CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

INFORMATION NOTE No. 59
on the case-law of the Court
December 2003

The summaries are prepared by the Registry and are not binding on the Court.

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ARTICLE 3

INHUMAN TREATMENT
Alleged ill-treatment by the police and effectiveness of the investigation : *admissible*.

MARTINEZ SALA and others - Spain (N° 58438/00)
Decision 18.11.2003 [Section IV]

The fifteen applicants, presumed sympathisers of a Catalan independence movement, were arrested and detained shortly before the 1992 Olympic Games in Barcelona. They allege that they were subjected to physical and psychological torture and ill-treatment on their arrest and during subsequent custody (for up to five days) in Catalonia and at the Guardia Civil headquarters in Madrid before being brought before a judge. Doctors sent by the authorities examined the applicants during their detention. Their reports identified various, mostly superficial, wounds or bruises and handcuff marks, and found that the applicants were fit to be heard by the judge. A few of the applicants were released on bail by the investigating judge, and three were released without charge. The investigating judge dealing with criminal complaints submitted in respect of torture and ill-treatment made a provisional discontinuation order in 1993 on the ground that, according to the reports by the state-appointed doctors, it had not been proven that the applicants had been subjected to ill-treatment. That decision was not subsequently set aside. The applicants were tried by the *Audiencia Nacional* in 1995; six of them received prison sentences for belonging to or aiding and abetting an armed gang, possessing explosives, unlawful possession of firearms and terrorism. Four were acquitted. The applicants' allegations of torture and ill-treatment were re-examined in 1997 by the investigating judge who had taken no further action on the case in 1993. The judge ruled on the basis of the previous medical reports, considering it unnecessary to conduct new investigations, and discontinued the proceedings on the ground that there was insufficient evidence. The applicants submitted further unsuccessful appeals.
Admissible under Article 3, after dismissal of the preliminary objections of inadmissibility submitted by the Government.

POSITIVE OBLIGATIONS
Adequacy of protection provided by Bulgarian law for victim of alleged rape: *violation*.

M.C. - Bulgaria (Nº 39272/98)
Judgment 4.12.2003 [Section I]

Facts: The applicant was fourteen years and ten months old when she claims to have been raped by two men, A. and P., aged 20 and 21. On the evening of 31 July 1995, she was in town with a friend when she met the two men (whom she knew) and a third man, V.A. She accepted their invitation to go to a disco bar in a nearby town. Later in the evening, although she urged them to go back, the men proposed to go swimming at a reservoir. Once at the reservoir, two of them left the car, and P. forced the applicant to have sexual intercourse. After that, they headed towards the house of V.A.'s relatives in another neighbouring town, where she alleges to have been forced to have sex with A. The next morning, when her mother found her at V.A.'s house, she took her to hospital. The medical examiner found that the applicant's hymen had been freshly torn and that there were four small oval-shaped bruises and grazing on her neck. At this stage the applicant had only confided in her mother that she had been raped once. Some days later, when the she confided about the second rape, the family filed a complaint. The District Prosecutor ordered a police enquiry. P. and A.

disputed the version of the events given by the applicant and maintained that they had had sex with the applicant with her full consent. They named as a witness a singer at a restaurant where they had allegedly been after the incident at the reservoir, who testified that she had spoken to the applicant and found nothing unusual in her behaviour. However, another person that had been with the singer at the restaurant that night, who was also questioned by the police, did not remember having seen the applicant. A neighbour of V.A.'s testified that he had heard the applicant quarrel with her mother on the morning of 1 August, refusing to leave with her. The investigation concluded that there was no evidence that P. and A. had used threats or violence to have sex with the applicant. The District Prosecutor was not convinced of the objectivity of the investigation and ordered an expert opinion by psychiatrists. Their report underlined that the applicant was likely to have been overwhelmed by an internal conflict between a natural sexual interest and a sense that the act was reprehensible, which had reduced her ability to defend herself. Despite this report, the District Prosecutor terminated the criminal proceedings against P. and A. as there was insufficient proof that the applicant had been compelled to have sex. The applicant complained that the Bulgarian legal framework and practice, by requiring proof of physical resistance by the victim of a rape case, was inadequate and left unpunished certain acts of rape. She also complained that the investigation had not been thorough and complete.

Law: Articles 3 and 8 (positive obligations) – In accordance with modern standards in comparative and international law in the area of legislation against rape, a State's positive obligations under Articles 3 and 8 require the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim. The Court's task was limited to examining whether the impugned legislation and its application to the present case, together with the alleged shortcomings in the investigation, had such significant flaws as to amount to a breach of the respondent State's positive obligations under Articles 3 and 8, but it could not replace the assessment of the facts by the domestic authorities or decide on the alleged criminal responsibility of the perpetrators. The Bulgarian authorities had been faced with a difficult task as they were confronted with two conflicting versions of the events and little "direct" evidence. The efforts by the investigator and prosecutors in the present case were not to be under-estimated but, nonetheless, they failed to assess in a context-sensitive manner the credibility of the conflicting statements and did not make use of all the possibilities of establishing and verifying the surrounding circumstances. In particular, the contradictory statements by witnesses were not confronted, nor was a precise timing of the events established. The approach of the investigation and its conclusions gave undue emphasis to the lack of "direct" proof of rape, such as violence, thus elevating the lack of "resistance" by the applicant to the status of the defining element of the offence. This approach was restrictive as the investigation should have been centred on the issue of "non-consent".
Conclusion: violation (unanimously)
Article 41 – The Court awarded the applicant 8,000 euros in respect of non-pecuniary damage. It also made an award in respect of costs and expenses.

ARTICLE 6

Article 6(1) [civil]

APPLICABILITY
Procedure for challenging a judge : *Article 6 not applicable*.

SCHREIBER and BOETSCH – France (N° 58751/00)
Decision 11.12.2003 [Section I]

The applicants were parties claiming damages in criminal proceedings. Having doubts as to the impartiality of the investigating judge at the tribunal de grande instance, they applied for him to be stood down. The president of the appeal court in the same judicial district, who was empowered to investigate that application, dismissed it and ordered the applicants jointly and severally to pay a civil fine of 150 euros.

Inadmissible under Article 6: The standing-down procedure was a form of interlocutory proceedings, and independent of the main proceedings. The right to obtain a judicial decision in respect of the replacement of a judge was not a civil right, and the possible applicability of Article 6(1) to the main proceedings did not bring the standing-down procedure within this Article's scope through association. The civil fine imposed on the applicants at the close of the standing-down procedure was a procedural sanction which did not entail the determination of a "civil" right or obligation. In imposing a fine for abuse of the right of application, a court was not ruling on the merits of a "criminal charge": incompatibility *ratione materiae*.

REASONABLE TIME
Significant periods of delay despite apparent reasonableness of overall length.

MATWIEJCZUK - Poland (Nº 37641/97)
Judgment 2.12.2003 [Section IV]

Extract : "The Court recalls its finding that domestic authorities did not display "special diligence" in the conduct of the criminal proceedings against the applicant. In this connection, it notes that although the overall length of the proceedings may not seem excessive, the period of eighteen months without a hearing in a criminal case shows the lack of diligence required in such cases. It therefore considers that the length of the proceedings assessed from the angle of the "reasonable time" requirement under Article 6 § 1 did not meet that requirement."

REASONABLE TIME
Significant periods of delay despite reasonableness of overall length – relevance of matter at stake.

HADJIKOSTOVA - Bulgaria (N° 36843/97)
Judgment 4.12.2003 [Section I]

Facts: The applicant brought an action for compensation in respect of a third party's occupation of a building of which she claimed to be a co-owner. The action, lodged on 19 January 1995, was finally settled on 2 February 2000 in a judgment by the Supreme Court of Cassation.

Law: Article 6(1) – Assuming an overall length of proceedings that was, in principle, acceptable (in the case in question, slightly longer than five years for three levels of jurisdiction), including significant periods of delay for which the national authorities could be held responsible (in the present case, two periods of delay, of one year and more than seven months and one year and more than eleven months), the Court considered that the importance of the matters at stake necessarily played a decisive role in assessing whether the length of the proceedings had been reasonable. Where the matter at stake was of particular importance, the Court required special diligence on the part of the authorities. If no particularly important matter was at stake, the authorities were not obliged to give priority to the case, whilst remaining bound by the obligation to ensure that the right to a hearing within a reasonable time was respected.
In concluding that the periods of delay for which the State could be held responsible had not resulted in a "reasonable time" being exceeded, the Court took into consideration the overall length of the proceedings, the fact that the dispute was not of particular importance and was somewhat complex and the fact that it had been brought before three courts.
Conclusion: no violation (unanimously).

TRIBUNAL
Inclusion of courts of arbitration in the notion of « tribunal ».

TRANSADO - TRANSPORTES FLUVIAIS DO SADO, S.A. – Portugal (N° 35943/02)
Decision 16.12.2003 [Section III]
(see Article 1 of Protocol No. 1, below).

Article 6(1) [criminal]

FAIR TRIAL
Replacement of a judge during trial in the Assize Court, followed by refusal to re-hear the witnesses: *admissible*.

GRAVIANO – Italy (N° 10075/02)
Decision 4.12.2003 [Section I]

The applicant was committed for trial before an Assize Court on charges of murder and of being a member of a mafia-type organisation. During the trial, the Assize Court examined various witnesses and questioned experts. Subsequently, one of the two professional judges (who, together with the six lay jurors, made up the bench of the Assize Court) was replaced by a substitute professional judge. The applicant attempted unsuccessfully to prevent the inclusion in the case-file of the newly composed bench of all the records of examinations and other proceedings conducted in the course of the trial prior to the judge's replacement. The Assize Court also dismissed the applicant's request for re-examination of the witnesses who had been heard before the change of judge. The Assize Court, relying on the witnesses' statements, sentenced the applicant to life imprisonment. The appeals lodged by the applicant were unsuccessful. In particular, the applicant complained that the witnesses had not been heard by the substitute judge, who had nonetheless taken part in the deliberations which resulted in the applicant's conviction.

Admissible under Article 6(1) and Article 6(3)(d), following dismissal of the objection of non-exhaustion of domestic remedies raised by the Government.

EQUALITY OF ARMS
Reliance on video recording of children's evidence in conviction for sexual abuse: *inadmissible*.

MAGNUSSON - Sweden (Nº 53972/00)
Decision 16.12.2003 [Section IV]

The applicant is the step-grandmother of two boys who were 5 and 9 years old when they allege that they had been sexually abused by her. In the pre-trial investigation of the case, the police carried out video recorded interviews of the boys, during which they confirmed their incriminating statements against the applicant (one of the boys was interviewed on a second occasion following the applicant's request). They also underwent a forensic examination which concluded that they seemed normal, except for some physical characteristics in one of the boys which could have been the result of sexual abuse, although this could not be established with certainty. The applicant claims to have requested a supplementary investigation to include statements from experts but has not provided any documentary evidence in support of this submission. The District Court, relying on the credibility of the boys' statements, convicted her of having committed sexual abuse and sentenced her to three months' imprisonment. The judgment was upheld by the Court of Appeal and the Supreme Court refused leave to appeal. The applicant subsequently obtained an opinion by a psychologist who concluded that the boys' statements were unreliable. The applicant complains she was denied "equality of arms" given the manner in which evidence was obtained (police interviews had been poor, with leading questions, without the opportunity of her presence) and relied on.

Inadmissible under Article 6(1) (fair hearing) and 6(3)(d) – It could not be maintained that the applicant had been denied the opportunity to challenge the boys' statements as shown by the fact that her request for a second interview of one of the boys had been granted and on that occasion she had waived her right to put questions to him. Her allegation that she had requested a supplementary investigation with the participation of experts had not been substantiated. In any event, the applicant had not raised her allegations on the shortcomings of the pre-trial investigation in the District Court, where she could have requested additional evidence or raised any other procedural objection. In such circumstances, the applicant's opportunity to challenge the children's evidence was considered sufficient, and it could not be concluded that the proceedings in their entirety, or the taking of evidence, had been unfair: manifestly ill-founded.

INDEPENDENT AND IMPARTIAL TRIBUNAL

Independence and impartiality of Air Force court martial: *no violation*.

COOPER – United Kingdom (N° 48843/99)
Judgment 16.12.2003 [Grand Chamber]

(extracts from press release)

Facts: At the relevant time, the applicant, Graham Cooper, was a serving member of the Royal Air Force (RAF). On 18 February 1998 Mr Cooper was convicted of theft under the 1968 Theft Act by an Air Force district court martial (DCM). He was sentenced to 56 days' imprisonment, to be reduced to the ranks and dismissed from the service. The DCM comprised a permanent president, two other officers lower in rank and a judge advocate. The permanent president was on his last posting prior to retirement and had ceased to be the subject of appraisal reports from August 1997. The two ordinary members had attended a

course in 1993 which included training in disciplinary procedures. On 3 April 1998 the Reviewing Authority, having received advice from the Judge Advocate General, upheld the DCM's finding and sentence. The applicant appealed unsuccessfully to the Courts Martial Appeal Court (CMAC).

Law: Article 6(1) – a) The Court considered that, given the nature of the charges against the applicants, together with the nature and severity of the penalty imposed (56 days and three years' imprisonment respectively in each case), the court martial proceedings constituted the determination of a criminal charge against the applicants. Finding that the applicants' complaints raised questions of law which were sufficiently serious that their determination should depend on an examination of the merits, the Court declared the complaints admissible. b) The Court rejected the applicant's general submission that service tribunals could not, by definition, try criminal charges against service personnel consistently with the independence and impartiality requirements of Article 6(1). The Court also rejected his complaint that his own court martial lacked independence and impartiality. His submissions did not cast any doubt on the genuineness of the separation of the prosecuting, convening and adjudicating roles in the court martial process or the independence of the decision-making bodies from chain of command, rank or other service influence. The Court stated that there was no ground upon which to question the independence of the Air Force judge advocate since he was a civilian appointed by the Lord Chancellor (a civilian) and he was appointed to a court martial by the Judge Advocate General (also a civilian). It was also found that the presence of a civilian with such qualifications and such a central role in court martial proceedings constituted one of the most significant guarantees of the independence of those proceedings. Furthermore the Permanent President of Courts Martial (PPCM) appointed to the court martial in the case was independent and made an important contribution to the independence of an otherwise *ad hoc* tribunal. Turning then to the ordinary members, the Court found that their *ad hoc* appointment and relatively junior rank did not in themselves undermine their independence, as there were safeguards against outside pressure being brought to bear on them, namely the presence of the PPCM and the judge advocate, the prohibition of reporting on members' judicial decision-making and the briefing notes distributed to the members. The Court noted that the Reviewing Authority was an anomalous feature of the present court martial system and expressed its concern about a criminal procedure which empowered a non-judicial authority to interfere with judicial findings. However, the Court found that the role of the Reviewing Authority did not undermine the independence of the court martial, because the final decision in the proceedings would always lie with a judicial body, the CMAC.
Conclusion: no violation (unanimously).

INDEPENDENT AND IMPARTIAL TRIBUNAL

Independence and impartiality of Navy court martial: *violation*.

GRIEVES – United Kingdom (N° 57067/00)
Judgment 16.12.2003 [Grand Chamber]

(extracts from press release)

Facts : At the relevant time, the applicant, Mark Anthony Grieves, was a serving member of the Royal Navy. On 18 June 1998 Mr Grieves was convicted by a Royal Navy Court Martial of unlawfully and maliciously wounding with intent to do grievous bodily harm, contrary to the Offences Against the Person Act 1861. He was sentenced to three years' imprisonment, reduced in rank, dismissed from the service and ordered to pay 700 pounds sterling in compensation. The court martial comprised a president (a Royal Navy captain), four naval officers and a judge advocate, who was a serving naval officer and barrister working as the naval legal advisor to FLEET (the command responsible for the organisation and deployment

of all ships at sea). On 29 September 1998 the Admiralty Board, having received advice from the Judge Advocate of the Fleet (JAF), upheld the court martial's finding and sentence. The applicant appealed unsuccessfully to the CMAC.

Law : Article 6(1) – a) see Cooper, point a), above. b) The Court noted that Royal Navy courts martial differed in certain important respects from the Air Force system. In contrast to the other services, the naval prosecuting authority could appoint a prosecutor for a court martial from a list of uniformed naval barristers outside his own staff. However, the prosecutor in the applicant's case came from the staff of the prosecuting authority, as in the Cooper case. The Naval Court Administration Officer was a civilian, not a serving officer as the Air Force Court Administration Officer. The involvement of a civilian in a service court martial process plainly contributed to its independence and impartiality. It was significant that the post of PPCM did not exist in the naval system; the president of a Royal Navy court martial being appointed for each court martial as it was convened. The Court considered that the absence of a full-time PPCM, with no hope of promotion and no effective fear of removal and who was not subject to report on his judicial decision-making, deprived Royal Navy courts martial of an important contribution to the independence of an otherwise *ad hoc* tribunal. Most importantly, the Court noted that, although Royal Navy judge advocates fulfilled the same pivotal role in courts martial as their Air Force equivalents, they were serving naval officers, who, when not sitting in a court martial, carried out regular naval duties. The Air Force judge advocate was a civilian working full-time for the Judge Advocate General, himself a civilian. In addition, Royal Navy judge advocates were appointed by a naval officer, the Chief Naval Judge Advocate (CNJA). The Court noted with some concern certain reporting practices regarding Royal Navy judge advocates which applied at the relevant time. For example, the JAF's report on a judge advocate's judicial performance could be forwarded to the judge advocate's service reporting officer. The Court considered that, even if the judge advocate appointed to the applicant's court martial could be seen as independent despite these reporting practices, the position of naval judge advocates could not be considered a strong guarantee of the independence of a Royal Navy court martial. Accordingly, the lack of a civilian in the pivotal role of judge advocate deprived a Royal Navy court martial of one of the most significant guarantees of independence enjoyed by other services' courts martial. The Court further considered the briefing notes sent to members of Royal Navy courts martial to be substantially less detailed and significantly less clear than the RAF briefing notes. They were consequently less effective in safeguarding the independence of the ordinary members of courts martial from inappropriate outside influence. The Court accordingly found that the distinctions between the Air Force court martial system assessed in the Cooper case and the Royal Navy court martial system at issue in the Grieves case were such that Mr Grieves's misgivings about the independence and impartiality of his court martial, convened under the 1996 Act, could be considered to be objectively justified.
Conclusion: violation (unanimously).
Article 41 – The Court made an award in respect of costs and expenses.

ARTICLE 8

POSITIVE OBLIGATIONS
Bulgarian law provided insufficient protection to victim of an alleged act of rape: *violation*.

M.C. - Bulgaria (Nº 39272/98)
Judgment 4.12.2003 [Section I]
(see Article 3, above).

FAMILY LIFE
Failure to implement final decisions allowing the adoption of Romanian children by foreigners: *admissible*.

PINI and BERTANI, MANERA and ATRIPALDI - Romani (N^{os} 78028/01 and 78030/01)
Decision 25.11.2003 [Section II]

The applicants, two Italian couples, had each received authorisation by final judicial decision to adopt a Romanian minor; both children had lived in a Romanian residential home since being abandoned. The decisions, delivered in Romania on 28 September 2000, ordered the amendment of the minors' birth certificates and the issuing of new certificates. The adoptions were declared to be compatible with the national legislation in force and with the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption. By final judicial decisions of June and August 2001 the residential home was ordered to hand over the children and their birth certificates to the applicants. The adopted children did not leave the residential home. The home repeatedly challenged the execution of the decisions and after its objections had been dismissed, attempted enforcement by bailiffs failed. In September 2002 the residential home succeeded in obtaining an interim stay of execution of the adoption orders. The applicants made various unsuccessful applications to enforce the adoption orders. At the same time, the residential home applied to have the adoption orders set aside, and the children applied to have the orders quashed; one of these applications has been granted in the course of proceedings which are still pending.

Admissible under Article 8 (applicability and merits) and 6(1) (complaint examined by the Court of its own motion) and under Article 2 of Protocol No. 4.

Inadmissible under Article 5(1): incompatible *ratione personae*.

ARTICLE 10

FREEDOM OF EXPRESSION
Prohibition of advertisement comparing the subscription rates of two newpapers without reference to different reporting styles: *violation*.

KRONE VERLAG GmbH - Austria (nº 3) (Nº 39069/97)
Judgment 11.12.2003 [Section I]

Facts: The applicant company owns the daily newspaper *Neue Kronenzeitung,* which published an advertisement for subscriptions, comparing its monthly subscription rates with those of another regional newspaper, the *Salzburger Nachrichten*. The advertisement described the *Neue Kronenzeitung* as the 'the best' local newspaper. The *Salzburger Nachrichten* applied to the courts for a preliminary injunction against publication of the advertisement. Following proceedings in the Regional Court and the Court of Appeal, the Supreme Court issued an injunction after finding that the advertisement was misleading, as it compared newspapers of different quality. The applicant was ordered to refrain from publishing the advertisement unless, *inter alia*, when comparing the prices between the newspapers it disclosed at the same time their different reporting styles in the coverage of events. The applicant company complains that this part of the injunction prohibiting the comparison of sales prices without describing the different reporting styles between the dailies breached its freedom of expression.

Law: Article 10 – It was not disputed that the impugned injunction constituted an interference with the applicant company's right to freedom of expression. The interference was prescribed by law (the Unfair Competition Act) and served the legitimate aim of protecting the reputation or rights of others. Given the wide margin of appreciation accorded to States in purely commercial matters, including the areas of unfair competition and advertising, the Court's task was confined to ascertaining whether the measure taken at national level was justifiable and proportionate. The impugned injunction had quite far-reaching consequences as the applicant company would have to publish detailed information on the different reporting styles of the respective newspapers when publishing future advertisements. The injunction was too broad and impaired the very essence of price comparison. Moreover, its practical implementation, though not impossible, was very difficult for the applicant company. The domestic courts had overstepped their margin of appreciation and the measure at issue was disproportionate and, therefore, not necessary in a democratic society.
Conclusion: violation (unanimously).
Article 41 – The Court made an award in respect of non-pecuniary damage. It also made an award in respect of costs and expenses.

FREEDOM OF EXPRESSION
Imposition of disciplinary punishment on prisoner on account of a manuscript in which he criticised the penitentiary system: *violation*.

YANKOV - Bulgaria (N°39084/97)
Judgment 11.12.2003 [Section I]

Facts: The applicant was the executive director of two investment/financial companies. In March 1996, he was arrested and detained pending trial on charges of unlawful financial operations with a view to obtaining an illicit gain. Despite several complaints by the applicant to the prosecution and courts against his pre-trial detention, he was kept in detention on remand until July 1998, when he was released on bail on health grounds. In October 1998, the District Court found the applicant guilty of ordering money transfers abroad, in breach of financial regulations. In 2000, the Regional Court quashed the applicant's conviction and remitted the case to the preliminary investigation stage (the criminal proceedings were still pending in 2001). During his detention, the prison administration seized typewritten material by the applicant when he was handing it over to his lawyer. The material, in the form of a personal manuscript, described moments of the applicant's life as a detainee and voiced criticism against the judicial and penitentiary systems and some of their officials. As a result, he was punished by seven days' confinement in an isolation cell, on grounds of having made allegedly offensive and defamatory statements against prison officers, investigators, judges, prosecutors and State institutions. Before being placed in the disciplinary cell, the applicant's hair was shaved off.

Law: Article 3 – The forced shaving off of a detainee's hair is in principle an act which can humiliate and debase the person. In the present case, the Government had failed to substantiate their assertion that the shaving of the applicant's head was a hygienic measure. The act had no legal basis or justification, and had been an arbitrary punitive element for the writing of offensive remarks by the applicant. Given his age and the fact that he had to appear at a hearing a few days after the incident, the applicant was likely to have felt humiliated. It followed that the shaving-off of his hair amounted to unjustified treatment of sufficient severity to be characterised as degrading within the meaning of Article 3.
Conclusion: violation (unanimously).

Article 10 – Punishing the applicant by seven days' confinement in a disciplinary cell for having made moderately offensive statements against the judicial and penitentiary systems in a personal manuscript amounted to an interference with his right to freedom of expression.

The Court examined this complaint without the benefit of a decision by a national authority, finding unacceptable that the factual statements in the applicant's manuscript – critical, *inter alia*, of the prison administration and its officials – called for his disciplinary punishment. The authorities should have shown restraint in their reaction, in particular considering that the remarks had never been circulated among other detainees and there was no immediate danger of dissemination of the manuscript, even if it had been taken out of the prison, as it was not in a form ready for publication. A fair balance had not been struck between the applicant's freedom of expression, on the one hand, and the legitimate aim of protecting the reputation of civil servants and maintaining the authority of the judiciary, on the other. It followed that the interference had not been necessary in a democratic society.
Conclusion: violation (unanimously).
Article 41 – The Court awarded the applicant 8,000 euros in respect of non-pecuniary damage. It also made an award in respect of costs and expenses.

FREEDOM OF EXPRESSION
Conviction of a leader of a religious sect for hate speech during a television broadcast: *violation*.

GÜNDÜZ - Turkey (N° 35071/97)
Judgment 4.12.2003 [Section I]

Facts: The applicant, leader of a radical Islamic sect (*Tarikat Aczmendi*), had taken part in a television programme which aimed to present the sect and its unorthodox ideas to the public in the context of a discussion involving various participants. The applicant expressed his opinions on subjects such as religious costumes, religion, secularism, democracy in Turkey and Islam. Certain of his comments resulted in his being sentenced by a state security court to two years' imprisonment and ordered to pay a fine. In the court's view, by describing democracy and secularism as "impious" in the light of Islam, by mixing religious and social issues, by saying that children born outside religious wedlock were "bastards" (*piç*), and by campaigning for Islamic law (Sharia), the applicant had intended openly to incite the population to hatred and hostility on the ground of a distinction based on membership of a religion. The Court of Cassation upheld the conviction.

Law: Article 10 – Prescribed by law, the interference had pursued a legitimate aim: prevention of disorder, prevention of crime, protection of morals and, in particular, protection of the rights of others. The controversy instigated by the television programme had concerned the presentation of a sect and focused on the role of religion in a democratic society, which was an issue of general interest in respect of which the restrictions on freedom of expression were to be interpreted strictly. It was important to establish whether, in convicting the applicant for having made statements described as "hate speech", the national courts had made correct use of the discretion granted to them in this regard.
The Court was obliged to consider the content of the remarks in issue. It held that the applicant's statements describing contemporary secular institutions as "impious" could not be construed as a call to violence or as hate speech based on religious intolerance. It emphasised that, although the applicant had used the pejorative and insulting term "*piç*", he had done so in the course of a live television programme, a fact which prevented him from re-wording, improving or withdrawing it before it was made public, and that it was appropriate to give greater weight than the national courts had done to the fact that the applicant had been actively participating in an animated public discussion. As for the applicant's remarks about Sharia, the situation was not comparable to that in issue in the *Refah Partisi* case (ECHR 2003). Statements which aimed to propagate, incite or justify hatred based on intolerance, including religious intolerance, were not protected by Article 10. However, the simple fact of defending Sharia, without calling for violence to bring about its introduction, could not be interpreted as "hate speech".

Further, it was necessary to examine the context in which the remarks in issue had been broadcast. In this case, the context was quite specific: the programme was intended to present the sect, and its leader's extremist views, which were already known and debated in the public arena, had been counter-balanced by the intervention of other participants and expressed in the context of a pluralist discussion.
Consequently, in the light of the case as a whole, and notwithstanding the national authorities' margin of appreciation, the interference had not been based on sufficient grounds.
Conclusion: violation (six votes to one).

ARTICLE 14

DISCRIMINATION (SEX)
De facto exemption of women from the obligation of jury service: *communicated*

ZARB ADAMI - Malta (Nº 17209/02)
Decision 11.12.2003 [Section I]

The applicant was placed on a list of jurors in 1971. Since then, he has undertaken jury service on three occasions, but failed to appear when called to act in a new set of proceedings in 1997. The applicant received a fine of approximately 240 euros, but as he did not pay it he was summoned to the courts, where he pleaded that the fine imposed on him was discriminatory because it subjected him to burdens and duties to which other persons in the same position were not subjected, in particular because once a person had been placed on a list he would remain on it until disqualified, whilst other persons who were eligible were being exempted from such a civic obligation. Moreover, the applicant maintained that the law and practice *de facto* exempted females from performing the social duty of jury service. He submitted statistics which were not contested by the domestic courts, showing that in practice only 3.05% of women as opposed to 96.95% of men served as jurors. The Constitutional Court accepted the applicant's complaint that the way the lists were compiled seemed to punish those persons who were on the list (and suggested the system be amended), but did not consider he had been subjected to burdensome treatment, and in any event he could have made use of ordinary remedies to seek exemption from jury service.
Communicated under Articles 4(3)(d), 6, 14 and 35.

DISCRIMINATION (Article 8)
Placement of children with father, as the mother was a Jehovah's Witness : *violation*.

PALAU-MARTINEZ – France (N° 64927/01)
Judgment 16.12.2003 [Section II]

Facts: The applicant had filed a petition for divorce following her husband's departure from the matrimonial home. The court of first instance had decided that her two underage children would reside with her and had granted the father access and staying access, especially during the children's holidays. During one such holiday period, the applicant's ex-husband kept the children with him and registered them in a school in his place of residence. The appeal court ruled that the children should reside at their father's home, and granted the mother access and staying access after having dismissed her request for a social inquiry report. The court considered that it was in the children's interests to avoid the educational rules imposed on children by the Jehovah's Witnesses movement, with which their mother was associated; these rules were open to criticism on account of their strictness and intolerance and the obligation on children to proselytise. The applicant appealed unsuccessfully on points of law.

Law: Article 14 taken together with Article 8 – The decision to place the children with their father had been made when they had lived with their mother for three and a half years. Consequently, the order to that effect was to be construed as "interference" and not as the necessary intervention by a court in any divorce, as the Government alleged. In examining the conditions in which the applicant and her ex-husband had raised their children, the court had treated the parents differently on the basis of the applicant's religion, on the strength of a harsh analysis of the educational principles allegedly imposed by the religion. In so doing, the court had merely asserted generalities concerning Jehovah's Witnesses. The judgment had contained no direct and tangible evidence of the influence of the applicant's religion on her children's education and day-to-day life. In addition, the court had not considered it appropriate to order a social inquiry report in accordance with the applicant's request with common practice in such cases; however, such an inquiry would doubtless have enabled tangible information to be gathered on the children's lives with each of their parents, and on the possible impact of their mother's religious practice on their life and education during the years when they had lived with her following their father's departure. In short, the national court had ruled *in abstracto* and on the basis of general considerations, without establishing a link between the children's living conditions with their mother and their real interests. While relevant, this reasoning was not "sufficient". Accordingly, there was no reasonable relationship of proportionality between the means employed and the aim pursued.
Conclusion: violation (six votes to one).
The Court held unanimously that it was not necessary to rule on the violation of Article 8 read alone or to examine Article 6(1) and Article 9 separately.
Article 41 – The Court made an award in respect of non-pecuniary damage and in respect of costs and expenses.

ARTICLE 35

Article 35(2)(b)

SAME AS MATTER SUBMITTED TO OTHER PROCEDURE
Refusal to exempt children from a subject focusing on the teaching of Christianity: *communicated*.

FOLGERØ - Norway (Nº 15472/02)
Decision 4.12.2003 [Section III]

The first nine applicants are parents whose children went to primary school at the time of the events complained of; the tenth applicant is a Norwegian Humanist Association. Their complaint is related to the legislative reform introduced in school curricula as from 1997, when the subject of Christianity, Other Religions and Philosophy started being taught. The emphasis of the subject was placed on the teaching of Christianity, so pupils who adhered to other religions or life stances could be exempted from parts of the teaching on the submission of a parental note. Prior to the reform it was possible for children to be exempted in whole from the teaching of Christian faith. The applicants brought proceedings in the domestic courts for the full exemption of their children from the subject. Their action was rejected at three domestic judicial levels. Two evaluation reports on the new system in 2000 concluded that the arrangement of partial exemption did not work as intended and should be thoroughly reviewed. The applicants complain that the refusal of the domestic authorities to grant a full exemption violated their rights under Article 9 of the Convention and Article 2 of Protocol No. 1 (as well as Articles 8 and 14).

Communicated under Article 35(2), with a question on whether the Court should be prevented from dealing with the application in view of the petition brought by certain parties to the national proceedings before the United Nations Human Rights Committee.

ARTICLE 1 OF PROTOCOL No. 1

DEPRIVATION OF PROPERTY
Interpretation by an arbitration court of a contract of concession : *Article 1 of Protocol No. 1 not applicable*.

TRANSADO - TRANSPORTES FLUVIAIS DO SADO, S.A. – Portugal (N° 35943/02)
Decision 16.12.2003 [Section III]

The applicant company provided a river transport service on the basis of a concession contract. A clause in the contract specified that the applicant company would receive compensation corresponding to the value of assets acquired by it that were not written off at the end of the concession, subject to a prior agreement between the parties regarding the writing-off period. However, no such agreement was confirmed. On expiry of the concession period, the applicant company asked to receive the compensation. The subsequent dispute between the parties was submitted to an arbitration tribunal, composed in accordance with the provisions of the contract. The arbitration tribunal established that there had been no agreement between the parties on the writing-off period and found against the applicant company.

Inadmissible under Article 1 of Protocol No. 1: The applicant company complained that it had been deprived of its possessions without compensation. However, no interference in that right was attributable to the Portuguese authorities. The deprivation of property had resulted from a reasonable and objective interpretation by the arbitration tribunal, composed in accordance with the concession contract, of a private-law clause inserted by the parties to the contract. Accordingly, there had been no interference by the public authorities with the applicant company's right to peaceful enjoyment of its possessions: incompatible *ratione materiae*.

Inadmissible under Article 6(1): The arbitration tribunals came within the concept of a "tribunal". By choosing to include in the contract an arbitration clause providing that no appeal lay against the arbitration tribunal's decision, the applicant company had lawfully and unequivocally waived certain rights, a waiver which Article 6 did not preclude.

Other judgments delivered in December

Articles 2, 3 and 5

YURTSEVEN and others – Turkey (Nº 31730/96)
Judgment 18.12.2003 [Section I]

disappearance of relatives of the applicants after being taken into custody – friendly settlement (statement of regret, reference to measures adopted, *ex gratia* payment).

Article 3

KMETTY - Hungary (Nº 57967/00)
Judgment 16.12.2003 [Section II]

alleged ill-treatment on arrest and in custody and effectiveness of investigation – violation (with regard to effective investigation only).

Article 5(1) and (5)

PEZONE – Italy (Nº 42098/98)
Judgment 18.12.2003 [Section I]

unlawful detention on account of error in calculating sentence and absence of right to compensation – violation.

Article 5(3)

IMRE – Hungary (Nº 53129/99)
Judgment 2.12.2003 [Section II]

length of detention on remand – violation.

Articles 5(3) and 6(1)

KÜLTER – Turquie (Nº 42560/98)
Judgment 4.12.2003 [Section III]

length of detention on remand and length of criminal proceedings – friendly settlement.

Article 6(1)

KOKTAVÁ – Czech Republic (Nº 45107/98)
Judgment 2.12.2003 [Section II]

PERYT – Poland (Nº 42042/98)
TREIAL - Estonia (Nº 48129/99)
TRENČIANSKÝ - Slovakia (Nº 62175/00)
Judgments 2.12.2003 [Section IV]

OLBREGTS – Belgium (Nº 50853/99)
Judgment 4.12.2003 [Section I]

FERREIRA ALVES - Portugal (no. 2) (Nº 56345/00)
FROTAL-ALUGUER DE EQUIPAMENTOS S.A. - Portugal (Nº 56110/00)
Judgments 4.12.2003 [Section III]

GIRARDI – Austria (Nº 50064/99)
Judgment 11.12.2003 [Section III]

KERÉKGYÁRTÓ - Hungary (Nº 47355/99)
SESZTAKOV – Hungary (Nº 59094/00)
Judgments 16.12.2003 [Section II]

ZÁBORSKÝ and ŠMÁRIKOVÁ – Slovakia (Nº 58172/00)
Judgment 16.12.2003 [Section IV]

PENA – Portugal (Nº 57323/00)
Judgment 18.12.2003 [Section III]

length of civil proceedings – violation.

TRIPPEL - Germany (Nº 68103/01)
Judgment 4.12.2003 [Section III]

length of proceedings before the Federal Constitutional Court – violation.

STANCZYK – Poland (Nº 50511/99)
Judgment 2.12.2003 [Section IV]

CWYL – Poland (Nº 49920/99)
Judgment 9.12.2003 [Section IV]

length of civil proceedings – friendly settlement.

MRÓZ - Poland (Nº 35192/97)
Judgment 9.12.2003 [Section IV]

length of four sets of civil proceedings – struck out (absence of intention to pursue application).

KÁROLY – Hungary (Nº 58887/00)
Juudgment 2.12.2003 [Section II]

KOVÁCS – Hungary (Nº 54457/00)
Judgment 16.12.2003 [Section II]

length of proceedings relating to employment – violation.

FAIVRE - France (no. 2) (Nº 69825/01)
Judgment 16.12.2003 [Section II]

length of administrative proceedings concerning tax penalties – violation.

SIAURUSEVIČIUS – Lithuania (Nº 50551/99)
Judgment 4.12.2003 [Section III]

access to court – dismissal of "repetitive"cassation appeal in criminal proceedings – friendly settlement.

SKONDRIANOS – Greece (Nº 63000/00, Nº 74291/01 and Nº 74292/01)
Judgment 18.12.2003 [Section I]

dismissal of appeal on points of law on account of appellant's failure to show he was detained on the basis of the judgment appealed against, and absence of any opportunity to contest that ground – violation (application of *Omar v. France* and *Guérin v. France* judgments, *Reports* 1998-V with regard to the first aspect).

DURSUN and others – Turkey (Nº 44267/98)
BILAL BOZKURT and others – Turkey (Nº 46388/99)
DURAN – Turkey (Nº 47654/99)
ÇAVUŞOĞLU and others - Turkey (Nº 47757/99)
SARIOĞLU – Turkey (Nº 48054/99)
YEŞIM TAŞ – Turkey (Nº 48134/99)
TAŞKIN – Turkey (Nº 49517/99)
Judgments 4.12.2003 [Section III]

ÜKÜNÇ and GÜNEŞ – Turkey (Nº 42775/98)
ÇETİNKAYA and others – Turkey (Nº 57944/00)
Judgments 18.12.2003 [Section III]

independence and impartiality of State Security Court – violation.

GIRDAUSKAS - Lithuania (Nº 70661/01)
Judgment 11.12.2003 [Section III]

length of criminal proceedings – violation.

POKORNY - Austria (Nº 57080/00)
Judgment 16.12.2003 [Section IV]

length of criminal proceedings – friendly settlement.

Articles 6(1) and 8

MIANOWSKI – Poland (Nº 42083/98)
Judgment 16.12.2003 [Section IV]

length of civil proceedings and control of prisoner's correspondence with the Court – violation.

Articles 6(1) and 8, Article 1 of Protocol No. 1 and Article 2 of Protocol No. 4

BASSANI – Italy (Nº 47778/99)
Judgment 11.12.2003 [Section III]

length of bankruptcy proceedings and effect thereof on property rights, restrictions on bankrupt's receipt of correspondence and freedom of movement – violation (cf. *Luordo* judgment of 17 July 2003).

Article 6(1) and Article 1 of Protocol No. 1

BERTUCCELLI – Italy (Nº 37110/97)
LEONARDI - Italy (Nº 52071/99)
POCI - Italy (Nº 57635/00)
FABBRI – Italy (Nº 58413/00)
POZZI – Italy (Nº 59367/00)
PETITTA – Italy (Nº 60431/00)
LERARIO - Italy (Nº 60659/00)
SCAMACCIA – Italy (Nº 61282/00)
CALVANESE et/and SPITALETTA – Italy (Nº 61665/00)
SPALLETTA – Italy (Nº 61666/00)
FEDERICI – Italy (Nº 62764/00)
GIULIANI – Italy (Nº 62842/00)
TODARO – Italy (Nº 62844/00)
SCARAVAGGI – Italy (Nº 63414/00)
GIUNTA – Italy (Nº 63514/00)
SOC. DE.RO.SA. – Italy (Nº 64449/01)
VIETRI – Italy (Nº 66373/01)
RECCHI – Italy (Nº 67796/01)
Judgments 4.12.2003 [Section I]

ALFANO – Italy (Nº 30878/96)
CARIGNANI – Italy (Nº 31925/96)
DI MATTEO – Italy (Nº 37511/97)
LIGUORI – Italy (Nº 64254/01)
Judgments 11.12.2003 [Section I]

GELSOMINI SIGERI SRL – Italy (Nº 63417/00)
Judgment 18.12.2003 [Section I]

staggering of granting of police assistance to enforce eviction orders, prolonged non-enforcement of judicial decision and absence of possibility of court review of prefectoral decisions staggering granting of police assistance – violation.

COVIELLO – Italy (Nº 39179/98)
FORTE and DI GIULIANO – Italy (Nº 61998/00)
Judgments 11.12.2003 [Section I]

BALDI – Italy (Nº 32584/96)
Judgment 11.12.2003 [Section I]

staggering of granting of police assistance to enforce eviction orders, prolonged non-enforcement of judicial decision and absence of possibility of court review of prefectoral decisions staggering granting of police assistance – struck out (absence of intention to pursue application).

KARAHALIOS – Greece (Nº 62503/00)
Judgment 11.12.2003 [Section I]

prolonged non-enforcement of court decision – violation.

Article 1 of Protocol No. 1

FRASCINO – Italy (Nº 35227/97)
Judgment 11.12.2003 [Section I]

failure of authorities to comply with court order to grant building permit – violation.

Just satisfaction

CARBONARA and VENTURA – Italy (Nº 24638/94)
Judgment 11.12.2003 [Section II (former composition)]

Cases referred to the Grand Chamber and judgments which have become final

Article 43(2)

The Panel has accepted requests for referral to the Grand Chamber of the following judgments:
CUMPĂNĂ and MAZĂRE – Romania (Nº 33348/96)
Judgment 10.6.2003 [Section II]

PEDERSEN and BAADSGAARD - Denmark (Nº 49017/99)
Judgment 19.6.2003 [Section I]
(see Information Note Nº 54)

EDWARDS and LEWIS - United Kingdom (Nº 39647/98 and Nº 40461/98)
Judgment 22.7.2003 [Section IV]
(see Information Note Nº 55)

Article 44(2)(b)

The following judgments have become final in accordance with Article 44(2)(b) of the Convention (expiry of the three month time limit for requesting referral to the Grand Chamber) (see Information Note No. 56):

STOCKHOLMS FÖRSÄKRINGS- OCH SKADESTÅNDSJURIDIK AB - Sweden
(N° 38993/97)
GLOD - Romania (Nº 41134/98)
Judgments 16.9.2003 [Section II]

B.R. - Poland (Nº 43316/98)
Judgment 16.9.2003 [Section IV]

SELLIER - France (Nº 60992/00)
C.R. - France (Nº 42407/98)
Judgments 23.9.2003 [Section II]

HANSEN - Turkey (N° 36141/97)
KARKIN - Turkey (Nº 43928/98)
Judgments 23.9.2003 [Section IV]

VASILEVA - Denmark (N° 52792/99)
BAYLE - France (Nº 45840/99)
PAGES - France (Nº 50343/99)
Judgments 25.9.2003 [Section I]

TODORESCU - Romania (Nº 40670/98)
KOUA POIRREZ - France (Nº 40892/98)
BELADINA - France (Nº 49627/99)
Judgments 30.9.2003 [Section II]

SIENKIEWICZ - Poland (Nº 52468/99)
Judgment 30.9.2003 [Section IV]

Article 44(2)(c)

On 3 December 2003 the Panel of the Grand Chamber rejected requests for referrral of the following judgments, which have consequently become final:

WALSTON – Norway (Nº 37372/97)
Judgment 3.6.2003 [Section IV]

HERZ - Germany (N° 44672/98)
Judgment 12.6.2003 [Section III]
(see Information Note Nº 54)

ASNAR - France (Nº 57030/00)
Judgment 17.6.2003 [Section II]

TIERCE - San Marino (N° 69700/01)
Judgment 17.6.2003 [Section II]
(see Information Note Nº 54)

STRETCH - United Kingdom (Nº 44277/98)
Judgment 24.6.2003 [Section IV]
(see Information Note Nº 54)

LORENZA CONTI – Italy (Nº 45356/99)
Judgment 10.7.2003 [Section I]

HARTMAN - Czech Republic (N° 53341/99)
Judgment 10.7.2003 [Section II]
(see Information Note Nº 55)

MURPHY - Ireland (Nº 44179/98)
Judgment 10.7.2003 [Section III]
(see Information Note Nº 55)

SCHMIDTOVA – Czech Republic (Nº 48568/99)
Judgment 22.7.2003 [Section II]

BISKUPSKA – Poland (Nº 39597/98)
Judgment 22.7.2003 [Section IV]

RYABYKH - Russie (Nº 52854/99)
Judgment 24.7.2003 [Section I]
(see Information Note Nº 55)

PRICE and LOWE - United Kingdom (Nº 43186/98 and Nº 43186/98)
Judgment 29.7.2003 [Section II]

KEPENEROV – Bulgaria (Nº 39269/98)
Judgment 31.7.2003 [Section I]

Statistical information[1]

Judgments delivered	December	2003
Grand Chamber	2	12(19)
Section I	37(39)	230(236)
Section II	9	165(172)
Section III	18	127(132)
Section IV	10	155(159)
Sections in former compositions	1	14
Total	**77(79)**	**703(732)**

Judgments delivered in December 2003					
	Merits	Friendly settlements	Struck out	Other	Total
Grand Chamber	2	0	0	0	2
former Section I	0	0	0	0	0
former Section II	0	0	0	1	1
former Section III	0	0	0	0	0
former Section IV	0	0	0	0	0
Section I	33(35)	3	1	0	37(39)
Section II	9	0	0	0	9
Section III	16	2	0	0	18
Section IV	6	3	1	0	10
Total	**66(68)**	**8**	**2**	**1**	**77(79)**

Judgments delivered in 2003					
	Merits	Friendly settlements	Struck out	Other	Total
Grand Chamber	11(18)	0	0	1	12(19)
former Section I	4	0	0	0	4
former Section II	1	0	0	2	3
former Section III	4	0	0	0	4
former Section IV	1	0	0	2	3
Section I	179(185)	43	3	5	230(236)
Section II	133(140)	23	4	5	165(172)
Section III	111(116)	15	0	1	127(132)
Section IV	104(106)	47(49)	4	0	155(159)
Total	**548(575)**	**128(130)**	**11**	**16**	**703(732)**

1. The statistical information is provisional. A judgment or decision may concern more than one application: the number of applications is given in brackets.

Decisions adopted		December	2003
I. Applications declared admissible			
Grand Chamber		2	3(6)
Section I		22(28)	142(152)
Section II		12	155(165)
Section III		19	135(138)
Section IV		2	176(288)
former Sections		0	1
Total		**57(63)**	**612(750)**
II. Applications declared inadmissible			
Section I	- Chamber	4	72(77)
	- Committee	568	5493
Section II	- Chamber	6	86(101)
	- Committee	337(351)	4536(4550)
Section III	- Chamber	4	108(119)
	- Committee	268	2761
Section IV	- Chamber	2	102(113)
	- Committee	335	3566
Total		**1524(1538)**	**16724(16780)**
III. Applications struck off			
Section I	- Chamber	12	44(72)
	- Committee	3	31
Section II	- Chamber	5	45
	- Committee	3	47
Section III	- Chamber	31	125
	- Committee	3	28
Section IV	- Chamber	8	96(112)
	- Committee	1	35
Total		**66**	**451(495)**
Total number of decisions[1]		**1647(1667)**	**17787(18025)**

1. Not including partial decisions.

Applications communicated	December	2003
Section I	34	455(460)
Section II	30	400(408)
Section III	13	452(471)
Section IV	11	303(351)
Total number of applications communicated	**87**	**1610(1690)**

Articles of the European Convention of Human Rights and Protocols Nos. 1, 4, 6 and 7

Convention

Article 2	:	Right to life
Article 3	:	Prohibition of torture
Article 4	:	Prohibition of slavery and forced labour
Article 5	:	Right to liberty and security
Article 6	:	Right to a fair trial
Article 7	:	No punishment without law
Article 8	:	Right to respect for private and family life
Article 9	:	Freedom of thought, conscience and religion
Article 10	:	Freedom of expression
Article 11	:	Freedom of assembly and association
Article 12	:	Right to marry
Article 13	:	Right to an effective remedy
Article 14	:	Prohibition of discrimination
Article 34	:	Applications by person, non-governmental organisations or groups of individuals

Protocol No. 1

Article 1	:	Protection of property
Article 2	:	Right to education
Article 3	:	Right to free elections

Protocol No. 2

Article 1	:	Prohibition of imprisonment for debt
Article 2	:	Freedom of movement
Article 3	:	Prohibition of expulsion of nationals
Article 4	:	Prohibition of collective expulsion of aliens

Protocol No. 6

Article 1	:	Abolition of the death penalty

Protocol No. 7

Article 1	:	Procedural safeguards relating to expulsion of aliens
Article 2	:	Right to appeal in criminal matters
Article 3	:	Compensation for wrongful conviction
Article 4	:	Right not to be tried or punished twice
Article 5	:	Equality between spouses