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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Fatal shooting of handcuffed prisoner by soldier during attempted escape: *communicated*

Ülüfer v. Turkey - 23038/07
[Section II]

In April 2003 the applicant's son, who was detained in a military prison for theft, was taken to a criminal court by public transport. He was accompanied by two soldiers and an officer. At the end of the hearing, while they were waiting at a bus stop to return to the prison, the prisoner, who was handcuffed, started to run. Although the soldiers chasing him issued verbal warnings and fired two shots in the air, he continued to run. One of the soldiers fired a shot that seriously wounded the prisoner. Three days later the applicant's son died in hospital. The post-mortem report recorded that a bullet had entered through his back and exited by the stomach. In July 2003 the public prosecutor instituted criminal proceedings against the soldier for wilful homicide. He considered that the latter had exceeded his powers and that the article in the Criminal Code providing for immunity for persons acting under official orders was not applicable in this case. In October 2004 the assize court acquitted the soldier on the ground that he had acted within the scope of the above-mentioned article. In June 2006 the Court of Cassation upheld the first-instance judgment. The applicant brought an action for damages in the administrative court against the Ministry of the Interior. The court ruled against the applicant, finding that there was no causal link between the death of her son and any fault on the part of the authorities. All of the applicant's appeals were unsuccessful.

Communicated under Article 2 (procedural and substantive heads) and Article 13.

Positive obligations
Effective investigation

Alleged suicide of a Roma suspect while in police custody and lack of independent and effective investigation: *violations*

Mižigárová v. Slovakia - 74832/01
Judgment 14.12.2010 [Section IV]

Facts – The applicant's husband, a twenty-year old Roma man in good health, was arrested on suspicion of theft. He was questioned by four policemen and then by a lieutenant, an off-duty officer with whom he had had previous encounters. During the latter interrogation, he was shot in the abdomen with the lieutenant's service pistol. He died four days later in hospital. The investigation concluded that he had forcibly taken the gun from the lieutenant and shot himself. Subsequently, the lieutenant was convicted of injury to health caused by negligence in the course of duty and sentenced to one year's imprisonment, suspended for a two-and-a-half-year probationary period. The applicant's claims for damages were dismissed by the courts.

Law – Article 2: (a) *Substantive aspect* – Even if the Court were to accept, despite the improbability of such a hypothesis, that the applicant's husband had committed suicide, the obligation of the authorities to protect the health and well-being of persons in detention encompassed an obligation to take reasonable measures to protect them from harming themselves. There was insufficient evidence to enable the Court to establish whether the authorities had been aware of a suicide risk. However, there were certain basic precautions which police and prison officers should be expected to take in all cases in order to minimise any potential risk. First, compelling reasons had to be given as to why the interrogation of a suspect had been entrusted to an armed police officer. Second, the regulations required police officers to secure their service weapons in order to avoid any "undesired consequences". The domestic courts had held that the lieutenant's failure properly to secure his service weapon had amounted to negligence which had resulted in the death of the applicant's husband. Consequently, even if he had committed suicide as alleged by the investigative authorities, they had been in violation of their obligation to take reasonable measures to protect his health and well-being while in police custody.

Conclusion: violation (unanimously).

(b) *Procedural aspect* – The initial forensic examination of the crime scene had been conducted by local police officers. Officers from the Ministry of the Interior had not arrived until the following day. However, even after they had taken over the investigation, the officers and technicians from the lieutenant's district had continued to be involved. The investigation had therefore not been sufficiently independent. Moreover, no attempt appeared to have been made to investigate the allegation made

by the applicant's husband himself that the lieutenant had given him the firearm. No gunpowder residue test had been conducted in the immediate aftermath of the shooting, which could have excluded or confirmed the possibility that the lieutenant had pulled the trigger. Thus, there had been a failure by the investigators to take reasonable steps to secure evidence which had, in turn, undermined their ability to determine beyond any doubt who was responsible for the death. Finally, the authorities had failed to investigate the applicant's allegation that her husband had been ill-treated by the police officers, even though the autopsy report indicated that he had injuries to his face, shoulder and ear. In sum, no meaningful investigation had been conducted at the domestic level capable of establishing the true facts surrounding the death of the applicant's husband.

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 2: (a) *Substantive aspect* – While the lieutenant's conduct during the applicant's detention called for serious criticism, there had been no evidence that it had been racially motivated. The Court did not consider that the authorities' failure to carry out an effective investigation into the alleged racist motive for the incident should shift the burden of proof to the Government.

Conclusion: no violation (six votes to one).

(b) *Procedural aspect* – The Court noted with concern the international reports concerning police brutality towards Roma in Slovakia. In respect of persons of Roma origin, it would not exclude the possibility that in a particular case the existence of independent evidence of a systemic problem could, in the absence of any other evidence, be sufficient to alert the authorities to the possible existence of a racist motive. However, in the present case the Court was not persuaded that the objective evidence was sufficiently strong in itself to suggest the existence of such a motive. Moreover, the applicant had not made an allegation of racial bias at any point during the investigation.

Conclusion: no violation (six votes to one).

Article 41: EUR 45,000 in respect of non-pecuniary damage.

Inadequate medical treatment of a deaf and mute man in police custody: *violations*

Jasinskis v. Latvia - 45744/08
Judgment 21.12.2010 [Section III]

Facts – After a night of drinking with friends, the applicant's son, who was deaf and mute, fell down a flight of stairs, injuring his head and losing consciousness for several minutes. The police called to the scene were informed of the events and of the son's sensory disabilities. They took him to the police station to sober up, without waiting for an ambulance which had also meanwhile been called. The police officer on duty noted a graze on the son's face, but when the ambulance crew contacted the police they were informed that no medical examination was needed since the son was simply intoxicated. After being locked up in a cell, the son knocked on the doors and walls for a while, but to no avail. He had no means of communicating with the police officers since none of them appeared to understand sign language and the notepad which he normally used to communicate had been taken away from him. The following morning, seven hours after taking him into custody, the police officers unsuccessfully tried to wake the applicant's son up, but although he managed to open his eyes he was otherwise unresponsive. Another seven hours later, after finding that the son had been "sleeping for too long", the police called an ambulance and he was finally taken to hospital only after repeated requests by the applicant. He died several hours later and a subsequent autopsy confirmed multiple injuries to the head and brain as the cause of death.

In the course of the subsequent investigation, an expert report was issued on the quality of the medical care that had been provided to the applicant's son. It noted several shortcomings in his treatment at the police station, such as a lack of information on his condition during his detention and the delays in calling an ambulance. The police department where the son had been detained also launched an internal inquiry into the circumstances of his death. However, it terminated the investigation on three occasions, concluding that the officers on duty had acted in line with the applicable laws and regulations. Each of those decisions was subsequently quashed by the competent public prosecutor's office. After the third decision to terminate the investigation and at the insistence of the applicant, the case was finally submitted to the Bureau of Internal Security for further investigation. Having heard further witnesses, the Bureau ultimately decided to terminate the investigation, finding that the police had acted with due care. The applicant's appeals against that decision were dismissed.

Law – Article 2: (a) *Substantive aspect* – The Court noted that persons with disabilities were particularly

vulnerable when in custody and that the police had been properly informed of the applicant's son's sensory disabilities and of his injury. However, they had not had him medically examined when they took into custody, as they were specifically required to do by the standards of the European Committee for the Prevention of Torture (CPT). Nor had they given him any opportunity to provide information about his state of health, even after he kept knocking on the doors and the walls of the sobering-up cell. Taking into account that he was deaf and mute, the police had a clear obligation under the domestic legislation and international standards, including the United Nations Convention on the Rights of Persons with Disabilities, to at least provide him with a pen and paper to enable him to communicate his concerns. Finally, it was of particular concern that almost seven hours had passed between the son's "refusing to wake up" and an ambulance being called. Not getting up for some fourteen hours could hardly be explained by simple drunkenness. In conclusion, given their failure to seek a medical opinion or to call an ambulance for almost seven hours after failing to awake the victim, the police had failed to fulfil their duty to safeguard his life.

Conclusion: violation (unanimously).

(b) *Procedural aspect* – The initial investigation into the son's death was conducted by the very same authority which had been implicated in the events resulting in the death. It could not, therefore, be said to have been effective since it did not comply with the minimum standard of investigatory independence. The investigation had then been taken over by the Bureau of Internal Security, which questioned the five police officers who had been present at the police station in the days prior to the death and drew its own conclusions, which coincided with those reached by the implicated police department's internal inquiry. Without drawing general conclusions about the independence of the Bureau, the Court considered that the investigation it had carried out was defective for several reasons. Firstly, it was not until some eighteen months after the death that the investigation was transferred away from the institution implicated in the events and the Bureau did not adopt its decision until almost a year later still. A more prompt reaction by an independent authority would have enabled more evidence to be gathered, for instance, from the pathologist who performed the autopsy or from the scene of the son's fall or the cell where he was detained. Secondly, the investigation carried out by the Bureau failed to provide answers to several questions that would have been crucial in determining the individual responsibility of the police officers, for example, regarding the quality of the medical treatment in the sobering-up centre. Nor had the investigators assessed whether refusing to have the son medically examined on his arrest and subsequently delaying him medical assistance were compatible with the police's duties under domestic law and the special needs of persons with disabilities. Lastly, the Court could not disregard the fact that responsibility for the investigation had been passed back and forth between the police and various prosecutors' offices three times.

Conclusion: violation (unanimously).

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

ARTICLE 3

Inhuman or degrading treatment

Religiously motivated attacks by private individuals on a Hare Krishna member: *violation*

Milanović v. Serbia - 44614/07
Judgment 14.12.2010 [Section II]

(See Article 14 below, page 20)

Degrading treatment
Positive obligations

Failure to test detainee for tuberculosis on arrival in prison: *violation*

Dobri v. Romania - 25153/04
Judgment 14.12.2010 [Section III]

Facts – On 20 October 2002 the applicant was taken into police custody and examined by a general practitioner, who declared him to be in good health with a normal respiratory system. The following day he was detained pending trial. In April 2003 he was sentenced to four years and six months' imprisonment for aggravated theft. In July 2003 the applicant was transferred to a prison where doctors found that he was suffering from tuberculosis and provided him with appropriate treatment.

Law – Article 3: When the applicant had been taken into police custody on 20 October 2002 the

doctor had concluded, after examining him but without specifically screening for tuberculosis, that in clinical terms he was in good health. Furthermore, the doctors who had treated the applicant between 1987 and 2002 for a liver condition had not detected any lung disease. In July 2003, approximately ten months after he had been taken into police custody, the prison hospital doctors had diagnosed the applicant with tuberculosis, and he had been provided with special treatment from September 2003 onwards. However, besides the positive obligation to preserve a prisoner's health and well-being, in particular by administering the necessary medical treatment, the State had a prior positive obligation under Article 3 to carry out early screening of prisoners on their arrival in order to identify those carrying germs or contagious diseases, isolate them and provide them with effective treatment, especially as the prison authorities could not ignore infections among prisoners and thereby expose others to the real risk of contracting serious illnesses. The medical treatment provided to the applicant appeared to have been sufficient and appropriate. However, after suspecting that he might be suffering from pulmonary tuberculosis, the prison authorities had housed him in conditions likely to worsen his health (overcrowding and lack of hygiene). In any event, in the absence of evidence to the contrary, it could be concluded that the applicant had developed tuberculosis while under the responsibility of the State, between the time he had been taken into police custody and the date on which the disease had been detected, on account of the poor conditions of his detention. The combination of those conditions and the tuberculosis developed by the applicant, over a period of more than eight months, amounted to degrading treatment.

Conclusion: violation (unanimously).

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

ARTICLE 5

Article 5 § 1

Procedure prescribed by law

Failure to adhere strictly to domestic-law rules governing detention with a view to deportation: *violation*

Jusic v. Switzerland - 4691/06
Judgment 2.12.2010 [Section I]

Facts – The applicant is a national of Bosnia and Herzegovina who lives in Switzerland. His application for asylum in that country was turned down. He was detained for twenty-two days with a view to his deportation, but was not deported.

Law – Article 5 § 1: The applicant's asylum application had been turned down but the order for his and his family's deportation had not been enforced. Following the deportation order of May 2005 the applicant could not have been unaware that he had to leave the country with his family and that if they did not leave of their own accord they would be removed, if necessary by force. Hence, the case fell within the scope of the second part of Article 5 § 1 (f), since action was "being taken" with a view to the deportation of the applicant and his family when he was placed in detention in August 2005. In the Cantonal Court's view, the fact that the applicant had clearly and repeatedly signalled his intention not to return to his country of origin, and that his wife had refused to sign a document acknowledging receipt of a flight plan for a flight in August 2005, were significant indications that the applicant intended to evade enforcement of the removal order. The Court did not share this view and considered that the manner in which the national authorities had applied the domestic law in the instant case had been incompatible with the requirement for Article 5 to be construed strictly. While it was true that an enforceable deportation order had existed, the applicant had provided his particulars and those of his wife on their arrival in Switzerland, had submitted his identity card and had kept all his appointments with the Cantonal Population Office. He had four dependent children, all of them minors, and his wife suffered from a psychological disorder. Hence, there had been no "real evidence" to suggest that the applicant planned to "evade return", although the law required such evidence before the person concerned could be detained. In particular, the fact that the applicant had repeatedly stated that he would not leave Switzerland could not be construed as an intention on his part to "evade" enforcement of the deportation order. Hence, the competent domestic authorities had not complied with the criteria laid down by the relevant section of the former Federal Aliens' Domicile and Residence Act. The applicant had therefore not been detained in accordance with a procedure prescribed by law.

Conclusion: violation (unanimously).

The Court further held unanimously that there had been no violation of Article 5 § 5, as the applicant's right to compensation for the breach of

Article 5 § 1 had been guaranteed with sufficient certainty.

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

Lawful arrest or detention

Arbitrary detention of minors in a juvenile holding facility: *violation*

Ichin and Others v. Ukraine - 28189/04 and 28192/04
Judgment 21.12.2010 [Section V]

Facts – The second and fourth applicants, minors at the material time, stole some food and kitchen appliances from a school canteen. They were questioned by the police and confessed to the theft. They also returned some of the stolen goods. A court ordered both boys to be placed in a juvenile holding facility as they were considered capable of committing socially dangerous acts, evading the investigation and interfering with the course of justice. They remained in detention for thirty days. The criminal proceedings against them were eventually terminated as they were under the age of criminal responsibility.

Law – Article 5 § 1: The procedure for placement of a minor in a special holding facility was provided for by the Code of Criminal Procedure. The circumstances of the present case, however, cast doubts as to whether the scope and manner of application of this procedure was sufficiently well-defined to avoid arbitrariness. The authorities had summoned the applicants as court witnesses in criminal proceedings against persons unknown, even though the identity of the offenders had been established by that time. The decision to detain them did not appear to be for any of the purposes listed in Article 5 § 1 (c). No investigative measures had been taken while the applicants had been detained, and the criminal proceedings against them had been started twenty days after their release although they could not be held criminally responsible given that they were under age. In addition, the juvenile holding facility where they had been placed could not be considered a place for "educational supervision" within the meaning of Article 5 § 1 (d), as it was an establishment for the temporary isolation of minors, including those who had committed an offence. It did not appear from the case materials that the applicants had participated in any educational activities during their stay there or that their detention had been related to any such purpose. Consequently, their detention had not fallen under the permissible exceptions of Article 5 § 1 (d) either. In sum, the applicants had been detained in an arbitrary manner.

Conclusion: violation (unanimously).

Article 41: EUR 6,000 to each of the second and fourth applicants in respect of non-pecuniary damage.

ARTICLE 6

Article 6 § 1 (civil)

Civil rights and obligations
Access to court

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

Boulois v. Luxembourg - 37575/04
Judgment 14.12.2010 [Section II]

Facts – The applicant is currently serving a fifteen-year prison sentence. Between 2003 and 2006 he submitted six requests for temporary leave of absence ("prison leave"), stating, in particular, that he wished to carry out administrative formalities and to take courses to gain qualifications. All his requests were refused by the prison board. The applicant applied to the first-instance administrative court for judicial review of the first two refusals, but the court ruled that it lacked jurisdiction to examine the matter. The higher administrative court upheld that ruling.

Law – Article 6 § 1

(a) *Admissibility* – It was clear that a dispute ("*contestation*") had arisen once the prison board had decided to refuse the various requests for prison leave submitted in connection with plans for the applicant's occupational and social resettlement. The dispute, which had been genuine and serious, had related to the actual existence of the right to prison leave, and had been pursued before the administrative courts. The outcome of the proceedings before the prison board and the administrative courts had been directly decisive for the right alleged in the present case. Furthermore, in view of the existence of legislation and regulations on the subject, the applicant could arguably maintain that, as a prisoner, he was entitled to prison leave,

provided that he satisfied the necessary requirements. Moreover, the restrictions on the right to a court alleged by the applicant related to a set of prisoners' rights which the Council of Europe had recognised by means of the European Prison Rules. Accordingly, a dispute over rights for the purposes of Article 6 § 1 could be said to have existed in the present case. In addition, the dispute had raised the issue of the applicant's interest in reorganising his professional and social life on leaving prison. The alleged restriction concerned personal rights, bearing in mind the importance of the applicant's interest in resettling in society. His social rehabilitation was vital for the protection of his right to lead a private social life and to develop his social identity. Accordingly, the applicant's complaint was compatible *ratione materiae* with the Convention in so far as it concerned the civil aspect of Article 6.

Conclusion: admissible (majority).

(b) *Merits* – It appeared from a 1986 law that decisions on requests for prison leave were taken by Principal State Counsel or his representative, in accordance with a majority decision by a prison board comprising, as well as Principal State Counsel or his representative, a judge and a member of State Counsel's Department. The law in question did not provide for public hearings before the board. After submitting each of his requests for prison leave, the applicant had been notified of the refusal through the prison governor, without the prison board having determined the matter after proceedings conducted in a prescribed manner. That finding was sufficient in itself to conclude that the prison board did not satisfy the requirements of a tribunal within the meaning of Article 6 § 1. However, there would not have been a violation of the Convention had the proceedings in question been subject to subsequent control by a judicial body with full jurisdiction providing the guarantees of Article 6. The applicant had applied for judicial review of the prison board's first two refusals of his requests, but both the first-instance and the higher administrative courts had ruled that they lacked jurisdiction to deal with the matter. Since the administrative courts had not considered the merits of the application for judicial review, it had to be concluded that the lack of any decision on the merits had nullified the effect of the administrative courts' review of the prison board's decisions. Furthermore, the 1986 law did not afford prisoners any other remedies in this sphere.

Conclusion: violation (four votes to three).

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

Article 46: The respondent State and all its authorities were called upon to take all necessary steps to ensure that applications concerning the execution of sentences could be examined by a court satisfying the requirements of Article 6 § 1.

Access to court

Fixing of court fees payable by creditor of insolvent company by reference to total value of claim: *no violation*

Urbanek v. Austria - 35123/05
Judgment 9.12.2010 [Section I]

Facts – The applicant brought court proceedings under section 110 of the Insolvency Act for a declaratory decision that a company which had gone into liquidation owed him some EUR 2,400,000. The court fixed the fee payable to it as a percentage of that sum, which it regarded as the amount in dispute, rather than as a percentage of the much lesser amount the applicant actually expected to recover from the company's assets (EUR 36,000). As a result, the applicant was charged almost EUR 30,000 instead of EUR 550 in court fees. In his application to the European Court, he complained of a breach of his right of access to court.

Law – Article 6 § 1: There were a number of factors that distinguished the applicant's case from cases in which the Court had found a violation of the right of access to a court on account of excessive court fees. Firstly, the conduct of the proceedings under section 110 of the Insolvency Act was not dependent on the fees being paid: the domestic courts were required to conduct the proceedings regardless of whether the fees were paid or not. Secondly, although the applicant had asserted that the level of fees he was required to pay was excessive, there was nothing unusual in a system in which court fees for pecuniary claims were dependent on the amount in dispute. The applicant's argument that the fees should have been fixed by reference to the amount he was likely to receive in the insolvency proceedings as opposed to the amount he had claimed was based on speculation, namely that the fees might exceed the amount he finally obtained. Moreover, as the domestic courts had rightly pointed out, the risk of a claimant having to pay fees which exceeded the final award was not confined to claims made in the context of insolvency proceedings. Such a risk could not in itself invalidate a system linking court fees to the amount in dispute. Lastly, the court-fee system at issue

appeared sufficiently flexible, as there had been a number of possibilities at the applicant's disposal to obtain full or partial exemption from the requirement to pay court fees if he was eligible for legal aid or was liable to suffer particular hardship. In sum, it had been within the State's margin of appreciation to link the court fees in respect of pecuniary claims to the amount in dispute and there was no reason of principle to distinguish the proceedings under section 110 of the Insolvency Act from other civil proceedings. Accordingly, the very essence of the applicant's right of access to court had not been impaired.

Conclusion: no violation (unanimously).

ARTICLE 8

Private life

Restrictions on obtaining an abortion in Ireland: *violation/no violation*

A, B and C v. Ireland - 25579/05
Judgment 16.12.2010 [GC]

Facts – Abortion is prohibited under Irish criminal law by sections 58 and 59 of the Offences Against the Person Act 1861. A referendum held in 1983 resulted in the adoption of Article 40.3.3 of the Irish Constitution (the Eighth Amendment) whereby the State acknowledged the right to life of the unborn and, with due regard to the equal right to life of the mother, guaranteed to respect the mother in national laws. That provision was interpreted by the Supreme Court in its seminal judgment in the *X* case in 1992 as meaning that abortion in Ireland was lawful if there was a real and substantial risk to the life of the mother which could only be avoided by termination of her pregnancy. The Supreme Court stated at the time that it found it regrettable that the legislature had not enacted legislation regulating that constitutionally guaranteed right. A further referendum in 1992 resulted in the Thirteenth and Fourteenth Amendments to the Constitution, which lifted a previously existing ban on travelling abroad for abortion and allowed information about lawfully available abortions abroad to be disseminated in Ireland.

All three applicants were resident in Ireland at the material time, had become pregnant unintentionally and had decided to have an abortion as they considered that their personal circumstances did not permit them to take their pregnancies to term. The first applicant was an unemployed single mother. Her four young children were in foster care and she feared that having another child would jeopardise her chances of regaining custody after sustained efforts on her part to overcome an alcohol-related problem. The second applicant did not wish to become a single parent. Although she had also received medical advice that she was at risk of an ectopic pregnancy, that risk had been discounted before she had the abortion. The third applicant, a cancer patient, was unable to find a doctor willing to advise whether her life would be at risk if she continued to term or how the foetus might have been affected by contraindicated medical tests she had undergone before discovering she was pregnant. As a result of the restrictions in Ireland all three applicants were forced to seek an abortion in a private clinic in England in what they described as an unnecessarily expensive, complicated and traumatic procedure. The first applicant was forced to borrow money from a money lender, while the third applicant, despite being in the early stages of pregnancy, had to wait for eight weeks for a surgical abortion as she could not find a clinic willing to provide a medical abortion (drug-induced miscarriage) to a non-resident because of the need for follow-up. All three applicants experienced complications on their return to Ireland, but were afraid to seek medical advice there because of the restrictions on abortion.

In their applications to the European Court, the first and second applicants complained that they were not entitled to abortion in Ireland as Irish law did not allow abortion for reasons of health and/or well-being, but solely when there was an established risk to the mother's life. The third applicant complained that, although she believed her pregnancy put her life at risk, there was no law or procedure through which she could have established that and so obviate the risk of prosecution if she had an abortion in Ireland.

Law – Article 8: While Article 8 could not be interpreted as conferring a right to abortion, the first and second applicants' inability to obtain an abortion in Ireland for reasons of health and/or well-being, and the third applicant's alleged inability to establish her qualification for a lawful abortion in Ireland, came within the scope of their right to respect for their private lives.

(a) *First and second applicants* – Having regard to the broad concept of private life within the meaning of Article 8, including the right to personal autonomy and to physical and psychological integrity, the prohibition of the termination,

for reasons of health and/or well-being, of the first and second applicants' pregnancies amounted to an interference with their right to respect for their private lives. That interference was in accordance with the law and pursued the legitimate aim of the protection of the profound moral values of a majority of the Irish people as reflected in the 1983 referendum.

In view of the acute sensitivity of the moral and ethical issues raised, a broad margin of appreciation was, in principle, to be accorded to the Irish State in determining whether a fair balance had been struck between the protection accorded under Irish law to the right to life of the unborn and the conflicting rights of the first and second applicants to respect for their private lives. Although there was a consensus amongst a substantial majority of the Contracting States towards allowing abortion on broader grounds than those accorded under Irish law, that consensus did not decisively narrow the broad margin of appreciation of the State. Since there was no European consensus on the scientific and legal definition of the beginning of life and since the rights claimed on behalf of the foetus and those of the mother were inextricably interconnected, the margin of appreciation accorded to the State as regards how it protected the unborn necessarily translated into a margin of appreciation as to how it balanced the conflicting rights of the mother.

A choice had emerged from the lengthy, complex and sensitive debate in Ireland as regards the content of its abortion laws. While Irish law prohibited abortion in Ireland for health and well-being reasons, it allowed women the option of seeking an abortion abroad. Legislative measures had been adopted to ensure the provision of information and counselling about the options available, including abortion services abroad, and to ensure any necessary medical treatment both before and after an abortion. The importance of the role of doctors in providing information and their obligation to provide all appropriate medical care, notably post-abortion, was emphasised in the Crisis Prevention Agency's work and documents and in professional medical guidelines. The first two applicants had not demonstrated that they had lacked relevant information or necessary medical care as regards their abortions.

Accordingly, regard being had to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the prohibition in Ireland of abortion for health and well-being reasons, based on the profound moral views of the Irish people, had not exceeded the State's margin of appreciation. The impugned prohibition had thus struck a fair balance between the first and second applicants' right to respect for their private lives and the rights invoked on behalf of the unborn.

Conclusion: no violation in respect of first and second applicants (eleven votes to six).

(b) *The third applicant* – The third applicant's complaint concerned the respondent State's alleged failure to introduce a procedure by which she could have established whether she qualified for a lawful abortion in Ireland on grounds of the risk to her life. She had a rare form of cancer and, on discovering she was pregnant, had feared for her life as she believed that her pregnancy increased the risk of her cancer returning and that she would not obtain treatment in Ireland while pregnant. The Court considered that the establishment of any such relevant risk to her life caused by her pregnancy clearly concerned fundamental values and essential aspects of her right to respect for her private life.

There were a number of concerns regarding the effectiveness of the only non-judicial means of determining such a risk – the ordinary medical consultation process – on which the Government had relied. The first of these was that the ground upon which a woman could seek a lawful abortion in Ireland – a real and substantial risk to life which could only be avoided by a termination of the pregnancy – was expressed in broad terms. No criteria or procedures had been laid down in Irish law governing how that risk was to be measured or determined. Nor was there any framework in place to resolve, in a legally binding way, differences of opinion between a woman and her doctor or between different doctors. Against this background of substantial uncertainty, it was evident that the criminal provisions of the 1861 Act would constitute a significant chilling factor for both women and doctors in the medical consultation process, with women risking conviction and doctors risking both conviction and disciplinary action.

As to the judicial procedures that had been proposed by the Government, a constitutional action to determine the third applicant's qualification for a lawful abortion in Ireland was not an effective means of protecting her right to respect for her private life. Constitutional courts were not the appropriate fora for the primary determination, which would largely be based on medical evidence, of whether a woman qualified for an abortion and it was inappropriate to require women to take on such complex constitutional proceedings when

their underlying constitutional right to an abortion in the case of a qualifying risk to life was not disputable. Nor was it clear how an order requiring doctors to carry out an abortion would be enforced. As to the Government's submission that the third applicant could have made an application under the European Convention on Human Rights Act 2003 for a declaration of incompatibility of the relevant provisions of the 1861 Act and damages, such a declaration placed no legal obligation on the State to amend domestic law and could not form the basis of an obligatory award of monetary compensation.

Consequently, neither the medical consultation nor litigation options constituted effective and accessible procedures that would allow the third applicant to establish her right to a lawful abortion in Ireland. The uncertainty generated by the lack of legislative implementation of Article 40.3.3 of the Constitution and by the lack of effective and accessible procedures to establish a right to an abortion had resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland and the reality of its practical implementation. No convincing explanation had been forthcoming for the failure to implement Article 40.3.3, despite recognition that further legal clarity was required. In sum, the authorities had failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which she could have established whether she qualified for a lawful abortion in Ireland.

Conclusion: violation in respect of the third applicant (unanimously).

Article 41: EUR 15,000 to the third applicant in respect of non-pecuniary damage.

Liability of health professionals to prosecution effectively depriving expectant mothers of right to medical assistance for home births: *violation*

Ternovszky v. Hungary - 67545/09
Judgment 14.12.2010 [Section II]

Facts – In her application to the European Court, the applicant, a pregnant mother who wished to give birth at home, complained that she was effectively prevented from obtaining adequate professional assistance if she exercised that choice by domestic legislation[1] which potentially rendered any health professional assisting a home birth liable to conviction and a fine.

Law – Article 8: "Private life" incorporated the right to respect for the decision to become a parent which in turn included the right to choose the circumstances in which one gave birth. Although the applicant was not prevented as such from giving birth at home, the legislation arguably dissuaded health professionals from providing the requisite assistance and thus constituted interference with the exercise of her right.

As to whether that interference was "in accordance with the law", the Court considered that, where choices related to the exercise of the right to respect for private life occurred in a legally regulated area, the State should provide adequate legal protection to the right in the regulatory scheme, notably by ensuring that the law was accessible and foreseeable. While the State had a wide margin of appreciation, the regulation had to ensure a proper balance between societal interests and the right at stake. In the context of home birth, this implied the mother being entitled to a legal and institutional environment that enabled her choice to be fulfilled, except where other rights rendered restrictions necessary. Although the question whether home birth carried significantly higher risks than a hospital birth was a matter of debate in medical circles, the right to choice in matters of child delivery included the right to legal certainty that the choice was lawful and not subject to sanctions, directly or indirectly. In that connection, the domestic legislation could reasonably be seen as contradictory. While the Health Care Act 1997 recognised patients' right to self-determination, section 101(2) of the Government Decree sanctioned health professionals who carried out activities within their qualifications in a manner incompatible with the law or their licence. In at least one case proceedings had been instituted against a health professional for having assisted home birth. Although the Government had recognised the need for regulations in this field, none had been introduced. The Court therefore concluded that the matter of health professionals assisting home births was surrounded by legal uncertainty prone to arbitrariness. Owing to the absence of specific and comprehensive legislation and to the permanent threat posed to health professionals inclined to assist home births, the applicant's choices had been limited. That situation was incompatible with the

1. Section 101(2) of Government Decree no. 218/1999 (XII.28).

notion of "foreseeability" so that the interference was not "in accordance with the law".

Conclusion: violation (six votes to one).

Article 41: No claim made in respect of damage.

Family life

Refusal to grant long-term cohabitee privilege against testifying in criminal proceedings against partner: *relinquishment in favour of the Grand Chamber*

Van der Heijden v. the Netherlands - 42857/05
[Section III]

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

In her application to the European Court, the applicant alleged a violation of Article 8, taken alone and together with Article 14.

Family life
Positive obligations

Inability of biological father to establish in law his paternity of children born to a married woman with whom he had been cohabiting: *no violation*

Chavdarov v. Bulgaria - 3465/03
Judgment 21.12.2010 [Section V]

Facts – In 1989 the applicant set up home with a married woman (who was living separately from her husband); she gave birth to three children, in 1990, 1995 and 1998, while they were living together. The woman's husband was named as the children's father on their birth certificates and the children were given his surname. At the end of 2002 the woman left the applicant and the children in order to set up home with another partner. Since then the applicant has lived with the three children. At the beginning of 2003 he consulted a lawyer with a view to bringing proceedings for recognition of paternity. However, the lawyer informed him that domestic law did not enable him to challenge the presumption of paternity in respect of his former companion's husband. In consequence, the applicant applied directly to the European Court.

Law – Article 8

(a) *Existence of a family life* – The thirteen years during which the applicant and his former companion had cohabited (1989-2002) and the birth of the three children during that period indicated that this was indeed a *de facto* family unit, in which the applicant had been able to develop emotional ties with the children. His attachment to them was also evident from the rapid steps taken by him following the separation with a view to overcoming the lack of any formal family ties between himself and the children, and from the fact that the children had apparently lived with him since the separation. It was therefore appropriate to consider that the ties between the applicant and the three children whose biological father he claimed to be did indeed amount to "family life" within the meaning of the Convention.

(b) *Positive obligations* – The States enjoyed a certain margin of appreciation in regulating paternal filiation, an area in which various moral, ethical, social or religious considerations applied. The data on twenty-four States Parties to the Convention indicated that there was no consensus on whether domestic legislation should enable the biological father to contest the presumption of a husband's paternity. In the instant case, the existence of the *de facto* single-parent family formed by the applicant and the three children had not been threatened at any point, by the authorities, the mother or the latter's husband. Although the applicant was unable to bring an action to challenge the three children's paternal filiation, domestic legislation did not deprive him of any possibility of establishing a paternal link in their respect or of overcoming the practical disadvantages posed by the absence of such a link. In particular, he could have applied to adopt the children, or asked the social services to have them placed under his responsibility as a close relative of abandoned

underage children. Since the applicant had not shown that he had availed himself of those possibilities, the State authorities could not be held responsible for the applicant's own passivity. Respect for the children's legitimate interests had also been secured by the domestic legislation. Accordingly, the fair balance between the interest of society and that of the individuals concerned had not been breached in this case.

Conclusion: no violation (unanimously).

Expulsion

Deportation order against long-term illegal immigrant: *deportation would not constitute a violation*

Gezginci v. Switzerland - 16327/05
Judgment 9.12.2010 [Section I]

Facts – The applicant is a Turkish national who has lived in Switzerland since 1978, on the basis of residence permits from 1980 to 1998 and unlawfully during the remaining periods. In 1997 the national authorities decided not to renew his residence permit. A few months later they set March 1999 as the deadline for his deportation from Switzerland. However, the applicant did not leave the country. In 2003, after a serious work-related accident, he applied for a residence permit on humanitarian grounds. The authorities refused the application. Shortly afterwards his wife disappeared without trace, leaving him to care for their eleven-year-old daughter. The applicant lodged several unsuccessful appeals against the deportation order, which is still in force.

Law – Article 8: In view of the applicant's very long-standing residence in Switzerland, the refusal to grant him a residence permit on humanitarian grounds amounted to interference with his right to respect for his private life. That interference had been in accordance with the law and had pursued the legitimate aims of ensuring the economic well-being of the country, preventing disorder or crime and protecting the rights and freedoms of others. In order to determine whether it had been necessary in a democratic society, a number of factors had to be taken into consideration. First of all, the applicant's convictions between 1982 and 1992 had not been very serious and since 1993 his conduct did not appear to have been open to criticism from a purely criminal-law standpoint. Next, the applicant had lived in Switzerland for approximately thirty years, not counting periods spent abroad, thanks to the considerable tolerance shown by the authorities since 1999. Furthermore, some members of the applicant's family still lived in Turkey and would be able to help him resettle there and find work; he also spoke Turkish fluently. Similar considerations would apply were he to opt for Romania, a country which he knew from visits, where his wife lived and his daughter had spent much of her life, and where he appeared to have been in gainful employment. Furthermore, it was clear from his attitude that he was unable and unwilling to find employment in Switzerland. As to his daughter, given that she had spent most of her life in Romania and Turkey, was a citizen of both countries and probably spoke both languages, she could reasonably be expected to be able to adjust if she returned there. Lastly, the applicant's health was not liable to significantly hinder his integration in Turkey, given that he would have access there to the necessary medicines and treatment and would undoubtedly receive an invalidity pension. Accordingly, regard being had in particular to the fact that the applicant had been residing unlawfully in Switzerland since 1997, his lack of willingness to integrate there, his failure to abide by the rules of the country and the fact that his ties with his country of origin did not appear to have been completely severed, the respondent State could be said to have struck a fair balance between the interests of the applicant and his daughter on the one hand and its own interest in controlling immigration on the other.

Conclusion: the applicant's deportation would not amount to a violation (five votes to two).

ARTICLE 9

Manifest religion or belief

Refusal to provide Buddhist prisoner with meat-free diet: *violation*

Jakóbski v. Poland - 18429/06
Judgment 7.12.2010 [Section IV]

Facts – In his application to the European Court, the applicant, a practising Buddhist who was serving a prison sentence, complained that he was unable to obtain a meat-free diet in prison.

Law – Article 9: The applicant's decision to adhere to a vegetarian diet could be regarded as motivated or inspired by a religion (Buddhism) and was not unreasonable. Consequently, the refusal of the prison authorities to provide him with a such a diet fell within the scope of Article 9. While the Court

was prepared to accept that a decision to make special arrangements for one prisoner within the system could have financial implications for the custodial institution, it had to consider whether the State had struck a fair balance between the different interests in play. The applicant had merely asked to be granted a diet without meat products. His meals did not have to be prepared, cooked and served in a prescribed manner, nor did he require any special products. He was not offered any alternative diet, and the Buddhist Mission was not consulted on the issue of the appropriate diet. The Court was not persuaded that the provision of a vegetarian diet would have entailed any disruption to the management of the prison or a decline in the standards of meals served to other prisoners and noted that Committee of Ministers' Recommendation Rec(2006)2 on the European Prison Rules advised that prisoners should be provided with food that took into account their religion. It therefore concluded that the authorities had failed to strike a fair balance between the applicant's and the prison authorities' interests.

Conclusion: violation (unanimously).

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

ARTICLE 10

Freedom of expression

Award of damages against public servant for comments made to press concerning confidential report on conduct of Court of Cassation judge: *no violation*

Poyraz v. Turkey – 15966/06
Judgment 7.12.2010 [Section II]

Facts – The applicant, chief inspector of the Ministry of Justice, was responsible for conducting an inquiry into alleged professional misconduct on the part of a judge. In the report he co-authored, the professional conduct of the judge – who had in the meantime been appointed to the Court of Cassation – was severely criticised through witness accounts of, *inter alia*, acts of sexual harassment. The report was leaked to the press and received widespread television coverage, featuring interviews with the applicant, the judge and witnesses. In response to accusations that he was involved in a political conspiracy against the judge, the applicant issued a written statement to the press in which he asserted that the judge was currently the subject of fifteen separate inquiries and that he had not named the harassment victims in order to prevent deaths from occurring. The judge brought an action for damages against the applicant in the latter's personal capacity. The applicant was ordered to pay damages and was unsuccessful in his appeal to the Court of Cassation.

Law – Article 10: The authorities' interference with the applicant's freedom of expression, in the form of the civil judgment against him on the basis of his report and his comments to the press, had been prescribed by domestic law and had pursued the legitimate aim of protecting the reputation or rights of others. Judgment had been given against the applicant in his personal and not his professional capacity, but both protagonists in the case nevertheless had a duty of loyalty towards the State and a reputation to preserve as high-ranking representatives of the legal service. The applicant's statements to the press, despite being generally neutral in tone, had amounted to acquiescence in the content of the information disclosed. Furthermore, the applicant had made his own subjective comment on top of that information, namely that deaths might occur if he disclosed the names of the harassment victims. He had also "defended" the content of the report when interviewed by the audiovisual media. It could therefore be concluded, in line with the domestic courts' findings, that the applicant had, at least in part, endorsed the content of the report as published in the press. As a result, he had not displayed the discretion required of a judicial authority. Moreover, the report mentioned serious offences allegedly committed by a member of the Court of Cassation, who needed to enjoy public confidence in order to be able to discharge his functions. People entrusted with public duties had to exercise restraint to avoid creating situations of inequality when making public statements concerning ordinary citizens, whose access to the media was more limited. They also had to be especially vigilant when in charge of investigations involving information covered by an official secrecy clause designed to ensure the proper administration of justice. Accordingly, the authorities' interference with the applicant's freedom of expression had been necessary in a democratic society and the means employed had been proportionate to the aim pursued, namely the protection of the reputation or rights of others.

Conclusion: no violation (unanimously).

The Court also held unanimously that there had been a violation of Article 6 § 1 on account of the excessive length (seven years and seven months) of the civil proceedings in the case.

ARTICLE 12

Right to marry

Requirement of certificate of approval for immigrants wishing to marry other than in the Church of England: *violation*

O'Donoghue and Others v. the United Kingdom - 34848/07
Judgment 14.12.2010 [Section IV]

Facts – Under section 19 of the Asylum and Immigration Act 2004, persons subject to immigration control who wish to get married but are not willing or able to do so in the Church of England must apply to the Secretary of State for permission in the form of a certificate of approval, for which they must pay a fee. There is no exemption or possibility of waiver or reduction of this fee, which at the material time was 295 pounds sterling (GBP) (about EUR 330). Under the first version of the scheme – introduced in 2005 – in order to qualify for a certificate of approval applicants had to have been granted leave to enter or remain in the United Kingdom for a period of more than six months and have at least three months of that leave remaining at the time of making the application. The scheme was subsequently amended twice with eligibility for a certificate of approval being extended firstly to applicants who had insufficient leave to enter or remain and then to those who had no leave to enter or remain. Under these new second and third versions of the scheme, applicants could be asked to submit information to show that the proposed marriage was genuine.

The second applicant, a Nigerian national, arrived in Northern Ireland in 2004 where he met the second applicant, to whom he proposed in May 2006. The couple did not seek to marry in the Church of England as they were practising Roman Catholics and, in any event, there is no Church of England in Northern Ireland. They therefore required a certificate of approval. However, as an asylum-seeker the second applicant did not become eligible to apply for a certificate until the third version of the scheme came into effect in June 2007. In July 2007 the first and second applicants applied for a certificate and requested exemption from the fee on the grounds that the first applicant was dependent on State benefits and the second applicant was not permitted to work under the terms of his temporary admission to the United Kingdom, but their application was rejected for failure to pay the fee. Ultimately, a certificate of approval was granted in July 2008 after they succeeded in raising the sum payable with help from friends.

Law – Article 12: Though not inherently objectionable, the requirement for persons subject to immigration control to submit an application for a certificate of approval before being permitted to marry in the United Kingdom gave rise to a number of grave concerns.

First, the decision whether or not to grant a certificate of approval was not based solely on the genuineness of the proposed marriage. The first version of the scheme did not provide for or envisage any investigation of that issue as the decision whether or not to grant a certificate was based solely on whether the applicant had sufficient leave; the second and third versions provided that persons with insufficient or no valid leave to remain could be required to submit information concerning the genuineness of their relationship. In contrast, under all three versions of the scheme applicants with "sufficient" leave to remain qualified for certificates of approval without any apparent requirement that they submit information concerning the genuineness of the proposed marriages.

Secondly, the first and second versions of the scheme had imposed a blanket prohibition on the exercise of the right to marry on all persons in a specified category – foreign nationals with either insufficient or no leave to remain – regardless of whether the proposed marriage was one of convenience or not. There was no justification whatsoever for imposing a blanket prohibition on the right of persons falling within these categories to exercise their right to marry. Even had there been evidence (none was submitted) to suggest that such persons were more likely to enter into marriages of convenience, a blanket prohibition, without any attempt being made to investigate the genuineness of the proposed marriages, restricted the right to marry to such an extent that its very essence was impaired. The existence of an exception on compassionate grounds did not alter the position as it was entirely at the discretion of the Secretary of State.

Thirdly, a fee fixed at a level which a needy applicant could not afford could impair the essence of the right to marry. In view of the fact that many persons subject to immigration control would be unable to work or would fall into the lower income bracket, the fee of GBP 295 was sufficiently high to impair the right to marry. That had remained

the case even after the introduction of a system of refunds for needy applicants was introduced in July 2010, as the requirement to pay a fee could still act as a powerful disincentive to marriage.

In conclusion, from May 2006, when the applicants first formed the intention to marry, until they were issued with a certificate of approval in July 2008, the very essence of the first and second applicants' right to marry was impaired, initially because under the second version of the scheme the second applicant was not eligible for a certificate of approval and subsequently because of the level of the fee charged.

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 12: The first version of the scheme was discriminatory on the ground of religion. The second applicant had been in a relatively similar position to a person with no leave to remain who was willing and able to marry in the Church of England. While such a person was free to marry unhindered, the second applicant had been both unwilling (on account of his religious beliefs) and unable (on account of his residence in Northern Ireland) to enter into such a marriage. Consequently, he had initially been prohibited from marrying at all in the United Kingdom before, following the amendments to the scheme, being permitted to marry only after submitting an application for a certificate of approval and paying a sizeable fee. There had therefore been a clear difference in treatment for which no objective and reasonable justification had been provided.

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 9: The Government conceded that, through being subject to a regime to which those wishing to marry in the Church of England would not have been subject, the first and second applicants' rights under Article 14, taken together with Article 9, had been breached.

Conclusion: violation (unanimously).

Article 41: EUR 8,500, jointly, in respect of non pecuniary damage, and GBP 295, jointly, in respect of pecuniary damage.

ARTICLE 14

Discrimination (Article 3)

Religiously motivated attacks by private individuals on a Hare Krishna member: *violation*

Milanović v. Serbia - 44614/07
Judgment 14.12.2010 [Section II]

Facts – The applicant, a leading member of the Hare Krishna religious community in Serbia, started receiving anonymous telephone threats and was attacked on two occasions in 2001. He reported the attacks to the police, who were unable to obtain any useful information concerning the attackers. In July 2005, June 2006 and June 2007, respectively, the applicant was attacked in the vicinity of his flat and each time stabbed in the abdomen or chest by unidentified individuals. In one of the attacks the assailants scratched a crucifix on the applicant's head. The attacks were reported to the police and the applicant submitted that they might have been committed by members of a far-right extremist group. The police questioned witnesses and several potential suspects, but were never able to identify any of the attackers or obtain more information on the extremist group they allegedly belonged to. In a report issued in 2005 the police referred to the applicant's well-known religious affiliation and his "rather strange appearance". In a further report in 2010 they observed that the attacks on the applicant always occurred around a major Orthodox religious holiday and that the applicant had publicised the incidents while "emphasising" his own religious affiliation. Moreover, they noted that self-infliction of the applicant's injuries could not be excluded. Criminal proceedings in respect of the attacks were still pending when the European Court adopted its judgment.

Law – Article 3: Many years after the incidents, the applicant's attackers had still not been brought to justice. The police had not kept the applicant properly informed of the course of the investigation or afforded him the opportunity to personally see and possibly identify his attackers from among a number of witnesses and suspects who had been questioned by the police. On the contrary, the police considered that the applicant's injuries might have been self-inflicted, although there was no medical or other evidence to that effect. By July 2005 at the latest it should have been obvious to the police that the applicant, who belonged to a vulnerable religious minority, was being systematically targeted around the same time every year and that future attacks were likely to follow, but they had done nothing to prevent them. No video or other surveillance was ever put in place in the vicinity of the flat where the incidents had occurred, no police stakeout was ever contemplated and the applicant was never offered police protection.

Despite the numerous steps taken by the domestic authorities and the significant difficulties encountered during the investigation, the Court considered that they had not taken all reasonable measures to conduct an adequate investigation and to prevent the applicant's repeated ill-treatment by persons unknown.

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 3: As in cases of racially motivated ill-treatment, when investigating violent attacks State authorities had the additional duty to take all reasonable steps to unmask any religious motives and to establish whether or not religious hatred or prejudice might have played a role in the events, even when the ill-treatment was inflicted by private individuals. In the applicant's case, where it was suspected that the attackers had belonged to one or several far-right organisations governed by extremist ideology, it was unacceptable that the State authorities had allowed the investigation to drag on for many years without taking adequate action with a view to identifying and prosecuting the perpetrators. Moreover, it was obvious from the police conduct and reports that they had serious doubts related to the applicant's religion and the veracity of his accusations. Consequently, even though the authorities had explored several leads suggested by the applicant concerning the underlying religious motivation of his attackers, those steps had amounted to a little more than a *pro forma* investigation.

Conclusion: violation (six votes to one).

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

Discrimination (Article 9)

Inability of Reformist churches to provide religious education in schools and to conclude officially recognised religious marriages: *violation*

Savez crkava "Riječ života" and Others v. Croatia - 7798/08
Judgment 9.12.2010 [Section I]

Facts – The applicants were churches of a Reformist denomination registered as religious communities under Croatian law. They sought to conclude an agreement with the Government regulating their relations with the State, claiming that without such an agreement they were unable, *inter alia*, to provide religious education in public schools and nurseries, to have religious marriages celebrated by them recognised by the State, or to provide pastoral care in health and social-welfare institutions and prisons. The authorities informed the applicants that they did not fulfil the cumulatively prescribed criteria for the conclusion of such an agreement as set out in a Government instruction, in particular that they had not been present on Croatian territory since 1941 and did not have the required 6,000 adherents.

Law – Article 14 in conjunction with Article 9: Even though the Convention did not impose on States an obligation to have the effects of religious marriages recognised as equal to those of civil marriages, or to allow religious education in public schools and nurseries, Croatia allowed certain religious communities to provide religious education in public schools and recognised religious marriages performed by such communities. Once the State had gone beyond its obligations and created additional rights falling within the wider ambit of any Convention right, it could not, in the application of such rights, take discriminatory measures within the meaning of Article 14. In the applicants' case, the authorities had refused to conclude an agreement because the applicant churches failed to satisfy the cumulative historical and numerical criteria set forth in the Government's instruction. However, the Government had entered into such an agreement with other religious communities which did not fulfil the numerical criterion either. This was because the competent commission had established that those churches satisfied the alternative criterion of being "historical religious communities of the European cultural circle". The Government had provided no explanation as to why the applicant churches did not qualify under that criterion. Consequently, the Court concluded that the criteria set forth in the Government's instruction had not been applied on an equal basis for all religious communities.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 12: Under domestic law the State enjoyed discretion in deciding whether or not to conclude an agreement with a religious community enabling it to provide religious education and to have religious marriages celebrated before it officially recognised. The applicant churches' complaint in this respect therefore did not concern "rights specifically granted to them under national law". Nevertheless, the Court considered that this complaint fell within the third category specified by the Explanatory Report on Protocol No. 12 as they concerned alleged discrimination "by a public authority in the exercise of discretionary power". Given the finding of a

violation of Article 14 taken in conjunction with Article 9, it found it unnecessary to examine separately the complaint under Protocol No. 12.

Conclusion: Protocol No. 12 applicable, but no separate examination necessary (unanimously).

Article 41: EUR 9,000 to each applicant in respect of non-pecuniary damage.

Discrimination (Article 12)

Requirement of certificate of approval for immigrants wishing to marry other than in the Church of England: *violation*

O'Donoghue and Others v. the United Kingdom - 34848/07
Judgment 14.12.2010 [Section IV]

(See Article 12 above, page 19)

ARTICLE 35

Article 35 § 3 (b)

No significant disadvantage

Complaints concerning substantial delays in recovering judgment debts exceeding 200 euros: *preliminary objection dismissed*

Gaglione and Others v. Italy - 45867/07 et al.
Judgment 21.12.2010 [Section II]

(See Article 46 below)

ARTICLE 46

Execution of a judgment – Measures of a general character

Respondent State required to take all necessary measures to ensure that requests relating to execution of sentence can be examined by a court satisfying Article 6 § 1 requirements

Boulois v. Luxembourg - 37575/04
Judgment 14.12.2010 [Section II]

(See Article 6 § 1 (civil) above, page 11)

Respondent State required to take measures to restore effectiveness of Pinto remedy

Gaglione and Others v. Italy - 45867/07 et al.
Judgment 21.12.2010 [Section II]

Facts – This application concerns 475 cases in which the applicants, who were parties to court proceedings, applied to the relevant courts under the "Pinto" Act (which brought in a remedy allowing complaints to be lodged in respect of the length of civil proceedings). Between 2003 and 2007 the courts found that a reasonable time had been exceeded and awarded the applicants sums in compensation for the non-pecuniary damage suffered. In 2006 and 2007 the applicants instituted enforcement proceedings. The amounts awarded were paid to some of them between 2007 and 2008, but others had still not received payment by the date on which the latest information was provided to the Court.

Law – (a) *Preliminary objections*

(i) *No significant disadvantage*: Contrary to the Government's submission, it was not necessary to declare the applications inadmissible for lack of a significant disadvantage within the meaning of the new criterion provided for in Article 35 § 3 (b) of the Convention as amended by Protocol No. 14. It could not be asserted that the applicants had not suffered a significant disadvantage, having regard to the amounts due to them (ranging from 200 to over 13,700 euros) in the "Pinto" proceedings and the delays in question (between 9 and 49 months, and 19 months or more in 65% of the applications).

Conclusion: preliminary objection dismissed (unanimously).

(ii) *Non-exhaustion of domestic remedies*: Requiring the applicants to bring fresh "Pinto" proceedings – as recommended by the respondent Government – would be tantamount to locking them into a vicious circle in which the malfunctioning of one remedy would oblige them to have recourse to another.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits*

Article 6 § 1: Whilst the authorities might need time to make payment, in respect of a compensatory remedy designed to redress the consequences of excessively lengthy proceedings, that period should not generally exceed six months from the date on which the decision awarding compensation

became enforceable. In the present case, having regard to the delay in enforcing the "Pinto" decisions, the authorities had far exceeded that period, thus depriving Article 6 § 1 of all useful purpose. Neither the reimbursement by the authorities of the costs and expenses incurred by the applicants in the enforcement proceedings nor the payment of interest could be regarded as compensation for the non-pecuniary damage sustained. Accordingly, the applicants retained their victim status.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 1: The delay in question amounted to an interference, which the Government had failed to justify, with the applicants' right to the peaceful enjoyment of their possessions. Neither a lack of resources nor an award of default interest could legitimise such an omission. Moreover, the period beyond which a violation of Article 1 of Protocol No. 1 would be deemed to have occurred should be fixed at six months from of the decision becoming final; that period had been considerably exceeded in the present case.

Conclusion: violation (unanimously).

Article 46: The conclusions set out above and the number of similar cases that had either been processed or were pending before the Court confirmed the existence of a widespread problem, namely, the difficulty for the national authorities to guarantee in a substantial number of cases the payment of compensation within a reasonable time. Having regard to the structural nature of the situation, general measures at national level were required. The respondent State had to re-establish the effectiveness of the "Pinto" remedy by putting an end to delays in the payment of compensation awarded in those proceedings; as the delays probably arose as a result of insufficient budgetary cover, the respondent State should make more funds available in order to guarantee compliance with "Pinto" decisions within a time-limit of six months from the date of their becoming final.

Article 41: EUR 200 to each of the applicants in respect of non-pecuniary damage.

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

Vassilios Athanasiou and Others v. Greece - 50973/08
Judgment 21.12.2010 [Section I]

Facts – In 1994 the applicants brought proceedings claiming an additional retirement premium from the Army Solidarity Fund, which rejected their claim. They lodged a number of appeals against that decision, without success, and on 1 October 2007 the Supreme Administrative Court dismissed their final appeal in a judgment confirmed by a certificate issued on 4 April 2008.

Law – Article 6 § 1: The proceedings, which had lasted for approximately thirteen years and eight months over three levels of jurisdiction, had been excessively long and in breach of the "reasonable-time" requirement.

Conclusion: violation (unanimously).

Article 13: The Court saw no reason to depart from its previous rulings to the effect that the Greek legal system did not afford the persons concerned an effective remedy by which to complain of the length of proceedings.

Conclusion: violation (unanimously).

Article 46

(a) *Application of the pilot-judgment procedure* – The pilot-judgment procedure was to be applied in this case in view of the long-standing and persistent nature of the problem, the considerable numbers of persons in Greece who were affected and the urgent need to provide them with prompt and appropriate redress at national level. In June 2007, in its interim Resolution CM/ResDH (2007)74, the Committee of Ministers had noted the large number of judgments by the Court finding Greece in violation of Articles 6 § 1 and 13 on account of the excessive length of proceedings before the administrative courts, and had urged the authorities to remedy the problem. However, since the adoption of that resolution the Court had delivered approximately fifty judgments finding a violation of Article 6 § 1 and fifteen judgments finding a violation of Article 13; in some cases the proceedings had lasted for more than ten years over three levels of jurisdiction. Finally, the two hundred or so cases pending against Greece concerning the excessive length of judicial proceedings, of which approximately one hundred related to the administrative courts, confirmed the structural nature of the problem.

(b) *General measures to be adopted* – The Court, while acknowledging certain recent developments in the Greek legal order, held that the national authorities had to introduce an effective remedy or combination of remedies at national level which would genuinely guarantee effective redress for breaches of the Convention resulting from the

excessive length of proceedings before the administrative courts. The essential criteria for gauging the effectiveness of compensatory remedies in respect of the length of proceedings were as follows: the action for compensation had to be determined within a reasonable time; the award had to be paid promptly, normally within six months of the decision becoming final; the procedural rules governing actions for compensation had to comply with the principles of fairness; the rules concerning legal costs must not impose an excessive burden on litigants whose claims were justified; and the amount of the award must be in line with the sums awarded by the Court in similar cases. With reference to this last criterion, the national courts were clearly best placed to rule on the existence and extent of any pecuniary damage. As to non-pecuniary damage, there was a strong but rebuttable presumption that excessively long proceedings would occasion damage. The domestic courts would have to justify their decisions by giving sufficient reasons if they considered that there had been only minimal non-pecuniary damage or none at all.

(c) *Procedure to be followed in similar cases* – The Court did not consider it necessary to adjourn the examination of all cases concerning the length of proceedings before the administrative or other courts pending the introduction of the necessary remedy or remedies by the domestic authorities. The time taken by the Greek Government to implement general measures should not be to the detriment of the examination in good time of the applications pending before the Court on the same subject. Furthermore, continuing the examination of similar cases via the normal procedure would serve as a regular reminder to the Greek authorities of their obligations arising out of the Convention and in particular out of the present judgment.

Article 41: EUR 14,000 to each of the applicants for non-pecuniary damage.

Execution of a judgment – Individual measures

Respondent State required to hold new, independent investigation into proportionality of use of lethal force

Abuyeva and Others v. Russia - 27065/05
Judgment 2.12.2010 [Section I]

Facts – The applicants and their relatives lived in a Chechen village, which was bombed by the Russian military forces in February 2000. As a result, twenty-four of the applicants' relatives died and some of the applicants and their relatives suffered grave bodily injuries. A criminal investigation was opened and the applicants were interviewed. The investigation was closed in March 2002 since the military action was found to have been legitimate in the circumstances. Following the Court's judgment in the *Isayeva v. Russia* case (no. 57950/00, 24 February 2005, Information Note no. 72), the investigation was reopened in late 2005 and the authorities conducted further interviews with ten more applicants granting them victim status. In June 2007 the investigation was once again closed with the same conclusion as in March 2002. That conclusion was further upheld by an additional military expert report – never submitted to the Court – which stated that the civilian evacuation had been properly organised but obstructed by Chechen rebels and that localised fire had been correctly chosen.

Law – Article 2

(a) *Substantive aspect* – The Court had accepted in the *Isayeva* judgment that the military operation at issue had pursued a legitimate aim, but found that it had not been planned and executed with the requisite care for the lives of the civilian population. There was no reason to depart from such a conclusion in the applicants' case, in particular given that the Government had never submitted the additional military report allegedly confirming the proper organisation of the civilian evacuation and the correct choice of weapons. The respondent State had therefore failed to protect the right to life of the applicants and their relatives who had died or been wounded in the military operation.

Conclusion: violation (unanimously).

(b) *Procedural aspect* – In the *Isayeva* judgment the Court had concluded that the domestic investigation had been inefficient. It criticised the substantial delay before the opening of the investigation, the lack of crucial information about the civilian evacuation and the failure to comprehensively assess human losses. Those who had been granted victim status had never been notified of the most important procedural decision taken in the criminal proceedings. Lastly, the Court found that the expert report of February 2002 – on the basis of which the investigation had been closed – did not appear to tally with the documents contained in the case file. A new investigation had taken place between November 2005 and June 2007. During this time, a number of additional witnesses were interviewed, including ten of the applicants and some of their relatives, and several people were

granted victim status in the proceedings. However, all the major flaws of the investigation had persisted throughout that second set of proceedings, in particular concerning the crucial issues of responsibility for the safety of the civilian evacuation. No additional questions about these aspects were posed to persons involved at ground level and no one was charged with any crime. Furthermore, the decisions of the military prosecutor's office to terminate the proceedings, on the basis of the expert reports prepared by army officers, raised serious doubts about the independence of the investigation. The Court noted again the surprising failure, even after seven years, to compile an exhaustive list of casualties in the attack and to communicate information to the applicants during the proceedings. In sum, the investigation carried out after the adoption of the *Isayeva* judgment had suffered from exactly the same defects as those identified in respect of the first set of proceedings and had not been effective within the meaning of Article 2.

Conclusion: violation (unanimously).

The Court also found a violation of Article 13 in conjunction with Article 2.

Article 46: In carrying out the investigation in the applicants' case, the respondent State had manifestly disregarded the specific findings of the Court's judgment in the *Isayeva* case. To date, there had been no independent study of the proportionality and necessity of lethal force. Nor has there been any attribution of individual responsibility for the aspects of the operation which had caused loss of life and the evaluation of such aspects by an independent body, preferably of a judicial nature. It fell to the Committee of Ministers, acting under Article 46, to address the issue of what – in practical terms – might be required of the respondent State by way of compliance. However, the Court considered that a new, independent investigation should take place, which would bear due regard to the above conclusions in respect of the failures of the investigation carried out to date.

Article 41: Awards to each applicant ranging between EUR 30,000 and EUR 120,000 in respect of non-pecuniary damage.

ARTICLE 1 OF PROTOCOL No. 1

Control of the use of property

Statutory ban on landlord terminating a long lease: *no violation*

Almeida Ferreira and Melo Ferreira v. Portugal - 41696/07
Judgment 21.12.2010 [Section II]

Facts – In 1980 the applicants granted a lease over a property. In 2002, as they needed the property for their son, they applied to the courts to have the lease terminated. The court refused their request by automatically applying an Act of 1979 that prevented property owners from terminating a lease in any circumstances where the tenant had been living in it for twenty years or more. Appeals by the applicants were unsuccessful.

Law – Article 1 of Protocol No. 1

There had been an interference with the applicants' right to the peaceful enjoyment of their property as a result of the court decisions rejecting their request to terminate the lease. That interference had been based on an Act that prevented the owner from giving notice to quit to a tenant who had occupied the property for twenty years or more. The legislature, which had a wide margin of appreciation in the relevant area, had merely enacted measures it considered appropriate for regulating the housing market – which was a central concern of social and economic policies in modern societies – with the aim of providing increased protection to certain categories of tenant. The Court could not call into question that sort of political choice by the legislature, as it was a measure that served the general interest and did not appear manifestly unreasonable. That reasoning also justified the fact that the limitation in question was applied automatically, with the courts being unable to weigh up the respective interests of the property owner and tenant. Moreover, the absolute character of a statute was not in itself incompatible with the Convention. The Court also gave decisive weight to the fact that the limitation in question had already been in force when the applicants had signed the lease and they had thus been aware of it. It pointed out, lastly, that the present case was distinguishable from a situation in which the limitation on the owners' rights modified their original contractual position. Accordingly, the limitation in question could not, having regard to the legitimate aim pursued, be deemed to be disproportionate or unjustified, and struck a fair balance between the interests of the community and the right of property owners, and of the applicants in particular.

Conclusion: no violation (five votes to two).

ARTICLE 2 OF PROTOCOL No. 1

Right to education

Measures taken by authorities of "Moldavian Republic of Transdniestria" against schools refusing to use Cyrillic script: *relinquishment in favour of the Grand Chamber*

Catan and Others v. Moldova and Russia - 43370/04, 8252/05 and 18454/06 [Section IV]

Following Moldovan independence in August 1991, separatists in Transdniestria sought to break away from the newly formed republic by adopting a "declaration of independence" in respect of the "Moldavian Republic of Transdniestria" (the "MRT"). The "MRT" has not been recognised by the international community. In 1992 the "MRT" authorities introduced legislation requiring "Moldavian" to be written with the Cyrillic alphabet. The use of the Latin script in schools in the "MRT" has been forbidden since 1994 and since 2004 steps have been taken to close down all schools using it. The applicants were pupils (or their parents or teachers) attending three schools in the "MRT" that were forced to transfer to new, and allegedly unsatisfactory, premises following stand-offs with the "MRT" authorities involving the intervention of the police to evict pupils, parents and teachers inside the buildings.

In their application to the European Court, the applicants complain, *inter alia*, of the restrictions on their right to use the Moldovan language and Latin script and of the impact of these restrictions on the cultural identity and integrity of the Moldovan community in the "MRT" (Article 8 of the Convention), of the difficulties encountered by pupils wishing to be educated in the Moldovan official language and in accordance with the curriculum of the Moldovan Ministry of Education (Article 2 of Protocol No. 1) and of discriminatory treatment (Article 14 of the Convention). Their applications were declared admissible by a Chamber of the Court in a decision of 15 June 2010 (see Information Note no. 131). The issue of whether the applicants came within the jurisdiction of either or both of the respondent States was joined to the merits.

ARTICLE 1 OF PROTOCOL No. 12

General prohibition of discrimination

Inability of Reformist churches to provide religious education in schools and to conclude officially recognised religious marriages: *Article 1 of Protocol No. 12 applicable*

Savez crkava "Riječ života" and Others v. Croatia - 7798/08
Judgment 9.12.2010 [Section I]

(See Article 14 above, page 21)

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

Van der Heijden v. the Netherlands - 42857/05 [Section III]

(See Article 8 above, page 16)

Catan and Others v. Moldova and Russia - 43370/04, 8252/05 and 18454/06 [Section IV]

(See Article 2 of Protocol No. 1 above)

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