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

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RESPONSIBILITY OF STATES
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AL-SKEINI and Others - United Kingdom (N° 55721/07)
[Section IV]

The applicants are Iraqi nationals. Their relatives were allegedly killed by members of the British Armed Forces in Basra, southern Iraq, during the period when the United Kingdom (UK) was an "occupying force" there within the meaning of the Hague Regulations 1907 (between May 2003 and June 2004). Most of the victims were allegedly shot during patrols, house searches or road blocks; one was beaten to death in a British military prison. In 2004 the Secretary of State for Defence decided not to conduct independent inquiries into the deaths, not to accept liability for the deaths, and not to pay just satisfaction. The applicants applied for judicial review of these decisions, seeking declarations that both the procedural and substantive obligations of Articles 2 and 3 of the Convention had been violated. The House of Lords accepted that the ill-treatment of one of the victims, which had occurred within a British-run prison, did fall within the UK's jurisdiction. That case was therefore remitted to a first-instance court for reconsideration (following the completion of the court-martial proceedings pending against a number of individuals) of the question whether there had been an adequate investigation into his death. As regards the other deaths, the House of Lords considered themselves bound by the decision in *Bankovic and Others v. Belgium and Others* (dec.) [GC], ECHR 2001-XII) to find that the UK did not have jurisdiction over these, since they occurred outside the "legal space" of the Contracting States and since the UK's armed forces in southern Iraq did not exercise effective control there such as to enable it to provide the full package of rights and freedoms guaranteed by the Convention to the region's inhabitants.
Communicated under Articles 1, 2 and 3 of the Convention.

(See also *Issa and Others v. Turkey*, no. 31821/96, judgment of 16 November 2004, Information Note no. 69).

ARTICLE 2

LIFE
POSITIVE OBLIGATIONS
Inadequate medical treatment during pre-trial detention and failure to investigate: *violation*.

DZIECIAK - Poland (N° 77766/01)
Judgment 9.12.2008 [Section IV]

Facts: The applicant was arrested in September 1997 and placed in pre-trial detention on suspicion of organised international drug-trafficking. At the time he was already suffering from a heart disease and had had two heart attacks. Despite his numerous requests for release on grounds of ill-health, the domestic courts repeatedly extended his detention, relying on the reasonable suspicion against him and the complexity of the investigation. In September 1998 and February 1999 a medical panel which had examined the applicant concluded that he was well enough to remain in detention, provided that there was a hospital wing in the detention centre where he was being held. The applicant's wife, who visited him twice a month, submitted that his health constantly deteriorated during his detention. She alleged that his serious health problems started in November 1999 when he was transferred to Łódź Detention Centre, which had no hospital facility, and declined to the extent that in March 2000 he lost consciousness and had to be transferred to Łódź Prison Hospital, where he spent 10 months. Subsequently, in January 2001 the applicant was transferred to another detention centre, where his health deteriorated even further. He

collapsed six months later and was taken to Warsaw Prison Hospital where he was treated for pneumonia. During the period spent in that hospital, he was examined by doctors from a cardiology institute who decided that he should have a heart-bypass operation. Three appointments were scheduled for surgery. The applicant submitted that he was not informed of the first appointment on 27 July 2001; the Government maintained that that date had been cancelled due to renovation work to the institute. As to the second appointment, the applicant's wife testified that her husband received notification, but only after the proposed date, 21 September 2001. She also submitted that the envelope in which the notification was sent was marked by the authorities as "censored 24.09.01". Finally, she said that she had had to attend the institute in person to obtain a third appointment, scheduled for 26 October 2001; she gave the notification to the applicant's lawyer in person so that he could inform the detention centre. On 1 October 2001 a medical panel examined the applicant again and concluded that detention posed a threat to his health. In view of his scheduled surgery, it was recommended that the preventive measure against him be changed. On 5 October 2001, without examining the applicant's state of health, the court extended his pre-trial detention for another four months.
The applicant's trial started on 16 October 2001 and he also attended hearings on 18 and 19 October. During that time he was prevented from having any medical consultations as he was transferred to the trial court before the doctors' arrival at the detention centre and was returned to his cell when they had already gone off duty. According to the applicant's wife and other evidence examined by the Court, on 22 October 2001 the applicant was brought to the court room where he fainted before the hearing began. At 9.30 a.m. he was taken back to the detention centre's hospital wing, where he was examined by a doctor and transferred back to his cell. The same day the trial court was forwarded the medical panel's report of 1 October 2001 and decided to release the applicant on 26 October 2001 so that he could have his heart surgery. Meanwhile, at 3.45 p.m. the applicant was taken unconscious from his cell back to the hospital wing before being hospitalised in Warsaw where he died on 25 October 2001. The post mortem examination concluded that he had died of acute coronary insufficiency. Following an investigation into the applicant's death that was launched in December 2001 and ultimately discontinued in January 2004, medical experts concluded that he had died as a result of unsuccessful medical treatment for which no-one could be held responsible and that it was impossible to assess whether surgery would have improved his health, given the advanced stage of his illness.

Law: Article 2 – Following the applicant's death, his wife maintained that the Polish authorities had contributed to his death through inadequate and belated medical care and that the investigation into his death had been ineffective.

(a) *Alleged failure to protect the applicant's life*: It was not in dispute that the applicant had suffered from a serious heart disease, had had heart attacks prior to his detention, and that his health had deteriorated during his years in custody. Nor had the Government denied that the authorities had been aware of his disease, which had required periodic hospitalisation and medical interventions and had, eventually, qualified him for heart surgery. However, contrary to the recommendations of medical panel reports the applicant had been kept in a detention centre without a hospital wing. There was no evidence in the case file to show that he had received any medical treatment during the four months he spent in that facility or even that he had seen a doctor. It had taken the deterioration in the applicant's health to the point of collapse for him to be transferred to hospital. The very fact that he had then had to stay in that hospital for 10 months indicated the gravity of his illness. On a subsequent occasion it had taken a diagnosis of pneumonia for him to be hospitalised. As regards the surgery, the Court considered that neither the domestic authorities nor the Government had given a satisfactory explanation as to why the applicant was not transferred to the institute on the first two of the dates scheduled. It was particularly troubling that the envelope containing the notification of the appointment scheduled for 21 September 2001 had apparently been delayed by a prosecutor for the purpose of censorship until 24 September 2001. Indeed, the Court was struck by the fact that even though the medical panel had recommended the applicant's release on 1 October 2001 as it considered further detention a threat to his health, its decision was only forwarded to the trial court 22 days later. Moreover, the Government's failure to give a detailed account of the circumstances of 22 October 2001 directly preceding the applicant's death made it difficult for the Court to assess the appropriateness of his medical care on that day. However, as concerned the days immediately before 22 October 2001, the Government had not contested that the applicant had attended

the hearings in his case and so been denied access to a doctor, as he had remained outside the detention centre during the doctors' hours of duty. Finally, the grounds given by the domestic authorities for extending the applicant's detention were particularly unsatisfactory given the serious state of his health, which had provided increasing cause for concern, and could not justify the overall period of his detention. The above elements were sufficient for the Court to conclude that the quality and promptness of the medical care provided to the applicant during the four years of his pre-trial detention had put his health and life in danger, in breach of Poland's obligation to protect the lives of those it held in custody.
Conclusion: violation (unanimously).

(b) *Alleged inadequacy of the investigation*: The Court considered that the facts of the case required a prompt and diligent reaction from the investigating authorities. The investigation had, however, lasted more than two years and had been discontinued by the prosecutor without consideration of the doubts expressed by the experts about the postponing of the applicant's surgery on three occasions. More importantly, the incomplete and inadequate character of the investigation was highlighted by the fact that the exact course of events directly preceding the applicant's death was never established. The prosecutor failed to establish whether the applicant had been taken to the court room that morning, what exactly happened in the court building, why the ambulance brought him back to the detention centre and what happened before the applicant was taken unconscious from his cell at 3.45 p.m. Nor had the prosecutor assessed the accuracy of the witness statements, or heard other witnesses such as prison guards, the applicant's cell mates or the ambulance team. The authorities had thereby failed to carry out a thorough and effective investigation into the allegation that the applicant's death had been caused by ineffective medical care during his four years of pre-trial detention.
Conclusion: violation (five votes to two).

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

ARTICLE 3

INHUMAN OR DEGRADING TREATMENT
Lack of medical assistance to an HIV-positive detainee and State's failure to comply with Rule 39 measures in connection therewith: *violation*.

ALEKSANYAN - Russia (N° 46468/06)
Judgment 22.12.2008 [Section I]

Facts: In 2003-2004 the tax authorities sued the Yukos oil company for unpaid corporate taxes. At the same time criminal proceedings were instituted against several of the company's leading executives on charges of large-scale fraud and embezzlement. The applicant provided legal services to the company and its senior executives Mr Khodorkovskiy and Mr Lebedev. He was subsequently appointed vice-president of Yukos. Shortly afterwards, he was allegedly questioned by an investigator from the General Prosecutor's Office who warned him to "stay far away" from the company's affairs unless he was volunteering "to go to prison". In April 2006 criminal proceedings were initiated against the applicant, his premises were searched and he was taken into custody. On several occasions he applied for release, citing poor health, but his requests were refused. In September 2006 he was found to be HIV-positive. By September 2007 he was suffering from a swinging fever, had lost over 10% of his body weight and had become anaemic. His eyesight, which was poor at the time of his arrest, worsened to the extent that he was effectively blind. He developed a number of other diseases: *inter alia*, stomatitis, neurological problems, encephalopathy, liver lesions and lymph cancer. A medical examination had revealed a dramatic worsening of his condition. It was recommended that he should undergo in-patient examination and treatment in the Moscow Aids Centre. The investigator in charge of the case lodged a request with a court stating that the applicant's diseases could not be treated in a detention centre and seeking his release on bail. The court decided that it was not competent to deal with the matter and noted that the investigator did not need a court order to replace detention on remand with a milder measure of restraint such as bail.

However, after receiving that decision, the investigator refused to allow release on bail, concluding that he was incompetent to decide whether the applicant should be transferred to a specialised medical institution. The applicant's detention was repeatedly extended, most recently until January 2009. The prison hospital attested that he was fit for detention and could participate in criminal proceedings. On 27 November 2007 the Court indicated an interim measure under Rule 39 of the Rules of Court, inviting the Government to secure immediately the applicant's in-patient treatment in a hospital specialised in the treatment of Aids and concomitant diseases and to submit a copy of his medical file. On 4 December 2007 the Government informed the Court that the interim measure had not yet been implemented since "it required additional time". On 21 December 2007 the Court indicated to the Government an additional interim measure while confirming the validity of the previous one (the applicant's transfer to a specialised institution): the Government were invited *inter alia* to form a medical commission to be composed on a parity basis to diagnose the applicant's health problems and suggest treatment. On 27 December 2007 the Government replied that the applicant could have received adequate medical treatment in the medical facility at the detention centre and that his examination by a mixed medical commission was against Russian law. However, they did not refer to any specific law in this respect. In February 2008 the trial in the applicant's case was suspended due to his poor health. He was placed in an external haematological hospital where he was guarded round-the-clock by policemen; the windows of his room were covered with an iron grill. He was still there when the Court adopted its judgment.

Law: Article 3 – The applicant had not disputed that while in the remand prison he had received certain forms of basic medical assistance. The central issue was, however, the treatment the applicant had received after he was found to be HIV-positive, including whether he had had access to anti-retroviral drugs and whether he should have been transferred to a specialist hospital.

Deterioration of the applicant's eyesight: The Court was unable to conclude that the deterioration of the applicant's eyesight was imputable to the authorities, or that his poor eyesight as such was incompatible with his detention from the standpoint of Article 3 of the Convention.

Access to anti-retroviral drugs: According to the applicant's medical file and official reports produced by the Government, on several occasions the applicant had refused "an examination", "injections", and "treatment". However, those documents had not specified what kind of treatment had been offered to the applicant and what examinations he had been supposed to undergo. If the applicant's medical file was not specific enough in these respects, the Court could make inferences. In all probability, the applicant had not received the anti-retroviral treatment from the prison pharmacy. Given that the Contracting States were bound to provide all medical care that their resources might permit, the Court did not consider that the authorities had been under an unqualified obligation to administer to the applicant the anti-retroviral treatment, which was very expensive, free of charge. In fact, the applicant could receive necessary medication from his relatives and had not alleged that procuring those medicines had imposed an excessive financial burden on him or his relatives. The Court was therefore prepared to accept that the absence of such drugs in the prison pharmacy had not been, as such, contrary to Article 3 of the Convention.

Access to specialised medical assistance: The Government's refusal to authorise the applicant's examination by a mixed medical commission including the doctors of his choice had been arbitrary. The Court therefore drew adverse inferences from the State's refusal to implement the interim measure indicated under Rule 39 of the Rules of Court. As from the end of October 2007 at the latest the applicant's medical condition had required his transfer to a hospital specialised in the treatment of AIDS. There was no information that the anti-retroviral therapy had ever been administered within the prison hospital, and that the medical staff working there had the necessary experience and practical skills for administering it. The prison hospital had therefore not been an appropriate institution for these purposes. The Court did not detect any serious practical obstacles for the immediate transfer of the applicant to a specialised medical institution. Thus, the Moscow AIDS Centre was located in the same city and had been prepared to accept the applicant for in-patient treatment. The applicant had been able to assume most of the expenses related to the treatment. The security risks he might have presented at that time, if any, had been negligible compared to the health risks he had faced. In any event, the security arrangements made

by the prison authorities in an external hospital had not been very complicated. The national authorities had therefore failed to take sufficient care of the applicant's health at least until his transfer to an external hospital. This had undermined his dignity and entailed particularly acute hardship, causing suffering beyond that inevitably associated with a prison sentence and the illnesses he suffered from, which had amounted to inhuman and degrading treatment.
Conclusion: violation (unanimously).

Article 34 – The Court had indicated to the Government two interim measures under Rule 39. The first – the applicant's transfer to a specialist medical institution – had been indicated in November 2007, and then confirmed in December 2007 and January 2008. However, it was not until February 2008 that the applicant had been transferred to an external hospital. Even assuming that this hospital could be considered a "specialist institution", it was clear that for over two months the Government had continuously refused to implement the interim measure indicated by the Court, thus putting the applicant's health and even life in danger. In the circumstances, especially given that this measure appeared to be relatively easy to implement, its prolonged non-implementation had been fully attributable to the authorities' reluctance to cooperate with the Court. In respect of the second measure, the Russian authorities had not permitted the applicant's examination by a mixed medical commission including doctors of his choice. The Court had already found the Government's justification of their refusal unsatisfactory. Bearing in mind that the applicant was seriously ill and in detention and so unable to collect all necessary information himself, such a position on the part of the authorities had amounted, in the circumstances, to an attempt to hinder him in pursuing his application under Article 34 of the Convention. In sum, by failing to comply with the interim measures indicated under Rule 39 of the Rules of Court, the Russian Government had failed to honour its commitments under Article 34 of the Convention.
Conclusion: violation (unanimously).

The Court also found violations of Articles 5 § 3 and 8 of the Convention. For more information, see Press Release no. 934.

Articles 41 and 46 – Having regard to its findings of violations of the Convention, and especially in view of the gravity of the applicant's illnesses, the Court considered that the applicant's continued detention was unacceptable. It accordingly concluded that, in order to discharge its legal obligation under Article 46 of the Convention, the Russian Government was under an obligation to replace detention on remand with other, reasonable and less stringent, measures of restraint, or with a combination of such measures, provided by Russian law.

(See also *Khodorkovskiy v. Russia* (N° 5829/04) in Information Note no. 85 and *Paladi v. Moldova* (N° 39806/05) in Information Note no. 99; the latter has been referred to the Grand Chamber).

EXPULSION
Expulsion to China despite grant of refugee status by UNHCR: *no violation*.

Y. - Russia (N° 20113/07)
Judgment 4.12.2008 [Section I]

Facts: The first applicant, a Chinese national, lived in St Petersburg with his wife, the second applicant, who is a Russian national. Upon his arrival in Russia, the first applicant, a retired university professor, obtained refugee status under the mandate of the UNCHR office in Moscow. He then applied for asylum in Russia in April 2003 claiming that he would be at risk of persecution as a result of his membership of the Falun Gong movement if he returned to China. His application was rejected by the immigration authorities, who were not convinced that he faced a real danger of persecution. This decision was confirmed in ensuing court proceedings. His subsequent applications were also unsuccessful. While the asylum proceedings were pending, in March 2005 the first applicant suffered a stroke and was admitted to hospital. In April 2005 the applicants married in the Leningrad Region. In May 2007 officials from the

Migration Department, in the presence of a doctor, entered the applicants' apartment in St Petersburg and removed the first applicant. The same evening he was deported to China. A request to the European Court for interim measures to be ordered was rejected.

Law: *Possible danger of ill-treatment in China*: Neither the Migration Department nor the courts had doubted that the first applicant was a follower of the Falun Dafa in Russia. However, after examining the applicants' statements and other available evidence, they had concluded that he was not known to the Chinese authorities as an active member of the Falun Gong and that his involvement could not be regarded as putting him at real risk of ill-treatment upon his return. International reports on the situation of Falun Gong practitioners in China showed that although they were under a threat of persecution, every case had to be assessed on an individual basis, in so far as the risk of ill-treatment was involved. The first applicant had failed to adduce any reliable evidence in support of his claims that his activities, either in China or in Russia, would put him at real risk of being treated in a way that was incompatible with Article 3. Furthermore, the second applicant's statement to the competent District Court indicated that after returning to China the first applicant had moved in with his son and there was no information that he had been subjected to treatment in breach of Article 3. As to the fact that the first applicant had been granted refugee status by the UNHCR Office in Moscow in March 2003, the Court found it extremely regrettable that he should have been deported without the UNHCR Office first being informed. However, taking into account the difference in the scope of protection afforded by Article 3 of the Convention and by the UN Convention relating to the Status of Refugees and the particular circumstances of the case before it, the Court considered that this fact alone could not justify altering its conclusions as to the well-foundedness of the first applicant's claim under Article 3. It had accordingly not been established that there were sufficient grounds for believing that the first applicant faced a real risk of ill-treatment upon his return to China.
Conclusion: no violation (unanimously).

Conditions of the first applicant's deportation: It was established in the domestic proceedings that he had been examined by a neurologist and found to be fit to travel. The doctor's credentials and conclusions had been found to be valid and well-founded. During the flight the first applicant had been accompanied by a doctor and provided with food and drink. Further, it was never alleged that his medical condition had been of such an exceptional nature that humanitarian considerations prevented his removal, or that the required treatment would not be available to him in China. The Court acknowledged that the deportation procedure may have caused the first applicant significant stress and mental anguish. However, and in particular taking into account the high threshold set by Article 3 of the Convention, it did not find that his removal from Russia involved a violation of that provision on account of his medical condition.
Conclusion: no violation (unanimously).

EXPULSION
Proposed removal of Iranian asylum seeker to Greece under the Dublin Regulation: *inadmissible*.

K.R.S. - United Kingdom (N° 32733/08)
Decision 2.12.2008 [Section IV]

The applicant, an Iranian national, sought asylum in the United Kingdom after arriving via Greece. His claim was refused on the grounds that under the Dublin Regulation (which determines responsibility for dealing with asylum applications among, *inter alia*, the EU Member States) it should have been made in Greece. Directions were given for the applicant's removal to Greece, but the applicant challenged these in the light of a position paper published by the United Nations High Commissioner for Refugees (UNHCR) on 15 April 2008 which criticised certain aspects of reception procedures for Dublin returnees and advised EU Member States to refrain from returning asylum seekers to Greece under the Dublin Regulation until further notice. The applicant was refused permission to apply for judicial review, but his removal was deferred following a Rule 39 indication from the European Court. In subsequent correspondence concerning the number of Rule 39 requests the Court had received from asylum seekers in the same position as the applicant, the UK Government provided clarification on the procedure followed on

removals to Greece. They explained that the Greek authorities did not in practice return asylum seekers to certain countries, including Iran, and that it was the UK Government's standard practice to seek express confirmation that the returnee would be able to submit an asylum application upon arrival in Greece should he or she wish to do so. A letter was also produced from the Greek Dublin Unit confirming that asylum applicants had a right of appeal against expulsion decisions and to "have a Rule 39 indication on their case".

Inadmissible: The concerns expressed by the UNCHR, whose independence, reliability and objectivity were beyond doubt, could not, when translated into Convention terms, be relied upon to prevent the United Kingdom from removing the applicant to Greece. The reasons for this were as follows. Firstly, the evidence before the Court indicated that Greece was not currently removing people to the applicant's country of origin, Iran. Secondly, the presumption had to be that Greece would abide by its obligations under both the Dublin Regulation and Council Directives 2005/85/EC and 2003/9/EC which required it to adhere to minimum standards in asylum procedures and to provide minimum standards for the reception of asylum seekers. In that connection, a new legislative framework for asylum applicants had recently been introduced in Greece. Thirdly, there was nothing to suggest that returnees to Greece under the Dublin Regulation, including those whose asylum applications had been the subject of a final negative decision by the Greek authorities, had been, or might be, prevented from applying to the Court for an interim measure under Rule 39 on account of the timing of their onward removal or for any other reason. Accordingly, the applicant's complaints under Articles 3 and 13 of the Convention arising out of his possible expulsion to Iran should be the subject of a Rule 39 application lodged with the Court against Greece following his return there, and not against the United Kingdom. Finally, while the objective information before the Court on conditions of detention in Greece was of some concern, for substantially the same reasons, any claim under the Convention arising from those conditions was to be pursued first with the Greek domestic authorities and thereafter in an application to the Court. The United Kingdom would not, therefore, breach its obligations under Article 3 of the Convention by removing the applicant to Greece: *manifestly ill-founded*.

ARTICLE 6

Article 6 § 1 [civil]

ACCESS TO COURT
State immunity from jurisdiction in proceedings concerning claim for damages for dismissal: *relinquishment in favour of Grand Chamber*.

SABEH EL LEIL - France (N° 34869/05)
[Section V]

The applicant, a French national and chief accountant at the Kuwaiti embassy in Paris, was dismissed for economic reasons in 2000. The applicant complained to the industrial tribunal (*conseil des prud'hommes*), which refused to allow the objection raised by the State of Kuwait on the grounds of immunity from jurisdiction. It found that the applicant had been dismissed without real and serious cause and ordered the State of Kuwait to pay the applicant various sums of money in compensation and damages. The applicant appealed, challenging the amounts awarded. The Court of Appeal set aside the judgment, finding that it was necessary to establish whether Kuwait enjoyed State immunity from jurisdiction in the particular case. The court noted that, in view of his level of responsibility and the general nature of his duties, the applicant had been participating, for the State of Kuwait through its diplomatic representation in France, in the exercise of powers conferred by public law. His claims against the State of Kuwait were thus inadmissible by virtue of the principle of State immunity from jurisdiction. An appeal lodged by the applicant with the Court of Cassation was declared inadmissible.

For further details, see the admissibility decision of 21 October 2008.

ACCESS TO COURT
FAIR HEARING
Scope of change in the case-law in a civil case: *no violation.*

UNÉDIC - France (N° 20153/04)
Judgment 18.12.2008 [Section V]

Facts: The applicant association, A.G.S. Unédic, manages the insurance scheme covering monies owed to salaried employees. When liquidation proceedings are opened, the A.G.S. Unédic delegation's role is to make the sums owed to employees available to the creditors' representative when those sums cannot be paid in full or in part from the company's own funds. A law of 1975, codified in the Labour Code, set a ceiling for the payment of the sums owed to employees and introduced different systems that took into account the origin of the sums owed, amongst other things. In December 1998 the Court of Cassation departed from its previous case-law concerning the interpretation of those provisions by allowing the retrospective raising of the ceiling for sums owed to employees in the event of liquidation proceedings. In January 1998 M.H. was made redundant for economic reasons following the placing under judicial reorganisation of the company for which he worked. He challenged the ceiling applied by A.G.S. to the sum owed to him, first before the industrial tribunal, then before the Court of Appeal, which, relying on the Court of Cassation's judgment of December 1998, both found in his favour. The Court of Cassation dismissed an appeal lodged by A.G.S.

Law: Article 34 – As to the Government's objection of incompatibility *ratione personae*, it was to be noted that the applicant in the present case was a private-law corporation subject only to private law in respect of its accounting and financial methods, the way it operated and the rules governing its liability. It was composed of members of representative employers' organisations independent of the political authorities. The fact that A.G.S. had delegated the operational side of its mission to Unédic, under a management agreement, could not be said to shed doubt on its independence. Although, in principle, the scheme was financed by private contributions, the fact that in exceptional cases there might be State funding made no difference. The recovery of funds was not a public-authority prerogative but rather a subrogation, as of right, in the rights and actions of the employees which the funds in question served to pay off. Moreover, simply in its capacity as the institution responsible for managing the scheme, A.G.S was entitled by law to take legal action to defend the interests of the scheme. The applicant organisation could therefore be considered as a "non-governmental organisation" within the meaning of Article 34 of the Convention.

Article 6 – The need for legal certainty and the protection of the legitimate confidence of litigants did not establish any acquired right to unchanging case-law. In the present case, M.H.'s situation had not been finally settled. The payment by A.G.S. of the advances was not capable of depriving him, under any circumstances and independently of the departure from the case-law, of his right to challenge before the industrial tribunal the quantum of the sums awarded to him. Furthermore, both parties had been perfectly aware of the new legal situation created by the departure from the case-law in December 1998, that is, prior to the litigation between M.H. and Unédic concerning his recovery of the remainder of the salary owed to him. M.H. had simply brought legal proceedings, as he was entitled to do, following a judgment in his favour which entitled him to claim additional severance pay. If the applicant organisation considered it an injustice that the courts should have found in M.H.'s favour, that injustice was inherent in any change of legal solution. The only consequence of the application to the instant case of the solution adopted in the judgment of December 1998 had been to increase the quantum of the surety A.G.S. had had to advance; it had not impaired any rights A.G.S. might have acquired once and for all. In conclusion, the applicant organisation had suffered no infringement of any of its rights guaranteed by Article 6, be it access to a court, legal certainty at the time when the domestic courts had delivered judgment, or the fairness of the proceedings.
Conclusion: no violation (unanimously).

FAIR HEARING
Conflict in case-law arising out of decisions of Supreme Court: *inadmissible*.

SCHWARZKOPF and TAUSSIK - Czech Republic (N° 42162/02)
Decision 2.12.2008 [Section V]

In 1995, under the 1991 Extra-Judicial Rehabilitations Act, the applicants brought an action for recovery of possession of property that had formerly belonged to their ancestors, who were victims of the persecution of Jews during the Second World War. In 1997 the District Court dismissed their claim, considering that they had not demonstrated that either they themselves or their ancestors had made their claim under a presidential decree of 1945 and a law of 1946 which annulled all transfers of ownership rights made under duress during the occupation for reasons of national, racial or political persecution, and gave the victims an opportunity to claim their rights and seek restitution of their property, provided that they did so by 17 June 1949. The court considered that this condition for restitution laid down in the 1991 Act had to be met in order for claimants to be able to seek restitution. In 1999 that judgment was upheld by the Regional Court, which referred, *inter alia*, to a decision of the Supreme Court. Relying, in their turn, on judgments of the Constitutional Court and on a judgment of the Supreme Court, the applicants appealed, arguing that the Regional Court's judgment was of crucial legal importance. In 2000 the Supreme Court declared the applicants' appeal inadmissible, finding that the Regional Court's judgment was not of crucial legal importance. Pointing out that the relevant case-law was rapidly changing, it noted that one of its judgments of August 2000, concerning the interpretation of the 1991 Act, had established that the mere existence of a claim based on the decree of 1945 and the law of 1946 did not suffice and that it was necessary to show, with a minimum of proof, that the claim had been submitted to the authorities for a decision. In 2002 the Constitutional Court rejected as manifestly ill-founded two constitutional complaints lodged by the applicants challenging the decisions of the courts below on the one hand and that delivered by the Supreme Court in their case on the other, as well as the contradictions between that decision and the judgment delivered by the Supreme Court in April 2000.

Inadmissible: The Supreme Court had initially interpreted the 1991 Act restrictively. Then, following a certain relaxation of that approach in a judgment of 2000, it had wavered between two different positions. A more open interpretation had finally prevailed in the judgments delivered by the Supreme Court between 2001 and 2005. It being understood that the role of a Supreme Court was to resolve contradictions in case-law, it was noteworthy that in this case the Supreme Court had been at the origin of the impugned divergences. However, the Act of 1991 had introduced measures to guarantee coherency of practice both in the lower courts and in the Supreme Court. As the aim of those measures was to settle, not prevent, differences in judicial decisions, it was to be expected that harmonising the case-law would take some time. In the instant case the interpretation of the Act of 1991 had been settled in 2001, *inter alia* because the Supreme Court had qualified it as a matter of crucial legal importance. The fact, that the decision adopted by that court in the applicants' case in 2000 had not yet reflected this new, more open approach, albeit regrettable, was not sufficient in itself to violate the principle of legal certainty: *manifestly ill-founded*.

Article 6 § 1 [criminal]

FAIR HEARING
EQUALITY OF ARMS
Trial court's refusal to disclose to the defence materials relating to surveillance operation or to admit statements obtained from key witnesses by the defence: *violation*.

MIRILASHVILI - Russia (N° 6293/04)
Judgment 11.12.2008 [Section I]

Facts: In 2003 the applicant was convicted on suspicion of organising the abduction of a group of people. The trial court relied on the recordings of telephone conversations made by the police in one of the victims' flat. Citing the Operational and Search Activities Act, the court refused to disclose to the defence the materials relevant to the authorisation of the wiretapping. The court also relied heavily on the written testimonies of three important witnesses, which had been obtained by an investigator at the pre-trial stage and read out at the trial. As these witnesses lived in Georgia, the court requested the Georgian authorities to secure their attendance at the trial, but without success. Two of the witnesses never appeared before the Russian courts, and one attended only the appeal hearing. Nor was the applicant able to question them during the pre-trial investigation. However, the three witnesses were questioned in Georgia by the defence lawyers after the start of the trial and sent written statements to the court retracting their earlier testimony. They all stated that they had falsely accused the applicant, and that their previous statements to the prosecution had been given under pressure. The defence applied to the trial judge for the admission of these statements. However, the court declared them inadmissible since the law prohibited defence lawyers from questioning witnesses after they had been questioned by the prosecution and in a manner that was not in accordance with the "proper" procedure for collecting of evidence prescribed by law. The applicant's conviction was in the main upheld on appeal.

Law: Materials withheld from the defence: The Court could not rule out the possibility that the materials in question might have been helpful to the defence, which would, therefore, have had a legitimate interest in seeking their disclosure. However, it was prepared to accept, having regard to the context of the case, that the documents sought by the applicant might have contained certain items of sensitive information relevant to national security. In such circumstances the national judge enjoyed a wide margin of appreciation in deciding on the disclosure request lodged by the defence. The question arose whether the non-disclosure had been counterbalanced by adequate procedural guarantees. The materials relating to the authorisation of the wiretapping had been examined by the presiding judge *ex parte*. Therefore, the decision to withhold certain documents had been taken not by the prosecution unilaterally, but by a member of the judiciary. However, the court had not analysed whether the materials would have been of any assistance to the defence or whether their disclosure would, at least arguably, have harmed an identifiable public interest. The court's decision had been based on the type of material at issue, not on an analysis of its content. Having regard to the Operational and Search Activities Act, which prohibited in absolute terms the disclosure of documents relating to operational and search activities, the court's role in examining the disclosure request lodged by the defence had been very limited. The decision-making process had therefore been seriously flawed. The impugned decision was vague and did not specify what kind of sensitive information the materials relating to the surveillance operation could contain. The court had accepted the blanket exclusion of all the materials from adversarial examination. Furthermore, the surveillance operation had not targeted the applicant or his co-accused. In sum, the decision to withhold materials relating to the surveillance operation had not been accompanied by adequate procedural guarantees, and had not been sufficiently justified.

Admissibility of witness statements: The defence had been in a disadvantageous position *vis-à-vis* the prosecution: whereas the prosecution had been able to examine the key witnesses directly, the defence had been deprived of that opportunity. However, the applicant's inability to examine these witnesses in person could be attributed to certain objective circumstances which were outside the control of the Russian authorities. Nevertheless, that fact alone did not suffice to conclude that the evidence had been taken and

examined in a fair manner. The defence had not been allowed to produce new written depositions obtained from the witnesses. The evidence submitted by the defence was relevant and important. The three witnesses at issue were key witnesses for the prosecution. By obtaining new statements from them the defence had sought not only to produce exculpatory evidence, but also to challenge the evidence against the applicant. When refusing to examine the new statements, the court had relied on a domestic law provision which did not appear to pursue any identifiable legitimate interest. In the particular circumstances of the case, namely where the applicant had been unable to examine several key witnesses in court or at least at the pre-trial stage, the refusal to admit the statements obtained by the defence had not been justified. The Court, however, emphasised that it was not taking a stand on the assessment of that evidence, which was the prerogative of the domestic courts.

Overall fairness of the proceedings: The defence had been placed at a serious disadvantage vis-à-vis the prosecution in respect of the examination of a very important part of the case file. In view of the importance of appearances in matters of criminal justice, the proceedings in question, taken as a whole, had not satisfied the requirements of a "fair hearing".
Conclusion: violation (unanimously).

FAIR HEARING
Undermining of the applicant's defence by sentencing of his lawyer for contempt of court: *violation*.

PANOVITS - Cyprus (N° 4268/04)
Judgment 11.12.2008 [Section I]

Facts: In the context of a criminal investigation, the police contacted the applicant's father and invited him and the applicant to attend the Limassol police station. At the time the applicant was just over 17 years old. When they arrived at the station, the Police Director explained to the father, in the applicant's presence, that there was evidence linking the applicant with the commission of murder and robbery and that an arrest warrant had been issued against him. The arresting officer then entered the Director's office, showed the arrest warrant and arrested the applicant, who was then taken to a separate room for questioning. Meanwhile, the Director explained to the applicant's father that the case was serious and that they should seek the assistance of a lawyer. A few minutes later, while the applicant was already being questioned, they were informed that the applicant had confessed his guilt. The applicant was then charged with manslaughter and robbery. Several days following the questioning in the police station he noted in an additional written statement: "I did not hit him [the victim] with the stone but only kicked him a couple of times". At the trial, the applicant claimed that his confession had been involuntary and the result of deception and threats by the police, but the Assize Court rejected that argument and concluded that his confession had been valid and as such was admissible in evidence. The applicant's complaint about the absence of legal counsel during the initial questioning was also dismissed because he had never requested a lawyer. At one of the hearings of the main trial, while cross-examining a witness, a confrontation occurred between the applicant's lawyer, Mr Kyprianou, and the court (see, for the relevant facts, *Kyprianou v. Cyprus* [GC], no. 73797/01, ECHR 2005-XIII; judgment of 15 December 2005 reported in Information Note no. 82). Even though the lawyer wished to step down from the case, the court refused his request. Subsequently, Mr Kyprianou was found to be in contempt of court and sentenced to five days' imprisonment. He remained the applicant's counsel for the rest of the trial. However, he insisted that another lawyer address the court concerning the applicant's request for the withdrawal of the judges with whom Mr Kyprianou had a conflict. That request was eventually dismissed. On 10 May 2001 the Assize Court found the applicant guilty of manslaughter and robbery, on the basis of his confession and additional written statement placing him at the time and scene of the crime and confirming that he had used force against the victim. He was sentenced to two concurrent sentences of imprisonment of fourteen and six years. The applicant appealed against the first-instance judgment, repeating his arguments as to the involuntary nature of his confession and complaining about the partiality of the Assize Court on account of his counsel's conflict with the judges at the trial. The Supreme Court dismissed the applicant's appeal and upheld his conviction.

Law: Article 6 § 3 (c) – *Lack of legal representation at the initial questioning*: The concept of fairness enshrined in Article 6 required that the accused be given the benefit of the assistance of a lawyer right from the initial stages of police interrogation. Since at the time of the police questioning the applicant was 17 years of age, it was unlikely that he could have been aware of his right to legal representation before making any statement. It was also unlikely that he could reasonably have appreciated the consequences of his proceeding to be questioned without the assistance of a lawyer in criminal proceedings concerning a murder. Even though the authorities appeared to have at all times been willing to allow the applicant to be assisted by a lawyer if he so requested, they had failed to make him aware of his right to request the assignment of a lawyer free of charge if necessary. Even though the applicant's confession under initial police questioning had not been the sole evidence on which his conviction was based, it nevertheless constituted a significant element thereof and was decisive for the prospects of his defence. In view of the above, the lack of sufficient information on the applicant's right to consult a lawyer before his questioning by the police, especially given his age and the fact that he was not assisted by his guardian during the questioning, constituted a breach of his defence rights.
Conclusion: violation (six votes to one).

Article 6 § 1 – (a) *Use of applicant's confession at the trial*: As already stated, the applicant's confession obtained in the above circumstances constituted a decisive element of the prosecution's case against him which substantially inhibited the prospects of his defence at trial and which was not remedied by the subsequent proceedings. While it was not the Court's role to examine whether the evidence in the applicant's case had been correctly assessed by the national courts, it considered that his conviction was based to a decisive extent on the applicant's confession, corroborated largely by his additional written statement. The extent to which that additional written statement had been tainted by the breach of his rights of defence due to the circumstances in which the confession had been taken was not addressed by the trial court and remained unclear. In such circumstances, the Court could not but conclude that the use in trial of the applicant's confession obtained in circumstances which breached his rights to due process had irreparably undermined his rights of defence.
Conclusion: violation (six votes to one).

(b) *Assize Court's treatment of the applicant's counsel*: The central question raised under this head was whether the nature of the Assize Court's interference with the defence counsel's exercise of his duties, combined with the deficiencies found by the Grand Chamber of the European Court as to the trial judges' treatment of the applicant's lawyer, were such as to cast doubt on the fairness of the applicant's trial. In this connection, the Court observed that the applicant's lawyer and the judges of the Assize Court had engaged in various disagreements over the course of the trial, as a result of which his lawyer had been found in contempt of court. While the Court did not doubt that the judges of the Assize Court were determined to exercise their functions in an impartial manner, it reiterates that in its judgment in the *Kyprianou* case it concluded that the judges' personal conduct had breached the subjective test of impartiality. Consequently, the personal conduct of the judges in the case undermined the applicant's confidence that his trial would be conducted in a fair manner. Although the contempt proceedings were separate from the applicant's main trial, the fact that the judges were offended by the applicant's lawyer when he complained about the manner in which his cross-examination was received by the bench undermined the conduct of the applicant's defence. Moreover, the Court noted that the refusal of Mr Kyprianou's request for leave to withdraw from the proceedings due to the fact that he felt unable to continue defending the applicant in an effective manner had exceeded the limits of a proportionate response given the impact on the applicant's rights of defence. The “chilling effect” on Mr Kyprianou's performance of his duties as defence counsel was demonstrated in particular by his insistence that another lawyer should address the court in respect of the request for the continuation of the proceedings before a different bench.
Conclusion: violation (five votes to two).

Article 41 – The Court ordered a retrial or the reopening of the proceedings.

FAIR HEARING
PUBLIC HEARING
Lack of a public hearing before appellate court: *no violation*.

BAZO GONZÁLEZ - Spain (N° 30643/04)
Judgment 16.12.2008 [Section III]

Facts: In a judgment delivered after a public hearing in *inter partes* proceedings, the criminal court judge no. 1 acquitted the applicant of the charges against him for attempted cigarette smuggling. Counsel for the State and State Counsel's Office appealed. The applicant was invited to submit observations. Assisted by a lawyer, he objected to the appeal and sought confirmation of the impugned judgment, except in so far as it concerned the taking of evidence by the trial court. Neither party requested a public hearing and, considering it unnecessary, the *Audiencia Provincial*, in keeping with the Code of Criminal procedure, decided not to hold one. In adversarial proceedings the *Audiencia Provincial* allowed the appeal and, without changing the facts, convicted the applicant of attempted smuggling. It found that the trial court had misinterpreted the law and that the applicant's actions could not be considered to have been decriminalised. The applicant lodged an *amparo* appeal with the Constitutional Court, which rejected it.

Law: That the applicant had been convicted by the *Audiencia Provincial* without having been heard in person was not in dispute. In order to determine whether there had been a violation of Article 6 of the Convention, therefore, it was necessary to examine the role of the *Audiencia* and the nature of the issues before it. Under Spanish law this court took evidence only exceptionally, and that was limited to evidence the applicant had not been able to submit at first instance, evidence that had been submitted but rejected without good reason, and evidence which had been declared admissible but not used at first instance for reasons beyond the applicant's control. Furthermore, when there was no new evidence, it was for the *Audiencia* to decide whether or not to hold a public hearing in appeal proceedings, depending on whether it considered one necessary for a better understanding of the case. In this case it had been open to the *Audiencia Provincial*, as an appeal court, to deliver a new judgment on the merits, which it did. The scope of the examination carried out by the *Audiencia* in the instant case led the Court to consider that it had not been essential that a public hearing be held. The aspects of the case which the *Audiencia* had had to analyse in order to determine the applicant's guilt had been predominantly points of law: the judgment had stated quite clearly that it was not for the *Audiencia* to re-examine the evidence the trial court had heard. Its role had simply been to arrive at a different interpretation from the trial court judge as to whether certain offences had been decriminalised by law. Accordingly, the appellate court had not been required to examine the case both on the merits and in law. On the contrary the issues the *Audiencia Provincial* had examined had been purely legal ones, with no changes being made to the facts that had been declared established at first instance.
As to the applicant's complaint that he had not had an opportunity to challenge the facts declared established at first instance because he had been acquitted, the Court confirmed that there was no provision in Spanish law for persons who had been acquitted to challenge facts that had been declared established. However, it noted that the proceedings before the criminal court judge no. 1 had included a public hearing in the course of which the applicant had had an opportunity to submit any arguments he considered necessary in order to challenge the disputed facts. In the appeal proceedings the submissions of the Counsel for the State and State Counsel's Office concerning the appeal had been communicated to the applicant, who had been given a deadline within which to reply, which he had done with the assistance of a lawyer. That being so, the proceedings could be said to have been *inter partes*.
The foregoing was sufficient for the Court to find that a public hearing had not been necessary. In view of the nature of the questions examined on appeal by the *Audiencia Provincial* and the fact that the applicant could have presented written submissions at any stage in the proceedings, the lack of a public hearing had not impaired the applicant's right to a fair trial.
Conclusion: no violation (unanimously).

Article 6 § 3 (c)

DEFENCE THROUGH LEGAL ASSISTANCE
Failure to inform the applicant, who was a minor, of his right to consult a lawyer prior to first police questioning: *violation*.

PANOVITS - Cyprus (N° 4268/04)
Judgment 11.12.2008 [Section I]

(See Article 6 § 1 above).

ARTICLE 8

PRIVATE LIFE
Retention of fingerprints and DNA information in cases where defendant in criminal proceedings is acquitted or discharged: *violation*.

S. and MARPER - United Kingdom (Nos. 30562/04 and 30566/04)
Judgment 4.12.2008 [GC]

Facts: Under section 64 of the Police and Criminal Evidence Act 1984 (PACE), fingerprints and DNA samples taken from a person suspected of a criminal offence may be retained without limit of time, even if the subsequent criminal proceedings end in that person's acquittal or discharge. In the case before the Court, both applicants had been charged with criminal offences but not convicted. The first applicant, an eleven-year-old minor, had been acquitted of attempted robbery while in a separate case proceedings against the second applicant for the alleged harassment of his partner had been formally discontinued after the couple reconciled. In view of the fact that they had not been convicted, the applicants asked for their fingerprints and cellular samples to be destroyed, but in both cases the police refused. Their applications for judicial review of that refusal were rejected in a decision that was upheld on appeal. Giving the lead judgment in the House of Lords, Lord Steyn noted that, even assuming there to have been an interference with the applicants' private life, it was very modest and was proportionate to the aim pursued, as the materials were only to be kept for limited purposes and were of no use without a comparator from the crime scene while an expanded database conferred enormous advantages in the fight against serious crime.

Law: (a) *Interference*: Given the nature and the amount of personal information contained in cellular samples, including a unique genetic code of great relevance to both the individual concerned and his or her relatives, and the capacity of DNA profiles to provide a means of identifying genetic relationships between individuals or of drawing inferences about their ethnic origin, the retention of both cellular samples and DNA profiles in itself amounted to an interference with the applicants' right to respect for their private lives. While the retention of fingerprints had less of an impact on private life than the retention of cellular samples and DNA profiles, the unique information fingerprints contained about the individual concerned and their retention without his or her consent could not be regarded as neutral or insignificant and also constituted an interference with the right to respect for private life.

(b) *In accordance with law*: Although, in view of its conclusions as to whether the interference was necessary in a democratic society, the Court did not find it necessary to decide whether the wording of section 64 of PACE met the "quality of law" requirements, it nevertheless noted that that provision was far from precise as to the conditions attached to and arrangements for the storing and use of the information contained in the samples and profiles and that it was essential to have clear, detailed rules governing the scope and application of such measures, as well as minimum safeguards.

(c) *Legitimate aim*: It was accepted that the retention of the information pursued the legitimate purpose of the prevention of crime by assisting in the identification of future offenders.

(d) *Necessary in a democratic society*: As to the scope of the Court's examination, the question before it was not whether the retention of fingerprints, cellular samples and DNA profiles could in general be regarded as justified under the Convention but whether their retention in the cases of the applicants, as persons who had been suspected, but not convicted, of certain criminal offences, was so justified. The core principles of the relevant instruments of the Council of Europe and the law and practice of the other Contracting States required retention of data to be proportionate in relation to the purpose of collection and limited in time, particularly in the police sector. The protection afforded by Article 8 would be unacceptably weakened if the use of modern scientific techniques in the criminal-justice system were allowed at any cost and without carefully balancing their potential benefits against important private-life interests. Any State claiming a pioneer role in the development of new technologies bore special responsibility for striking the right balance. In that respect, the blanket and indiscriminate nature of the power of retention in England and Wales was particularly striking, since it allowed data to be retained irrespective of the nature or gravity of the offence or of the age of the suspect. Likewise, retention was not limited in time and there existed only limited possibilities for an acquitted individual to have the data removed from the nationwide database or to have the materials destroyed. Nor was there any provision for independent review of the justification for the retention according to defined criteria. The risk of stigmatisation was of particular concern, with persons who had not been convicted of any offence and were entitled to the presumption of innocence finding themselves treated in the same way as convicted persons. Retention could be especially harmful in the case of minors such as the first applicant, given their special situation and the importance of their development and integration in society. In conclusion, the blanket and indiscriminate nature of the powers of retention, as applied in the applicants' case, had failed to strike a fair balance between the competing public and private interests, and the respondent State had overstepped any acceptable margin of appreciation in that regard. Accordingly, the retention constituted a disproportionate interference with the applicants' right to respect for private life and could not be regarded as necessary in a democratic society.
Conclusion: violation (unanimously).

Article 41 – Finding of a violation constituted sufficient just satisfaction in respect of non-pecuniary damage. Respondent State to implement, under Committee of Ministers' supervision, appropriate general and/or individual measures.

PRIVATE LIFE
Failure to compel service provider to disclose identity of person wanted for placing an indecent advertisement about a minor on an Internet dating site: *violation*.

K.U. - Finland (N° 2872/02)
Judgment 2.12.2008 [Section IV]

Facts: In 1999 an unknown individual posted an advertisement of a sexual nature on an Internet dating site in the name of the applicant, who was twelve years old, without his knowledge. The advertisement gave details of the applicant's age, year of birth and physical characteristics and stated that he was looking for an intimate relationship with a male. It also contained a link to his web page where his picture and telephone number could be found. The applicant became aware of the advertisement when he received an e-mail from a man offering to meet him. A complaint was made to the police but the service provider refused to disclose the identity of the person who had placed the advertisement as it considered itself bound by confidentiality rules. A district court subsequently refused a request by the police under the Criminal Investigations Act for an order requiring the service provider to divulge the advertiser's identity after finding that there was no explicit legal provision in cases concerning less serious offences, such as calumny, which could be used to compel a service provider to disregard professional secrecy and disclose such information. The court of appeal upheld that decision and the Supreme Court refused leave to appeal.

Law: Although domestic law saw the applicant's case in terms of calumny, the Court preferred to highlight the effects on his private life, given the potential threat to his physical and mental welfare and his vulnerable age. The posting of the Internet advertisement about the applicant was a criminal act which had resulted in a minor being a target for paedophiles. Such conduct called for a criminal-law response and effective deterrence had to be reinforced through adequate investigation and prosecution. Children and other vulnerable individuals were entitled to protection by the State from such grave interferences with their private life. The possibility of obtaining damages from a third party, in this instance the service provider, was not a sufficient remedy. What was required was the availability of a remedy enabling the actual offender – in this instance, the person who had placed the advertisement – to be identified and brought to justice, and the victim to obtain financial reparation from him. The Government could not argue that they had not had the opportunity to put in place a system to protect children from being targeted by paedophiles via the Internet as the widespread problem of child sexual abuse and the danger of the Internet being used for criminal purposes were well-known when the incident took place. Although freedom of expression and confidentiality of communications were primary considerations and users of telecommunications and Internet services had to have a guarantee that their own privacy and freedom of expression would be respected, such guarantee could not be absolute and had to yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others. The legislature should, therefore, have provided a framework for reconciling those competing interests. Although such a framework had subsequently been introduced through the Exercise of Freedom of Expression in Mass Media Act, it had not been in place at the relevant time. The State had thus failed to protect the applicant's right to respect for his private life by giving precedence to the confidentiality requirement over his physical and moral welfare.
Conclusion: violation (unanimously).

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

FAMILY LIFE
Expulsion on the basis of a "secret" report of the State Security Department which was not disclosed to the applicant: *violation*.

GULIJEV - Lithuania (N° 10425/03)
Judgment 16.12.2008 [Section II]

Facts: In 2001 the applicant, an Azerbaijani citizen, married his partner, a Lithuanian national with whom he already had a five-year old daughter, and obtained a temporary residence permit to live in Lithuania. His request for the renewal of his residence permit was rejected by the Migration Department on the basis of a State Security Department's "secret" file stating that he posed a "threat to national security and public order". The applicant appealed to the courts claiming that he had lived in Lithuania since 1989, that he owned property there and had a family and that his wife was expecting another child. The Administrative Court dismissed his appeal relying in particular on the classified State Security Department report (the contents of which were not disclosed to the applicant) and its conclusion that the applicant's continued presence in Lithuania endangered national security and public order. His further appeals were to no avail. In October 2002 the authorities made an attempt to deport the applicant to Azerbaijan and prohibited him from entering Lithuania until 2099. However, he went into hiding before eventually being deported in November 2003.

Law: The Government's assertion that there had been no interference with the applicant's right to respect for his family life since the entire family could have moved to Azerbaijan was dismissed because his wife was a Lithuanian national with strong social and cultural links to Lithuania and both of their children had been born there. The key issue in the applicant's case was, however, whether that interference corresponded to a pressing social need. The State Security Department's conclusion in its classified report that the applicant posed a threat to national security had subsequently been relied on by the authorities as the sole ground for refusing his request for temporary residence in Lithuania, even though under domestic law factual data constituting State secrets were not to be used as evidence in administrative proceedings

until they were unclassified. There was no evidence that the applicant's stay in Lithuania had posed a national threat when he was first issued with a temporary residence permit in 2001 and the Government had not provided the Court with further factual information substantiating why domestic authorities considered the applicant a threat. Although the applicant had a criminal conviction, it involved theft and not a crime related to national security. Accordingly, the applicant's deportation and prohibition from re-entering Lithuania, where his two children and wife lived, until 2099 had not been necessary in a democratic society.
Conclusion: violation (unanimously).

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

FAMILY LIFE
Placement of children in public care on ground that their blind parents had failed to provide adequate care and housing: *violation*.

SAVINY - Ukraine (N° 39948/06)
Judgment 18.12.2008 [Section V]

Facts: The applicants, husband and wife, have both been blind since childhood. They gave birth to seven children. Four of them were taken into public care in 1998. In 2006, pursuant to a court judgment, the remaining three children were also placed in public care. The domestic authorities based their decision on a finding that the applicants' lack of financial means and personal qualities endangered their children's life, health and moral upbringing. Notably, they were unable to provide them with proper nutrition, clothing, hygiene and health care or to ensure that they adapted in a social and educational context. The applicants appealed unsuccessfully.

Law: In assessing the necessity of the interference with the applicants' rights guaranteed by Article 8, the Court doubted the adequacy of the evidence on which the authorities had based their finding that the children's living conditions had in fact endangered their life and health. In particular, the custody proceedings instituted in January 2004 had not resulted in the children's removal from home until June 2006. No interim measure had been sought and no actual harm to the children during this period had been recorded. Further, the courts appeared to have taken on trust the submissions by the municipal authorities, drawn from their occasional inspections of the applicants' dwelling. No other corroborating evidence, such as the children's own views, their medical files, opinions by their paediatricians or statements by neighbours, had been examined. Nor did the courts appear to have analysed in any depth the extent to which the purported inadequacies of the children's upbringing were attributable to the applicants' irremediable incapacity to provide requisite care, as opposed to their financial difficulties and objective frustrations, which could have been overcome by targeted financial and social assistance and effective counselling. In connection with the financial difficulties, it was not the Court's role to determine whether the promotion of family unity in the case entitled the applicants' family to a particular standard of living at public expense. It was, however, a matter which fell to be discussed by, initially, the relevant public authorities and, subsequently, in the course of the judicial proceedings. As regards the applicants' purported parental irresponsibility, no independent evidence (such as an assessment by a psychologist) had been sought to evaluate the applicants' emotional or mental maturity or motivation in resolving their household difficulties. Nor had the courts examined the applicants' attempts to improve their situation, such as requests to equip their flat with access to natural gas and hot water, recoup salary arrears or request employment assistance. No data was sought as regards the actual volume and sufficiency of social assistance or the substance of specific recommendations provided by way of counselling and explanations as to why these recommendations had failed. Soliciting specific information in this regard would have been pertinent in evaluating whether the authorities had discharged their Convention obligation to promote family unity and whether they had sufficiently explored the effectiveness of less far-reaching alternatives before seeking to separate the children from their parents. Furthermore, at no stage of the proceedings had the children been heard by the judges. Moreover, not only had the children been separated from their family of origin, they had also been placed in different institutions. Two of them

lived in another city, away from the town where their parents and siblings resided, which rendered it difficult to maintain regular contact. In sum, although the reasons given by the national authorities for removal of the applicants' children had been relevant, they had not been sufficient to justify such a serious interference with the applicants' family life.
Conclusion: violation (unanimously).

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

ARTICLE 9

MANIFEST RELIGION OR BELIEF
Expulsion of female pupils from State school for refusing to remove headscarves during physical education and sports lessons: *no violation*.

DOGRU - France (N° 27058/05)
KERVANCI - France (N° 31645/04)
Judgments 4.12.2008 [Section V]

Facts: The applicants in these two cases – an eleven- and a twelve-year-old girl, both of the Muslim faith – enrolled at a public secondary school for the academic year 1998-1999. In January 1999 they presented themselves a number of times for physical education and sports lessons wearing headscarves, which they refused to take off in spite of repeated requests from their teacher, who explained that wearing headscarves was incompatible with physical education classes. In February 1999 the school's pupil discipline committee ordered the applicants' expulsion for repeated failure to participate actively in physical education and sports lessons. In March 1999 the area Director of Education upheld that decision after consulting the Academic Appeals Board, which justified the ban on the wearing of headscarves during physical education in terms of compliance with school regulations governing safety, health and attendance. In October 1999 the Administrative Court dismissed applications lodged by the applicants' parents seeking to have the Director of Education's decision set aside. The court found that by presenting themselves for physical education and sports lessons wearing garments that prevented them from participating in the activities concerned, the applicants had failed in their duty to attend classes regularly; their attitude had created a climate of tension at the school, and all these factors taken together sufficed to justify their expulsion from the school, in spite of their proposal, at the end of January, to wear hats instead of scarves. The Administrative Court of Appeal subsequently upheld those rulings, noting that the applicants had overstepped the limits of the right to express and manifest their religious beliefs on school premises. The *Conseil d'Etat* ultimately declared appeals lodged by the applicants' parents inadmissible. The applicants submitted that after being expelled from the school they had continued their schooling by correspondence.

Law: The ban on wearing headscarves during physical education and sports lessons and the expulsion of the applicants from their school for refusing to remove their headscarves amounted to a "restriction" of the applicants' exercise of their right to freedom of religion.
At the material time no law explicitly prohibited the wearing of headscarves in physical education lessons, the events in this case having taken place prior to the enactment of Law no. 2004-228 of 15 March 2004, which regulated the wearing of symbols or vestimentary signs of one's religious beliefs on public school premises, in application of the principle of secularism. However, the French authorities had justified these measures by the combination of three factors: the requirement of assiduity in attending lessons, safety concerns and the need to dress in a manner compatible with the practice of sports. These factors were based on laws and regulations, internal documents (circulars, memoranda, school rules) and decisions of the *Conseil d'Etat*. The impugned interference had therefore had sufficient legal basis in domestic law, and the rules had been accessible as they consisted mainly of provisions that had been duly published, and established case-law of the *Conseil d'Etat*. Furthermore, in signing the school rules when they had enrolled at the school, the applicants had been made aware of their content and had undertaken to respect

them, with their parents' agreement. The applicants could therefore have foreseen, to a degree that was reasonable, that at the material time the refusal to remove their headscarves for physical education and sports classes might lead to their expulsion for failure to attend classes, so that the interference could be considered to have been "prescribed by law".
Furthermore, the restriction of the applicants' right to manifest their religion had pursued the aim of defending the requirements of secularism in public education, as interpreted by the *Conseil d'Etat* and ministerial circulars on the matter. The same sources indicated that the wearing of religious signs was not, in itself, incompatible with the principle of secularism in schools, but could become so depending on the conditions in which they were worn and the consequences that wearing them could have. Referring to its earlier judgments in which it had held that it was for the national authorities, in the exercise of their margin of appreciation, to take great care to ensure that, in keeping with the principle of respect for pluralism and the freedom of others, the manifestation by pupils of their religious beliefs on school premises did not take on the nature of an ostentatious act that would constitute a source of pressure and exclusion, the Court found that that concern did indeed appear to have been answered by the French secular model. In the present cases the conclusion reached by the national authorities that the wearing of a veil, such as the Islamic headscarf, was incompatible with sports classes for reasons of health or safety was not unreasonable. The penalty imposed had merely been the consequence of the applicants' refusal to comply with the rules applicable on the school premises – of which they had been properly informed – and not of their religious convictions, as they alleged.
Furthermore, the disciplinary measures taken against the applicants had fully satisfied the duty to balance the various interests at stake and had been accompanied by safeguards that were apt to protect the pupils' interests. As regards the choice of the most severe penalty, where the ways and means of ensuring respect for internal rules were concerned, it was not within the province of the Court to substitute its own vision for that of the disciplinary authorities which, being in direct and continuous contact with the educational community, were best placed to evaluate local needs and conditions or the requirements of a particular training.
Consequently, the penalty of expulsion did not appear disproportionate, and the applicants had been able to continue their schooling by correspondence classes. The applicant's religious convictions thus appeared to have been fully taken into account in relation to the requirements of protecting the rights and freedoms of others and public order. It was also clear that the decision complained of had been based on those requirements and not on any objections to the applicant's religious beliefs. The interference in question had been justified in terms of the principle and proportionate to the aim pursued.
Conclusion: no violation (unanimously).

ARTICLE 10

FREEDOM OF EXPRESSION
Conviction of criminal defamation for reporting suspected child abuse to a doctor: *violation*.

JUPPALA - Finland (N° 18620/03)
Judgment 2.12.2008 [Section IV]

Facts: The applicant took her three-year-old grandson to a doctor on account of a bruise on his back. She voiced concern that the injury had been caused by the boy's father and informed the doctor that the boy had said that he had been punched. The doctor wrote in his report that the bruising was consistent with a punch and that, on being interviewed, the boy had repeated that he had been hit by his father. He then alerted the child-protection services. The applicant was subsequently charged with criminal defamation on the ground that she had given information to the doctor which implied, without reasonable cause, that the boy had been assaulted by his father. She was convicted on appeal and ordered to pay EUR 3,365.67 compensation for non-pecuniary damage and legal costs. The court of appeal found that the fact that she had discussed the bruise with the boy, who was only three years old at the time, and that he had told the doctor that his father had hit him did not constitute a sufficiently reasonable ground for the allegation of abuse. The Supreme Court refused leave to appeal.

Law: The applicant's conviction constituted an interference with her right to freedom of expression and pursued the legitimate aim of protecting the reputation or rights of others. Both the conviction and the order requiring the applicant to pay damages had been "prescribed by law". The essential question raised by the case was how to strike a proper balance when a parent was wrongly suspected of having abused his or her child, while, given the difficulties in uncovering child abuse, protecting children at risk of significant harm. The seriousness of child abuse as a social problem required that persons acting in good faith in what they believed were the best interests of the child should not be influenced by fear of being prosecuted or sued when deciding whether and when their doubts should be communicated to health care professionals or social services. An alarming feature of the applicant's case was that the court of appeal had taken the view that, even though there was no doubt that she had seen her grandson's bruised back, the applicant had not been entitled to repeat what the boy had told her, that is, that he had been hit by his father. In the Court's view, people should be free to voice a suspicion of child abuse, formed in good faith, in the context of an appropriate reporting procedure without fear of a criminal conviction or an obligation to pay compensation for harm suffered or costs incurred. There had been no suggestion that the applicant had acted recklessly: on the contrary, even a health care professional had decided that the case should be reported to the child welfare authorities. In sum, it was only in exceptional cases that restriction of the right to freedom of expression in this sphere could be accepted as necessary in a democratic society. In the applicant's case, sufficient reasons for the interference with her right to freedom of expression had not been provided and the interference had therefore failed to answer any "pressing social need".
Conclusion: violation (unanimously).

Article 41 – EUR 3,000 in respect of non-pecuniary damage and EUR 3,616.41 in respect of pecuniary damage.

FREEDOM OF EXPRESSION
Imposition of a fine on a television station for having broadcast an advertisement by a small political party, in breach of the statutory prohibition of any televised political advertising: *violation*.

TV VEST AS and ROGALAND PENSJONISTPARTI - Norway (N° 21132/05)
Judgment 11.12.2008 [Section I]

Facts: The applicants were a television company and the regional branch of a small political party (the Pensioners Party). TV Vest was fined on the ground that it had broadcast political adverts for the Pensioners Party in breach of the statutory prohibition on such adverts. The prohibition at issue was permanent and absolute and applied only to television; political advertising in other media was permitted. TV Vest unsuccessfully contested the fine before the courts.

Law: The Court was prepared to accept that the lack of European consensus in this area spoke in favour of granting States greater discretion than would normally be allowed in decisions with regard to restrictions on political debate. The rationale for the statutory prohibition on television broadcasting of political advertising had been, as stated by the Supreme Court, the assumption that allowing the use of such a powerful and pervasive form and medium of expression was likely to reduce the quality of political debate generally. Complex issues could easily be distorted and financially powerful groups would get greater opportunities for marketing their opinions. However, the Pensioners Party did not come within the category of parties or groups that were the primary targets of the prohibition. On the contrary, it belonged to a category which the ban in principle had intended to protect. Furthermore, in contrast to the major political parties, which had been given wide edited television coverage, the Pensioners Party had hardly been mentioned. Therefore, paid advertising on television had been the sole means for the Pensioners Party to get its message across to the public through that type of medium. Having been denied this possibility under the law, the Pensioners Party had moreover been put at a disadvantage in comparison to the major parties. Finally, the specific advertising at issue, namely a short description of the Pensioners Party and a call to vote for it in the forthcoming elections, had not contained elements apt to lower the quality of political debate or offend various sensitivities. In those circumstances, the fact that television had a more immediate and powerful effect than other media could not justify the prohibition and fine

imposed on TV Vest. There had not, therefore, been a reasonable relationship of proportionality between the legitimate aim pursued by the prohibition and the means deployed to achieve that aim. The restriction which the prohibition and the imposition of the fine had entailed on the applicants' exercise of their freedom of expression could not therefore be regarded as having been necessary in a democratic society, notwithstanding the margin of appreciation available to the national authorities.
Conclusion: violation (unanimously).

FREEDOM OF EXPRESSION
Disciplinary penalty imposed on doctor for criticising fellow practitioner in report to a patient: *violation*.

FRANKOWICZ - Poland (N° 53025/99)
Judgment 16.12.2008 [Section IV]

Facts: The applicant, a consultant, was found guilty of unethical conduct by a regional medical court for expressing a negative opinion on the professional conduct of a fellow practitioner directly to a patient in a report on his treatment, in breach of the principle of professional solidarity laid down in Article 52 of the Code of Medical Ethics. The court did not examine the truthfulness of the opinion as it considered that issue irrelevant to the question of whether there had been a breach. It gave the applicant a reprimand in a decision that was upheld by the Supreme Medical Court.

Law: In answer to the Government's submission that there had been no interference with the applicant's rights as his opinion had been made in the context of his commercial activity, the Court reiterated that matters relating to professional practice were not removed from the protection of Article 10. The applicant's conviction and disciplinary sanction for having expressed a critical opinion on medical treatment received by a patient thus amounted to an interference with his right to freedom of expression. That interference was prescribed by law and followed the legitimate aim of protecting the rights and reputation of others. As to whether it had been necessary in a democratic society, the Court accepted that the relationship between doctors and patients, based on trust and confidentiality, might imply the need to preserve solidarity between members of the medical profession. However, it also recognised the right of every patient to consult another doctor for a second opinion on the treatment he had received and for a fair and objective evaluation of his doctor's actions. In the applicant's case, the authorities had concluded, without any attempt to verify the truthfulness of the findings in the medical opinion, that the applicant had discredited another doctor and was thus guilty of a disciplinary offence. Such a strict interpretation of the domestic law by the disciplinary courts as to ban any criticism of colleagues in the medical profession was liable to discourage medical practitioners from providing their patients with an objective opinion on their health and any treatment received and so to compromise the very purpose of the medical profession, namely to protect the health and life of patients. The interference was therefore not proportionate to the legitimate aim pursued.
Conclusion: violation (unanimously).

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

FREEDOM OF EXPRESSION
Warning issued against a politician for calling her opponent a thief in a live television broadcast during the electoral period and court order granting her opponent a right to reply: *inadmissible*.

VITRENKO and Others - Ukraine (N° 23510/02)
Decision 16.12.2008 [Section V]

The first applicant was the leader of the Progressive Socialist Party of Ukraine. She stood as a candidate for the 2002 parliamentary elections. Some weeks before the elections, one of the television channels scheduled a political debate but cancelled it at the last minute. Ms Tymoshenko, who was due to appear for the debate with the first applicant, was not allowed on to the premises of the channel by the security.

Being unaware of these facts, the first applicant reacted during the live broadcast to the non-appearance of her counterpart by saying "She definitely knew that I would prove that she was a thief... She deliberately did not come here and she will never wash out her guilt...". Upon a complaint by Ms Tymoshenko, the Central Electoral Commission gave an official warning to the first applicant, finding that she had infringed electoral legislation and the principle of the presumption of innocence enshrined in the Constitution of Ukraine. This warning was published in the two official newspapers. The first applicant unsuccessfully challenged this decision before the Supreme Court. Following these events, Ms Tymoshenko instituted defamation proceedings against the first applicant. Seeking to confirm her statements made on television, the first applicant requested the court to obtain from the General Prosecutor's Office and the State Tax Administration copies of the decisions relating to the investigation of the criminal cases pending against Ms Tymoshenko. This request was rejected as irrelevant to the proceedings in question. The court found in part against the first applicant. In particular, it established that Ms Tymoshenko had never been convicted of theft or a similar criminal offence. Thus, the statements of the first applicant violated her right to be presumed innocent. It also found untruthful the first applicant's statement accusing Ms Tymoshenko of deliberate failure to appear for the television debate in question. The court ordered the channel to ensure that Ms Tymoshenko was given 50 seconds of live broadcast in which to correct the statements disseminated about her by the first applicant. It also ruled that the first applicant had to pay for the broadcast. Arguing that the term "thief" was a value judgement, the first applicant appealed, to no avail.

Inadmissible: The warning issued by the Central Electoral Commission, as well as the sanctions imposed by the courts, constituted an interference with the applicant's right to freedom of expression. The interference was "prescribed by law" and pursued the legitimate aim of protecting "the reputation or rights of others". From the materials submitted by the parties, the word "thief" ordinarily suggested involvement in criminal activities and this would most likely be the meaning understood by the public. Therefore, it was not a mere value judgment but an untrue statement of fact. Notwithstanding the particular role played by the first applicant in her capacity as a candidate for election to Parliament and in the context of her political campaign, her criticism of a political opponent had included untrue accusations which entitled the domestic authorities to consider that there were relevant reasons to take action against her. In addition, it should be noted that the applicant had accused Ms Tymoshenko in her absence. Though the event may be considered to have been part of a public debate, there had been no actual heated exchange within a live television broadcast where political leaders may overstep certain limits. In the circumstances of the present case, the decisions of the domestic authorities to issue a warning to be published in the newspapers and to provide Ms Tymoshenko with the opportunity to rebut the accusations in the same forum where they had been made could reasonably be considered to be in line with the principles established in the Court's case-law. It could not be said that the authorities had overstepped their margin of appreciation: *manifestly ill-founded*.

FREEDOM TO RECEIVE INFORMATION

Court decision not to prolong private tenancy agreement owing to refusal by immigrant tenants to remove satellite dish used to receive television programmes from their country of origin: *violation*.

KHURSHID MUSTAFA and TARZIBACHI - Sweden (N° 23883/06)
Judgment 16.12.2008 [Section III]

Facts: The applicants, a married couple of Iraqi origin with three minor children, rented a flat in Stockholm under a private tenancy agreement. The agreement included obligations by the tenant not to install "outdoor antennae and the like" and to maintain "order and good custom". On moving in, the applicants made use of an existing satellite dish in order to receive television programmes in Arabic and Farsi. Following a change of landlord they were instructed to dismantle the dish and, when they failed to do so, were served with a notice terminating the tenancy. Although they took down the existing dish and replaced it with a mobile unit attached to an arm that could be passed through the kitchen window, the landlord issued proceedings. These were dismissed at first instance but on appeal by the landlord a court of appeal held, in accordance with subsection 42-1(2) of the Land Code, that the applicants had neglected

their obligations to such an extent that they had forfeited the right for the tenancy agreement to be prolonged. The landlord offered to allow the applicants to stay if they agreed to remove the satellite dish, but they refused and had to move out. They complained to the European Court of a violation of their freedom to receive information.

Law: (a) *Admissibility*: In response to the Government's argument that the complaint was incompatible *ratione materiae* as the case concerned a contractual dispute between two private parties without any intervention by a public authority giving rise to a positive obligation on the part of the State, the Court noted that the court of appeal had applied and interpreted not only the tenancy agreement but also the relevant domestic legislation and the Constitution. Domestic law, as interpreted in the last resort by the court of appeal, had thus made lawful the treatment of which the applicants complained and their eviction was the result of the court's ruling. The responsibility of the respondent State for any resultant breach of Article 10 could consequently be engaged on that basis.
Conclusion: admissible (unanimously).

(b) *Merits*: Having found that there had been an interference prescribed by law with the legitimate aim of protecting the rights of others, the Court turned to the question of whether that interference had been necessary in a democratic society. The satellite dish had enabled the applicants and their three children to receive television programmes in Arabic and Farsi from their native country and region. That information – which included political and social news and, almost equally importantly, cultural expression and entertainment – was of particular interest to them as an immigrant family who wished to maintain contact with the culture and language of their country of origin. It had not been claimed that the applicants had any other means of receiving such programmes at the time or that they could have placed the satellite dish elsewhere. Nor could news obtained from foreign newspapers and radio programmes in any way be equated with information available via television broadcasts. The landlord's concerns about safety had been examined by the domestic courts, who had found that the installation did not pose any real safety threat. Moreover, the fact that the applicants had effectively been evicted from their home with their three children had been disproportionate to the aim pursued. The interference had not, therefore, been "necessary in a democratic society".
Conclusion: violation (unanimously).

Article 41 – EUR 6,500 in respect of pecuniary damage and EUR 5,000 in respect of non-pecuniary damage.

ARTICLE 34

VICTIM
Insufficient amount of non-pecuniary damage for non-enforcement of final judgment at domestic level: *victim status upheld*.

KUDIĆ - Bosnia and Herzegovina (N° 28971/05)
Judgment 9.12.2008 [Section IV]

Facts: In 1993, the applicants obtained a judgment in their favour ordering the repayment of their "old" foreign-currency savings. Since they were unable to obtain the amounts that had been awarded to them, they subsequently complained to the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina about the prolonged non-enforcement of the 1993 judgment. In April 2005 the Human Rights Commission found a violation of Article 6 of the Convention and of Article 1 of Protocol No. 1 to the Convention arising out of the failure to enforce that judgment, and ordered the Federation of Bosnia and Herzegovina to ensure its full enforcement within two months and to pay the applicants EUR 255 in respect of non-pecuniary damage. The judgment was fully enforced on 5 June 2007.

Law: Article 34 – The Government had submitted that the applicants could no longer claim to be victims since the judgment in issue had been enforced and the Human Rights Commission had acknowledged the alleged breach and awarded compensation. According to the Court's case-law, a decision or measure favourable to the applicant was not sufficient to deprive him of his status as a "victim" unless the national authorities had acknowledged the breach, at least in substance, and afforded appropriate and sufficient redress for it. As already held in length-of-proceedings cases, one of the characteristics of sufficient redress which may remove an applicant's victim status was the amount awarded as a result of using the domestic remedy. Since enforcement proceedings formed an integral part of the "trial" for the purposes of Article 6, the principles developed in the context of length-of-proceedings cases were found to be equally applicable in the situation where an applicant complained of the protracted non-enforcement of a final and enforceable judgment in his or her favour. In the applicants' case, the just satisfaction awarded by the Human Rights Commission was not in reasonable proportion to what the Court would have been likely to award them under Article 41 in respect of the same period and, moreover, had not sped up the enforcement, since the proceedings had continued for more than two years after the Human Rights Commission's decision. In view of the foregoing, the applicants could still claim to be victims of the alleged violations.

Article 6 § 1 and Article 1 of Protocol No. 1 – On account of the lengthy non-enforcement of the judgment in the applicants' case, the Court found violations of their right of access to court and of their right to the peaceful enjoyment of their possessions (compare *Jeličić v. Bosnia and Herzegovina*, no. 41183/02, judgment of 31 October 2006, Information Note no. 90).

Article 41 – EUR 1,300 in respect of non-pecuniary damage.

VICTIM
Association underwriting employees' claims qualified as a non-governmental organisation: *victim status upheld.*

UNÉDIC - France (N° 20153/04)
Judgment 18.12.2008 [Section V]

(See Article 6 § 1 above).

VICTIM
Complaint by severely disabled persons concerning domestic-court decision permitting artificial nutrition and hydration of coma victim to be discontinued: *lack of victim status*.

ADA ROSSI and Others - Italy (N° 55185/08, etc.)
Decision 16.12.2008 [Section II]

The father and guardian of a young woman who had been in a vegetative state for a number of years as a result of a road-traffic accident began court proceedings seeking authorisation to discontinue his daughter's artificial nutrition and hydration, basing his arguments on his daughter's personality and the ideas concerning life and dignity which she had allegedly expressed. In an order of 16 October 2007 remitting the case, the Court of Cassation stated that the judicial authority could authorise the discontinuation of nutrition if the person concerned was in a persistent vegetative state and if there was evidence that, had he been in possession of all his faculties, he would have opposed medical treatment. The Court of Appeal granted the requested authorisation on the basis of those two criteria.
Before the European Court, relying on Articles 2 and 3 of the Convention, the applicants (people with severe disabilities and associations defending the interests of such people) complained of the adverse effects that execution of the Court of Appeal's decision was liable to have on them.

Inadmissible: In principle, it did not suffice for an applicant to claim that the mere existence of a law violated his rights under the Convention; it was necessary that the law should have been applied to his detriment. Furthermore, the exercise of the right of individual petition could not be used to prevent a potential violation of the Convention: only in highly exceptional circumstances could an applicant nevertheless claim to be a victim of a violation of the Convention owing to the risk of a future violation. The applicants had no direct family ties with the young woman. Furthermore, the domestic proceedings of which they criticised the outcome and feared the consequences had not affected them directly, as a decision of the Court of Appeal, by its very nature, concerned only the parties to the proceedings and the facts of the particular case. The applicants could therefore not be considered direct victims of the alleged violations. The question remained whether they could justifiably claim "potential victim" status. In this case the individual applicants had not met the requirement to produce reasonable and convincing evidence of the likelihood that a violation affecting them personally would occur, as the judicial decisions whose effects they feared had been adopted in relation to a specific set of circumstances concerning a third party. If the competent national judicial authorities were called upon to rule on the question of whether the applicants' medical treatment should be continued, they could not disregard either the wishes of the persons concerned as expressed by their guardians – who had adopted a clear position in defence of their relatives' right to life – or the opinions of the medical specialists. Just like the Court of Appeal in this case, the judicial authorities would be bound in their assessment of the facts by the criteria laid down by the Court of Cassation in its judgment of 16 October 2007. Accordingly, the individual applicants could not claim to be victims of a failure by the Italian State to protect their rights under Articles 2 and 3. As to the applicant legal entities, they were not directly affected by the Court of Appeal's decision, which was not actually capable of having any impact on their activities and did not prevent them from pursuing their aims: *incompatibility* ratione personae.

HINDER THE EXERCISE OF THE RIGHT OF PETITION
Lack of medical assistance to an HIV-positive detainee and State's failure to comply with Rule 39 measures in connection therewith: *failure to comply with obligations under Article 34*.

ALEKSANYAN - Russia (N° 46468/06)
Judgment 22.12.2008 [Section I]

(See above, under Article 3).

ARTICLE 37

Article 37 § 1 (c)

CONTINUED EXAMINATION NOT JUSTIFIED
Pursuit of application brought on behalf of a deceased person: *inadmissible for abuse of right of petition (in respect of the deceased's son) and refusal of the Government's strike-out request (in respect of the daughter)*.

PREDESCU - Romania (N° 21447/03)
Judgment 2.12.2008 [Section III]

Facts: By virtue of a 1950 decree on nationalisation the State took possession of a building owned by Maria Predescu ("the owner"). In 1997 the county council concluded a contract of sale with the E. family for the ground floor flat in the building concerned. In 1999 the owner lodged an action for recovery of possession with the first-instance court, seeking the annulment of the contract. Soon after, she died and her attorney continued the proceedings. In 2002 the domestic courts allowed the action in part, considering that the building concerned had been nationalised illegally by the State, and ordered its restitution, except for the flat that had been sold and which the E. family had purchased in good faith.

In 2003 the attorney lodged an application with the Court on behalf of the owner and was appointed by her son to represent them. In 2007, when the Court's registry contacted him about the owner's status, the attorney informed it that she had died in 1999 and that he had not thought it necessary to inform the registry. The owner's son and daughter confirmed that their mother had died and added that they thought the Court had been informed. In 2008 the daughter also stated her wish to continue the proceedings before the Court on her mother's behalf.

Law: *The Government's request for the application to be struck out of the list because the owner of the building in dispute had died*:

(a) *Allowed* in respect of the owner's son: At no time had he informed the Court that his mother had died. Nor had he confirmed that essential fact for the examination of the case until after the Court's registry had requested information about the mother from the attorney; and he had offered no plausible explanation for his failure to do so. The applicant's conduct, which was likely to mislead the Court with regard to an essential element for the examination of the application, was contrary to the purpose of the right of individual petition. That being so, this part of the application was to be declared inadmissible because it was abusive.

(b) *Request for striking out rejected* in respect of the owner's daughter: The daughter's conduct could not be considered to amount to abuse of the right of individual petition, as she had not intervened in the proceedings before the Court, expressing her wish to take over and continue the proceedings in her capacity as her mother's heir, until 2008. In other, similar cases the Court had found that inability to enjoy the benefits of part of a building, the nationalisation of which the courts had found to be illegal, because the State had sold that part of it to third parties, constituted a continuing situation. The Government had offered no proof that any compensation had actually been paid for the flat concerned or at least that it would be paid in the near future. That being so, the application concerned a still continuing situation and a complaint under Article 1 of Protocol No. 1, which the owner's above-mentioned heir could consider affected her personally. The Government, however, alleged that she could not take over an application that had been lodged incorrectly. Nevertheless, it would be rather excessive and artificial to punish Maria Predescu's heir by striking the application out of the list because of the manner in which the attorney had initially lodged it with the Court. The Court accordingly concluded that there was no reason for it to find that the examination of the application was no longer justified within the meaning of Article 37 § 1 c) of the Convention.

Article 1 of Protocol No. 1 – The Court had examined numerous cases that raised issues similar to those raised in this case and found that there had been a violation of Article 1 of Protocol No. 1.
See *Străin and Others v. Romania*, no. 57001/00, 21 July 2005, Information Note no. 77.
Conclusion: violation (unanimously).

ARTICLE 46

EXECUTION OF A JUDGMENT
Obligation on State to take general measures to secure the right to restitution in kind of confiscated land or to an award of compensation in lieu.

VIAŞU - Romania (N° 75951/01)
Judgment 9.12.2008 [Section III]

(See Article 1 of Protocol No. 1 below).

EXECUTION OF A JUDGMENT
Respondent State required to discontinue the applicant's detention on remand.

ALEKSANYAN - Russia (N° 46468/06)
Judgment 22.12.2008 [Section I]

(See above, under Article 3).

ARTICLE 1 OF PROTOCOL No. 1

PEACEFUL ENJOYMENT OF POSSESSIONS
Date of commencement of pension entitlement put back solely on account of time taken by administrative authorities and courts to issue their decisions: *violation*.

REVELIOTIS - Greece (N° 48775/06)
Judgment 4.12.2008 [Section I]

Facts: The applicant, a public servant, was retired in 1982. The Public Accounting Department rejected an application he made in 1999 seeking the readjustment of his pension in accordance with the provisions of a law enacted in 1997. He appealed to the Court of Audit, which allowed his request in 2002, finding that he had the right to a higher pension under the legislation in force and backdating the increase to 1997. When the State appealed, however, the Court of Audit, sitting as a full court, set aside that judgment in part, considering that the increased pension was payable only from 1999. It held that under a presidential decree limiting the retroactive effect of pension claims against the State to three years, that three-year limit should be calculated from the time of publication of the Audit Court's judgment of 2002, as that was the decision which had acknowledged the applicant's right.

Law: The applicant's right to obtain the retroactive payment of his increased pension had been restricted by the way in which the Court of Audit , in interpreting the decree in question, had fixed the starting date for the calculation of entitlement. According to the decree the starting point was the first day of the month in which the ruling or decision concerning the pension was delivered. In the instant case, considering that the term "the ruling or decision concerning the pension" referred to its own judgment, the Court of Audit had decided that the date concerned was the date of publication of its judgment. In the Court's opinion the rule of law required dates of commencement or expiry of rights to be clearly defined and linked to concrete, objective facts, such as the filing of a claim or the lodging of a court action by the interested party. In this case the date from which the applicant was entitled to his increased pension had been determined solely on the basis of the time the authorities and the administrative courts had taken to reach their decisions. Although the applicant had challenged his pension adjustment in 1999, the decision granting his request had not been delivered until three years later. The application of such a criterion seemed rather uncertain and likely to produce contradictory results which were difficult to justify. Furthermore, the Court could not ignore the fact that the Court of Audit had recently held that the practice of calculating the time limit from the date of publication of it judgment in favour of the party concerned was incompatible with the rule of law, several provisions of the Constitution and Article 1 of Protocol No. 1. The Government did suggest that the applicant could obtain compensation for the illegal deprivation of his pension rights by lodging a claim for compensation under the Civil Code. However, the Court did not share that view: a person who had already availed himself of a remedy seeking compensation for the disputed situation directly and not in a roundabout manner should not be required to avail himself of other remedies which were open but were unlikely to be effective. In this case the applicant had challenged the miscalculation of his pension both before the authorities and before the Court of Audit at its different levels, and had obtained a final decision stating that his pension had not been calculated correctly. That being so, he should be under no obligation to take further action in court. Particularly considering that the Government had produced no example of any previous cases in which the parties had been awarded compensation of this kind based on the Civil Code. The Court accordingly

rejected the Government's objection on the grounds of failure to exhaust domestic remedies and held that the way in which the Court of Audit had determined the disputed date for the calculation of the commencement of pension entitlement had infringed the applicant's right to the peaceful enjoyment of his possessions and upset the fair balance that should be struck between the requirements of the general interest and the protection of property.
Conclusion: violation (unanimously).

PEACEFUL ENJOYMENT OF POSSESSIONS
Failure to return land confiscated by the State or to provide equivalent redress: *violation*.

VIAŞU - Romania (N° 75951/01)
Judgment 9.12.2008 [Section III]

Facts: The applicant, now deceased, had owned a piece of land which he had been obliged to transfer to the State in 1962. In 1989 he lodged an action to recover the land, under Law no. 18/191. Part of the land he had owned was returned to him, but the remainder could not be restored because it was being used by a State-run mining company. Law no. 18/191 was amended several times, and in the last instance by Law no. 1/2000. Early in 2000, having still not recovered all of his land, the applicant brought several actions seeking to recover another, equivalent piece of land or to obtain compensation for the part he had not recovered. In June 2000 the municipality informed the applicant that his claim had been allowed and that should no land be available he would be entitled to pecuniary compensation. He was subsequently informed that no land was available. The applicant lodged several requests for compensation, but they were rejected, in particular because no provision had been made concerning the ways and means of paying the compensation provided for in the implementing Act for Law no. 1/2000. Two administrative decisions of 2002 confirmed the applicant's entitlement to compensation from the State.
The applicant applied to the authorities on several occasions to secure effective payment of the compensation. In March 2007 the applicant was informed that the land to which he was entitled might be returned to him before the end of 2007, whereupon his compensation claim against the State would no longer be enforceable. Thus far the land had not been returned and no compensation had been paid.

Law: Article 1 of Protocol No. 1 – The applicant had a "proprietary interest" which was sufficiently established under domestic law, was certain, irrevocable and enforceable, and which fell within the concept of a "possession". The Court had to examine whether the time it had taken the authorities to restore the applicant's land to him or pay him compensation had not placed a disproportionate and excessive burden on him. Several years had passed without the applicant being able to secure the enforcement of the decisions in his favour or any compensation for the land or for the delays. By their conduct the authorities had interfered with the applicant's peaceful enjoyment of his rightful possessions. The organisational difficulties of the competent authorities advanced by the Government as justification were the result of a series of changes to the legislation governing the restitution process. The fact that the changes were ineffective in practice had created a climate of legal uncertainty. As a result, the fair balance that must be struck between the requirements of the general interest and the applicant's right to the peaceful enjoyment of his possessions had been upset and the applicant had had to bear an individual and excessive burden.
Conclusion: violation (unanimously).

Article 46 – The facts of the case revealed the existence of a deficiency in the Romanian legal order as a result of which a whole category of individuals had been or were being deprived of the peaceful enjoyment of their possessions. Referring also to its judgment in the case of *Brumărescu v. Romania* [GC] (no. 28342/95, ECHR 1999-VII), the Court found that there was an accumulation of identical violations which reflected a continuing situation that had still not been remedied and in respect of which litigants had no domestic remedy. Furthermore, over a hundred applications pending before the Court lodged by people affected by the restitution laws could in future give rise to further findings of violations of the Convention. There was no doubt that general measures needed to be taken by Romania in connection with the execution of the present judgment. The respondent State must therefore take the appropriate legal and

administrative measures in order to guarantee effective and rapid implementation of the right to restitution of property or the payment of compensation. These objectives could be achieved, for example, by amending the present restitution procedure, in which the Court has detected certain shortcomings, and setting in place, as a matter of urgency, simpler, effective procedures based on coherent legislative and regulatory measures, capable of striking a fair balance between the various interests at stake.

Article 41 – EUR 115,000 to Mr Viaşu's son in respect of pecuniary and non-pecuniary damage.

RULE 39 OF THE RULES OF COURT

INTERIM MEASURES

Lack of medical assistance to an HIV-positive detainee and State's failure to comply with Rule 39 measures in connection therewith: *violation*.

ALEKSANYAN - Russia (N° 46468/06)
Judgment 22.12.2008 [Section I]

(See above, under Article 3).

Relinquishment in favour of the Grand Chamber

Article 30

SABEH EL LEIL - France (N° 34869/05)
[Section V]

(See Article 6 § 1 above).