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

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State's obligations in respect of deaths arising out of rail accident; lack of effective investigation: *violations*

Kalender v. Turkey - 4314/02
Judgment 15.12.2009 [Section II]

Facts – The applicants are relatives of two people who were killed in a railway accident in 1997. A criminal investigation was opened immediately after the accident and liability was found to be shared between the TCDD (Turkish National Railways) – the safety measures in the station being insufficient – and the victims, who had got off the train on the wrong side and had been attempting to cross the adjacent track by mistake. The train driver was acquitted of manslaughter and the criminal court then requested that a criminal investigation be opened into breaches of safety regulations on the part of the TCDD. However, the requested investigation was never opened. The applicants brought civil proceedings against the TCDD seeking compensation for their pecuniary and non-pecuniary damage. The TCDD, for its part, claimed compensation for the pecuniary damage resulting from the delays caused by the accident. An expert appointed to assess the parties' respective liability concluded that the victims were 60% liable and that the railway company was 40% liable. After bringing enforcement proceedings, the applicants obtained full payment of the corresponding compensation in June 2006.

Law – Article 2: (a) *Substantive aspect* – In their reports on the accident, the court-appointed experts had concluded that both the structure of the station and the manner in which it was run had failed to comply with minimum safety requirements. Although platforms connected by subways were obligatory under the regulations governing the organisation and management of stations, the station had no platforms. In addition, the victims' train had stopped on a central track because the track adjacent to the station building was blocked by an immobilised goods train, so forcing the passengers to cross the track. Passengers on the train had not received any information or assistance from staff on board when getting off. The lighting had been insufficient and there had not been any staff to assist passengers in the station. In those circumstances, it could not be said that imprudent conduct on the part of the victims had been the decisive cause of the accident. Moreover, both the experts' reports and the domestic courts' findings in the compensation proceedings had established a causal link between the failure to comply with the safety regulations and the accident. In view of the significant number and seriousness of the breaches of the safety regulations in this case, the Court found that the authorities had failed to take the most elementary safety measures to protect life and could not validly claim negligence on the part of the victims. The State had thus failed in its positive obligation to implement regulations for the purpose of protecting the lives of passengers.

Conclusion: violation (unanimously).

(b) *Procedural aspect* – The criminal-law remedies available in Turkey at the material time had been part of a system which, in theory, appeared sufficient to ensure the protection of the right to life in the context of hazardous activities. The question remained whether the measures taken in the Turkish criminal-justice system, following the railway accident in which the applicants' relatives were killed, had been satisfactory in practice, taking into account the Convention requirements in such matters. In this connection, the investigating authorities had reacted speedily after the accident. The public prosecutor had opened a criminal investigation *proprio motu* and proceedings had been brought against the train driver for manslaughter. The trial had resulted in the train driver's acquittal and the criminal court had then decided to refer the case to the public prosecutor's office for a criminal investigation into the conduct of the TCDD, in view of the findings in the forensic institute's report of non-compliance with safety regulations. However, the case file showed that the criminal court's request had never been followed up: no such investigation or criminal proceedings were ever opened. The authorities thus did not seem to have paid due attention to the extremely serious consequences of the accident in which two people were killed. The manner in which the Turkish criminal-justice system had operated in response to the tragedy could not therefore be said to have secured the full accountability of State officials or authorities for their role in the accident or to have guaranteed the effective implementation of the provisions of domestic law ensuring respect for the right to life. Accordingly, there had also been a violation of Article 2 under its procedural head, on account of the lack of appropriate protection "by law"

safeguarding the right to life and deterring similar life-endangering conduct in the future.

Conclusion: violation (unanimously).

Article 41: Awards ranging from EUR 25,000 to EUR 35,000 for all heads of damage combined.

Life
Effective investigation

Effectiveness of investigation into murders in which a police officer was implicated: *violation*

Velcea and Mazăre v. Romania - 64301/01
Judgment 1.12.2009 [Section III]

(See Article 8 below, page 26)

Responsibility of judiciary and prosecutors for a double murder committed by a dangerous offender on day release: *violations*

Maiorano and Others v. Italy - 28634/06
Judgment 15.12.2009 [Section II]

Facts – In 1976 one Mr Izzo was sentenced to life imprisonment for the abduction, rape and brutal abuse of two young women and the murder of one of them. In spite of his involvement in numerous incidents in prison, which led to further convictions, in November 2004 the sentence-execution court granted him day release. While on day release he planned and carried out the murder of two women ("the victims") with the help of two accomplices. He was given a further life sentence. In May 2005 the Minister of Justice opened an administrative inquiry to determine whether, on account of the procedure which had led to Mr Izzo being granted day release, the judges of the sentence-execution court were liable to disciplinary penalties. In March 2008 the National Council of the Judiciary issued the judges concerned with a reprimand. In September 2007 the applicants, who are relatives of the victims, filed a criminal complaint against the judges, but the proceedings were discontinued.

Law – Article 2: (a) *Substantive aspect* – At the time Mr Izzo was granted day release it had not been possible to identify the two victims as potential targets of a lethal act on his part. The Court could not *per se* find fault with the arrangements in Italy for the rehabilitation of prisoners, as they afforded sufficient safeguards to ensure the protection of society. However, the question remained whether, in the particular circumstances of the case, the granting of day release to Mr Izzo disclosed a breach of the duty of care imposed by Article 2 in this sphere. The Court could not overlook the various positive indicators which had led to the granting of measures to assist his rehabilitation, in particular the favourable reports by probation officers and psychiatrists. But those had been counterbalanced by many others that should have counselled greater prudence. After being sentenced to life imprisonment for an exceptionally brutal offence, Mr Izzo's behaviour had been far from exemplary. He had shown familiarity with weapons and a propensity to disobey both the law and orders from the authorities. The decision to proceed with the social rehabilitation of an offender such as Mr Izzo had therefore been highly questionable. The Court attached considerable weight to his misconduct after he was granted day release and before he murdered the two victims. In particular, an informant in prison had told a local public prosecutor that Mr Izzo was actively planning a murder and other serious offences. Subsequent investigations had shown that that information had not been considered unfounded. Mr Izzo and his associates had been placed under close surveillance, which had revealed that Mr Izzo was breaching the conditions of his day release. That information represented a cause for great concern and should have been brought to the attention of the sentence-execution court. It had been for that court, not the public prosecutor, to assess whether Mr Izzo's conduct was serious enough to justify a disciplinary penalty or revocation of the order for day-release, having regard to the purpose of that measure as an alternative to imprisonment and balancing Mr Izzo's interest in his gradual social rehabilitation with the need to protect the community. Therefore, the granting of day release to Mr Izzo, together with the failure to forward information to the sentence-execution court about his non-compliance with the conditions, had constituted a breach of the duty of care, arising from the obligation to protect life under Article 2. Accordingly, there had been a violation of Article 2 on account of the sentence-execution court's decision and the failure to seek revocation of the order for day-release in the light of the information from the prison informant and the results of the police investigations.

Conclusion: violation (unanimously).

(b) *Procedural aspect* – In January 2007, one year and eight months after the murders, Mr Izzo was sentenced to life imprisonment and ordered to pay the applicants, as civil parties, an advance on the

amount due in respect of non-pecuniary damage. In those circumstances, the Italian authorities had fulfilled their obligation under Article 2 to guarantee a criminal investigation. It remained to be determined whether the authorities were also under a positive obligation to secure the accountability of the State officials involved. Disciplinary proceedings had been opened against the judges of the sentence-execution court. These had led to a disciplinary penalty by the National Council of the Judiciary in the form of a reprimand. However, that decision had concerned only certain specific aspects of the case. In particular, the National Council of the Judiciary had not addressed the fact that neither the information provided by the prison informant nor the results of the police investigations had been used to consider the possible revocation of the order for day-release – a factor that the Court had found essential in its reasons for finding a substantive violation of Article 2. The applicants had filed a criminal complaint about that omission but it had not been followed up and no disciplinary proceedings had been brought against the authorities concerned. Therefore, the disciplinary proceedings brought by the Minister of Justice had not entirely fulfilled the State's positive obligation to secure the accountability of its officials for their possible role in the matter.

Conclusion: violation (unanimously).

Article 41: EUR 10,000 awarded to the seventh applicant and EUR 5,000 to each of the other six applicants and jointly to the heirs of the eighth applicant, in respect of non-pecuniary damage.

Positive obligations

Suicide during eviction from home by the authorities: *no violation*

Mikayil Mammadov v. Azerbaijan - 4762/05
Judgment 17.12.2009 [Section I]

Facts – The applicant and his family were internally displaced persons who lived in a State-owned hostel. In 2003 they discovered three abandoned rooms owned by the local army-recruitment office and decided to move in. In March 2004 a group of local-authority representatives and police officers came to the property to evict them. They did not have a court order. The police officers started carrying out the furniture and loading it onto a lorry. The applicant's wife, visibly distressed by the arrival of the authorities, threatened to set fire to herself. Shortly afterwards she poured kerosene over herself and set it alight. She was taken to hospital with serious burns and died from complications a few days later. Before the European Court the applicant claimed that the police had not taken his wife's threat seriously and that one of the local-authority representatives had mockingly encouraged her to carry out her threat. The Government denied the accusations, claiming that at least one of the police officers had tried to help the applicant's wife put out the fire with a blanket.

Following the incident, a preliminary inquiry was carried out into the death but in May 2004 the investigator decided not to start criminal proceedings because the inquiry had not established any responsibility on the part of State officials. At the insistence of the applicant, who claimed that the authorities had incited his wife to commit suicide, criminal proceedings were eventually brought in 2005. A number of witnesses were questioned including the applicant's family and officials who had been present at the scene. The investigation was suspended on several occasions for failure to identify the person who had allegedly incited the applicant's wife to commit suicide. It was finally terminated in September 2008.

Law – Article 2: (a) *Substantive aspect* – It was undisputed that the applicant's wife had died as a result of suicide rather than as result of the use of force. However, it was necessary to establish the degree of control the authorities had exercised over the events in question and whether the circumstances of the case as a whole had given rise to positive obligations on the part of the State agents present at the scene to protect the life of the applicant's wife. Irrespective of the lawfulness of their action, by conducting the operation to evict the applicant's family, the authorities could not be considered to have intentionally put the life of the applicant's wife at risk or otherwise caused her to commit suicide. Nor could they have anticipated that the applicant's wife would set herself on fire, since such conduct was not a reasonable or predictable reaction in the context of an attempted eviction from an illegally occupied dwelling. Consequently, the authorities' decision to evict the applicant's family from the dwelling did not, in itself, engage the State's responsibility under Article 2 and there had been insufficient evidence to show that any of the State agents had incited the applicant's wife to commit suicide. However, it was also necessary to establish whether the authorities, once confronted with the unexpected situation during the eviction procedure, ought to have become aware that the applicant's wife posed

a real and immediate risk of suicide and, if so, whether they did all that could reasonably have been expected of them to avert that risk. If the State agents had become aware of such a threat sufficiently in advance, a positive obligation would have arisen under Article 2 requiring them to prevent it from materialising by all reasonable and feasible means. In the applicant's case, given the diverging account of the facts presented by the parties, it had been impossible for the Court to establish with certainty whether the State agents had become aware of the danger in time to prevent the fire or extinguish it as soon as possible. Even though some doubts remained whether responsibility for the death lay at least in part with the authorities, the Court considered them insufficient to establish conclusively that the authorities had acted in a manner incompatible with their positive obligations to guarantee the right to life.

Conclusion: no violation (five votes to two).

(b) *Procedural aspect* – The investigation into the death of the applicant's wife was inadequate as it had not covered all the issues relevant to the assessment of the State's responsibility for the incident. In particular, the investigation had been limited to the question whether the State agents had incited the applicant's wife to commit suicide, while it had never examined whether they had done everything necessary to prevent her death or to minimise her injuries. Moreover, the investigation had been characterised by numerous other shortcomings. Firstly, the authorities had failed to take immediate action or to question the victim before she died. They had not attempted to reconstruct the sequence and duration of the events or to address the discrepancies in the witness statements. Moreover, the domestic investigation had lasted more than four years, having been adjourned and resumed a number of times without any evident progress in its effectiveness and without any substantive improvement in the adequacy of the measures taken. Lastly, by granting the applicant the status of a victim in the criminal proceedings only in June 2006, the authorities had denied him the possibility of effectively intervening in the investigation up to that point.

Conclusion: violation (unanimously).

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

Effective investigation

Delays in investigation into violent crackdown on anticommunist demonstrators prior to the fall of the Romanian regime in December 1989: *violation*

Şandru and Others v. Romania - 22465/03
Judgment 8.12.2009 [Section III]

Facts – On 16 December 1989 demonstrations against the communist regime began in Timişoara. On 17 December 1989, on orders from Nicolae Ceauşescu, President of the Republic, several senior military officers, including two generals, were sent to the city to re-establish order. The violent repression that followed resulted in numerous victims. The first two applicants and the husband of the third applicant, who were taking part in the demonstrations, were seriously injured by gunshots. The brother of the fourth applicant was shot dead. The demonstrations continued until the fall of the communist regime on 22 December 1989. The above-mentioned generals rallied to the new authorities. Shortly after the events of December 1989, an investigation was opened on the authorities' own motion. The proceedings began in January 1990 and ended in October 2008 with the final conviction of those responsible for organising the repression of the anti-communist demonstrations.

Law – Article 2: (a) *Admissibility* – (i) *Applicability*: Given the massive use of lethal force against members of the civilian population demonstrating in Timişoara in 1989, the Court considered that the procedural aspect of Article 2 was applicable with regard to all of the applicants.

(ii) *Victim status*: Although he had taken part in the investigation conducted by the military prosecutor's office, the second applicant had not joined the proceedings before the Supreme Court of Justice as a civil party within the time-limit set by the domestic law. However, while this omission had deprived him of the possibility of being awarded compensation, it did not exonerate the State from its procedural obligation under Article 2 to conduct an effective investigation into the use of lethal force. The applicants who joined the domestic proceedings as civil parties had obtained compensation in respect of pecuniary and non-pecuniary damage. The Court considered, however, that those sums did not remove the applicants' status as victims of a violation, within the meaning of Article 34 of the Convention as, firstly, the awards had not been the result of a friendly settlement accepted by the applicants and, secondly, there could only be loss of "victim" status if the national authorities had acknowledged, explicitly or in substance, the violation of the Convention

and then provided reparation for it. In the instant case, the amounts in question had not been intended to provide reparation for the inconvenience and uncertainty resulting from the manner in which the investigation was conducted, but to compensate the applicants for the pecuniary losses sustained on account of the breach of their own or their relatives' physical integrity and to compensate for the non-pecuniary damage arising directly from that breach. In addition, at no point did the national authorities acknowledge, explicitly or in substance, any shortcoming in the investigation. Accordingly, the Court held that, notwithstanding the awards of damages, the applicants could claim to be victims with regard to the complaint under the procedural aspect of Article 2 of the Convention.

(b) *Merits* – The Court would therefore limit itself to examining whether the investigation had been effective in relation to its duration. Its jurisdiction *ratione temporis* permitted it to take into consideration only the period of fourteen years and four months since 20 June 1994, the date on which the Convention entered into force in respect of Romania. In 1994 the case was still pending before the military court, where no investigative measure appeared to have been taken since April 1990. The finding in March 1996 that there was no case to answer was also set aside a year and a half later. The investigation had been assigned to military prosecutors who, like the accused, were servicemen and subject to the principle of subordination to their hierarchy and therefore to the accused themselves, who had been Ministers of Defence and of the Interior between 1990 and 1991. The proceedings which took place before the domestic courts continued until November 1998 before the Military Division of the Supreme Court of Justice. In spite of the large number of hearings, the proceedings were marked by repeated adjournments for procedural defects concerning, in particular, the summoning of the parties and the composition of the judicial bench, and long delays between hearings that could not be entirely justified by judicial vacations and examination of the constitutional complaint. The applicants' conduct had not contributed in any significant way to the prolongation of the total length of the proceedings. The first set of proceedings had ended with the final judgment of the Supreme Court of Justice in February 2000. However, the proceedings as a whole were subsequently invalidated by the intervention of the Prosecutor-General, who applied to have the judgment set aside in favour of the convicted men, thus delaying final resolution of the case for a further eight years, whereas it had already been delayed by the total inactivity of the prosecutor's office between April 1990 and March 1996. Although the European Court did not have jurisdiction to comment on the merits of the Prosecutor-General's intervention and, more generally, on the manner in which the domestic courts had interpreted and applied the domestic law, it was clear that the prosecution service's inactivity and the setting aside of the above-mentioned judgment had contributed decisively to the further delays in the proceedings. In this regard, it was for the State to organise its judicial system in such a way as to enable its courts to comply with the requirements of the Convention, particularly those enshrined in the procedural obligation under Article 2. Finally, while the Court recognised the undoubted complexity of the case, it considered that the political and social stakes relied on by the Government could not justify the length of the investigation. On the contrary, its importance for Romanian society ought to have prompted the domestic authorities to deal with the case speedily and without unnecessary delay, in order to prevent any appearance of tolerance of or collusion in unlawful acts. In the light of the above considerations, the national authorities had not acted with the degree of diligence required under Article 2.

Conclusion: violation (unanimously).

Article 41: EUR 5,000 to each of the applicants in respect of non-pecuniary damage.

Inadequate investigation into suicide committed during eviction from home by the authorities: *violation*

Mikayil Mammadov v. Azerbaijan - 4762/05
Judgment 17.12.2009 [Section I]

(See above, page 11)

ARTICLE 3

Torture
Inhuman or degrading treatment
Expulsion

Deportation to Algeria of a person convicted in France of terrorist offences: *deportation would constitute violation*

Daoudi v. France - 19576/08
Judgment 3.12.2009 [Section V]

Facts – The applicant is currently subject to a compulsory residence order in France. He arrived in France in 1979 with his parents, went to school there and later worked there as a computer engineer. He acquired French nationality by naturalisation in January 2001. Between 1999 and 2001 he allegedly developed close contacts with radical Islamist groups and admitted, among other things, that he had attended a paramilitary training course in Afghanistan in 2001. In September 2001 the applicant was arrested during an operation to dismantle a radical Islamist group allegedly affiliated to al-Qaeda. He was suspected of having prepared a suicide attack on the United States Embassy in Paris. He was charged with, among other things, conspiracy to prepare an act of terrorism. In 2002 he was stripped of his French nationality. In 2005 the *tribunal de grande instance* found him guilty as charged, sentenced him to nine years' imprisonment and ordered his permanent exclusion from French territory. The Court of Appeal upheld the judgment but reduced the sentence to six years' imprisonment.

In 2008 the applicant applied to have the order permanently excluding him from French territory lifted. On his release he was taken to an administrative detention centre, where he immediately applied for asylum, contested the administrative decision stipulating that he was to be deported to Algeria and sought to have the measure against him stayed. On the same day the European Court, to which the applicant had applied for an interim measure under Rule 39 of the Rules of Court, indicated to the French Government that it would be advisable not to deport the applicant to Algeria pending the outcome of the proceedings before it. Four days later he was made the subject of a compulsory residence order in France. The applicant's applications and appeals were subsequently dismissed. An appeal on points of law against a decision of the National Court of Asylum is pending before the *Conseil d'Etat*.

Law – Article 3: With regard to the situation in Algeria, the Court had regard first of all to reports of the United Nations Committee against Torture and of a number of non-governmental organisations describing a worrying situation. Those conclusions were reflected in, among other sources, reports of the US Department of State and the UK Ministry of the Interior. Whilst those reports found that there had been a significant improvement as far as general security in Algeria was concerned, they nonetheless pointed to numerous instances of arrests by officers of the Security Services (or DRS), in particular of persons suspected of involvement in international terrorism. According to the aforementioned sources, such persons, who were detained without any review by the judicial authorities or any communication with the outside, could be subjected to ill-treatment including torture. The practices complained of, apparently committed with impunity mainly with a view to extracting confessions and information subsequently used as evidence by the courts, included repeated interrogations at all times of day or night, threats, blows, electric shocks, forced ingestion of large quantities of dirty water, urine or chemicals, and the suspension of detainees by their arms from the ceiling. Such practices undoubtedly reached the level proscribed by Article 3. With regard to the frequency of the ill-treatment described, there was no evidence that the practices had ceased or even abated in Algeria with regard to persons suspected of acts of terrorism. Having regard to the authority and reputation of the authors of the above-mentioned reports, the many corroborative and reliable sources of information, the thorough nature of the investigations – undertaken recently – and the factual evidence on which they were based, the Court had no cause to doubt the reliability of the evidence thus gathered.

The applicant had been convicted of conspiring to prepare a terrorist attack in September 2001, by a group affiliated to al-Qaeda. The attack was profoundly symbolic because American interests in France had been directly targeted. The applicant's conviction, imposed at first instance and upheld on appeal, had been the subject of two extensively reasoned and detailed judicial decisions that had been made public. Furthermore, both the domestic proceedings and part of the proceedings before the Court (interim measure and admissibility) had attracted international media attention. Above all, during the deportation proceedings commenced in April 2008, the French authorities had applied to the Algerian Consulate General to arrange a hearing of the applicant and had provided an information note indicating his civil status, the offence of which he had been convicted and a copy of his Algerian passport. That information had subsequently been validated by diplomatic contacts. The applicant was therefore well known to the Algerian authorities, as were the reasons for his conviction. Admittedly, there was no evidence that a warrant was out for the applicant's arrest or

that he had been convicted by the Algerian authorities; nor did the Algerian legal system provide that a person could be tried twice for the same offence. However, those factors were not decisive in the present case. Indeed, it was clear from the above-mentioned reports that persons suspected of involvement in terrorist-related offences were arrested and detained by the DRS in unforeseeable circumstances and without clearly established legal grounds, mainly for the purposes of being interrogated to obtain information, rather than in the furtherance of a judicial aim. Persons detained by the DRS did not have the benefit of adequate judicial safeguards and the fact of having already been convicted abroad did not in any way rule out the risk of being arrested in Algeria. In that connection, even if, in the light of the examples given by the parties, systematic arrests by the DRS of persons involved in terrorist activities did not appear to have been established, particularly regarding the applicant's co-accused at the trial in France, the Court found particularly significant the fact that a number of reliable sources referred to many cases of this type and reported secret detentions that had lasted several months. It did not appear possible to monitor developments in the country. There was no control system in place to ensure that detainees would not be tortured in secret centres inaccessible to anyone, and it would appear that if the applicant was placed in such conditions, he would be unable to submit to the domestic or international courts any complaints he might raise as to the treatment to which he was subjected. Furthermore, and the parties did not dispute this, the amnesty provided for by the Algerian Charter for Peace and National Reconciliation was not applicable to the applicant.

For all the foregoing reasons, and having particular regard to the profile of the applicant, who was not only suspected of links with terrorism but had been convicted of a serious offence in France of which the Algerian authorities were aware, the Court found that it was likely that, were he to be deported to Algeria, he would become a target for the DRS. It pointed out, moreover, that having regard to the nature and degree of the applicant's involvement in radical Islamist networks, the National Court of Asylum had considered it reasonable to believe that, on account of the Algerian security services' interest in the applicant, the latter might, on his arrival in Algeria, be subjected to methods or procedures capable of being regarded as inhuman or degrading treatment. Accordingly, in the particular circumstances of the case, there were substantial grounds for concluding that there was a real risk that the applicant would be subjected to treatment contrary to Article 3 if he were deported to Algeria.

Conclusion: violation of Article 3 in the event of implementation of the decision to deport the applicant to Algeria (unanimously).

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

Inhuman or degrading treatment
Effective investigation

Ill-treatment in police custody and lack of effective response by authorities: *violations*

Yusuf Gezer v. Turkey - 21790/04
Judgment 1.12.2009 [Section II]

Facts – The applicant was arrested in 2001 on suspicion of murder and was taken into police custody. In the assize court he denied the charges against him and alleged that he had been tortured while in police custody. In 2002 the assize court sentenced him to life imprisonment. The judgment was upheld by the Court of Cassation. Meanwhile, in 2003, the applicant lodged a complaint against the officers in charge during his police custody and applied for leave to intervene in the proceedings. The public prosecutor sought the officers' conviction for inflicting ill-treatment with a view to obtaining a confession. The assize court acquitted the police officers for lack of tangible evidence against them. The applicant did not appeal against that decision to the Court of Cassation.

Law – Article 3: (a) *Admissibility* – Regarding the alleged failure to exhaust the remedy before the Court of Cassation, the Court remained of the view that, in practice, an appeal on points of law would not have enabled the applicant to clarify or improve the evidence already in the case file concerning his complaint, nor could it have altered significantly the outcome of either the investigation or the criminal proceedings. It therefore dismissed this objection.

Conclusion: preliminary objection dismissed (majority).

(b) *Merits* – (i) *Substantive aspect*: The medical examination carried out on the applicant after his arrest had not recorded any injuries. The applicant had been examined by a doctor at the end of his detention in police custody and had complained of being beaten. His account was corroborated by

the medical report on that examination, which mentioned multiple bruises and linear abrasions to his chest and back. Accordingly, in the absence of a plausible explanation from the Government, responsibility for the applicant's injuries lay with the respondent State. There had therefore been a violation of Article 3 in its substantive aspect.

(ii) *Procedural aspect*: As to whether the authorities had responded effectively to the applicant's allegations of ill-treatment, the Court observed that, as far back as 19 July 2001, the former had had sufficiently precise indications of ill-treatment in the form of a complaint to that effect corroborated by medical evidence dated 22 April 2001. However, they had taken no action until 19 April 2004, that is, approximately three years after the events, when they had commenced a prosecution, and then only after the applicant had lodged a complaint. Accordingly, there had been a violation of Article 3 in its procedural aspect also.

Conclusion: violations (six votes to one).

Article 6: The applicant had been interrogated by police officers from the Security Directorate during his four days in police custody. During that time, and without his lawyer being present, he had made several self-incriminating statements which had subsequently formed part of the evidence on which the assize court based its decision to convict. It was sufficient for the European Court to observe that the establishment of the facts by the criminal courts had been based in part on statements obtained from the applicant as a result of ill-treatment. Consequently, the procedural guarantees provided in the instant case had not prevented use being made of confessions obtained under duress. Given that the Court of Cassation had not remedied that defect, the European Court ruled that the result required by Article 6 had not been achieved in the proceedings in question.

Conclusion: violation (six votes to one).

Article 41: A retrial in compliance with the requirements of Article 6 § 1 of the Convention considered the most appropriate form of redress, if requested by the applicant.

Inhuman treatment
Positive obligations
Effective investigation

Failure by police officers and hospital to provide adequate assistance to the unconscious victim of an assault and lack of effective investigation: *violations*

Denis Vasilyev v. Russia - 32704/04
Judgment 17.12.2009 [Section I]

Facts – The applicant and a school friend were robbed late at night after receiving heavy blows to the head from behind that left them unconscious. The police were called and two officers attended the scene. They stated in their report that they had dragged the applicant and his friend from the road and had instructed the police station to call an ambulance or a sobering-up centre. They had then been called away by a private security coordinator to check a property where an alarm had gone off. Several hours later the applicant and his friend were found, still unconscious, by janitors, who called an ambulance. On arriving at the hospital, the applicant was diagnosed with alcohol intoxication. Two hours later he was seen by a neurosurgeon, but was then left, undressed and still unconscious, on a trolley in a hospital corridor for almost thirty-two hours before being admitted for emergency surgery to the skull. A week later a private doctor who had been retained by the applicant's mother diagnosed the applicant's condition as life-threatening and the applicant was transferred in a coma to a military hospital, where he underwent various other surgical procedures. He was later recognised as suffering from second-degree disability. A criminal investigation into the initial assault had not, by the date of the European Court's judgment, succeeded in identifying the applicant's assailant. In separate proceedings, the two police officers who had attended the scene were acquitted of any wrongdoing, notably on the grounds that they could not have been aware that the applicant's condition was life-threatening. Criminal proceedings for alleged negligence on the part of the hospital to which the applicant was first admitted were repeatedly discontinued and restarted in the face of conflicting evidence from two panels of forensic experts appointed to examine the case.

Law – Article 3: (a) *Investigation into the attack on the applicant* – Very serious shortcomings in the investigation of the initial incident, with significant delays and a failure to take important steps, meant that it had not been effective.

Conclusion: violation (unanimously).

(b) *Alleged failure to render assistance* – The matter had been within the control of the authorities from the moment the police officers arrived at the scene and found the applicant lying on the ground. He was clearly in a vulnerable and life-threatening position and the officers could not have "erred in

good faith" as to the gravity of his condition. The authorities had thus been under an obligation to protect him from further harm. However, owing to a vicious circle of shifted responsibility and multiple failings the applicant had remained unconscious on the ground for another six or seven hours before being discovered by janitors. The officers who attended the scene had manifestly disregarded domestic regulations in that they had failed to examine the applicant with a view to determining the gravity of his condition or the nature of the assistance he required, had not called an ambulance or medical help, and had moved the applicant despite suspected head injuries. It was also incongruous that they should have left the applicant on the instructions of a private-security coordinator, whose orders had taken precedence over those of the duty officer at the police station. The arrangements in place had effectively meant that the protection of private property had taken precedence over the protection of the applicant's life. There had also been manifest procedural breaches at the police station, with the duty officer not being informed about the incident because he had allowed himself to be replaced by an unauthorised officer who had not followed the established procedure for processing patrol reports. In sum, the authorities' failure to take requisite measures to prevent harm to the applicant had amounted to inhuman treatment.

Conclusion: violation (unanimously).

(c) *Investigation into the failure to render assistance* – The investigation into the applicant's allegations that he had been abandoned by the police could not be considered effective, as it was not started until six months after the incident and failed to examine the conduct of the duty officer at the police station; moreover, the applicant's procedural rights had not been secured and the proceedings had lacked a solid evidential and factual basis.

Conclusion: violation (unanimously).

(d) *Alleged medical negligence* – Faced with the contradictory findings of the two panels of forensic experts who had examined the adequacy of the applicant's medical care at the hospital, the Court decided to accept those of the first panel, which, in contrast to the second, had prepared its report on the basis of the original medical records and was wholly independent of both the hospital and the investigative authority. According to the first panel's report, the applicant had been admitted to hospital in a particularly serious condition which called for heightened medical attention and immediate examination by a neurosurgeon, toxicologist and other specialist doctors. However, the hospital personnel had failed to implement even the most basic procedures. The description of the applicant's condition and of the nature and extent of his injuries was cursory and incomplete; the diagnosis of alcohol intoxication was not based on blood or urine tests and, despite the potentially lethal alcohol concentration, no disintoxication treatment was prescribed or administered. The applicant was not seen by a neurosurgeon until two hours after his admission and was essentially left unattended for thirty-two hours. The procrastination in administering appropriate treatment and the failure to examine the applicant properly upon his admission had caused serious deterioration in his condition, including irreversible brain changes so severe as to require emergency surgery to save his life. Subsequent failings had led to multiple inflammations of the post-operative wounds and osteomyelitis of the skull. Although the experts considered it impossible to determine whether the applicant's health problems were due to a decisive extent to the defective medical care or to the original trauma, they concurred that the grave failings on the part of the hospital personnel had "contributed to an unfavourable outcome". In the light of those findings, which had not been refuted by the Government, the Court found that the medical care administered to the applicant at the hospital was inadequate.

Conclusion: violation (unanimously).

(e) *Investigation into the alleged medical negligence* – There had been very serious shortcomings in this investigation too. The authorities had been responsible for the delays in instituting the criminal proceedings and had failed to act promptly and of their own motion, essentially leaving the matter to be dealt with by the applicant's relatives. The manner in which the investigation had been conducted indicated a desire to dispose of the matter, with the case being shuttled between authorities and investigators who had routinely attempted to stall the proceedings on ostensibly procedural grounds. A crucial piece of evidence, namely the applicant's original medical record from the hospital, had been lost and the applicant had only been recognised as having victim status some two and a half years after the institution of the criminal proceedings. Accordingly, this investigation had been ineffective also.

Conclusion: violation (unanimously).

Article 41: EUR 75,000 in respect of pecuniary damage and EUR 78,000 in respect of non-pecuniary damage.

ARTICLE 5

Article 5 § 1

Deprivation of liberty
Lawful arrest or detention

Applicant's continued placement in preventive detention beyond the maximum period authorised at the time of his placement: *violation*

M. v. Germany - 19359/04
Judgment 17.12.2009 [Section V]

Facts – In 1986 the applicant was convicted of attempted murder and robbery and sentenced to five years' imprisonment. In addition, the trial court ordered his placement in preventive detention, a measure considered necessary in view of the applicant's strong propensity to commit offences which seriously damaged his victims' physical integrity. He had already been convicted and imprisoned on numerous occasions, notably for attempted murder, theft, assault and blackmail. In the court's opinion, he was liable to commit spontaneous acts of violence and was a danger to the public. The applicant finished serving his prison sentence in August 1991 and has been in preventive detention ever since. In April 2001 a court refused to release him on licence and ordered that he be kept in preventive detention beyond 8 September 2001, the date the maximum ten-year period previously authorised for such detention was due to expire. In making that order the court applied the Criminal Code as amended by a law which had entered into force in January 1998. It stated that the amended provision was applicable also to prisoners who had been placed in preventive detention prior to the law's entry into force and added that, on account of the gravity of the applicant's criminal record and the likelihood of his committing further offences, his continued placement in preventive detention was not disproportionate. The court of appeal confirmed that the applicant's dangerousness necessitated his continued preventive detention and added that such detention was not contrary to the prohibition of retrospective provisions in the criminal law. The applicant lodged an unsuccessful constitutional complaint. The Federal Constitutional Court held, in particular, that the abolition of the maximum period of detention, and the application of this measure to criminals who had been placed in preventive detention prior to the entry into force of the new legislation and had not yet finished serving their sentences, were compatible with the Constitution. It also considered that the retrospective application of the amended provision of the Criminal Code was not disproportionate.

Law – Article 5 § 1: The Court confirmed that the applicant's preventive detention before the expiry of the ten-year period had resulted from his "conviction" by the sentencing court in 1986 and was therefore covered by Article 5 § 1 (a). The Court, however, found that there was no sufficient causal connection between his conviction and his continued deprivation of liberty beyond the period of ten years in preventive detention, which had been made possible only by the subsequent change in the law in 1998. The applicant's continued detention had been justified by the courts responsible for the execution of sentences with reference to the risk that the applicant might commit further serious offences – similar to those of which he had previously been convicted – if released. These potential further offences were not, however, sufficiently concrete and specific, as required by the Court's case-law as regards the place and time of their commission and the victims, and did not, therefore, fall within the ambit of Article 5 § 1 (c). The domestic courts had not based their decisions to further detain the applicant on the ground that he was of unsound mind. Therefore, his detention could not be justified under Article 5 § 1 (e) either. In sum, the applicant's preventive detention beyond the ten-year period had not been justified under any of the sub-paragraphs of Article 5 § 1.

Conclusion: violation (unanimously).

Article 7 § 1: The Court had to determine whether the applicant's preventive detention constituted a "penalty" within the meaning of this provision. Under German law, such a measure was not considered a penalty to which the absolute ban on retrospective punishment applied, but rather a measure of correction and prevention aimed at protecting the public from a dangerous offender. However, just like a prison sentence, preventive detention entailed a deprivation of liberty. Persons subject to preventive detention were detained in ordinary prisons, albeit in separate wings. Minor alterations to the detention regime compared to that of an ordinary prisoner serving his sentence, including privileges such as detainees' right to wear their own clothes and to further equip their more comfortable prison cells, could not mask the fact that there was no substantial difference between the execution of a prison sentence and that of a preventive-detention order. There was currently no

sufficient psychological support specifically aimed at prisoners in preventive detention to secure the prevention of offences by the persons concerned. The Court could not therefore subscribe to the Government's argument that preventive detention served a purely preventive, and no punitive, purpose. Pursuant to the Criminal Code, preventive-detention orders could be made only against persons who had repeatedly been found guilty of criminal offences of a certain gravity. Given its unlimited duration, preventive detention might well be understood as constituting an additional punishment and entailed a clear deterrent element. Courts belonging to the criminal-justice system were involved in making and implementing orders for preventive detention. The suspension of preventive detention on probation was subject to a court's finding that there was no danger that the detainee would commit further serious offences, a condition which could be difficult to fulfil. This measure appeared, therefore, to be among the most severe – if not the most severe – which could be imposed under the German Criminal Code. In view of the foregoing, the Court concluded that preventive detention under the German Criminal Code was to be qualified as a "penalty" for the purposes of Article 7 § 1 of the Convention. The Court was further unconvinced by the Government's argument that the extension of the applicant's detention merely concerned the execution of the penalty imposed on the applicant by the sentencing court. Given that at the time the applicant committed the offence he could have been kept in preventive detention only for a maximum of ten years, the extension had constituted an additional penalty which had been imposed on him retrospectively, under a law enacted after he had committed his offence.

Conclusion: violation (unanimously).

Article 41: EUR 50,000 in respect of non-pecuniary damage.

ARTICLE 6

Article 6 § 1 (civil)

Oral hearing

Lack of an oral hearing before a tribunal sitting at first and last instance: *violation*

Koottummel v. Austria - 49616/06
Judgment 10.12.2009 [Section I]

Facts – The applicant requested a work permit for a foreign national she wished to employ in her restaurant, but her request was refused by an administrative authority. She appealed to the administrative court and requested an oral hearing. The administrative court dismissed her complaint and held that an oral hearing would not have been likely to help clarify her case.

Law – Article 6 § 1: The administrative court which decided the applicant's appeal was the first and only tribunal to deal with her case. She had therefore been entitled, as a matter of principle, to a public oral hearing. The Court could not find that the subject matter of the impugned proceedings was of such a nature, namely highly technical or purely legal, as to dispense with the obligation to hold a hearing.

Conclusion: violation (unanimously).

Article 41: Claim in respect of pecuniary damage dismissed.

Independent and impartial tribunal

Impartiality of a court whose president had previously filed a criminal complaint against the applicant: *no violation*

Parlov-Tkalčić v. Croatia - 24810/06
Judgment 22.12.2009 [Section I]

Facts – In 1992 the applicant brought an action in damages against an insurance company. The first-instance court found in the applicant's favour and she collected the amount awarded to her. In March 1993 that judgment was rectified since it contained a clerical error, as a result of which the applicant had received a higher amount of interest than she had been entitled to. In September 1993 Judge M.M., who had at that time served as the president of the first-instance court which had decided the applicant's case, filed a criminal complaint against the applicant considering that in refusing to return the unlawfully obtained amount she had committed a criminal offence. The criminal charges against the applicant were eventually dropped. Meanwhile, in August 1993, the insurance company brought a civil action against the applicant for unjust enrichment seeking to recover the overpaid interest. The first-instance court decided in favour of the insurance company, and the applicant appealed. At the same time she lodged a request for a transfer of jurisdiction, since Judge M.M. had meanwhile become president of the appeal court which, in her view, could not, therefore, be regarded as an

impartial tribunal. The Supreme Court dismissed the applicant's request holding that the circumstances described could not cast doubt on the professional and objective examination of her appeal. The applicant's appeal, as well as her subsequent constitutional complaint, were eventually dismissed as ill-founded.

Law – Article 6 § 1: The Court noted that Judge M.M. had not sat on the panel of judges which decided the applicant's appeal, nor had the applicant adduced any evidence to indicate personal bias on the part of any of the judges in that panel. Instead, she had questioned the appeal court's impartiality on the ground that its president had previously filed a criminal complaint against her based on the same facts as those on which the insurance company had based its action for unjust enrichment. The Court was thus called upon to determine whether in the circumstances the president of the appeal court could have compromised the impartiality of the entire tribunal. Judge M.M. had no personal interest in either the criminal or civil proceedings against the applicant. He had filed a criminal complaint in his official capacity as the president of the first-instance court pursuant to the relevant provisions of the Criminal Procedure Act, rather than in his own name. Moreover, more than seven years had elapsed between the filing of that complaint and the lodging of the applicant's appeal. However, given that the concept of objective impartiality was closely linked to that of independence and that the absence of sufficient safeguards securing the independence of judges within the judiciary, in particular, *vis-à-vis* their judicial superiors could give rise to an issue of partiality, the Court had to examine whether the judges who had actually decided the applicant's appeal were sufficiently independent of the court president. Under Croatian law court presidents performed only administrative functions, which were strictly separated from judicial functions. Judge M.M. could not therefore have taken advantage of his hierarchical position to give the rapporteur or other members of the panel instructions as to how to decide the applicant's appeal. Furthermore, domestic law provided clear rules governing the distribution of cases to judges within courts, which meant that Judge M.M. was unable to influence the choice of the judge rapporteur or the composition of the panel hearing the applicant's appeal. Lastly, even though under domestic law at the material time the president of a court played a role in the career advancement and discipline of judges, his powers were rather limited. On the whole, Croatian law at the material time had adequate mechanisms to prevent improper interference within the judiciary and the powers vested in the court presidents could not have reasonably been viewed as having a "chilling" effect on the judges.

Conclusion: no violation (five votes to two).

Article 6 § 1 (criminal)

Applicability
Access to court

Inability of a parliamentarian to have his parliamentary immunity lifted to enable him to defend himself in criminal proceedings: *Article 6 § 1 applicable; no violation*

Kart v. Turkey - 8917/05
Judgment 3.12.2009 [GC]

Facts – In the course of his professional activities as a lawyer, two sets of criminal proceedings were brought against the applicant. Subsequently, in 2002, he was then elected to the Grand National Assembly of Turkey, where he enjoyed parliamentary immunity. The National Assembly's joint committee was asked to lift the applicant's immunity, but decided to stay the criminal proceedings against him until the end of his term of parliamentary office, and transmitted that decision to the plenary Assembly of the National Assembly. The applicant objected, arguing that he had the right to be judged in a fair trial, but to no avail. He was elected to Parliament for a second term in 2007 and the files concerning his request to waive his parliamentary immunity remained pending before the parliamentary body.

In a judgment of 8 July 2008 (see Information Note no. 110), a Chamber of the Court found a violation of Article 6 § 1 of the Convention.

Law – Article 6 § 1: a) *Applicability* – A person's situation was necessarily affected when criminal accusations remained pending against him for a long period. There was no doubt that what was at issue in this case was the applicant's right to have his case heard within a reasonable time. It had therefore to be concluded that Article 6 § 1 was applicable.

b) *Compliance* – It was in relation to the need to preserve the institutional purpose of parliamentary inviolability that the effect on the applicant's rights of the manner in which inviolability had been applied in his case had to be examined: the less the

measure served to protect the integrity of Parliament, the more compelling its justification had to be. Decisions whether or not to lift immunity indubitably fell within the margin of appreciation of the States. In order to make sure that the rule of law had been respected, the first step was to examine the institutional configuration of the system of parliamentary inviolability in Turkish law and the conditions of its implementation. It was true that the inviolability enjoyed by Turkish MPs appeared to be broader in many respects than that enjoyed by MPs in certain other member States. However, the scope of the protection afforded could not be deemed excessive in itself. It was relative; it was limited to the duration of the MP's term, and it was subject to an exception, in that it could be lifted. It applied only to criminal matters. It did not apply in certain cases of *flagrante delicto* or specific crimes against the regime or the State. Furthermore, while the scope of parliamentary inviolability in Turkey was more broadly defined, it did not seem to be at odds with the solutions adopted in most European parliamentary systems. In the present case it had clearly had the effect of preventing criminal proceedings against the applicant from taking their full course. However, the applicant's interest in this respect was to be weighed against his right to a court and not against any right to have his immunity lifted at his request. Such decisions were a matter for the internal proceedings of Parliament and therefore fell within that body's sphere of competence alone. The Court's role was to examine whether the parliamentary procedure followed was compatible with the rights guaranteed by the Convention. The parliamentary procedure for examining requests to lift immunity was defined and regulated by the Constitution and the Rules of Procedure of the National Assembly, which laid down the procedure to follow. That procedure appeared to be subject to certain formalities which secured respect for the rights of the defence at every stage of the decision-making process and a right of appeal against the decisions taken by the relevant parliamentary bodies. Indeed the applicant had had the possibility of exercising the rights thus guaranteed by filing an objection to the decisions to suspend the criminal proceedings against him. Furthermore, the machinery for implementing parliamentary liability by a decision to lift or not to lift immunity was one of the ways in which Parliament exercised its autonomy. Such decisions were political decisions by nature and not court decisions, so they could not be expected to satisfy the same criteria as court decisions when it came to giving reasons. Moreover, there had been a constant trend in the practice of the parliamentary bodies concerned since the election of the 22nd Parliament not to grant any request to lift an MP's immunity. The procedure followed here seemed to have been devoid of any discriminatory or arbitrary character. Also, while the examination of the requests by the relevant parliamentary committees was limited in time by predefined deadlines, that was not the case once they had been transferred to the plenary Assembly. In the present case the Court could not ignore the fact that the applicant had had criminal accusations hanging over him for over six years, and the situation could remain the same until he ceased to be a Member of Parliament. There was therefore no denying that the uncertainty inherent in any criminal proceedings had been accentuated in this case by the impugned parliamentary procedure, as the delays it had caused had resulted in equivalent delays in the criminal proceedings. However, while the Chamber had found such a delay to be prejudicial to the applicant, the Grand Chamber was unable to ignore the special nature of the applicant's status and the specificity of the impugned procedure: the connection between an MP's parliamentary immunity and his status was a fundamental aspect of the matter at issue. The criminal proceedings at the origin of the applicant's complaint had been brought against him prior to his election to Parliament. As a lawyer he could not have been unaware of the consequences his election would have on the proceedings in question, namely that he would not be able to waive his inviolability or have it lifted merely at his request. Having regard to the unusual nature of the complaint, in which immunity was perceived not as an advantage for the beneficiary but as a disadvantage linked to parliamentary office, the Court found that the degree of prejudice suffered was also a factor to be taken into account in determining the impact of the delay, inherent in MP status, on the applicant's right to have his case heard by a court. It was important when assessing any prejudice suffered by the applicant to bear in mind that the impugned delay was the time taken by the parliamentary procedure for examining requests for the lifting of immunity and not the time taken to complete criminal proceedings as such. There was no reason in this case to consider that the applicant would not be able to have a fair trial when he ceased to be an MP. The parliamentary procedure did not appear to have adversely affected that possibility in any way, particularly as it had not affected the presumption of innocence to which all accused persons were entitled. Sight should not be lost here of the fact that the decisions taken by parliamentary bodies in this connection

served no penal or repressive purpose but were aimed in principle – as the lifting of immunity was generally refused – at protecting MPs rather than harming them. In the present case, not only was the obstruction to criminal proceedings as a result of parliamentary inviolability only temporary, but in principle Parliament did not intervene at all in the course of justice as such. In this case, when examining the applicant's request to lift his immunity Parliament seemed only to have considered whether inviolability, as a temporary obstacle to judicial action, should be lifted immediately or whether it was preferable to wait until the end of the applicant's term in Parliament. The effect had thus merely been to suspend the course of justice, without influencing it or taking part in it. As to the applicant's allegations that the proceedings against him had tarnished his reputation, it was in the very nature of this form of prejudice to manifest itself as soon as an official accusation was lodged. In this case, however, there was no doubt that the applicant's honour and reputation had been protected by the principle of the presumption of innocence.

In the light of the above, the Court considered that while the delay inherent in the parliamentary procedure had affected the applicant's right to have his case heard by a court, in delaying the proceedings it had not, in the instant case, impaired the very essence of that right. As it was limited in time and covered by special rules concerning, *inter alia*, the suspension of the running of time for the purposes of limitation, the impugned immunity merely constituted a temporary procedural obstacle to the criminal proceedings, by no means depriving the applicant of the possibility of having his case tried on the merits. With regard to the requirements of the rule of law, however, the type of immunity associated with the applicant's status as an MP was valid only because of the legitimacy of the aims pursued, namely, to preserve the integrity of Parliament and protect the opposition. The applicant's inability in this case to waive his inviolability fell within the scope of the legitimate aims thus defined. In that sense individual renunciation by the applicant was no substitute for a decision of the National Assembly. Lastly, as the right to obtain a judgment in respect of criminal accusations was not absolute, in particular when there was no fundamental irreversible detrimental effect on the parties, the failure to lift the applicant's parliamentary immunity had not impaired his right to a court to a degree disproportionate to the legitimate aim pursued.

Conclusion: no violation (thirteen votes to four).

Fair hearing

Use of confession obtained under duress: *violation*

Yusuf Gezer v. Turkey - 21790/04
Judgment 1.12.2009 [Section II]

(See Article 3 above, page 15)

ARTICLE 7

Article 7 § 1

Nulla poena sine lege

Registration on national sex-offenders register for a period of thirty years running from date of completion of prison sentence: *inadmissible*

Gardel v. France - 16428/05
Judgment 17.12.2009 [Section V]

(See Article 8 below, page 23)

Heavier penalty

Replacement of a prison sentence on an alien with deportation and exclusion orders: *violation*

Gurguchiani v. Spain - 16012/06
Judgment 15.12.2009 [Section III]

Facts – In 2002 the applicant was sentenced to eighteen months' imprisonment for an attempted house burglary and was released on licence. The conviction was upheld on appeal. An *amparo* appeal lodged by the applicant was dismissed by the Constitutional Court in 2004. In the meantime, in 2003, the police administration requested the judge responsible for the enforcement of the judgment against the applicant to issue directions for the applicant's removal from the country in accordance with the applicable enforcement procedure. The request was accompanied by a decision given in 2002 by a regional arm of central government ordering the administrative removal of the applicant, a Georgian citizen living illegally in Spain, under an Institutional Law of 2000 on the rights and freedoms of foreign nationals in Spain. However, the criminal court decided not to issue removal directions as it found that the enforcement of the sentence imposed by the

judgment of 2002 would be more appropriate. An appeal by the public prosecutor was dismissed by the criminal court but upheld on appeal. The applicant's deportation from Spain, together with a ten-year ban on re-entry, was ordered in 2004. An *amparo* appeal by the applicant was unsuccessful.

Law – Article 7: The applicant's deportation and ten-year exclusion from Spain had been authorised by a decision of 2004 in accordance with a new version of an Article in the Criminal Code that had been in force since 2003. According to the new wording, where an illegal immigrant in Spain was given a prison sentence of up to six years, there was an obligation to replace that sentence by deportation, save in exceptional cases. Accordingly, through this legislative amendment, deportation had become the rule and unless there were exceptional circumstances the court's assessment no longer counted.

The Court therefore had to ascertain what the applicant's prison "sentence" in 2002 had entailed under domestic law at the material time. It had to determine, in particular, whether the legislation, together with its interpretation in case-law, had fulfilled the conditions of accessibility and foreseeability. In doing so it had to take into account the domestic law as a whole and the manner in which it had been applied at the time. It was noteworthy that according to the new Article of the Criminal Code the replacement of a sentence by deportation had to be stated in the judgment, but this had not been taken into account by the court in examining on appeal the enforcement of the sentence imposed in the judgment of October 2002. It was the relevant Article of the Criminal Code, as applicable in 2002, which had provided for the possibility – there being no obligation – for the court to decide on such a replacement sentence. Moreover, whereas the public prosecutor had sought the applicant's deportation and exclusion for only four years, the appellate court had decided on a ten-year exclusion, as was provided for by the above-mentioned provision in its new wording under the Institutional Law of 2003. It had to be concluded, therefore, that the replacement of the applicant's eighteen-month prison sentence by his deportation and ten-year exclusion from Spain, without allowing him to appear before the court and without taking into account any circumstances, but rather by a virtually automatic application of the new wording of Article 89 of the Criminal Code (in force since 2003), had to be regarded as a sentence in the same sense as that originally imposed. In the applicant's submission it was impossible to say, having regard to the substantive provisions of the Criminal Code, that at the time the offence was committed the replacement of a prison sentence by deportation and a ten-year exclusion could be regarded as established. He had therefore alleged that a heavier penalty had been imposed on him retroactively. In that connection the Court also observed that the new wording of the Article in the Criminal Code had deprived the enforcement judge of the choice, depending on the circumstances of the case, between authorising the deportation of the convicted foreign national and maintaining the prison sentence imposed by the judgment. Moreover, the new provision had also prevented the applicant from being able to appear before the court on the same footing as the public prosecutor, in order to challenge his deportation if he so wished. Lastly, the provision at issue, in its 2003 version, required that the deported foreign national be prohibited from re-entering the country for a period of ten years, thus imposing a much harsher sentence than under the former provision of the Criminal Code, which had provided for deportation and exclusion of between three and ten years, as the court deemed appropriate.

Conclusion: violation (unanimously).

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

Heavier penalty
Retroactivity

Retrospective extension of preventive detention from a maximum of ten years to an unlimited period of time: *violation*

M. v. Germany - 19359/04
Judgment 17.12.2009 [Section V]

(See Article 5 § 1 above, page 18)

ARTICLE 8

Private life

Registration on national sex-offenders register for a period of thirty years running from date of completion of prison sentence: *no violation*

Gardel v. France - 16428/05
Judgment 17.12.2009 [Section V]

Facts – The applicant was in prison, having been sentenced in 2003 to life imprisonment for the

rape of fifteen-year-old minors by a person in a position of authority. The law of 9 March 2004 (Law no. 2004-204), adapting the judicial system to developments in criminality, created an automated national judicial database of sex offenders. The provisions of the Code of Criminal Procedure concerning this database entered into force in June 2005. In November 2005 the applicant was informed that he had been included in the database on account of his convictions.

Law – Article 7: Following the entry into force of the 2004 Law the applicant was included in the database of sex offenders, that is, after his conviction. This measure required the applicant to provide information on his address and inform the authorities of any change. The applicant's inclusion in the database resulted from his conviction in October 2003, since the database automatically concerned individuals who had been sentenced to more than five years' imprisonment for a sexual offence. With regard to the purpose and nature of the disputed measure, the Court considered that the main aim of the obligation imposed on the applicant was to prevent recidivism. In this connection, the fact that the police services and judicial authorities would know the addresses of convicted persons as a result of their inclusion in the database entailed an element of dissuasion and was likely to facilitate police investigations. The obligation arising from registration in the database thus pursued a preventive and dissuasive aim and could not be regarded as punitive in nature or as constituting a criminal penalty. In addition, while the applicant faced a two-year prison sentence and a fine of EUR 30,000 in the event of failure to comply with the obligation, another set of proceedings, totally independent from those which had led to his conviction in October 2003, would have to be brought in such a case, during which the competent court would be able to assess whether the failure had been unlawful. Finally, with regard to the severity of the impugned measure, this was not in itself a decisive element and, in any event, the obligation to provide information on one's address every six months and to notify any change within fifteen days, albeit for a period of thirty years, was not serious enough for it to be treated as a penalty. Thus, registration in the database of sex offenders and the resulting obligation were to be regarded as a preventive measure to which the principle of non-retroactivity set out in Article 7 did not apply.

Conclusion: inadmissible (*ratione materiae*).

Article 8: The impugned interference was provided for by law and pursued the legitimate aims of protection of public order and the prevention of crime. The Court could not call into question the prevention-related objectives of the database such as that in which the applicant was registered. Sexual offences were clearly a particularly reprehensible form of criminal activity which had debilitating effects on their victims. Children and other vulnerable people had the right to be protected by the State, in the form of effective protection from such serious forms of interference in essential aspects of their private life. At the same time, crime policies in Europe were developing and, alongside punishment, attached growing importance to the aim of prisoner reinsertion, especially towards the end of a long prison term. Successful reinsertion assumed, among other things, the prevention of recidivism. The applicant had been automatically included in the database under the transitional provisions of the 2004 Law, as a result of the crime of which he had been definitively convicted. He had been duly notified of the registration and informed of his obligations. With regard to the requirements to provide information on his address and any changes to it, on pain of imprisonment and a fine, the Court had already found that this did not raise a problem under Article 8. The length of the data conservation was twenty or thirty years depending on the seriousness of the conviction. Although in the instant case this length was considerable, namely thirty years, the data was automatically subject to deletion once that time-limit, calculated from the date on which the decision that had resulted in inclusion ceased to have full effect, had expired. The individual concerned could submit a request for deletion to the public prosecutor from that date. An appeal lay against the prosecutor's decision. Those judicial proceedings thus ensured independent supervision of the reasons for conserving the data on the basis of specific criteria, and offered sufficient and adequate guarantees of respect for private life in relation to the seriousness of the offences justifying the initial inclusion. In those circumstances, the length of the data conservation was not disproportionate in relation to the aim pursued by retention of the information. As to the arrangements for use of the database and the range of public authorities with access to it, the latter had been extended on several occasions and was no longer limited to the judicial authorities and the police; administrative bodies now also had access. The right to consult the database was restricted to authorities that were under a duty of

confidentiality and to precisely determined circumstances. In addition, the instant case did not lend itself to an examination *in concreto* of the issue of making consultation of the database possible for administrative purposes. In conclusion, inclusion in the database of sex offenders, as it had been applied in this case, had struck a fair balance between the competing private and public interests at stake, and the respondent State had not exceeded the acceptable margin of appreciation in this area.

Conclusion: no violation (unanimously).

(See also the judgments of the same date *B.B. v. France*, no. 5335/06, and *M.B. v. France*, no. 22115/06, and the decision of 24 November 2009 *Hautin v. France*, no. 6930/06, which concern like complaints)

Private and family life

Refusal to grant a divorce to an elderly person who had been found at fault for the breakdown of the marriage: *communicated*

Ostrowski v. Poland - 27224/09
[Section IV]

The applicant, who is elderly, sought a divorce from his wife after meeting another woman. The courts refused to grant him a divorce since they found that he alone had been at fault for the breakdown of the marriage and his wife opposed a divorce. The regional court noted that the applicant had not formed strong emotional attachments to the other woman and that there were no minor children of his relationship with her. His wife's alleged refusal of a physical relationship was of no relevance in view of the parties' age and he did not have any serious arguments in favour of dissolution of the marriage.

Referring, *inter alia*, to Articles 8 and 14 of the Convention, the applicant complains to the European Court, *inter alia*, that he has been prevented from establishing a new family and discriminated against on the ground of his age.

Communicated under Article 8, alone and in conjunction with Article 14.

Family life
Positive obligations

Failure adequately to enforce a father's right of access to his minor child: *violation*

Eberhard and M. v. Slovenia
- 8673/05 and 9733/05
Judgment 1.12.2009 [Section III]

Facts – In April 2001 the first applicant's wife left the matrimonial home with the couple's four-year-old daughter, the second applicant. The wife petitioned for divorce and was granted provisional, and subsequently full, custody of the child. Following administrative proceedings the first applicant obtained an order for access, which became final and enforceable in October 2002. His wife, however, repeatedly refused to comply with the order and despite numerous attempts at enforcement, which resulted in various fines being imposed on his wife, the first applicant had almost no contact with his daughter until he succeeded in obtaining an interim court order in May 2006.

Law – Article 8: The State's obligation to implement positive measures included a right for parents to have steps taken to reunite them with their children and an obligation on the national authorities to facilitate such reunion. The national authorities were required to take all necessary steps that could reasonably be demanded in the special circumstances of the case to facilitate the execution of decisions in this sphere and a measure's adequacy was to be judged by the swiftness of its implementation, as the passage of time could have irremediable consequences on the parent-child relationship.

As regards, firstly, the order for access issued in the administrative proceedings, the Court noted that the authorities had established that it had been in the child's interest to maintain contact with her father. Notwithstanding this, however, the access arrangements had not been enforced between their becoming final in October 2002 and the court order making new arrangements in May 2006. It was noteworthy here that the fines, even assuming them to have been capable of compelling the wife to comply with the access arrangements, were never actually enforced. Likewise, there was no indication that any measures had been taken in response to the wife's refusal to cooperate with attempts to organise supervised meetings and nothing had been done to create the necessary conditions for enforcing access, either through coercive measures or steps preparatory to contact. Having regard to the facts of the case, including the passage of time and the child's best interests, the Court concluded that, notwithstanding their margin of appreciation, the domestic authorities had failed to make adequate and effective efforts to execute the access order issued in the administrative proceedings. As regards the judicial proceedings concerning custody

and access, they had lasted more than four and a half years but only five hearings had been held during that time. Despite powers to take measures to protect the child's interests of their own motion, the domestic courts had failed to treat the question of access with the utmost urgency it had required in view of the ongoing lack of contact and the wife's failure to comply. Accordingly, both as regards the enforcement of the access order issued in the administrative proceedings and the conduct of the court proceedings concerning access and custody rights, the domestic authorities had failed to meet their positive obligations arising from Article 8, with the result that the applicant had had almost no contact with his daughter for more than four years.

Conclusion: violation (unanimously).

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

Refusal of courts to disinherit a murderer after his own death prevented a final conviction: *violation*

Velcea and Mazăre v. Romania - 64301/01
Judgment 1.12.2009 [Section III]

Facts – The applicants are the father and sister of Tatiana A. In 1993 Tatiana and her mother were killed during a fight that broke out with Tatiana's husband, Aurel A. On the night of the tragedy Aurel A. had been accompanied by his brother George L., an off-duty police officer. George L. left with his brother and took him home. Shortly afterwards Aurel A. committed suicide, leaving two letters in which he confessed to having killed his wife and mother-in-law. George L., acting in his capacity as a police officer, reported the incident to the police. The criminal investigation concerning Aurel A. was discontinued on the ground that the perpetrator of the crimes had died and no one else had been involved. Following a criminal complaint lodged by the first applicant against George L., the military prosecutor's office opened an investigation, which ended in 1994 with a finding that there was no case to answer. Following a complaint by the applicants, the Chief Military Prosecutor's Office attached to the Supreme Court of Justice decided to proceed with the prosecution and the investigation was resumed. In 2003, following legislative changes concerning the status of police officers, the case was referred to the public prosecutor's office, which in 2004 found that there was no case to answer. Proceedings for the division of Tatiana's estate had commenced in 1993. The first applicant sought to have Aurel A.'s family disqualified from inheriting on the ground that his daughter had been killed by Aurel A. The Romanian Civil Code (Article 655 § 1 at the material time) provided that a person convicted of murder was to be deemed unfit to inherit from the victim's estate. Applying a strict interpretation of that provision, the Romanian courts refused to declare Aurel A. unfit to inherit, on the ground that he had not been convicted of murder by a final court ruling, having committed suicide shortly after killing his wife. Lucian L., Aurel A.'s brother, was therefore able to inherit from Tatiana's estate.

Law – Article 2: In this case an investigation had been carried out on the initiative of the authorities. The public prosecutor's office had opened an investigation in the immediate aftermath of the tragedy and a number of steps had been taken to preserve the evidence at the scene. However, despite being informed of George L.'s involvement, the authorities had not at first opened an investigation concerning him. They had not done so until several months later, after the first applicant had lodged a formal criminal complaint.

As to whether the investigation had been adequate, the Court noted a number of defects and shortcomings. Hence, the official report drawn up on the night of the tragedy had made no mention of the steps taken by the first team of investigators, nor had any explanation been given regarding their replacement; Aurel A.'s home had not been searched until the following day; the letters which Aurel A. had left in his flat, instead of being seized by the prosecutor, had been taken away by his brother, who had handed them over to the prosecutor's office a few months later. In addition, George L. had not been questioned during the first investigation, which had simply been discontinued by the prosecutor's office because of Aurel A.'s death. Furthermore, although George L. had not been acting in his capacity as a police officer when the tragedy occurred in 1993, the independence of the military prosecutors who had carried out the investigation was open to question in view of the national rules in force at the time. And, although the case had been sent to the public prosecutor's office in 2003, the latter had simply discontinued the proceedings eleven months later without undertaking any investigative measures. The intervention of the public prosecutor's office did not suffice to offset the lack of independence of the military prosecutors, who had gathered most of the evidence in the investigation.

On the subject of the applicants' involvement in the proceedings, the Court observed that the public prosecutor had allowed the second applicant's request for copies of the documents in the file concerning the first investigation. In addition, during the second investigation, the public prosecutor had granted her requests for a confrontation between George L. and the other witnesses and for a reconstruction of the events.

Finally, it was clear that there had been delays in the conduct of the investigation into George L.'s role in the events. The Court noted that the investigation had lasted for over eleven years, which in itself constituted an unreasonable length of time. It also observed a lack of diligence on the part of the prosecutors handling the case.

In sum, the proceedings concerning the role played by the police officer George L. in the events in 1993 which had culminated in the death of the applicants' two relatives had not amounted to a speedy and effective investigation.

Conclusion: violation (unanimously).

Article 8: In the instant case the first applicant complained in essence of the fact that his son-in-law's brother, Lucian L., had inherited from his daughter's estate. The domestic courts had refused to declare the applicant's son-in-law, Aurel A., unfit to inherit, on the ground that he had not been convicted of murder by a final court ruling. As a result, his brother had been able to claim his share of the estate and inherit from the first applicant's daughter. The Court considered that requiring a final court conviction for murder before declaring a person unfit to inherit could be justified on grounds of protection of the rights and freedoms of others, one of the legitimate aims contemplated by Article 8 § 2 of the Convention. In principle, a final conviction offered a guarantee of legal certainty compared with other possible findings of guilt in relation to the person supposedly unfit to inherit; this was in society's interests. In determining whether or not the domestic courts had struck a fair balance between the competing interests, particular attention had to be paid to the scope of the rule laid down by the Civil Code concerning fitness to inherit and, more specifically, to how it had been applied in the instant case. In view of the particular circumstances of the case, the interpretation of the relevant provision of the Civil Code had been unduly restrictive, to the detriment of the first applicant's family life. By not taking into consideration the public prosecutor's finding that Aurel A. had killed Tatiana A., the perpetrator's confession and the family's acknowledgment of his guilt, the courts had gone beyond what was necessary to ensure adherence to the principle of legal certainty. The Court deemed it unacceptable that, following a person's death, the unlawfulness of his or her actions should remain without effect. Admittedly, it was right that the principles governing the criminal responsibility of persons suspected of committing an offence punishable under criminal law, and their application by the domestic authorities, should have acted as a bar to continuing to investigate Aurel A.'s responsibility after his death, once it had been decided to discontinue the proceedings. The Court could not call into question the fundamental principle of domestic criminal law whereby criminal responsibility was personal and non-transferable. Nevertheless, formal acknowledgement by the authorities that the acts in question had been unlawful, before they decided to discontinue the proceedings on account of the death of the person concerned, would send out a clear message to the public that such acts would not be tolerated by the authorities and at the same time serve as a basis for possible civil claims by those affected. In order to ensure respect for the first applicant's family life the particular, not to say exceptional, circumstances of the case should have been taken into account so as to prevent the principles articulated in Article 655 § 1 of the Civil Code from being interpreted in mechanistic fashion. In view of the highly unusual situation in this case, and bearing in mind the narrow margin of appreciation left to the respondent State in matters concerning family life, a fair balance had not been struck between the interests of Aurel A.'s legal successor on the one hand and those of the first applicant on the other. The Court nevertheless noted with interest the recent change in the legislation in relation to the clause in the new Romanian Civil Code concerning fitness to inherit.

Conclusion: violation (unanimously).

Article 41: EUR 15,000 to the first applicant and EUR 8,000 to the second applicant in respect non-pecuniary damage.

ARTICLE 9

Freedom of religion

Assignment of a tax identification number which the applicants opposed on religious grounds: *inadmissible*

Skugar and Others v. Russia - 40010/04
Decision 3.12.2009 [Section I]

Facts – In 1999 the Government adopted regulations governing the register of taxpayers. Information on taxpayers was to be entered in the register on the basis of individual identification numbers allocated to taxpayers. The applicants unsuccessfully requested the tax inspectorate, and subsequently the courts, to have their taxpayers' numbers cancelled on the grounds that they had been assigned to them without their prior consent and were contrary to their religious beliefs, being "a forerunner of the mark of the Antichrist". In support of that contention, they referred to Apocalypse, Revelation, 13:15-13:16.

Law – Article 9: In determining the applicability of Article 9, the Court was called upon to decide whether the applicants entertained beliefs that could genuinely claim protection as a religious creed or matter of conscience. While it was not the Court's province to evaluate the legitimacy of religious claims, this did not, nevertheless, prevent it from making factual findings as to whether an applicant's religious claims were genuine and sincerely held. In the instant case the interpretation of the Bible to which the applicants adhered appeared to be at variance with the position expressed by the Holy Synod of the Russian Orthodox Church. However, in the absence of any indication of insincerity on the part of the applicants, the Court accepted that their rejection of technologically-derived markers for religious reasons could, in principle, qualify for protection under Article 9. The Convention organs had consistently held that general legislation which applied on a neutral basis without any link whatsoever with an applicant's personal beliefs could not in principle be regarded as an interference with his or her rights under Article 9. The Russian Tax Code stipulated that the tax authorities would assign an individual number to each taxpayer which would be used to identify him or her and to process his or her tax documents. The numbers were formed according to the same pattern and the procedure was neutral and uniform in its application with regard to every taxpayer under Russian jurisdiction, irrespective of his or her nationality, language, religious views or other similar factors. There was no obligation on taxpayers to take any action to obtain a number, since it was automatically created on first contact with the tax authorities. The applicants had objected to the use of the number in their case solely because they believed that its mere existence harmed their spiritual well-being. However, the State, in designing and implementing its internal procedures, could not be required to take into account the way in which individual citizens could interpret them on the basis of their religious beliefs. The alleged incompatibility of the authorities' internal arrangements with the applicants' beliefs was merely an incidental effect of generally applicable and neutral legal provisions. Thus, the content of official documents or databases could not be determined by the wishes of the individuals listed therein. It was obvious that the entries in a database had to be established on the same model, both for technical reasons and on account of legal considerations. If every individual could remove or add at whim the information they considered desirable or inappropriate, the uniformity required in administrative matters and its underlying philosophy would be impaired. The method of organisation of the State taxation database involving the use of individual taxpayers' numbers had not, therefore, amounted to an interference with the applicants' right to freedom of religion.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 10

Freedom of expression

Finding by a civil court that article criticising author's role on a question of the utmost public interest was defamatory: *violation*

Karsai v. Hungary - 5380/07
Judgment 1.12.2009 [Section II]

Facts – In 2004 there was a public debate in Hungary as to whether a statue should be set up to commemorate the former Prime Minister Pál Teleki, who had cooperated with Nazi Germany and had been involved in the passing of anti-Semitic legislation. The applicant, who is a Hungarian historian and university professor, published an article criticising the right-wing press, including the author B.T., for praising Pál Teleki's role and for making anti-Semitic statements. B.T. brought a civil action against the applicant, claiming that his reputation had been harmed by a passage in the article that accused the right-wing press of "inciting against and bashing the Jews". The regional court did not, however, grant his claim, holding in essence that the impugned statement had not concerned B.T. himself but the right-wing media generally. The decision was later

reversed by the court of appeal, which held that the statement could be seen as relating to B.T. and that the applicant had failed to prove that it was true. It ordered the applicant to publish rectification at his own expense and to bear the legal costs. The court of appeal's decision was upheld by the Supreme Court in June 2006.

Law – Article 10: The Court firstly considered that the impugned statements made an indirect reference to B.T. personally and had thus affected his reputation. Even though the domestic courts had qualified the applicant's statement as one of fact, the Court considered that such classification should not preclude the protection of freedom of expression by being unreasonable or arbitrary. It was true that the applicant's argument contained a factual statement describing B.T. as someone active in embellishing Pál Teleki's historical role. However, that statement of fact was a value-laden one, since in his article the applicant had argued that the apologia of a politician with well-known anti-Semitic convictions amounted to participation in the process, ongoing in the extreme right-wing press, of trivialising his racist policies. In such circumstances, the Court could not fully endorse the domestic courts' findings that the dispute concerned a pure statement of fact. Given the role that Pál Teleki had played in the enactment of anti-Semitic legislation in Hungary, the conclusions advanced by the applicant could not be considered excessive or devoid of factual basis.

The applicant's article had been published in the course of a public debate of the utmost public interest. Moreover, B.T. had voluntarily exposed himself to public criticism by publishing articles in the popular daily press as part of that debate. Lastly, the sanction imposed on the applicant, namely the duty to retract in a matter which affected his professional credibility as a historian, was capable of producing a chilling effect. In sum, the domestic courts had not convincingly established any pressing social need for putting the personality rights of a participant in a public debate above the applicant's right to freedom of expression.

Conclusion: violation (unanimously).

Article 41: EUR 4,000 in respect of non-pecuniary damage.

Order requiring news media to disclose a leaked document liable to lead to the identification of their source: *violation*

Financial Times Ltd and Others v. the United Kingdom - 821/03
Judgment 15.12.2009 [Section IV]

Facts – The case concerned a complaint by the applicants – four newspapers and a news agency – that they had been ordered by the domestic courts to disclose a document that was liable to lead to the identification of one of their sources. In November 2001 a journalist at one of the newspapers had received a copy of a leaked document from an undisclosed source X concerning a possible takeover bid by a company called Interbrew. The journalist had telephoned the company's investment-bank advisers the same day to advise them that he had received the document and intended to publish it. An article was published at about 10 p.m. on the newspaper's website and, referring to the leaked document, stated that Interbrew had been plotting a takeover bid. The other applicants had published articles on the same and following days, also referring to the leaked document and the possible takeover bid. Following a statement by Interbrew to the press, they continued to report on the issue, adding that the leaked document may have been doctored. The press coverage had a significant impact on the market shares of both Interbrew and the target company. Interbrew's security and risk consultants made unsuccessful attempts to identify X. Following advice from the consultants that access to the originals of the leaked document might vitally assist the investigation, Interbrew sought and obtained on 19 December 2001 an order requiring the applicants to disclose the leaked document. The High Court found in particular that X had deliberately leaked a lethal concoction of confidential and false information, with serious consequences for the integrity of the share market, and that there was an overriding need for disclosure of the document in the interests of justice and for the prevention of crime. That decision was upheld by the Court of Appeal, which concluded that the public interest in protecting the source of the leak was not sufficient to withstand the prevailing public interest in allowing Interbrew to seek justice against the source, the critical point being X's evident aim "to do harm whether for profit or for spite…". To date, the applicants have not delivered up the document and the disclosure order has not been enforced against them.

Law – Article 10: The disclosure order of 19 December 2001 remained capable of being enforced and so, no matter how remote a possibility that was, constituted interference with the

applicants' freedom of expression. That interference was prescribed by law and pursued the legitimate aims of protecting the rights of others and preventing the disclosure of information received in confidence.

Turning to the question whether the interference had been necessary in a democratic society, the Court noted that disclosure orders had a detrimental impact not only on the source, but also on the newspaper, whose reputation could be negatively affected in the eyes of future potential sources, and on members of the public, who had an interest in receiving information through anonymous sources and were also potential sources themselves. As to whether the conduct of the source could override the principle of non-disclosure, the Court explained that domestic courts should be slow to assume, in the absence of compelling evidence, that a source was clearly acting in bad faith with a harmful purpose and had disclosed intentionally falsified information. In any event, given the multiple interests in play, the conduct of the source could never be decisive in determining whether a disclosure order ought to be made but merely operated as one, albeit important, factor to be taken into consideration in carrying out the requisite balancing exercise. In carrying out that exercise, the Court focused on the following aspects of the applicants' case: the purpose of the leak, the authenticity of the leaked document and the interests of Interbrew in identifying the source and bringing proceedings, and, lastly, the effect of the disclosure order.

As regards the first of these aspects, the Court noted that a critical factor in the decision to order disclosure had been X's purpose in leaking the document, which the Court of Appeal had described as being "on any view a maleficent one, calculated to do harm whether for profit or for spite…". However, while accepting that there could be circumstances in which a source's harmful purpose would in itself constitute a relevant and sufficient reason to order disclosure, the Court found that in the instant case the legal proceedings against the applicants had not allowed X's purpose to be ascertained with the necessary degree of certainty for any significant weight to be placed on it. The second aspect – the question of the authenticity of the leaked document – could not be seen as significant either, as the domestic courts had reached no conclusion as to whether the document had been doctored and the question of what steps the journalists had taken to verify its accuracy could not be decisive, but had to be considered in the context of the case as a whole.

Turning to the issue of Interbrew's interest in identifying the source, the Court noted that it had sought disclosure both to prevent future leaks and to enable it to bring an action in damages. However, it was relevant here that, despite receiving prior notice of the intention to publish, Interbrew had not sought an injunction to prevent the initial publication. Moreover, the aim of preventing further leaks would only justify an order for disclosure of a source in exceptional circumstances where no reasonable and less invasive alternative means were available and where the risk was sufficiently serious and defined to render such an order necessary within the meaning of Article 10 § 2. Although the Court of Appeal had found that there had not been any less invasive means available, the Court noted that Interbrew had not given full details of the inquiries that had been made and that the Court of Appeal's conclusion had been based on inferences. Lastly, as regards the effect of the disclosure order, the Court considered that no crucial distinction could be made between disclosure that would directly result and disclosure that might result in the identification of the source, as a chilling effect arose whenever journalists were seen to assist in the identification of anonymous sources. It sufficed that information or assistance had been required for the purpose of identifying X.

Accordingly, the interests in eliminating damage through the future dissemination of confidential information and in obtaining damages for past breaches of confidence were, even if considered cumulatively, insufficient to outweigh the public interest in the protection of journalists' sources.

Conclusion: violation (unanimously).

Article 41: No claim made in respect of damage.

Conviction of journalist on a satirical political magazine for insulting the pope: *communicated*

Urban v. Poland - 29690/06
[Section IV]

In August 2002 the satirical political magazine *NIE* published an article entitled "S&M roadshow", written by the applicant. The article criticised the events organised in connection with the visit of Pope John Paul II to Poland as well as the Pope himself and his activities. It included the terms "ageing idol" and "Brezhnev of the Vatican". In January 2005 a regional court found the applicant guilty of insulting a foreign Head of State and ordered him to pay a fine. The court

held that the remarks made by the applicant in the article had insulted the Head of State of the Vatican, Pope John Paul II, on Polish soil. In view of the highly insulting nature of the terms used, the article had overstepped the degree of exaggeration and provocation usually associated with *NIE*'s overtly sensational and anti-clerical style. The applicant's actions had been premeditated and tactically motivated, in a bid to provoke, and had unleashed a scandal. By writing the article he had knowingly insulted a foreign Head of State within the meaning of the Criminal Code. In March 2005 the applicant appealed against the regional court judgment. The latter was upheld by the court of appeal in March 2006.

Communicated under Article 10.

ARTICLE 14

Discrimination (Article 2)

Difference, based on pathology type, in compensation arrangements between persons contaminated with HIV during blood transfusions: *violation*

G.N. and Others v. Italy - 43134/05
Judgment 1.12.2009 [Section II]

Facts – The first six applicants are relatives of persons who died after contracting HIV or hepatitis C in the 1980s following blood transfusions carried out by the State health service. The seventh applicant is the only surviving member of the infected group. The persons concerned had thalassaemia, a hereditary disorder whose sufferers need blood transfusions in order to survive. In 1993 a group of about a hundred persons commenced proceedings (the so-called "*Emo uno*" case) against the Ministry of Health ("the Ministry"), seeking compensation for damage sustained in similar cases. The applicants intervened in those proceedings. The Ministry was ordered to provide compensation only in respect of cases occurring after certain key dates in terms of the understanding of the viruses. As the applicants and their relatives had been infected before those dates, they did not obtain compensation. The Court of Cassation upheld that decision in 2005. Meanwhile, a decree enacted in 2003 allowed the Ministry to conclude out-of-court settlements with haemophiliacs infected in this manner. Because they suffered from thalassaemia, the applicants were unable to benefit.

Law – Article 2: (a) *Substantive aspect* – It had not been established that at the material time the Ministry had known or should have known about the risk of transmission of HIV or hepatitis C via blood transfusion. The Court could not take it upon itself to determine from what point onward the Ministry had been or should have been aware of the risks, nor could it substitute its own assessment for that of the domestic authorities regarding the Ministry's responsibility. Accordingly, the Italian authorities could not be said to have failed in their duty to protect the life of the thalassaemia sufferers or their heirs. The same conclusion applied to the limb of the complaint alleging a failure to provide information on the risks associated with transfusions.

Conclusion: no violation (unanimously).

(b) *Procedural aspect* – While the Italian system, by offering the applicants the possibility of a civil remedy, had in theory satisfied the procedural requirements of Article 2, in practice the proceedings in question had lasted for over ten years in the case of some of the applicants, despite the fact that exceptional diligence was called for in compensation proceedings of this kind brought by persons infected following blood transfusions. While the Court accepted that the proceedings had been complex, it observed that there had been delays and periods of inactivity. In view of these considerations and in the light of the Court's case-law, the length of the proceedings had been excessive. Furthermore, the compensatory remedy provided by the "Pinto Act" would have been insufficient in the instant case, given that the issue at stake was not just the length of the proceedings but whether, in the circumstances of the case taken overall, the State could be said to have complied with its procedural obligations under Article 2. Accordingly, the Italian judicial authorities, in dealing with an arguable complaint under Article 2, had failed to provide an adequate and prompt response in accordance with the State's procedural obligations under that provision.

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 2: Given that the domestic authorities had offered out-of-court settlements to persons infected following blood transfusions or the administration of blood products, the measures governing access to the remedy in question could not disregard the guarantees provided by Article 14. Furthermore, the difference in treatment in the instant case did not fall within the scope of the Ministry's contractual freedom to conclude out-of-court

settlements, as the criteria for settling disputes out of court had been laid down by ministerial decree. This legislation, unlike the law on which it was based, was limited in scope to persons suffering from haemophilia, thereby preventing the Government from concluding out-of-court settlements with the applicants, who were thalassaemia sufferers or their heirs. In addition, the 2008 legislation had earmarked substantial public funds for out-of-court settlements in pending compensation proceedings, including some brought by thalassaemia sufferers. However, the applicants were not covered by that measure as the proceedings in the "*Emo uno*" case had ended in 2005. In the circumstances of the case, this difference in treatment, which had been based on the type of disorder from which the persons concerned suffered, was not compatible with the guarantees of Article 14. In the Court's view, the Government had not adduced convincing arguments to justify the approach taken. The reference to the need to use public funds wisely by concluding settlements only with the largest group of sufferers, namely haemophiliacs, did nothing to alter that finding. The principle, asserted in relation to the positive obligations stemming from Article 2, whereby choices in terms of priorities and resources were a matter for the domestic authorities, did not make it legitimate for Contracting States to put in place measures based on arbitrary criteria on the pretext of a lack of resources. Hence, the applicants, as thalassaemia sufferers or their heirs, had been discriminated against compared with haemophilia sufferers, who had been able to take advantage of the out-of-court settlements offered by the Ministry.

Conclusion: violation (unanimously).

Article 41: Question of pecuniary damage reserved; EUR 39,000 in respect of non-pecuniary damage to the applicant who was infected and EUR 39,000 jointly to the heirs of the deceased persons.

Discrimination (Article 8)

Inability of father of a child born out of wedlock to obtain joint custody without the mother's consent: *violation*

Zaunegger v. Germany - 22028/04
Judgment 3.12.2009 [Section V]

Facts – Article 1626a of the German Civil Code provides that a minor born out of wedlock shall be in the sole custody of the mother unless the parents marry or make a declaration that they will exercise joint custody. The applicant and his partner, who were not married, had a daughter in 1995. They did not make a joint-custody declaration. Three years later the couple separated and, after spending two years with the applicant, the child moved in with the mother. The applicant had regular contact and continued to provide for his daughter's needs. He applied for a court order granting him joint custody, as the mother was unwilling to make a declaration to that effect, but this was refused on the basis of the legislation and a leading judgment of the Federal Constitutional Court dated 29 January 2003. In that judgment, the Federal Constitutional Court had ruled that Article 1626a did not breach the right to respect for the family life of fathers whose children were born out of wedlock as, firstly, there was insufficient evidence that a father of a child born out of wedlock would want to bear joint responsibility and, secondly, the legislature could legitimately assume that joint custody exercised against the will of one parent would have more disadvantages than advantages for a child born out of wedlock.

Law – Article 14 in conjunction with Article 8: In view of the participatory role the applicant had played in the child's upbringing, the decisions dismissing his request for joint custody and joint parental authority had amounted to interference with his right to respect for his family life. The facts therefore fell within the scope of Article 8 and Article 14 was applicable. Further, in the light of the domestic courts' decisions and the underlying legislation, the applicant had been treated differently from mothers or from married or divorced fathers in that he had required his former partner's consent to joint custody. Very weighty reasons would be required to justify a difference in treatment between married and unmarried fathers.

The Court accepted that the domestic courts' decisions had pursued a legitimate aim as they were based on Article 1626a of the Civil Code, which sought to protect the best interests of a child born out of wedlock by determining its legal representative and by avoiding disputes over questions relating to custody. Moreover, by allowing parents of children born out of wedlock to agree on joint custody the legislature had sought to put them to a certain extent on the same footing as married parents, who had assumed responsibility for each other and their children. The Court also noted that it was legitimate, in the absence of a joint declaration, for parental authority of a child born out of wedlock initially to be given to the mother, in order to ensure that there was a person at birth who could act for the child in a legally binding way, and that there could also be cases in

which there were valid reasons for denying a father parental authority if it risked jeopardising the child's welfare. However, these considerations had not applied in the applicant's case: his paternity had been certified from the beginning, he had lived with the child for more than five years and thereafter had enjoyed extensive contact and provided for her daily needs. Despite this, he had been prevented by law from seeking a judicial ruling on the issue whether joint parental authority would serve the child's best interests. In this connection, the Court did not agree that joint custody against the will of the mother could be assumed not to be in the child's interest. While there was no European consensus on the question whether unmarried fathers had a right to request joint custody even without the mother's consent, the common point of departure in the majority of the member States appeared to be that decisions on custody were to be based on the child's best interests and subject to court scrutiny in the event of a conflict between the parents. Nor was it relevant here to argue that legal proceedings might unsettle a young child as that risk also existed in cases involving married parents or those who had opted for joint parental authority and the Government had not shown why fathers in the applicant's situation should be entitled to any less judicial scrutiny of the custody issue. Accordingly, there had not been a reasonable relationship of proportionality between the exclusion of judicial scrutiny of the mother's sole custody and the aim of protecting the child's best interests.

Conclusion: violation (six votes to one).

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

Refusal to grant a divorce to an elderly person who had been found at fault for the breakdown of the marriage: *communicated*

Ostrowski v. Poland - 27224/09
[Section IV]

(See Article 8 above, page 25)

Discrimination (Article 1 of Protocol No. 1)

Refusal to recognise validity of Roma marriage for purposes of establishing entitlement to survivor's pension: *violation*

Muñoz Díaz v. Spain - 49151/07
Judgment 8.12.2009 [Section III]

Facts – The applicant is a Spanish national belonging to the Roma community. In 1971 she married M.D., who also belonged to the Roma community, in a marriage solemnised according to the rites of that community. They had six children, who were all listed in a family record book issued by the Spanish authorities. In 1986 they were granted "large family" status. M.D. died in 2000. He had paid social-security contributions for over nineteen years. The applicant applied for a survivor's pension but it was refused on the ground that her marriage to M.D. had not been registered in the Civil Register. That decision was confirmed in 2001. The applicant applied to the Labour Court and was recognised as being entitled to a survivor's pension. However, the judgment was quashed by the Higher Court of Justice. The applicant lodged an *amparo* appeal but it was dismissed by a judgment of 2007.

Law – Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: As regards the arrangements for survivor's pensions at the material time, the General Social Security Act, as then worded, had recognised an entitlement to a survivor's pension for the surviving spouse. That statutory provision had, however, been supplemented and nuanced both in the law itself and in the case-law of the domestic courts, including that of the Constitutional Court.

At the time of the applicant's marriage in 1971 according to Roma rites and traditions, it had not been possible in Spain, except by making a prior declaration of apostasy, to be married otherwise than in accordance with the canon-law rites of the Catholic Church. The applicant could not have been required, without infringing her right to religious freedom, to marry legally, that is to say under canon law, when she expressed her consent to marry according to Roma rites in 1971. Admittedly, following the entry into force of the Spanish Constitution of 1978, in particular, the applicant could have opted for a civil marriage. She had argued, however, that she had believed in good faith that the marriage solemnised according to Roma rites and traditions had produced all the effects inherent in the institution of marriage. In order to assess the applicant's good faith the Court had to take into consideration the fact that she belonged to a community within which the validity of the marriage, according to its own rites and traditions, had never been disputed, nor had it been regarded as contrary to public order by the

domestic authorities, which had even recognised in certain respects the applicant's status as spouse. The force of the collective beliefs of a community that was well-defined culturally could not be ignored. Moreover, there was an emerging international consensus amongst the member States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle. In the present case, the applicant's belief that she was a married woman, with all the effects inherent in that status, was undeniably strengthened by the attitude of the authorities, who had recognised her as M.D.'s wife and had done so very concretely by issuing her with certain social-security documents, in particular a registration document showing her as a wife and the mother of a large family, a situation that was regarded as particularly deserving of assistance and required recognition of spousal status. The applicant's good faith as to the validity of her marriage, which was confirmed by the authorities' official recognition of her situation, had given her a legitimate expectation of being regarded as the spouse of M.D. and of forming a recognised married couple with him. After M.D.'s death it had been natural for the applicant to hope that she would be entitled to a survivor's pension. Consequently, the refusal to recognise the applicant as a spouse for the purposes of the survivor's pension had been at odds with the authorities' previous recognition of such status. Moreover, the applicant's particular social and cultural situation had not been taken into account when assessing her good faith. In that connection it was noted that, under the Framework Convention for the Protection of National Minorities, the States Parties to the Convention were required to take due account of the specific conditions of persons belonging to national minorities. In the circumstances of the case, the applicant's situation revealed a disproportionate difference in treatment compared to that normally reserved for marriages contracted in good faith. In its judgment the Labour Court had interpreted the applicable legislation in the applicant's favour. However, the Higher Court of Justice had quashed that judgment without drawing any conclusions from the specificities of the Roma minority. In the light of the foregoing, it had been disproportionate for the Spanish State, which had issued the applicant and her Roma family with a family record book, granted them large-family status, afforded health-care assistance to her and her six children and collected social-security contributions from her Roma husband for over nineteen years, now to refuse to recognise the effects of the Roma marriage when it came to the survivor's pension.

Lastly, the Court could not accept the Government's argument that it would have been sufficient for the applicant to enter into a civil marriage in order to obtain the pension. The prohibition of discrimination enshrined in Article 14 was meaningful only if, in each particular case, the applicant's personal situation in relation to the criteria listed in that provision was taken into account exactly as it stood.

Conclusion: violation (six votes to one).

Article 41: EUR 70,000 for all heads of damage combined.

Discrimination (Article 3 of Protocol No. 1)

Inability of a Roma and a Jew to stand for parliamentary elections: *violation*

Sejdić and Finci v. Bosnia and Herzegovina - 27996/06 and 34836/06
Judgment 22.12.2009 [GC]

(See Article 1 of Protocol No. 12 below, page 38)

ARTICLE 33

Inter-State cases

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

Georgia v. Russia (I) - 13255/07
[Section V]

The application, which the Court declared admissible on 30 June 2009 (see Information Note no. 120), concerns the reaction of the Russian authorities to the arrest in Tbilisi in September 2006 of four Russian service personnel on suspicion of espionage. The Georgian Government allege that that response amounted to a pattern of official conduct giving rise to specific and continuing breaches of the Convention and its Protocols. The complaints concern the arrest and detention of Georgian nationals (Article 5 of the Convention), their conditions of detention (Article 3 of the Convention), and expulsion (Article 4 of Protocol No. 4 and Article 1 of Protocol No. 7) and other

measures (Article 8 of the Convention and Articles 1 and 2 of Protocol No. 1) allegedly taken against them. These provisions are relied on alone and/or in conjunction with Articles 13, 14 and 18 of the Convention.

ARTICLE 41

Just satisfaction

Assessment of pecuniary damage for constructive expropriation

Guiso-Gallisay v. Italy (just satisfaction) - 58858/00
Judgment 22.12.2009 [GC]

Facts – The applicants were owners of plots of land which were occupied by the public authorities with a view to their expropriation; construction work was then carried out on the land. In the absence of formal expropriation and compensation, the applicants brought proceedings for damages.

In a judgment of 8 December 2005 a Chamber of the Court held that the interference in the applicants' right to the peaceful enjoyment of their possessions as a result of the constructive expropriation of their land had not been compatible with the principle of lawfulness and that, accordingly, there had been a violation of Article 1 of Protocol No. 1. In its Chamber judgment of 20 October 2008 (see Information Note no. 112), the Court examined the question of just satisfaction and departed from its previous case-law concerning the application of Article 41 in cases of constructive expropriation. It awarded compensation in respect of the pecuniary and non-pecuniary damage sustained by the applicants.

Law – Article 41: The Grand Chamber upheld the Chamber's departure from the case-law with regard to the application of Article 41 in cases of constructive expropriation. The criterion previously used[1] had consisted in compensating for the losses sustained that would not be covered by the payment of an amount corresponding to the market value and loss of enjoyment of the disputed assets, by automatically calculating those losses up to the gross value of the work carried out by the State and adding the current value of the land. The Court considered it appropriate to adopt a new approach, regard being had to the possible disparities in the treatment of applicants depending on the nature of the public works undertaken by the authorities, which was not necessarily related to the land's original potential; the concern to avoid room for arbitrariness; the refusal to assign a punitive or dissuasive role to compensation *vis-à-vis* the respondent State, rather than a compensatory role *vis-à-vis* the applicant; and, finally, the developments in the domestic case-law, which provided that the expropriation compensation for building land was to correspond to the latter's market value, and the fact that the domestic courts had taken account of the Court's case-law in the sphere of the right of property. The new principles laid down in the instant judgment could be applied by the domestic courts in the disputes which were currently pending before them and in future cases. In this context and for those reasons, the Court decided to reject the applicants' claims in so far as they were based on the value of the land on the date of the Court's judgment and, in assessing the pecuniary damage, to have no further regard to the construction costs of the buildings erected by the State on the land. In assessing the damage sustained by the applicants, the date on which they had learned with legal certainty that they had lost their right of ownership of the property was to be taken into consideration. The total market value of the property as determined on that date by the domestic courts was then to be readjusted for inflation and the statutory interest payable on the date of the adoption of the Court's judgment. The amount paid to the applicant by the national authorities would then be deducted from the sum thus obtained. In addition, the Court considered that, in order to evaluate the market value of the land, it was appropriate to refer to the court judgment finding that the applicants had lost ownership of part of their land in 1982 and of another part in 1983. Once the amount awarded at national level was deducted, and the difference with the market value of the land in 1983 thus obtained, that amount would have to be converted to current value to offset the effects of inflation. Moreover, interest would have to be paid so as to compensate, at least in part, the long period that had elapsed since the dispossession of the land. That interest should take the form of simple statutory interest applied to the capital progressively adjusted. Accordingly, the Court awarded the applicants EUR 2,100,000 in respect of pecuniary damage. As to the damage occasioned by the unavailability of the land during the period from the beginning of the lawful occupation (1977) until

1. See *Papamichalopoulos and Others v. Greece* (Article 50), no. 14556/89, 31 October 1995, and *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 250-254, 29 March 2006.

the date of loss of ownership (1983), the amount already paid to the applicants at national level as compensation for occupation was to be deducted.

The Court awarded the three applicants EUR 45,000 jointly for the loss of opportunities arising from the impugned expropriation. Finally, the feelings of powerlessness and frustration arising from the unlawful dispossession of their property had caused the applicants considerable non-pecuniary damage and the Court awarded each of the applicants EUR 15,000 under that head.

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Revocation of disability pension on the grounds that the applicant was no longer unfit for work: *no violation*

Wieczorek v. Poland - 18176/05
Judgment 8.12.2009 [Section IV]

Facts – The applicant received a disability pension from 1985 until 2000, when the Social Insurance Authority brought proceedings to reassess her medical condition and concluded that she was no longer entitled to such a pension since she was no longer unfit for work. On appeal, a regional court granted the applicant the disability pension for a fixed period of two years, ending on 1 January 2003. The applicant's further appeal was dismissed and her application for legal aid to lodge a subsequent cassation appeal was also dismissed on the grounds that the case was not so complex as to warrant legal assistance.

Law – Article 6 § 1 of the Convention: The applicant's request for legal aid was refused on the ground that her case had not warranted professional legal assistance for the purposes of a further appeal. In so finding, the domestic court failed to refer in any way to the legal arguments that had been advanced by the applicant concerning a matter which had raised serious questions of interpretation before the domestic courts and was, in fact, clarified by the Supreme Court only after the applicant's case had already been decided. The conclusion that legal assistance would be unnecessary – in particular in the absence of any analysis of whether the cassation appeal offered any prospects of success – did not therefore seem justified.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 1: The social-security system in Poland was based on the principle of solidarity and the basic level of social-insurance benefits, including disability pensions, were paid from a single fund financed by various compulsory contributions from employees and employers. Individual entitlement to a disability pension was based on a number of conditions which had to be met by the claimant, including inability to continue paid employment on grounds of ill-health. However, since a person's medical condition was subject to change with the passage of time, the Court considered it permissible for States to take measures to reassess the condition of persons receiving disability pensions with a view to establishing whether they continued to be unfit for work, provided that the procedure was in conformity with the law and attended by sufficient procedural safeguards. If entitlement to a disability pension was maintained permanently, without regard to a possible change in the condition of the beneficiary, this would not only result in unjust enrichment, but also in an improper allocation of public funds. In the applicant's case, the Social Insurance Authority's decisions were subject to judicial review before two instances of special social-insurance courts offering her full procedural guarantees. The applicant had had recourse to that procedure and had been able to present her arguments to those courts. Further, it was important also to note that the applicant had not been totally divested of her only means of subsistence, since the regional court had granted her a temporary two-year disability pension and she had not been required to pay back any amounts she had received prior to the date of the revocation of her pension. For these reasons, the Court concluded that a fair balance had been struck between the demands of the general interest and the applicant's property rights and that the burden on the applicant was neither disproportionate nor excessive.

Conclusion: no violation (unanimously).

Article 41: EUR 2,000 in respect of non-pecuniary damage.

ARTICLE 3 OF PROTOCOL No. 1

Free expression of opinion of people
Choice of the legislative

Statutory provisions on elections establishing "blocked lists" and "majority weighting": *communicated*

Saccomanno and Others and 16 other applications v. Italy - 11583/08 et al.
[Section II]

The applicants are Italian electors who complain about provisions in the electoral law in force, which establishes a system of "blocked lists" (in which the order of the candidates is determined by the party itself) and a system of "majority weighting" in the two chambers of Parliament (a number of seats are reserved for the coalition which obtains the most votes). The applicants also complain that they had no effective remedy to provide redress for their grievances.

Communicated under Article 13 of the Convention and Article 3 of Protocol No. 1.

Stand for election

Ban on impeached President from running for office: *relinquishment in favour of the Grand Chamber*

Paksas v. Lithuania - 34932/04
[Section II]

The applicant was removed from office as President of the Republic following his impeachment on the basis of findings by the Constitutional Court that he had violated his constitutional oath. He intended to run for presidency in newly called elections, but the Presidential Elections Act was amended by the *Seimas* (Parliament) so as to ban an impeached President from running for office again within a period of five years. The Central Electoral Commission refused to register him as a candidate. An appeal by the applicant to the Supreme Administrative Court was dismissed, on the grounds that from the moment his candidacy was submitted, his situation had been governed by the Constitution, which banned an impeached President from standing. Accordingly, the principle of the non-retroactivity of legal acts had not been breached. An amendment to the *Seimas* Elections Act introduced an equivalent ban on holding legislative office for any official who had been removed from office as a result of impeachment proceedings. In separate proceedings, the applicant was charged with disclosing classified information, but was acquitted for lack of evidence in a decision that was ultimately upheld by the Supreme Court.

The applicant complains under Article 3 of Protocol No. 1 that the legislative amendments have prevented him from holding public office and under Article 4 of Protocol No. 7 that he has effectively been tried for the same offence twice, firstly by the Constitutional Court and subsequently by the criminal courts. He has also lodged complaints under Articles 6, 7 and 13 of the Convention.

Refusal to register a former clergyman as candidate for parliamentary elections: *violation*

Seyidzade v. Azerbaijan - 37700/05
Judgment 3.12.2009 [Section I]

Facts – The applicant applied to the district electoral commission for registration as a candidate in the parliamentary elections in November 2005 and lodged an undertaking to terminate any professional activities incompatible with the office of a Member of Parliament. The commission allegedly approved his candidacy. He then resigned from his positions with the Caucasus Muslims Board and Baku Islamic University. Subsequently, however, the electoral commission revoked his registration as a candidate on the grounds that he had continued his activities as a professional clergyman. It did not provide any further details. The applicant lodged a complaint with the Central Electoral Commission but this was rejected as unsubstantiated. The domestic courts upheld that decision, stating that the Constitution banned clergymen from being elected to Parliament and that the applicant's resignation from the above positions had not excluded his engaging in "professional religious activities" in terms of the Election Code.

Law – Article 3 of Protocol No. 1: When read literally, the relevant provisions of domestic law appeared to be mutually inconsistent as to whether clergymen were deprived of the right to stand for election, or were only subject to disqualification if they simultaneously held incompatible positions. The domestic legislation providing for the impugned restriction was not foreseeable as to its effects and left considerable room for speculation as to the definition of the categories of persons affected by it. The provisions had not been sufficiently precise to enable the applicant to regulate his conduct and foresee which specific types of activity would entail a restriction of his passive electoral rights. The lack of any definition of the terms "clergyman" and "professional religious activity" allowed an excessively wide discretion to the electoral authorities and left much room for arbitrariness in applying the restriction. Like the electoral commissions, the courts had failed to offer

any explanation as to what other specific activity conducted by the applicant precluded him from standing for election or to indicate the definition and evidence they had relied on in finding him to be a "clergyman" within the meaning of the relevant provisions. The Government had not submitted any examples of domestic practice or judicial rulings that showed a comprehensive and consistent interpretation of the impugned provisions. The application of the law in respect of the applicant had resulted in a situation where the very essence of the rights guaranteed by Article 3 of Protocol No. 1 had been impaired.

Conclusion: violation (unanimously).

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

ARTICLE 1 OF PROTOCOL No. 12

General prohibition of discrimination

Inability of a Roma and a Jew to stand for election to highest political office in the country: *violation*

Sejdić and Finci v. Bosnia and Herzegovina - 27996/06 and 34836/06
Judgment 22.12.2009 [GC]

Facts – The applicants, who are both citizens of Bosnia and Herzegovina, are respectively of Roma and Jewish origin and hold prominent public positions. At the time of the European Court's judgment, Mr Sejdić was the Roma Monitor of the OSCE mission to Bosnia and Herzegovina, whereas Mr Finci was the Ambassador of Bosnia and Herzegovina to Switzerland. Under the 1995 Constitution of Bosnia and Herzegovina – which formed an annex to the 1995 Dayton Peace Agreement – only Bosniacs, Croats and Serbs, described as "constituent peoples", were eligible to stand for election to the tripartite State presidency and the upper chamber of the State Parliament, the House of Peoples. The applicants complained that, despite possessing experience comparable to the highest elected officials in the country, they were prevented by the Constitution from being candidates for such posts solely on the grounds of their ethnic origin.

Law – Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1 (election to the House of Peoples of Bosnia and Herzegovina): As the House of Peoples is composed of members appointed by the legislature of the two Entities of Bosnia and Herzegovina and enjoys wide powers to control the passing of legislation, the Court held that election to the upper chamber of the Parliament fell within the ambit of Article 3 of Protocol No. 1. It reiterated that discrimination based solely on a person's race could not be objectively justified in today's democratic society. The applicants, who described themselves as being of Roma and Jewish origin respectively and who did not wish to declare affiliation with a "constituent people", were, as a result of constitutional provisions, excluded from standing for election to the House of Peoples. Such exclusion pursued an aim broadly compatible with the general objectives of the Convention, namely that of the restoration of peace. When the impugned constitutional provisions were put in place they were designed to end a brutal conflict marked by genocide and "ethnic cleansing". The nature of the conflict was such that the approval of the "constituent peoples" was necessary to ensure peace. This could explain the absence of representatives of the other communities – such as local Roma and Jewish communities – at the peace negotiations and the participants' preoccupation with effective equality between the "constituent peoples" in the post-conflict society. However, the Court could not but observe the significant positive developments in Bosnia and Herzegovina after the Dayton Peace Agreement: in 2005 the former parties to the conflict had surrendered their control over the armed forces and transformed them into a small professional force; in 2006 Bosnia and Herzegovina had joined NATO's Partnership for Peace; in 2008 it had signed and ratified a Stabilisation and Association Agreement with the European Union; in March 2009 it had successfully amended the State Constitution for the first time; and it had recently been elected a member of the United Nations Security Council for a two-year term starting in January 2010. Moreover, by ratifying the Convention and its Protocols thereto in 2002 without any reservations, the respondent State had specifically undertaken to review, within one year, its electoral legislation with the help of the Venice Commission, and to bring it in line with the Council of Europe standards where necessary. A similar commitment had also been given when ratifying the Stabilisation and Association Agreement. Lastly, while it was true that the Convention itself did not require the respondent State to totally abandon the peculiar power-sharing system, the opinions of the Venice Commission clearly demonstrated the existence of other mechanisms of power-sharing which did not

automatically lead to the total exclusion of representatives of the other communities. In conclusion, the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacked objective and reasonable justification.

Conclusion: violation (fourteen votes to three).

Article 1 of Protocol No. 12 (election to the Presidency of Bosnia and Herzegovina): Whereas Article 14 of the Convention prohibited discrimination in the enjoyment of "the rights and freedoms set forth in [the] Convention", Article 1 of Protocol No. 12 extended the scope of protection to "any right set forth by law", thus introducing a general prohibition of discrimination. Therefore, whether or not elections to the Presidency fell within the scope of Article 3 of Protocol No. 1, this complaint concerned a "right set forth by law" and Article 1 of Protocol No. 12 was consequently applicable. The lack of a declaration of affiliation by the present applicants with a "constituent people" had also rendered them ineligible to stand for election to the Presidency. Since the notions of discrimination prohibited by Article 14 and by Article 1 of Protocol No. 12 were to be interpreted in the same manner, for the same reasons the constitutional provisions which had rendered the applicants ineligible for election to the Presidency must also be considered discriminatory.

Conclusion: violation (sixteen votes to one).

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

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

Georgia v. Russia (I) - 13255/07
[Section V]

(See Article 33 above, page 34)

Paksas v. Lithuania - 34932/04
[Section II]

(See Article 3 of Protocol No. 1 above, page 37)