioning such documents to any other person. What Article 38 § 2 and Rule 62 § 2 barred the parties from doing was publicising the information in question, whether via the media, in correspondence liable to be read by a large number of people or by any other means. In the instant case, the applicants stated that they did not know how the documents in question had fallen into the hands of a third party. For their part, the Government had not adduced any evidence that the applicants had been at fault. In the circumstances, as it had no evidence that all the applicants had consented to the disclosure of the content of the confidential documents by a third party, the Court could not but give them the benefit of the doubt, and was unable to find that the applicants had abused the right of individual petition for the purposes of Article 35 § 3. The Court further pointed out that possible plans by a government to institute criminal or disciplinary proceedings against an applicant for alleged failure to comply with his or her procedural obligations before the Court could give rise to an issue under Article 34 *in fine*, which prohibited any hindrance to the effective exercise of the right of individual petition.

Conclusion: objection dismissed (majority).

Article 9: The authorities' intervention in the dispute between the members of the RGVD, as a result of which the applicants and their fellow worshippers ceased to be recognised as the legitimate leaders of the community and were expelled from their temple, clearly amounted to interference with the exercise of the applicants' right to freedom of religion. The interference had pursued at least the legitimate aims of "protection of public order" and "protection of the rights and freedoms of others".

At the material time, the RGVD had been wholly independent, a fact legally recognised by the State. In July 2002 two meetings of Old Orthodox believers had been held simultaneously, of comparable size and each claiming to be an "extraordinary general meeting of the RGVD". As a State body responsible for managing relations between the State and religious communities in accordance with the legislation in force, the Directorate had then been obliged to make a choice and decide in favour of one of the factions to the detriment of the other, as both were making the same claims. In the instant case the Court had to consider whether that choice had been made in accordance with the requirements of Article 9 § 2.

Following these events, the Directorate had recognised the legitimacy of the meeting held in the street, cancelled the registration certificate issued to the RGVD when it had been led by the first applicant, and issued a new certificate to the representatives of the rival faction. In other words, the State had withdrawn the recognition hitherto granted to the bodies lawfully constituted by the RGVD in accordance with its own statutes and had approved their wholesale replacement by bodies set up by the rival faction. In view of the principle of legitimate trust inherent in all the Convention provisions and the principle of structural autonomy of religious communities inherent in the requirements of Article 9, only the most serious and compelling reasons could justify such intervention.

The Court noted the extremely sketchy nature of the decision taken by the Directorate to recognise the legitimacy of the meeting held in the street. The decision had simply stated that it had been taken "having regard to the opinion of the Directorate's legal division" – without revealing the content of that opinion – and "given that the documents received [were] in conformity with the legislation of the Republic of Latvia". Those grounds could not be said to have been sufficient. Similarly, the decision to approve and register the new RGVD parish council had confined itself to addressing the practical issue of the RGVD's registration certificates.

However, the written observations sent by the Directorate to the court of first instance, which were included in the case file, had explained in greater detail the reasons for the impugned decisions. According to those observations, by celebrating an act of worship with a priest of the Russian Orthodox Church, the first applicant's fellow worshippers had *ipso facto* changed religious allegiances, forfeiting all their rights within the community in the process; as a result, despite appearances, the general meeting led by the first applicant had no longer had the quorum required by the community's statutes. The Directorate had based these findings on two expert opinions, including one from the Dean of the Faculty of Theology of the University of Latvia, for which no reasons were given. By implicitly determining the religious affiliation of the applicants and their fellow worshippers against their wishes, contrary to their opinion and, moreover, on the basis of the opinions of just two experts, neither of whom shared their religious beliefs, the Directorate had failed in its duty of neutrality. Determining the religious affiliation of a religious community was a task for its highest spiritual authorities alone, not for the State. Furthermore, the Directorate had reached its conclusions despite being in possession of a letter from the Holy Synod of the Russian Orthodox Church stating clearly that there had been no conversions to the Russian Orthodox faith in the instant case. In the circumstances, the Directorate had not based its decision on "an acceptable assessment of the relevant facts" as required by Article 9 § 2.

In sum, the Directorate's intervention in the dispute between the two groups of parishioners within the RGVD had been based on a decision which had not given sufficient reasons, had not taken account of all the relevant circumstances and had disregarded the State's duty of neutrality in religious matters. As a result of the Directorate's intervention the applicants had been expelled from their temple and had been unable to return. Such interference could not be said to have been "necessary in a democratic society", irrespective of the legitimate aim pursued.

Conclusion: violation (six votes to one).

Article 41: EUR 4,000 to each of the applicants in respect of non-pecuniary damage.

ARTICLE 10

Freedom of expression

Police seizure of material that could have led to identification of journalistic sources: *case referred to the Grand Chamber*

Sanoma Uitgevers B.V. v. the Netherlands - 38224/03
Judgment 31.3.2009 [Section III]

Journalists from a car magazine published by the applicant company were allowed by the organisers of an illegal road-racing event to photograph the event on condition that they did not disclose the participants' identity. However, the applicant company was subsequently compelled to hand over the photographs to prosecutors trying to trace a car that had been used in raids on cash dispensers after an investigating judge had ruled that the needs of the investigation outweighed the company's journalistic privilege. In its application to the European Court, the applicant company complained of a violation of its right to freedom of expression.

In a judgment of 31 March 2009 a Chamber of the Court held by four votes to three that there had been no violation of Article 10 of the Convention. It noted that the offences under investigation were serious as they had involved the use of firearms, that the information in the journalists' possession was relevant and capable of identifying the offenders and that there had been no reasonable alternative means of identifying the suspects' vehicle. The only use to which the information appeared to have been put was to identify and prosecute the offenders. Accordingly, in the very particular circumstances of the case, the reasons advanced for the interference with the applicant company's freedom of expression had been relevant and sufficient and proportionate to the legitimate aims pursued.

On 14 September 2009 the case was referred to the Grand Chamber at the applicant company's request.

(See Information Note no. 117 for further details)

Insufficient statutory guarantees of independence of public broadcaster: *violation*

Manole and Others v. Moldova - 13936/02
Judgment 17.9.2009 [Section IV]

Facts – The applicants were employed by Teleradio-Moldova (TRM), a State-owned company which at the material time was the only national television and radio station in Moldova. According to the applicants, TRM had, throughout its existence, been subjected to political control. This had worsened after February 2001 when the Communist Party won a large majority in Parliament. In particular, senior managers were removed and replaced by persons loyal to the Government. Only a trusted group of journalists were used for reports of a political nature, which were edited to present the ruling party in a favourable light. Journalists were reprimanded for using expressions which reflected negatively on the Soviet period or suggested cultural and linguistic links with Romania. Interviews were cut and programmes were taken off the air for similar reasons. Opposition parties were allowed only very limited opportunity to express their views. Journalists transgressing these policies were subjected to disciplinary measures and even interrogated by the police. In the first half of 2002, following a strike by TRM staff demanding an end to censorship, two of the applicants were subjected to disciplinary sanctions.

In April 2002 the Moldovan Audiovisual Coordinating Council published its conclusions on the question of alleged TRM censorship. It found that certain words and topics were indeed prohibited in TRM's reports, but dismissed other allegations of censorship as excuses used by the journalists to cover their lack of professionalism.

In July 2002 following the transformation of TRM into a public company, its staff were required to sit examinations to be confirmed in their posts. Four of the applicants, together with a large number of the journalists who had been on strike earlier that year, were not retained. Their appeals were dismissed. Nineteen members of staff who attended a press conference in the wake of the dismissals were banned from entering TRM premises. TRM's change of status had followed a resolution by the Parliamentary Assembly of the Council of Europe calling on Moldova to reform its broadcasting service and end television censorship. Although an independent expert was appointed to appraise the draft legislation, his recommendations were not taken into account and continued to allow many forms of direct political interference.

In their complaint to the European Court, the applicants alleged that, while working as journalists for TMC, they had been subjected to a regime of censorship by the State.

Law – Article 10: Where a State decided to create a public broadcasting system, domestic law and practice had to guarantee that the system provided a pluralistic service. Particularly where private stations were still too weak to offer a genuine alternative and the public or State organisation was therefore the sole or the dominant broadcaster within a country or region, it was indispensable for the proper functioning of democracy that it transmit impartial, independent and balanced news, information and comment and provide a forum for public discussion in which as broad a spectrum as possible of views and opinions could be expressed. The standards agreed by the Contracting States through the Committee of Ministers of the Council of Europe on public service broadcasting provided guidance here. The participating States had undertaken to guarantee the independence of public service broadcasters against political and economic interference. The Committee of Ministers' guidelines indicated that independence could be assured by a clear assertion of editorial independence and institutional autonomy in the broadcaster's legal framework, in particular as regards the editing and presentation of news and current affairs programmes and the recruitment, employment and management of staff. News programmes had to present facts and events fairly and encourage the free formation of opinions while the cases in which public service broadcasters could be compelled to broadcast official information or events were to be confined to exceptional, statutorily defined, circumstances. Rules governing the status and appointment of management and supervisory bodies were to be defined in such a way as to avoid any risk of political or other interference.

For the purposes of the applicants' case, the Court considered the period from February 2001, when the applicants alleged the problem of political control over editorial policy had become acute, to

26 September 2006, the date of the Court's admissibility decision. It noted that there had been a significant bias by TRM towards reporting on the activities of the President and Government, with insufficient access being given to opposition parties. There was also evidence of a policy of restricting discussion or mention of certain topics considered politically sensitive or to reflect badly on the Government. For example, the Audiovisual Council had reported that it was TRM policy to prohibit the use of certain words and phrases, in particular words relating to the shared culture and language of Romania and Moldova and human-rights violations during the Soviet era and independent data showed a consistent pattern of disproportionate airtime being given to the activities of the President and the Government. The applicants had thus experienced a continuing interference with their rights to freedom of expression throughout the period in question.

Further, since for most of the period in question TRM had enjoyed a virtual monopoly over audiovisual broadcasting in Moldova, it had been vital from the democratic perspective that it transmit accurate and balanced news and information reflecting the full range of political opinion and debate. Having decided to create a public broadcasting system, the State had been under a strong positive obligation to guarantee a pluralistic audiovisual service by putting in place a legal framework to ensure TRM's independence from political interference and control. This, however, it had failed to do during the relevant period when one political party controlled the Parliament, the Presidency and Government. Thus, although TRM's Statute had been amended to provide that its creative and editorial activity would be protected by law from interference, no suitable structure had been put in place. The Audiovisual Council, which acted as the supervisory body, was composed of members appointed by the Parliament, the President of Moldova and the Government, with no guarantee against dismissal. TRM's management was appointed by Parliament on the proposal of the Audiovisual Council. Even after the replacement of the management board by the Observers' Council, there had been no safeguard to prevent all but one of that body's fifteen members from being appointees loyal to the ruling party.

In sum, the legislative framework had been flawed throughout, in that it did not provide sufficient safeguards against the control of TRM's senior management, and thus its editorial policy, by the political organ of the Government. As to the Government's preliminary objection that the applicants had failed to exhaust domestic remedies, the Court considered that the examples of political bias and restrictions on reporting it had found were sufficient to support the conclusion that there had been a pattern or system of using TRM to promote the policies of the ruling party, amounting to an administrative practice. The applicants were therefore exempted from the requirement to exhaust domestic remedies. In any event, it was not satisfied that the applicants had had access to an effective domestic remedy in respect of a central part of their complaint.

Conclusion: violation (unanimously).

Articles 41 and 46: Respondent State to take general measures, including legislative reform, to ensure that the legal framework complied with the requirements of Article 10. The question of just satisfaction was reserved.

ARTICLE 13

Effective remedy

Lack of effective remedy against deportation: *violation*

Abdolkhani and Karimnia v. Turkey - 30471/08
Judgment 22.9.2009 [Section II]

(See Article 3 above, page 13)

ARTICLE 35

Article 35 § 1

Six-month period

Application in disappearance case lodged more than six months after the respondent State's ratification of the right of individual petition: *preliminary objection dismissed*

Varnava and Others v. Turkey - 16064/90 et al.
Judgment 18.9.2009 [GC]

(See Article 2 above, page 7)

Article 35 § 2 (a)

Anonymous application

Failure to disclose identity in application to European Court: *inadmissible*

"Blondje" v. the Netherlands - 7245/09
Decision 15.9.2009 [Section III]

Facts – The applicant was arrested on suspicion of various offences. He refused to identify himself and was detained for a period of seven days in total to enable his identity to be established. His appeals against that deprivation of liberty were rejected. The applicant subsequently complained to the European Court under Articles 5, 6 and 14 of the Convention.

Law – Article 35 § 2 (a): The applicant's identity had not been disclosed. None of the forms or documents submitted contained a mention of his name. He was referred to only as "Blondje alias NN cel 07 alias Nn.PI09.m.20081101.1100" and the power of attorney that had been submitted was signed "X". Since the case file did not indicate any element enabling the Court to identify the applicant, the application was to be regarded as anonymous.

Conclusion: inadmissible (anonymous application).

Article 35 § 2 (b)

Substantially the same application

Court's jurisdiction where it had already examined case concerning substantially same facts in an inter-State case: *preliminary objection dismissed*

Varnava and Others v. Turkey - 16064/90 et al.
Judgment 18.9.2009 [GC]

(See Article 2 above, page 7)

Article 35 § 3

Competence *ratione temporis*

Court's temporal jurisdiction in respect of disappearances that had occurred some thirteen years before the respondent State recognised the right of individual petition: *preliminary objection dismissed*

Varnava and Others v. Turkey - 16064/90 et al.
Judgment 18.9.2009 [GC]

(See Article 2 above, page 7)

Abuse of the right of application

Burden on Government to prove intentional breach of confidentiality amounting to abuse of right: *admissible*

Miroļubovs and Others v. Latvia - 798/05
Judgment 15.9.2009 [Section III]

(See Article 9 above, page 24)

ARTICLE 1 OF PROTOCOL No. 1

Possessions
Deprivation of property

Revocation of a welfare benefit which had been granted by mistake several months before and constituted the applicant's sole source of income: *violation*

Moskal v. Poland - 10373/05
Judgment 15.9.2009 [Section IV]

Facts – In August 2001 the applicant applied to the Social Security Board for an early retirement pension in order to care for her son who suffered from asthma, allergies and recurring infections and needed constant care. Her request was granted, but the Board suspended payment of the pension because the applicant was still working on the date of its decision. The applicant resigned from her full-time job, where she had been employed for the past thirty years. Subsequently, she was issued with a pensioner's identity card marked "valid indefinitely" and for the following ten months, starting from September 2001, she received her early retirement pension without interruption. In June 2002 the Social Security Board quashed the 2001 decision and refused to award the applicant the pension, on the grounds that she did not qualify for that type of welfare benefit, as her child's health condition was not severe enough to require his mother's permanent care. The payment of the pension was discontinued from 1 July 2002. The applicant was not required to return the payments

she had already received. She unsuccessfully challenged this decision in the courts. Between 1 July 2002 and 25 October 2005 she did not receive any social benefits and claimed she had no other income. Following separate social-security proceedings, on 25 October 2005 the District Labour Office granted her another benefit amounting to approximately 50% of her discontinued early-retirement pension, retroactive effect from 25 October 2002, but without interest.

Law – Article 1 of Protocol No. 1: The applicant had applied for the early-retirement pension in good faith and in compliance with the applicable law. As soon as the authorities confirmed her entitlement to the benefit, she was justified in considering that decision accurate and in organising her life accordingly. She could not have realised that her pension right had been granted by mistake. The 2001 decision had provided the applicant with an enforceable claim to receive the pension in a particular amount. She could be regarded as having a substantive interest protected by Article 1 of Protocol No. 1. The decision in 2002, which had deprived her of the right to receive the pension, had amounted to an interference with her possessions. The interference had been lawful and had pursued the legitimate aim of correcting the authorities' mistake and ensuring that the public purse was not called upon to subsidise without limitation in time undeserving beneficiaries of the social-welfare system. As regards proportionality, the 2001 decision had been left in force for ten months and had undoubtedly affected the applicant and her family. However, when the error was discovered the decision to discontinue the payment of the benefit was issued relatively quickly and with immediate effect. The fact that the applicant had not been required to return the pension which had been paid in error did not mitigate sufficiently the consequences of that decision. Her right to the pension was determined by the courts only two years later and during the interval she was not in receipt of any welfare benefit. In the context of property rights, particular importance had to be attached to the principle of good governance. It was desirable that public authorities act with the utmost scrupulousness, in particular when dealing with matters of vital importance to individuals, such as welfare benefits. In the instant case, having discovered their mistake the authorities had failed in their duty to act in good time and in an appropriate and consistent manner. As a general principle, public authorities should not be prevented from correcting their mistakes, even those resulting from their own negligence. Holding otherwise would be contrary to the doctrine of unjust enrichment. It would also be unfair to other individuals contributing to the social-security fund, in particular those who had been denied a benefit because they had failed to meet the statutory requirements. Lastly, it would amount to sanctioning an inappropriate allocation of scarce public resources, which in itself would be contrary to the public interest. However, if a mistake was caused by the authorities themselves, without any fault by a third party, a different proportionality approach had to be taken in determining whether the burden borne by the recipient of the benefit was excessive. As a result of the impugned measure, the applicant had been faced, practically from one day to the next, with the total loss of her early-retirement pension, which constituted her sole source of income. Moreover, there was a risk that she would have considerable difficulty in securing new employment. It was not until three years later that she had been able to obtain a new benefit (at 50% less than the previous rate). Therefore, a fair balance had not been struck between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights and that the burden placed on the applicant had been excessive.

Conclusion: violation (four votes to three).

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

Deprivation of property

Compensation for expropriation wholly absorbed by legal costs: *violation*

Perdigão v. Portugal - 24768/06
Judgment 4.8.2009 [Section II]

Facts – The applicants requested over twenty million euros in compensation to cover the profit they claimed they could have made by exploiting a quarry on land that had previously been theirs but had been expropriated. The court of appeal rejected their claim, taking the view that the potential profits from the quarry should not be taken into account, and set the compensation at around EUR 197,000. However, the legal costs the applicants were required to pay as the losing party in those proceedings exceeded the amount of the award. As a result, not only did the amount awarded in compensation eventually revert to the State, but the applicants had to pay another EUR 15,000.

Law – Article 1 of Protocol No. 1: The lack of compensation complained of by the applicants had resulted. from the application of the rules concerning legal costs, which were contributions within the meaning of the second paragraph of Article 1 of Protocol No. 1 and constituted a particular instance of interference with the right to peaceful enjoyment of property. The Court decided to examine the situation complained of in the light of the general rule. The applicants had not contested the lawfulness of the expropriation as such or that of the rules on legal costs which had been applied to them. There was nothing to suggest, either, that the interference complained of had been arbitrary, as the applicants had been able, for instance, to submit their arguments to the domestic courts. However, unlike the Government, the Court took the view that the applicants could not be criticised for having endeavoured to persuade the district court, using the procedural means available to them, to include in the award elements which they deemed to be essential. It was not the Court's task to conduct an overall examination of the Portuguese system for determining and fixing legal costs. However, its practical application in the instant case had meant that the applicants received no compensation whatsoever for the deprivation of their property. In the circumstances, the conditions of compensation – or, more precisely, the lack of compensation – had imposed an excessive burden on the applicants, upsetting the fair balance that had to be struck between the general interest of the community and the individual's fundamental rights.

Conclusion: violation (five votes to two).

Article 41: EUR 190,000 in respect of pecuniary damage. Finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage.

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

The following cases have been referred to the Grand Chamber in accordance with Article 43 § 2 of the Convention:

Sakhnovskiy v. Russia - 21272/03
Judgment 5.2.2009 [Section I]

(See Article 6 § 3 (c) above, page 18)

Şerife Yiğit v. Turkey - 3976/05
Judgment 20.1.2009 [Section II]

(See Article 8 above, page 23)

Sanoma Uitgevers B.V. v. the Netherlands - 38224/03
Judgment 31.3.2009 [Section III]

(See Article 10 above, page 26)