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

Information Note on the Court's case-law

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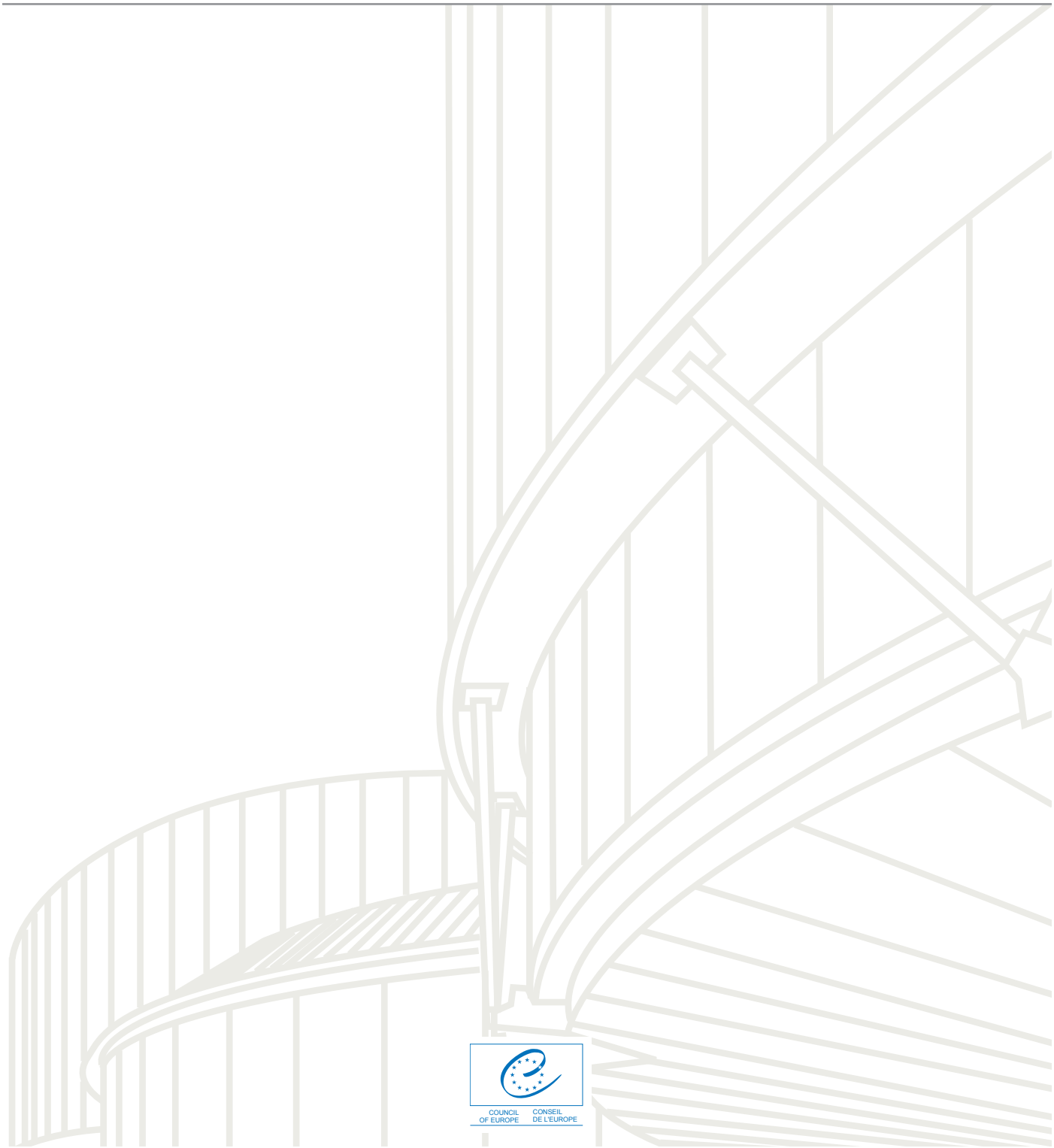

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Judgment

ARTICLE 2

Article 2 § 2

USE OF FORCE
Undisputed use of lethal force by State agents and effectiveness of the investigation: *violation*.

MANSUROĞLU - Turkey (N° 43443/98)
Judgment 26.2.2008 [Section IV]

Facts: The case concerned, in particular, the killing of the applicants' son and ill-treatment inflicted on the second applicant, Mrs Mansuroğlu, during an anti-terrorist operation against the PKK conducted by the security forces in a region in which a state of emergency had at that time been declared. The parties agreed that the son's death had been the result of an intentional use of force by members of the security forces, but disagreed as to the exact circumstances. An investigation was opened in 1996 and three autopsies were carried out. The examinations determined that death had occurred from internal and external haemorrhaging caused by bullet wounds. The trajectory of the bullets showed that he had been hit in the back. Their impact suggested that he could not have been shot at point-blank range, but the distances from which the shots had been fired could not be determined because it would have been necessary to carry out ballistic tests on the deceased's clothing, and the first autopsy team, which was not specialised in forensic medicine, had not been aware of the need to preserve those items. In 1997 the administrative committee dealing with the case under the law on criminal proceedings against public servants informed the applicants' lawyer that his clients could not be informed of progress in the case as they had not applied to join the proceedings as interveners. All the requests from the applicants for evidence to be taken from prosecution witnesses were refused. In 1998 the administrative committee discontinued the proceedings on the ground that it had been established that the victim was a member of the PKK and that he had been "captured dead during an armed clash between the security forces and terrorists". The committee concluded that the allegation to the effect that the victim had been unlawfully imprisoned and then subjected to an extrajudicial execution was unfounded. The Supreme Administrative Court upheld the decision to discontinue the proceedings.
In the meantime, Mrs Mansuroğlu underwent a medical examination. The final medical report concluded that she was unfit for work for five days and required a total recovery time of ten days. She made an official complaint against police officers for ill-treating her. Ultimately, the Turkish authorities decided not to prosecute them. She appealed but was unsuccessful.

Law: Article 2 § 2 – (a) *Establishments of the facts and the burden of proof*: Faced with an allegation that the undisputed use of lethal force by State agents in circumstances under their control entailed a breach of Article 2 § 2, it was for the respondent Government to establish that the force in question had not exceeded what was "absolutely necessary" and that it was "strictly proportionate" to one of the aims authorised by that provision.

(b) *As to the death*: At a time when terrorist attacks were raging in south-eastern Turkey and in respect of three individuals who had been denounced by name as PKK militants, the Court was prepared to accept that the operation complained of could be regarded as the result of an "honest and plausible belief" that it was necessary. However, it was not satisfied, in the light of the material in the file, that the operation, involving thirty-seven police officers armed with assault weapons and explosives such as grenades, had been planned in such a way as to reduce to a minimum the need to resort to lethal force. Nor did the Court accept the Turkish Government's argument that there had been an armed clash of such great violence as to require the police officers to resort to self-defence. It noted, on the other hand, a number of serious defects in the determination of the source of the fatal shots. In particular, the weapons used by the police officers had not been examined by experts and a ballistic report on the victim's clothes had been made impossible. On that point, the Court observed that a non-specialist should not have had the authority to decide what was or was not usable evidence, with the power to dispose of unwanted items.

Another glaring omission identified by the Court was the fact that the 37 police officers who had taken part in the operation were not questioned about the way it had been conducted. In those conditions, the authorities could not be deemed to have made a real effort to identify the officer or officers who might be in a position to shed light on the exact circumstances which had allegedly made the death complained of inevitable. As regards the victim's conduct, there was nothing to show that at the relevant time he had used a weapon against the police officers. Consequently, it was impossible to understand how they could have found it absolutely necessary to respond with such force – including bullets and explosive weapons – as to cause numerous extremely serious injuries, nor how, in the course of an exchange of fire, all the fatal bullets had struck the victim in the back. The Turkish Government had therefore failed to establish that the lethal force used against the applicants' son was "absolutely necessary" or "strictly proportionate".

(c) *As to the investigation*: The authorities had not conducted an investigation capable of establishing the circumstances of the death, still less of identifying who might have been responsible. Even before the case was referred by the public prosecutor to the administrative committee, the applicants had been practically kept in the dark about the investigation. The proceedings before the administrative committee had revealed a determination to exclude the applicants from the investigation and, as a result, to ensure unconditional acceptance of the denials of the security personnel under suspicion. That confirmed the Court's serious doubts about investigations conducted by administrative bodies, such as the one involved in the applicants' case, in that they were not independent of the executive.
Conclusion: violation of Article 2 (unanimously) on account of the murder of the applicants' son by police officers and the absence of an adequate and effective investigation into his death.

Article 3 concerning Mrs Mansuroğlu – The Court noted that here again it was for the Turkish Government to explain the circumstances that had given rise to the applicant's allegation of ill-treatment. The medical report mentioned "injuries" that were sufficiently severe to render Mrs Mansuroğlu unfit for work for five days and to require a ten-day convalescence period. As regards the investigation carried out in this connection, the Court could see nothing to cast doubt on the applicant's allegations. On the contrary, it noted the lack of any determination on the part of the authorities to gather evidence supporting her complaint, or even to verify the existing evidence, with the result that they ran the risk of increasing people's feeling of vulnerability at the hands of State agents that was current at the time. The Court considered that the Government had relied on the results of administrative inquiries which were as ineffective as they were inappropriate, and had accordingly not been able to explain the facts complained of by the applicant, in violation of Article 3.
Conclusion: violation (unanimously).

Article 41 – 5,000 euros (EUR) plus 150 United States dollars (USD) was awarded to the applicants in respect of pecuniary damage; EUR 9,000 to Mr Mansuroğlu and EUR 13,000 to Mrs Mansuroğlu in respect of non-pecuniary damage.

ARTICLE 3

INHUMAN OR DEGRADING TREATMENT
Mandatory life sentence with no prospect of release for good behaviour following changes to the legislation: *no violation*.

KAFKARIS - Cyprus (N° 21906/04)
Judgment 12.2.2008 [GC]

Facts: In 1989 the applicant was found guilty on three counts of premeditated murder and given mandatory life sentences under the Criminal Code. At the time the Prison (General) Regulations, as amended, stipulated that life prisoners were eligible for remission of up to a quarter of their sentence. For that purpose, imprisonment for life was defined as meaning imprisonment for twenty years. At the hearing on sentencing in the applicant's case, the prosecution invited the assize court to clarify whether life

imprisonment in his case would entail imprisonment for life or for the period of twenty years referred to in the prison regulations, as in the latter instance it wished to apply for the sentences to run consecutively. The court held that the term meant imprisonment for the remainder of the convicted person's life. However, on his arrival at the prison, the applicant was notified by the prison authorities that with good behaviour he would qualify for release in 2002. Subsequently, the Supreme Court declared in a separate case that the regulations governing remission of sentence were unconstitutional and *ultra vires* and new legislation was enacted which prevented life prisoners applying for remission for good behaviour. The applicant was not released on the date that had been notified by the prison authorities and applied to the Supreme Court for a writ of habeas corpus. However, his application and subsequent appeal were both dismissed. The only prospects of release now open to life prisoners in Cyprus are under the President's constitutional powers to suspend, remit or commute a sentence on the recommendation of the Attorney-General or statutory powers to order conditional release with the latter's agreement.

Law: Article 3 – (a) *Length of detention*: While the prospect of release for prisoners serving life sentences in Cyprus was limited, this did not mean that life sentences in Cyprus were irreducible with no possibility of release. On the contrary, such sentences were both *de jure* and *de facto* reducible. A number of prisoners serving mandatory life sentences had been released under the President's constitutional powers and life prisoners could benefit from the relevant provisions at any time without having to serve a minimum period of imprisonment. Accordingly, although there were shortcomings in the procedure in place and reforms were under way, the applicant could not claim that he had been deprived of any prospect of release or that his continued detention – though long – constituted inhuman or degrading treatment.

(b) *Detention beyond date set by prison authorities*: Although the change in the applicable legislation and consequent frustration of his expectations of release must have caused the applicant anxiety, it had not attained the level of severity required to fall within the scope of Article 3. In view of the chronology of events, the applicant could not justifiably have harboured genuine expectations that he would be released in 2002, as the assize court had been clear about the nature of the sentence it was passing and the relevant changes to domestic law had been made some six years before the release date given by the prison authorities. Any hopes the applicant may have had of early release would therefore have diminished as it became clear, with the changes in domestic law, that he would be serving the life sentence. While a life sentence without a minimum term necessarily entailed anxiety and uncertainty related to prison life, that was inherent in the nature of the sentence imposed and, considering the prospects for release under the current system, did not warrant a conclusion of inhuman and degrading treatment.
Conclusion: no violation (ten votes to seven).

Article 5 § 1 – The assize court had made it quite plain that the applicant had been sentenced to imprisonment for the remainder of his life, not for a period of twenty years. The subsequent notification by the prison authorities of a conditional release date could not, and did not, affect that sentence or render his detention beyond 2002 unlawful.
Conclusion: no violation (sixteen votes to one).

Article 7 – (a) *Quality of the law*: On the question of accessibility and foreseeability, the Court noted that, although at the time the applicant committed the offence the Criminal Code clearly provided that premeditated murder carried the penalty of life imprisonment, it was equally clear that in reliance upon the prison regulations both the executive and the administrative authorities had been working on the premise that that penalty was tantamount to twenty years' imprisonment and that all prisoners, including life prisoners, were eligible for remission of sentence for good behaviour. While the Court accepted that the regulations concerned the execution of the penalty – and not the penalty itself – the distinction between the scope of a life sentence and the manner of its execution was not immediately apparent. Accordingly, at the time the applicant committed the offence, Cypriot law taken as a whole was not formulated with sufficient precision to enable the applicant to discern, if necessary with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty of life imprisonment and the manner of its execution.
Conclusion: violation (fifteen votes to two).

(b) *Retrospective application of a heavier penalty and loss of possibility of remission*: The Court did not accept that a heavier penalty had been retroactively imposed on the applicant since, in view of the substantive provisions of the Criminal Code, it could not be said that at the relevant time the penalty of a life sentence clearly amounted to twenty years' imprisonment. The fact that the applicant, as a life prisoner, no longer had a right to have his sentence remitted related to the execution of the sentence as opposed to the "penalty" imposed on him, which remained that of life imprisonment. Although the changes in prison legislation and in the conditions of release might have rendered the applicant's imprisonment effectively harsher, they could not be construed as imposing a heavier "penalty" than that imposed by the trial court. Issues relating to release policies, the manner of their implementation and the reasoning behind them were part of criminal policy to be determined at the national level.
Conclusion: no violation (sixteen votes to one).

Article 14, in conjunction with Articles 3, 5 and 7 – (a) *Alleged discrimination between the applicant and life prisoners who had been released*: The life prisoners concerned had not been released on the basis of the prison regulations or their sentence but by the President of the Republic in the exercise of his discretionary constitutional powers. Furthermore, in the applicant's case, the assize court had expressly addressed the proper interpretation of a life sentence and passed a sentence of imprisonment for the remainder of the applicant's life. Bearing in mind the wide variety of factors taken into account in the exercise of the President's discretionary powers, such as the nature of the offence and the public's confidence in the criminal-justice system, it could not be said that the exercise of that discretion gave rise to an issue under Article 14.

(b) *Alleged discrimination between the applicant as a life prisoner, and other prisoners*: Given the nature of a life sentence, the applicant could not claim to be in an analogous or relevantly similar position to other prisoners not serving life sentences.
Conclusion: no violation (sixteen votes to one).

Article 41 – Finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage.

INHUMAN OR DEGRADING TREATMENT
Allegations of ill-treatment during an operation by security forces against the PKK in a state-of-emergency region: *violation*.

MANSUROĞLU - Turkey (N° 43443/98)
Judgment 26.2.2008 [Section IV]

(see Article 2 above).

INHUMAN OR DEGRADING TREATMENT
Amount of old-age pension insufficient to maintain adequate standard of living: *communicated*.

BUDINA - Russia (N° 45603/05)
Partial decision 12.2.2008 [Section I]

The applicant is a disabled 60-year-old woman. Since April 2003 she has been receiving an old-age pension amounting to approximately EUR 27 per month. After paying her bills, she says that she is left with 50 cents per day, which allow her to buy a loaf of bread. She requested an increase in her pension, submitting a detailed calculation of the amounts necessary to cover her indispensable needs, but her request was dismissed.
Communicated under Article 3 of the Convention; remainder declared inadmissible by a partial decision.

DEGRADING TREATMENT
Decision to place child in care because of suspected abuse after failure to diagnose brittle-bone disease: *inadmissible*.

D. and Others - United Kingdom (N° 38000/05)
Decision 12.2.2008 [Section IV]

(see Article 8 below).

EXPULSION
Risk of ill-treatment in case of deportation to Tunisia of a terrorist who had been tried *in absentia*: *deportation would constitute a violation*.

SAADI - Italy (N° 37201/06)
Judgment 28.2.2008 [GC]

Facts: The applicant is a Tunisian national. In 2001 he was issued with an Italian residence permit. In 2002 he was arrested and placed in pre-trial detention on suspicion of international terrorism. In 2005 he was sentenced by an assize court in Italy to imprisonment for criminal conspiracy, forgery and receiving stolen goods. On the date the Grand Chamber's judgment was adopted an appeal was pending in the Italian courts. Also in 2005 a military court in Tunis sentenced the applicant in his absence to 20 years' imprisonment for membership of a terrorist organisation acting abroad in peacetime and for incitement to terrorism. In August 2006 he was released from prison, having served his sentence in Italy. However, the Minister of the Interior ordered him to be deported to Tunisia under the legislation on combating international terrorism. The applicant's request for political asylum was rejected. Under Rule 39 of the Rules of Court (interim measures), the Court asked the Italian Government to stay his expulsion until further notice.

Law: The Court could not underestimate the danger of terrorism and the considerable difficulties States were facing in protecting their communities from terrorist violence. However, it was not possible to weigh the risk that a person might be subjected to ill-treatment against his dangerousness to the community if he was not sent back. The prospect that he might pose a serious threat to the community did not diminish in any way the risk that he might suffer harm if deported. For that reason it would be incorrect to require a higher standard of proof where the person was considered to represent a serious danger to the community or even a threat to national security, since such an approach was incompatible with the absolute nature of Article 3. It amounted to asserting that, in the absence of evidence meeting a higher standard, protection of national security justified accepting more readily a risk of ill-treatment for the individual. The Court reaffirmed that for a forcible expulsion to be in breach of the Convention it was necessary – and sufficient – for substantial grounds to have been shown for believing that there was a risk that the applicant would be subjected to ill-treatment in the receiving country. The Court referred to reports by Amnesty International and Human Rights Watch which described a disturbing situation in Tunisia and which were corroborated by a report from the US State Department. These reports mentioned numerous and regular cases of torture inflicted on persons accused of terrorism. The practices reported – said to be often inflicted on persons in police custody – included hanging from the ceiling, threats of rape, administration of electric shocks, immersion of the head in water, beatings and cigarette burns. It was reported that allegations of torture and ill-treatment were not investigated by the competent Tunisian authorities and that the latter regularly used confessions obtained under duress to secure convictions. The Court did not doubt the reliability of those reports and noted that the Italian Government had not adduced any evidence capable of rebutting such assertions. Given the applicant's conviction of terrorism related offences in Tunisia, there were substantial grounds for believing that there was a real risk that he would be subjected to treatment contrary to Article 3 if he were to be deported to Tunisia. Furthermore, the Tunisian authorities had not provided the diplomatic assurances requested by the Italian Government. The existence of domestic laws guaranteeing prisoners' rights and accession to relevant international treaties, referred to in the *notes verbales* from the Tunisian Ministry of Foreign Affairs, were not sufficient to

ensure adequate protection against the risk of ill-treatment where, as in the applicant's case, reliable sources had reported practices manifestly contrary to the principles of the Convention. Furthermore, even if the Tunisian authorities had given the diplomatic assurances, that would not have absolved the Court from the obligation to examine whether such assurances provided a sufficient guarantee that the applicant would be protected against the risk of treatment.
Conclusion: violation, if the decision to deport the applicant to Tunisia were to be enforced (unanimously).

Article 41 – The finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained.

ARTICLE 6

Article 6 § 1 [civil]

CIVIL RIGHTS AND OBLIGATIONS
Dispute concerning validity of search and seizure operations carried out by tax authorities: *Article 6 applicable*.

RAVON and Others - France (N° 18497/03)
Judgment 21.2.2008 [Section III]

Facts: The tax authorities, suspecting the applicant companies of tax fraud, carried out searches and seized documents at the companies' premises and at the first applicant's home, on the basis of court orders. The applicants applied unsuccessfully to have all the operations in question declared void.

Law: *Applicability*: Article 6 § 1 applied under its civil head to the dispute concerning the lawfulness of the searches of residential premises and seizures to which the applicants had been subjected: the core issue was whether or not the authorities had breached the applicants' right to respect for their home. The "civil" nature of that right was clear, as was its recognition in domestic law, both under Article 9 of the Civil Code and by virtue of the fact that it was enshrined in Article 8 of the Convention, which was directly applicable in the French legal system.

Merits: The applicants complained that they had not had access to an effective remedy by which to challenge the lawfulness of the searches and seizures to which they had been subjected under Article L.16 B of the Code of Tax Procedure. Under that Article, orders authorising searches of residential premises were amenable only to an appeal on points of law. The Court considered that, on its own, the possibility of appealing on points of law – of which the applicants had, moreover, availed themselves – did not satisfy the requirements of Article 6 § 1, since an appeal of that kind to the Court of Cassation, which examined only questions of law, did not allow examination of the facts on which the disputed authorisations had been based. The fact that authorisations to carry out searches of residential premises were issued by a judge – so that, at first glance, a review by the courts encompassing examination of the facts was incorporated in the decision-making process itself – was not sufficient to remedy that deficiency. The person who was to be the subject of the search – who was unaware at that stage that proceedings had been instituted against him or her – did not have an opportunity of being heard.
The Court emphasised a number of further factors. The officials conducting the search were under no legal obligation to inform the persons concerned of their right to raise any problems with the judge, who was not obliged to make reference in the authorisation order to the possibility of making an application to the court to have the search suspended or terminated, or to the arrangements for so doing. The presence of the persons concerned was not required and the law made no provision for them to be assisted by a lawyer or to have outside contact. Once the operation had been completed, the persons concerned no longer had the option of applying to the judge who had authorised it.

In the end, the Court considered that the applicants had not had access to a "tribunal" in order to obtain a decision in the dispute concerning them following proceedings that satisfied the requirements of Article 6 § 1.
Conclusion: violation (unanimously).

Article 41 – EUR 5,000 to the first applicant for non-pecuniary damage; finding of a violation sufficient for the applicant companies.

ACCESS TO COURT
Access to "court" to challenge validity of orders authorising search and seizure operations in the applicant's home by the tax authorities: *violation*.

RAVON and Others - France (N° 18497/03)
Judgment 21.2.2008 [Section III]

(see above).

Article 6 § 1 [criminal]

FAIR HEARING
Conviction of the offence of bribery incited by the police: *violation*.

RAMANAUSKAS - Lithuania (N° 74420/01)
Judgment 5.2.2008 [GC]

Facts: The applicant worked as a prosecutor. He submitted that he had been approached through a private acquaintance by a person previously unknown to him who was, in fact, an officer from a special anti-corruption police unit. The officer offered the applicant a bribe of USD 3,000 in return for a promise to obtain a third party's acquittal. The applicant had initially refused but later agreed as the officer had repeated the offer a number of times. The officer informed his employers and in January 1999 the Deputy Prosecutor General authorised him to simulate criminal acts of bribery. Shortly afterwards, the applicant accepted the bribe from the officer. In August 2000 he was convicted of accepting a bribe of USD 2,500 and sentenced to imprisonment. The judgment was upheld on appeal. When dismissing the applicant's cassation appeal, the Supreme Court noted that there was no evidence that the initial negotiations with the applicant had taken place on police instructions; that the authorities had been informed only after the applicant had agreed to accept the bribe and that, in authorising the officer's further actions, they had merely joined in a criminal act which was already in progress. According to the Supreme Court, the question of incitement was of no consequence for the legal classification of the applicant's conduct.

Law: The national authorities could not be exempted from responsibility for the actions of police officers simply by arguing that, although carrying out police duties, the officers were acting "in a private capacity". It was particularly important that the authorities should have assumed responsibility, as the initial phase of the operation had taken place in the absence of any legal framework or judicial authorisation. Furthermore, by authorising the officer to simulate acts of bribery and by exempting him from all criminal responsibility, the authorities had legitimised the preliminary phase *ex post facto* and made use of its results. Moreover, no satisfactory explanation had been provided as to what reasons or personal motives could have led the officer to approach the applicant on his own initiative without bringing the matter to the attention of his superiors, or why he had not been prosecuted for his acts during that preliminary phase. On that point, the Government had simply referred to the fact that all the relevant documents had been destroyed. The authorities' responsibility was thus engaged for the actions of the officer and the applicant's acquaintance prior to the authorisation of the bribery simulation. To hold otherwise would open the way to abuse and arbitrariness by allowing the applicable principles to be

circumvented. The actions of the officer and the applicant's acquaintance had gone beyond the mere passive investigation of existing criminal activity: there was no evidence that the applicant had committed any offences beforehand, in particular corruption-related offences; all the meetings between the applicant and the officer had taken place on the latter's initiative; and, the applicant seemed to have been subjected to blatant prompting on the part of his acquaintance and the officer to perform criminal acts, although there was no objective evidence to suggest that he had been intending to engage in such activity. Throughout the proceedings, the applicant had maintained that he had been incited to commit the offence. Accordingly, the domestic authorities and courts should at the very least have undertaken a thorough examination of whether the prosecuting authorities had incited the commission of a criminal act. To that end, they should have established in particular the reasons why the operation had been mounted, the extent of the police's involvement in the offence and the nature of any incitement or pressure to which the applicant had been subjected. That was especially important having regard to the fact that his acquaintance, who had originally introduced the officer to the applicant and who appeared to have played a significant role in the events leading up to the giving of the bribe, had never been called as a witness in the case since he could not be traced. The applicant should have had the opportunity to state his case on each of those points. However, the domestic authorities had denied that there had been any police incitement and had taken no steps at judicial level to carry out a serious examination of the applicant's allegations. More specifically, they had not made any attempt to clarify the role played by the protagonists in the applicant's case, despite the fact that the applicant's conviction was based on the evidence that had been obtained as a result of the police incitement complained of. The Court noted the Supreme Court's finding that, once the applicant's guilt had been established, the question whether there had been any outside influence on his intention to commit the offence had become irrelevant. However, a confession to an offence committed as a result of incitement could not eradicate either the incitement or its effects. The actions of the officer and the applicant's acquaintance had had the effect of inciting the applicant to commit the offence of which he had been convicted. There was no indication that the offence would have been committed without their intervention. In view of such intervention and its use in the impugned criminal proceedings, the applicant's trial had been deprived of fairness.
Conclusion: violation (unanimously).

Article 41 – EUR 30,000 in respect of all damages.

ARTICLE 7

Article 7 § 1

NULLUM CRIMEN SINE LEGE
Conviction of genocide in respect of acts committed in 1949: c*ommunicated*.

LARIONOVS - Latvia (N° 45520/04)
[Section III]

In 1998 the Prosecutor General's Office opened a preliminary investigation into the applicant's activities in 1949 when, as an official with the State Security Ministry of the Soviet Socialist Republic of Latvia, he had issued and signed several administrative orders for the arrest and deportation of a large number of wealthy farmers (kulaks) and their families. The prosecuting authorities requested that the applicant be placed in detention pending trial; however, the request was refused. They then subjected him to police surveillance, a measure which was never lifted, and placed him under investigation for crimes against humanity and genocide. According to the decision, the applicant had been an active participant in the large-scale deportation of peasants from the Baltic countries on 25 March 1949, known as "Operation Surf" (Priboi), drawing up and signing 150 orders for the deportation of 150 kulaks and their families. The prosecutor served a final indictment on the applicant and the file was sent to various regional courts before the case was assigned to one of them for consideration on the merits. The regional court held a preparatory sitting at which the applicant made a series of procedural requests, asking the court in

particular to suspend examination of the case and refer a preliminary question to the Constitutional Court. The regional court refused all the requests. The applicant sought to challenge the decision by means of an appeal to the Criminal Division of the Supreme Court. However, the regional court refused to forward the appeal to the Criminal Division on the ground that no appeal lay against decisions of that type. The charges against the applicant were examined at the regional court trial, which lasted for approximately one year, with numerous interruptions owing to the ill-health of the accused. The applicant pleaded not guilty. He submitted that the Soviet legislation in force in 1949 had not provided for persons to be held criminally liable for the acts of which he was accused. He further submitted that his acts had not constituted criminal offences under international law at the time. In that connection he pointed out that Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide dealt only with crimes committed against "a national, ethnical, racial or religious group". Operation Priboi, however, had entailed the deportation of wealthy farmers, in other words, a social group. It could not therefore be considered as "genocide" as the term had been understood at the material time. As to the relevant Article of the Criminal Code, its terms had been broadened in the light of the aforementioned Convention and could not be applied to him retrospectively. The applicant was found guilty of the crime of genocide within the meaning of the Criminal Code. The regional court emphasised that the prevention and punishment of genocide did not depend either on the date of entry into force of the Convention on the Prevention and Punishment of the Crime of Genocide or on the existence of corresponding provisions in domestic law. Accordingly, it could not be said that the principle of nullum crimen sine lege had been breached in the present criminal case. Nor did the court consider that any legal difficulty arose on account of the fact that the Criminal Code, unlike the Convention on the Prevention and Punishment of the Crime of Genocide, made specific reference to social groups as potential victims of genocide. As the criminal offence of genocide referred to by the Convention did not differ in substance from the offence defined by the Criminal Code, it could be excluded from statutory limitation in accordance with the latter. The provision of the Criminal Code concerning genocide also included a reference to social groups. Hence, the forced and violent displacement of persons from their habitual place of residence to a distant and completely foreign place which was unknown to them amounted to inflicting on them conditions of life calculated to bring about their physical destruction in whole or in part. The applicant appealed to the Criminal Division of the Supreme Court. In his memorial he reiterated the arguments he had raised at first instance. In addition, he maintained that the regional court had confused the issues of exclusion of an offence from statutory limitation and the retrospective application of a criminal-law provision. In his view, there had been no justification for the retrospective application of the Criminal Code in his case. Meanwhile, the applicant applied to the Constitutional Court to have the Criminal Code declared incompatible with the Latvian Constitution, Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and Article 7 of the European Convention on Human Rights. In his memorial he acknowledged that his application did not satisfy the conditions of the Constitutional Court Act, which required ordinary remedies to be exhausted before an application could be made to that court. However, he argued that his case was in the public interest and that ordinary remedies were not capable of providing redress for his complaint, and accordingly requested the Constitutional Court to grant a derogation in accordance with the Act. The Constitutional Court declared the application inadmissible for failure to exhaust ordinary remedies. It observed in that regard that the first-instance judgment was still amenable to an ordinary appeal and an appeal on points of law. The applicant died in late 2005 before his appeal had been considered. The Criminal Division of the Supreme Court dismissed the appeal, endorsing fully the reasons cited in the regional court judgment. The applicant's lawyer lodged an appeal on points of law in the name of and on behalf of the applicant's son. The Senate of the Supreme Court dismissed the appeal, endorsing the reasons given in the impugned judgment.
Communicated under Articles 7, 6 § 1 and 35 § 1 of the Convention.

(see also *Tess v. Latvia* (no.2), no. 19363/05)

NULLUM CRIMEN SINE LEGE
Conflicting statutory provisions concerning meaning of a sentence of life imprisonment for the purposes of establishing eligibility for remission: *violation*.
Change of law on remission for good behaviour in case of a life prisoner who had been informed at the outset by the trial court that his sentence meant imprisonment for life: *no violation*.

KAFKARIS - Cyprus (N° 21906/04)
Judgment 12.2.2008 [GC]

(see Article 3 above).

ARTICLE 8

PRIVATE AND FAMILY LIFE
Still-born child's burial, without her mother's consent or attendance, in a common grave to which she was taken in a delivery van: *violation*.

HADRI-VIONNET - Switzerland (N° 55525/00)
Judgment 14.2.2008 [Section V]

Facts: The applicant, who is of Algerian origin, gave birth to a stillborn baby whose father was a Swiss national. In a state of shock, she was taken to hospital from the hostel for asylum-seekers in which she had been placed. She and her partner said that they did not wish to see the baby's body. On the same day the social worker and the registrar were informed of the birth and, taking the view that a burial ceremony was not mandatory in the case of a stillborn child, they ordered the burial to take place without a ceremony, and without the applicant being present. After being placed in a wooden coffin by a firm of undertakers, the child's body, on the orders of the social worker, was transported in a delivery van to the cemetery, where it was buried in a communal grave for stillborn babies. The applicant left hospital the same day. Two days later, she was taken to the cemetery by a psychiatric worker in order to lay flowers. The applicant contested the Government's assertion that she had been informed in the meantime of the possibility of organising a burial ceremony for her child at a later date. Hence, she returned to the cemetery with a priest and laid some stones and flowers there. The applicant lodged a criminal complaint with the district office against person or persons unknown and applied to be joined to the proceedings as a civil party seeking damages. Criminal proceedings were instituted against the social worker and the registrar for misuse of official authority and disturbing the peace of the dead and, in the alternative, for unlawful removal of movable property. The applicant argued that the corpse of her child had been taken from her unlawfully and that it had been transported in an unsuitable vehicle and without the authorisation required for that kind of transport. She complained of a violation of her personal liberty as guaranteed by the Federal Constitution which, in her view, protected the feelings of the individual *vis-à-vis* a deceased member of his or her family. The public prosecutor's office issued two orders discontinuing the proceedings against the two accused. The applicant lodged two appeals with the Higher Court, both of which were declared inadmissible. With regard to the complaint relating to disturbing the peace of the dead, the court found that the constituent elements of the offence had not been made out. It nevertheless took the view that in ordering the child's burial without a ceremony, the two persons charged had acted in breach of the relevant legislation, which provided for burial to take place only when two days had elapsed since the stillbirth, and for a ceremony to be held. Accordingly, there had *a priori* been a breach of the applicant's right to a ceremony. Moreover, the applicant's psychological and physical state would not have prevented her from attending the burial, as she had left hospital on precisely that day. However, the Higher Court pointed out that a ceremony could be held after the burial, but that the applicant had made no such request. As to the complaint concerning the transport of the baby's body, the Higher Court acknowledged that the registrar had been in breach of the road traffic regulations, as no authorisation had been obtained. Nevertheless, it considered that the fault committed by the official responsible, who had little experience in such matters, had to be placed in perspective, as did the actual effects of his conduct.

Accordingly, the public prosecutor's office, basing its decision on the desirability or otherwise of bringing proceedings, had been legally entitled to decide against prosecuting the persons concerned. The applicant lodged two public-law appeals and two appeals on grounds of nullity with the Federal Court. In two judgments, the latter dismissed the four appeals. It declared inadmissible the ground of appeal based on the right to a decent burial. Leaving open the question whether the objective elements of the offence of disturbing the peace of the dead had been made out, the Federal Court further held that in any event no intent had been established on the part of the persons charged. Lastly, with reference to the breach of personal liberty of which the applicant complained on account of the fact that she had been prevented from going through the mourning process, and the alleged breach of the right to a decent burial, the Federal Court considered that the allegations were, or at least could be, founded, but that they were not relevant in the context of the proceedings concerned, where the only issue to be decided was the guilt or otherwise of the persons who had committed the acts in question. In parallel with these proceedings the applicant filed a claim for compensation for the non-pecuniary damage she had sustained as a result of the infringement of her personality rights. The claim was rejected by the social services and subsequently by the administrative court and the Federal Court; the latter considered that the offence in question, namely misuse of official authority, did not by its nature come within the scope of the law in question.

Law: In the light of its case-law the Court considered that Article 8 fell to be applied to the question whether the applicant had been entitled to attend her child's burial, possibly with a ceremony, and to have the body transported in a suitable vehicle. The Court in no sense wished to cast doubt on the good faith of the official responsible for the particularly delicate task of arranging the transport and burial of the child's body, bearing in mind, among other considerations, that the applicant had been in a state of shock and that it had been necessary to act quite quickly. That being said, the fact that a civil servant was acquitted of criminal charges did not necessarily release the State concerned from its obligations under the Convention. The State's responsibility in this regard arose out of the provisions of the Convention, which had to be interpreted and applied in accordance with the aims of the latter and in the light of the relevant principles of international law. Hence, the absence of intent or bad faith on the part of the municipal officials responsible did not in any sense absolve Switzerland from its own international responsibilities under the Convention. It was up to Contracting States to organise their services and train employees in such a way as to ensure that the Convention requirements were satisfied. In a sphere as private and sensitive as the death of a close relative, a particularly high degree of diligence and care was called for. Accordingly, there had been interference with the applicant's enjoyment of her rights under Article 8 of the Convention with regard to both the burial of her child's body and the transport of the remains. The Court therefore had first to examine whether the actions of the municipal officials had had sufficient legal basis. With regard to the parents' right to attend the burial and to have a ceremony, the Court saw a contradiction between the legislation, which was clear, and the practice followed in the applicant's case. The registrar had conducted the burial without consulting the relatives, in breach of the regulations governing the cemetery and funerals. In addition, the burial had not been organised by the relatives. With regard to the complaint concerning the transport of the child's remains, the Higher Court had acknowledged that the body had been transported in breach of the road traffic regulations, as no authorisation had been obtained. The Federal Court had not disputed that finding in any way. In view of the above considerations, there had been no legal basis for the interference with the applicant's Article 8 rights.
Conclusion: violation (unanimously).

Article 41 – EUR 3,000 for non-pecuniary damage.

PRIVATE AND FAMILY LIFE
Lack of access to a genetic test decisive for determining whether the applicant qualified for an abortion: *communicated*.

R.R. - Poland (N° 27617/04)
[Section IV]

Following an ultrasound scan in the eighteenth week of pregnancy, the applicant was informed that the foetus might be suffering from Turner Syndrome. She immediately expressed her wish to have an abortion, but underwent two more scans in order to confirm the diagnosis. She was advised to undergo a genetic test by way of amniocentesis. Her general practitioner refused to refer her to such an examination because he did not think she qualified for an abortion. The applicant then went to a state hospital, where she was refused the genetic test because the hospital categorically refused to perform abortions. Another doctor told her that he was not competent to issue her a referral for such test. In her twenty-third week of pregnancy the applicant finally underwent the genetic test in another hospital, where she was admitted as an emergency patient without a referral. She had to wait another two weeks for the results. Meanwhile, the applicant again unsuccessfully requested an abortion. In her twenty-fifth week of pregnancy she received the results of the amniocentesis, which confirmed that the foetus was suffering from Turner Syndrome. Under domestic law, an abortion on grounds of foetal abnormalities is possible at the latest in the twenty-fourth week of pregnancy, so the applicant could no longer have it performed. Instead, she gave birth to a baby girl suffering from Turner Syndrome. Subsequently, she unsuccessfully requested the prosecuting authorities to institute criminal proceedings against those involved in handling her case. She also brought a civil action against the doctors and hospitals involved in her case. Those proceedings are still pending.
Communicated under Articles 3, 8 and 13 of the Convention, with a separate question concerning the exhaustion of domestic remedies.

PRIVATE AND FAMILY LIFE
Withdrawal of parental rights and prohibition on access to children: *inadmissible*.

HAASE and Others - Germany (N° 34499/04)
Decision 12.2.2008 [Section V]

(see Article 46 below).

PRIVATE AND FAMILY LIFE
Measures taken by the authorities to protect children wrongly suspected of being victims of child abuse: (a) registration on at-risk register: *inadmissible*, (b) care order: *admissible*.

D. and Others - United Kingdom (N° 38000/05)
Decision 12.2.2008 [Section IV]

The applications in *D. and Others* concern two separate cases in which measures were taken by the authorities to protect young children who were wrongly suspected by doctors to have been victims of abuse.
In the first case (*D.*), the applicant was wrongly diagnosed by a hospital doctor of exaggerating or fabricating the severe allergy problems her then six-year-old son had been suffering from since birth. The applicant was not informed of the diagnosis and only became aware of it some two years later (in March 1997) on a chance reading of her son's medical records. In June 1997 the child was placed on the at-risk register in the emotional-abuse category. However, following an assessment of his condition carried out with the applicant's agreement on an acute ward, his symptoms were found to be genuine and his name removed from the register.

The case of *RK and AK* concerned an immigrant family with a poor command of English. Their two-month old baby suffered a fracture of the femur after being picked up by the maternal grandmother. The mother and grandmother were interviewed without an interpreter by a consultant paediatrician who, in view of their apparent inability to explain the injury, concluded that it had been inflicted. The possibility of a genetic condition stemming from the fact that the parents were first cousins was not examined. The police and social services were informed and the child placed in the interim care of an aunt after its discharge from hospital. A full care order was made three months after the initial incident and the mother and grandmother were branded liars by the county court judge. However, after sustaining a second injury while in the aunt's care, the child was found to be suffering from brittle bone disease. The care order was dismissed and the child returned to the applicants some nine months after the first injury. By this time the entire local community and relatives and acquaintances overseas had become aware that the family was suspected of harming the child.
The applicants in both cases brought an action in damages against the hospital authorities. Their claims were dismissed at first instance, *inter alia*, on the grounds that, as parents, they were not owed a duty of care. Those decisions were upheld by the Court of Appeal and the House of Lords, with the latter explaining that the seriousness of child abuse as a social problem demanded that health professionals, acting in good faith in what they believed were the best interests of the child, should not be subject to potentially conflicting duties when deciding whether a child may have been abused by its parents. Accordingly, there could be no claim for professional negligence and an action would only lie in the absence of good faith.

(a) *Case of D.*: *Inadmissible* under Articles 6, 8 and 13 – The applicant was never separated, formally or legally, from her son. Nor was any step taken regarding the son's medical care or treatment without her consent. While in retrospect the applicant had become aware that various professionals harboured suspicions that she may have been exaggerating or fabricating her son's illness, the Court was not persuaded that this had had any direct effect on her enjoyment of her right to respect for her family or private life. The fact that her son's name was placed on a register was an administrative step which alerted the authorities to the need to address concerns as a matter of some urgency. Even if it was a possible forerunner of care measures, these had not transpired as the suspicions of abuse were, in the event, defused by the specialist. Even assuming, therefore, that the applicant could claim to be a victim of an interference with her rights under Article 8, such interference could be considered to have been necessary for the protection of her son's rights. In so finding, the Court emphasised that mistaken judgments or assessments by medical personnel did not *per se* reveal procedural shortcomings, that the child's health had given considerable cause for concern, that a number of professionals had received negative impressions from the applicant's conduct and that, once the applicant had agreed to her son's assessment, the suspicion of fabricated or induced illness had been dispelled and her son's name removed from the at-risk register immediately, having been on it for a total of just under four months. The Article 13 complaint failed for lack of any arguable claim of a violation of Convention rights. As regards Article 6, there was no basis for finding that any of the alleged procedural defects in the handling of the case had impinged on the determination of any existing civil right: *manifestly ill-founded*.

(b) *Case of RK and AK*: *Admissible* under Article 8 and Article 13.

Inadmissible under Article 3 – The Court reiterated that Article 3 could not be relied on where distress and anguish, however deep, flowed inevitably from measures which were otherwise compatible with the Convention, unless there was a special element which caused the suffering to go beyond that inherent in their implementation. Given the authorities' responsibility under Article 3 to protect children from severe abuse, it would be contradictory to the effective protection of children's rights to hold them automatically liable to parents under this provision whenever they erred, reasonably or otherwise, in the execution of their duties. There had to be a factor apart from the normal implementation of those duties which brought the matter within the scope of Article 3. In the applicants' case, it was not disputed that their child had suffered an injury which could not initially be accounted for. While the Court did not doubt the applicants' distress, the fact that they had mistakenly been suspected of abuse and their account of events had been considered unsatisfactory or false, could not be regarded as constituting special elements in the sense identified: *manifestly ill-founded*.

Inadmissible under Article 6 – (i) *criminal limb*: No charge had been brought and no decision was taken to prosecute. Even if the police could have reconsidered at a later stage, that was not sufficient to disclose the determination of any "criminal charge": incompatible *ratione materiae*.
(ii) *civil limb*: Article 6 did not apply to internal child-protection procedures as such. Nor was there any indication that any aspects of those procedures had impinged on the fairness of any proceedings before the courts in respect of the applicants: *manifestly ill-founded*.

PRIVATE AND FAMILY LIFE
HOME
Noise nuisance from wind turbine built near a house: *inadmissible*.

FÄGERSKIÖLD - Sweden (N° 37664/04)
Decision 26.2.2008 [Section III]

In 1998 a wind turbine was erected approximately 400 metres from the applicants' house. The applicants complained that it caused disturbing sounds, despite the implementation of measures to minimise the noise. They also claimed that its construction had been illegal and that, as a result of the noise pollution, the value of their property had decreased considerably. Their appeals to the administrative and judicial authorities were dismissed.

Inadmissible: Article 8 – The noise level in respect of the applicants' property had been calculated at about 39 dB. Although the applicants had criticised the noise tests, they had not submitted any alternative ones. Nor had they requested an in-depth investigation, although such a demand would have resulted in a decision by the Environment Committee which could have been appealed against to the courts. However, even having regard to the applicants' submission that the noise level might have been higher than that shown by the tests (roughly between 42 and 45 dB), this did not exceed the level recommended by the World Health Organisation, either outdoors or indoors, and only slightly exceeded the recommended maximum level in Sweden. It was also significantly inferior to the noise levels measured in other cases that had been examined by the Court (see *Moreno Gómez v. Spain* in Information Note no. 69; *Hatton and Others v. the United Kingdom* in Information Note no. 55; and *Ashworth and Others v. the United Kingdom* in Information Note no. 60). Therefore, the nuisance caused by the wind turbine could not be found to have reached the level constituting severe environmental pollution. Even though the applicants' property was used mainly for recreational purposes and was located in a semi-rural area, the noise levels were not such as to seriously affect the applicants or prevent them from enjoying their home and their private and family life. Moreover, before deciding on the appeal, both the administrative authority and the court had visited the applicants' property to form their own opinion about the noise level and had found that although the sound emitted from the wind turbine could be considered somewhat disturbing it was at a tolerable level. The applicants had not furnished the Court, or the national authorities, with any medical certificates to substantiate that their health had been adversely affected by the noise or the light reflections. Hence, the noise levels and light reflections in the present case were not so serious as to reach the high threshold established in cases dealing with environmental issues: *manifestly ill-founded*.

Article 1 of Protocol No. 1 – The building permit for the wind turbine had been granted in accordance with national law, after the neighbours and competent authorities had been heard. The nuisance caused to the applicants could not be considered so severe as to affect them seriously or impinge on their enjoyment of their property. In relation to the interests of the community as a whole, the Court reiterated that wind power was a renewable source of energy which was beneficial to both the environment and society. The wind turbine at issue in the instant case was capable of producing enough energy to heat between 40 and 50 private households over a one-year period. In order to reduce noise from the turbine, the Environment Committee had imposed certain temporary restrictions on its functioning, which had been subsequently extended. It was open to the applicants to request the imposition of further measures. The alleged interference was therefore proportionate to the aims pursued: *manifestly ill-founded*.

ARTICLE 9

MANIFEST RELIGION OR BELIEF
Applicant being sworn in as a lawyer forced to disclose that he was not a member of the Orthodox Church and did not wish to take a religious oath: *violation*.

ALEXANDRIDIS - Greece (N° 19516/06)
Judgment 21.2.2008 [Section I]

Facts: The applicant, who was admitted to practise as a lawyer at a court of first instance, had to take an oath of office. Under the relevant domestic legislation, this entailed in principle taking a religious oath. In order to be allowed to make a solemn declaration, the applicant was obliged to declare that he was an atheist or that his religion did not permit him to take an oath.
The applicant alleged that, in accordance with usual practice, the court secretariat had provided him with a form containing a standard text. At a public hearing he had given the form, duly completed, to the president of the court. When the latter had asked him to place his right hand on the Bible in order to take the oath, he had informed her that he was not an Orthodox Christian and therefore wanted to make a solemn declaration, which he had been allowed to do.
The Greek Government, meanwhile, stated that, instead of going to the court secretariat, the applicant had approached the president of the court directly and sought permission to make a solemn declaration. The president had granted the request. The applicant had subsequently gone to the secretariat of the court. There were two different forms, one for the religious oath and the other for a solemn declaration; the applicant had not asked for the correct form and had filled out the form used for the religious oath.
In their observations in reply to those of the applicant, the Government mentioned that the applicant had indeed taken the form for religious oaths with him when he appeared before the president of the court, but had then requested permission to make a solemn declaration. He had made no attempt to have the document rectified subsequently.

Law: The Court observed that the Government had presented two versions of the facts that were inconsistent with each other, and that none of the documents showed that the applicant had failed to follow the proper procedure for taking the oath. Moreover, the record of the hearing, the only official document drawn up following the proceedings in question, corroborated the applicant's version of events. In the instant case the procedure for taking oaths reflected a presumption that lawyers going before the court were Orthodox Christians and wished to take the religious oath. Hence, when the applicant went before the court, he had been obliged to declare that he was not an Orthodox Christian and, hence, to reveal in part his religious beliefs in order to be allowed to make a solemn declaration.
The freedom to manifest one's beliefs also contained a negative aspect, namely the individual's right not to manifest his or her religion or religious beliefs and not to be obliged to act in such a way as to enable conclusions to be drawn as to whether he or she held – or did not hold – such beliefs. The State authorities did not have the right to intervene in the sphere of individual conscience and to ascertain individuals' religious beliefs or oblige them to reveal their beliefs concerning spiritual matters. This was all the more true in cases where a person was obliged to take such action with a view to performing certain duties, in particular when taking an oath of office. The fact that the record of the hearing, which was the only official document certifying that the oath had been taken, stated that the applicant had sworn a religious oath, contrary to his beliefs, suggested that lawyers taking the oath were considered in principle to be Orthodox Christians. While the Government contended that two forms had existed, one for religious oaths and the other for solemn declarations, the Court was unable to conclude from the evidence produced that two forms had existed at the material time.
In conclusion, the fact that the applicant had had to reveal to the court that he was not an Orthodox Christian and that he wanted to make a solemn declaration rather than take the religious oath, had interfered with his freedom not to have to manifest his religious beliefs.
Conclusion: violation of Article 9 (unanimously).

The Court also found a violation of Article 13 (unanimously).

Article 41 – EUR 2,000 for non-pecuniary damage.

ARTICLE 10

FREEDOM OF EXPRESSION
Criminal conviction of the publications director of a newspaper for defaming investigating judges in an article reporting on a press conference organised by the civil parties: *violation*.

JULY and SARL LIBÉRATION - France (N° 20893/03)
Judgment 14.2.2007 [Section III]

Facts: The case concerned a judgment against the French daily newspaper Libération and its publication director Serge July on account of defamation committed through the publication of an article concerning a criminal investigation into the death, in suspicious circumstances, of a French judge while he was on assignment abroad. The article, published under the title Mort d'un juge: la veuve attaque juges et policiers ("Death of a judge: widow attacks judges and police"), reported comments made during a press conference about the case. The aim of the conference had been to make public an official request by the widow of the deceased for an inquiry into the actions of the judges in charge of the criminal investigation. The investigation was criticised on that occasion. The investigating judges in question brought defamation proceedings against the applicants, alleging that four passages in the article were defamatory: "1. Bias. She [widow of the deceased] complains of bias on the part of the judges. 2. The investigation into the case is being conducted in a 'bizarre' fashion. 3. [The president of the Judges' Union], meanwhile, spoke of 'a catalogue of errors'. 4. Because they [the investigating judges] have been slow". The Criminal Court acquitted the two applicants. Only the passage referring to "bias on the part of the judges" was found to be defamatory. The court, however, accepted the applicants' plea of good faith, taking the view that the newspaper, in reporting on the criticism of the investigation, had simply been performing its task of informing the public. The Court of Appeal partly quashed the applicants' acquittal. It held that, in addition to the allegation that the judges had been biased, the accusation that the investigation had been conducted in a "bizarre" fashion was also defamatory. The court considered that the passages in question damaged the honour and reputation of the two investigating judges. The appellate court, however, did not accept the applicants' plea of good faith, on the ground that they had patently failed in their duties of caution and objectivity. Serge July was found guilty of public defamation of civil servants and the applicant company was held civilly liable. Serge July was ordered to pay a fine of 10,000 francs (approximately EUR 1,500) and the same amount in damages to each of the civil parties, and to insert an announcement in Libération and in another national daily newspaper setting out the main provisions of the judgment. The Court of Appeal also ordered the applicants jointly and severally to pay the civil parties 20,000 francs (approximately EUR 3,000) in respect of costs not paid by the State. The applicants appealed on points of law on the basis, among other things, of Article 10 of the Convention, but were unsuccessful.

Law: The judgment against the applicants amounted to interference with their right to freedom of expression. The interference had been prescribed by French law and had pursued the legitimate aims of protecting the reputation of the investigating judges concerned, in their capacity as civil servants, and maintaining the authority and impartiality of the judiciary.
As to whether the interference had been "necessary in a democratic society", the press was one of the means by which politicians and public opinion could verify that judges were discharging their heavy responsibilities in a manner that was in conformity with the aim forming the basis of the task entrusted to them. This had been particularly true in the present case, as the comments made at the press conference had directly concerned a judicial investigation into a sensitive criminal case that had received exceptionally wide media coverage. The authorities' margin of appreciation in assessing the "necessity" of the impugned measure was thus limited.
The Court was not persuaded by the reasons given by the Court of Appeal. The article in question had been a report on a press conference concerning a case already in the public domain, and it was not for the

national courts to substitute their own views for those of the press as to what techniques of reporting should be adopted by journalists in imparting information. Moreover, the article had rightly used the conditional tense and had used quotation marks in several places in order to avoid any confusion in readers' minds between the statements made by the speakers and the newspaper's analysis. The speakers' names had also been given each time for the benefit of the reader, with the result that it could not be argued, as the appellate court had done, that some passages could be attributed to the journalist and hence to the applicants. Furthermore, the article did not display any personal animosity towards the judges.
The limits of acceptable criticism were wider with regard to civil servants acting in an official capacity. The reasons given by the Court of Cassation for dismissing the applicants' appeal had been neither relevant nor sufficient, given that the judges in question, both civil servants working for "fundamental institutions of the State" could as such be the subject of personal criticism within "acceptable" limits, expressed not just in a theoretical and general manner. As to the reason given by the Court of Appeal based on the use of the adjective "bizarre", this description, while it was certainly not flattering, had been attributed by the article to one of the participants in the press conference and had not been used by the journalist personally. In any event, the applicants had not even had recourse to a degree of exaggeration or provocation, although that was permitted in the exercise of journalistic freedom. The Court did not consider the terms in question to be "manifestly insulting" to the two judges concerned and took the view that the grounds cited for finding that the applicants had not acted in good faith sat uneasily with the principles relating to the right of freedom of expression and the role of the press as "watchdog".
Conclusion: violation (unanimously).

Article 41 – EUR 7,500 awarded to the applicants jointly.

FREEDOM OF EXPRESSION
Conviction of a newspaper reporter for defamation of a politician by unsubstantiated allegations of fact: *no violation*.

RUMYANA IVANOVA - Bulgaria (N° 36207/03)
Judgment 14.2.2008 [Section V]

Facts: Following a serious banking crisis in the late 1990s, new legislation was introduced to reform Bulgarian banking law, in particular with regard to non-performing and unsecured loans. The new legislation stipulated that the Bulgarian National Bank was to compile a list, to be published in a special bulletin, of all customers with loans which had been overdue for more than six months. The list was presented to the National Assembly in 1998. The customers on the list were popularly referred to as "credit millionaires".
In 2001 24 Hours, a leading daily newspaper, published an article written by the applicant which stated that M.D., a well-known politician and a Member of Parliament, was on the National Bank's official list on account of his ownership of three companies. The article suggested that the inclusion of M.D. – a candidate at the time for the post of Deputy Minister of Finance – on the list was a cause for concern for the Prime Minister. The editor of 24 hours' was then informed by M.D. that he was not a shareholder of the three companies and published a rectified version of the article later the same day. Two days later 24 Hours also ran an additional article in which M.D. denied any involvement with any debtor company. M.D. subsequently brought criminal proceedings against the applicant for libel. In her defence, the applicant claimed that she had simply relayed information from Members of Parliament who had tipped her off about doubts concerning M.D.'s candidacy. She had verified that information by contacting the Customs Administration Press Office, who had referred her to the Full list of credit millionaires that had been published by another leading national newspaper. Two of the companies were mentioned in the preface of that publication and, having checked an electronic law database, the applicant had found that M.D. had been a member of another company on the debtor list, which she had not mentioned in her article.
A district court found the applicant guilty of criminal defamation and ordered her to pay an administrative fine of 500 new Bulgarian levs (approximately 256 Euros), non-pecuniary damage and costs. That judgment was upheld on appeal. The courts held that the applicant had only been to prove that Mr M.D.

was on the official bad debtors' list through his connection with one company, but not through the three companies cited in the article. Alleging that M.D. was a "credit millionaire" because of his indirect involvement in one company was quite different to stating that he fully owned three companies on the bad debtors' list. Those decisions also found, in general, that the applicant had not sufficiently verified her information prior to its publication and that, in her desire to publish news quickly and against best journalistic practice, she had failed to consult trustworthy sources.

Law: Article 10 – Both parties agreed that the applicant's conviction for defamation had amounted to an interference with her right to freedom of expression and was "prescribed by law". Examining whether that interference had been "necessary in a democratic society" and corresponded to a "pressing social need", the Court reiterated the vital role of the press as a "public watchdog" and its duty in a democratic society to provide information on all matters of public interest. The article at issue had reported on a question of considerable public interest: the candidacy of a well known politician for the post of Deputy Minister of Finance. Furthermore, as a politician and candidate for public office, M.D. had inevitably and knowingly laid himself open to public scrutiny, in particular as regards his financial integrity.
However, Article 10 did not guarantee totally unrestricted freedom of expression. The statement in the applicant's article about M.D. being mentioned on an official debtors' list on account of his ownership of three specifically named companies was clearly an allegation of fact and, as such, susceptible to proof. Indeed, the more serious the allegation, as in the case in question, the more solid the proof had to be, especially as the allegations had been published in a popular national daily newspaper with a wide circulation. The Court saw no reason to question the findings of the domestic courts that the applicant had not provided sufficient proof that her statement was not defamatory and, in fact, that she had published facts which she had known or ought to have known to be dubious. Moreover, she had phrased her statement in such a way as to leave no doubt that it was her allegation, not that of the Members of Parliament who had tipped her off. The statement had also implied that the information was directly based on the official list, not on any other publication. The applicant had adopted the allegations as her own and was therefore liable for their truthfulness. Moreover, there had been no special grounds to exempt the applicant from her obligation to verify the accuracy of her statements. Clearly the other publication relied on by the applicant, which was not an official report, and informal statements by two Members of Parliament in a National Assembly lobby could not be relied upon unreservedly. Although the impugned article had been amended and a reply by M.D. had been published, the original had by that time been widely read and the damage to his reputation already done.
In conclusion, the reasons given by the Bulgarian courts for convicting the applicant were relevant and sufficient and the manner in which the case was examined had shown full recognition of a conflict between, on the one hand, the right to impart information and, on the other, protection of the reputation or rights of others. Moreover, given the relative leniency of her punishment, with criminal liability having been waived in favour of the minimum administrative fine, the domestic authorities had not overstepped their margin of appreciation.
Conclusion: no violation (unanimously)

Article 6 §§ 1 and 3 (d) – The applicant's complaint concerning the district court's failure to establish certain facts had been rectified on appeal and, in any event, had not made her statement concerning M.D.'s ownership of the impugned companies any the less defamatory. Furthermore, the district court could not be criticised for not summoning as a witness the Member of Parliament who had tipped off the applicant, since she had not identified that person and, under the Court's settled case-law, it was the national courts' responsibility to assess whether it was appropriate to call a witness. It was primarily for the national authorities, notably the courts, to interpret and apply domestic law and the decisions in the applicant's case had not been arbitrary.
Conclusion: no violation (unanimously).

FREEDOM TO IMPART INFORMATION
Dismissal of a member of the Prosecutor General's Office for leaking evidence of apparent governmental interference in the administration of criminal justice to the press: *violation*.

GUJA - Moldova (N° 14277/04)
Judgment 12.2.2008 [GC]

Facts: In January 2003 the President of Moldova made a speech in which he stressed the need to fight corruption and called on law-enforcement officers to disregard undue pressure from public officials. The speech was reported in the media. A few days later the applicant, who was the Head of the Press Department at the Prosecutor General's Office, passed two letters received by that office to a national newspaper. Neither letter was marked confidential. The first was a note from the Deputy Speaker of Parliament to the Prosecutor General enclosing a letter from four police officers who wished to apply for protection from prosecution after being charged with the illegal detention and ill-treatment of detainees. The note was critical of the Prosecutor General's Office and commended the police officers, saying that they were "from one of the best teams" at the ministry. It ended with a request by the Deputy Speaker for the Prosecutor General to "get personally involved in th[e] case and to solve it in strict compliance with the law". The second letter was from a deputy minister to a deputy prosecutor general and indicated that one of the police officers had a previous conviction for assaulting prisoners but had later been amnestied. After receiving the letters, the newspaper published an article describing the President's anti-corruption drive and noting that abuse of power was widespread in Moldova. It cited the Deputy Speaker's apparent attempts to protect the four police officers as an example and printed copies of the two letters. The applicant subsequently admitted that it was he who had passed the letters to the newspaper, but said that he had done so in line with the President's anti-corruption drive, in order to create a positive image of the Prosecutor's Office, and that the letters were not confidential. However, he was dismissed for failing to consult his colleagues and for disclosing what it was alleged were secret documents. He made an unsuccessful application to the civil courts for reinstatement.

Law: The Court had not previously had to consider a case in which a civil servant had publicly disclosed internal information. It noted that civil servants might, in the course of their work, become aware of in-house information, including secret information, whose divulgation or publication corresponded to a strong public interest. The signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace ought thus, in certain circumstances, to enjoy protection, for example where the civil servant or employee was the only person, or part of a small category of persons, aware of what was happening and so best placed to act. Disclosure in such cases was to be made in the first place to a superior or other competent authority or body. Only where that was clearly impracticable could the information, as a last resort, be disclosed to the public.
Various factors had to be considered in determining the proportionality of an interference with a civil servant's freedom of expression in such cases. The first was whether other effective means of remedying the wrongdoing were available. The Court noted that in view of the lack of any laws or internal regulations governing the reporting of irregularities, the applicant had had no authority apart from his superiors to turn to and no prescribed procedure for reporting such matters. The Prosecutor General had shown no sign of having any intention to respond to the Deputy Speaker's letter and had instead given the impression that he had succumbed to political pressure. In such circumstances, external reporting, even to a newspaper, could be justified. The second issue was whether there was a public interest in disclosure. On this point, the Court could not accept that the note from the Deputy Speaker to the Prosecutor General was intended solely to transmit the police officers' letter to a competent body and – despite the instruction to examine the case "in strict compliance with the law" – could not exclude the possibility that pressure was being put on the Prosecutor General's Office. It noted too that the President of Moldova had actively campaigned against interference by politicians with the criminal-justice system and that the Moldovan media had widely covered the subject. The letters disclosed by the applicant had a bearing on issues of high importance in a democracy – such as the separation of powers, improper conduct by a high-ranking politician and the Government's attitude towards police brutality – which the public had a legitimate interest in being informed about. There was therefore a public interest in disclosure. The third consideration, whether the information disclosed was authentic, was not in dispute. As to the question of

what damage would be suffered by the public authority concerned, the Court found that despite the negative effects the disclosure had undoubtedly had on the Prosecutor's Office, the public interest in the provision of information about undue pressure and wrongdoing within that institution was so important as to outweigh the interest in maintaining public confidence in its independence. As to whether the disclosure was made in good faith, there was no reason to believe that the applicant had been motivated by a desire for personal advantage, held any personal grievance or had had any other ulterior motive. The last factor to be considered on the question of proportionality was the penalty inflicted on the applicant. Here it was noted that the heaviest possible sanction (dismissal) had been imposed. In addition to the negative repercussions that had had on the applicant's career, it was liable to have a serious chilling effect on civil servants and employees generally, as the applicant's case had attracted wide media coverage. Such a severe sanction could only discourage the reporting of misconduct and was difficult to justify.
After weighing up all the interests involved, the Court concluded that the interference with the applicant's right to freedom of expression, in particular his freedom to impart information, had not been "necessary in a democratic society".
Conclusion: violation (unanimously).

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

FREEDOM TO IMPART INFORMATION
Disciplinary penalty imposed on a doctor for advertising his cosmetic-surgery practice: *inadmissible*.

VILLNOW - Belgium (N° 16938/05)
Decision 29.1.2008 [Section II]

The applicant is a cosmetic surgeon. Over a number of years, the company L. advertised hair transplants via various hairdressers, who received a commission, and also placed regular adverts in newspapers and advertising magazines and on the Internet. L. had its offices on the ground floor of the building where the applicant had his practice (on the first floor). When members of the public responded to company L.'s advertising, they were put in touch with the applicant. The applicant was summoned by the Medical Association and asked to justify in ethical terms the fact that he had advertised his practice through company L. The Medical Association found that he had been in serious breach of his ethical obligations and imposed a disciplinary sanction on him in the form of a thirty-one week ban on practising. The sanction was ultimately reduced on appeal to a six-month ban. The decision pointed out that, in accordance with the Code of Medical Ethics, medicine could in no circumstances be regarded as a commercial activity. In particular, it emphasised that the commercial nature of the applicant's medical activities, supported by large-scale advertising by company L., despite the fact that, according to the Code of Medical Ethics they should have been carried on discreetly, had undermined the confidence of customers/patients in the medical and scientific value of those activities. The applicant appealed unsuccessfully on points of law.

Inadmissible under Article 10 – The temporary ban on practising medicine amounted to interference with the right to impart information freely. The interference had been "prescribed by law" (the Code of Medical Ethics) and had pursued legitimate aims relating to the protection of health and the rights of others. The Court stressed in that connection that practising medicine could not be equated with commercial activity, which was governed by its own set of rules. The task of a doctor was of a different nature, involving the protection of public health and entailing specific responsibilities towards the community.
As to whether the interference had been necessary in a democratic society, the domestic courts considered that the advertising in question had been used not as a means of providing information on the existence and usefulness of a particular form of treatment, but purely for publicity purposes, being aimed at persuading customers to undergo certain types of treatment and attracting custom to the detriment of fellow specialists. The Court took the view that medicine was not a commodity to be traded in exchange for money. In the vast majority of countries, the code of medical ethics contained specific provisions governing medical advertising. The Belgian Code was more precise, laying down an express prohibition

on soliciting patients (which was essentially what the applicant had been criticised for) and imposing stringent conditions on advertising. In some countries, all forms of direct or indirect advertising were prohibited outright.
In addition, any surgery, even non-reconstructive cosmetic surgery of the kind in issue in the present case, entailed risks for the patient. This branch of surgery therefore had to be governed by conditions as stringent as those applied to reconstructive surgery. Accordingly, the reasons given by the domestic courts had been relevant and sufficient: *manifestly ill-founded*.

ARTICLE 21

Article 21 § 1

CRITERIA FOR OFFICE
Refusal of candidate list solely on the basis of gender-related issues: *practice of Parliamentary Assembly incompatible with Convention*.

ADVISORY OPINION - composition of lists of candidates for election as judges of European Court
12.2.2008 [GC]

(see Article 47 below).

ARTICLE 35

Article 35 § 1

EXHAUSTION OF DOMESTIC REMEDY
EFFECTIVE DOMESTIC REMEDY (the Former Yugoslav Republic of Macedonia)
Failure to prove effectiveness of new domestic remedy concerning length of judicial proceedings: *preliminary objection dismissed*.

PARIZOV - the Former Yugoslav Republic of Macedonia (N° 14258/03)
Judgment 7.2.2008 [Section V]

Facts: In 1986 the applicant instituted civil proceedings for the annulment of an agreement. The case was reconsidered on several occasions. The applicant's appeal on points of law is now pending before the Supreme Court.

Law: *Admissibility*: The remedy concerning the excessive length of the proceedings had been introduced by the 2006 Act as of 1 January 2007. The applicant had not availed himself of it. The 2006 Act provided for a compensatory remedy – a request for just satisfaction – through which a party could, where appropriate, be awarded just satisfaction for any non-pecuniary and pecuniary damage sustained. A compensatory remedy was an appropriate means of redressing a violation that had already occurred. However, some provisions of the Act were susceptible to different interpretations. It defined two courts which could decide upon such a remedy: the immediately higher court and the Supreme Court. It did not specify which court would be competent where, as in the applicant's case, the case was pending before the Supreme Court. Statutes could not be absolutely precise. The interpretation and application of such provisions depended on practice. However, although more than twelve months had elapsed after the introduction of the remedy, there was still no domestic case-law on the point. Finally, unlike Slovenian, Polish and Italian laws which contained transitional provisions concerning cases pending before the Court, the 2006 Act did not contain any provisions explicitly bringing within the jurisdiction of the national courts all applications pending before the Court irrespective of whether they were still pending at

domestic level. Bearing in mind that the applicant's case had been pending before the domestic courts for more than twenty years before the introduction of the remedy by the 2006 Act and was still not decided and that no conclusions could be drawn from the Government's submissions about its effectiveness in the particular circumstances of the instant case, it would be disproportionate to require the applicant to try that remedy. Accordingly, the Government's objection of a failure to exhaust domestic remedies was rejected.

Merits: Article 6 § 1 – The length of the proceedings (over twenty-one years, of which ten years and nine months fell within the Court's temporal jurisdiction) had been excessive.
Conclusion: violation (unanimously).

Article 41 – EUR 4,000 for non-pecuniary damage.

ARTICLE 41

JUST SATISFACTION
Relevance of large number of joint claimants on quantum of awards in respect of non-pecuniary damage in length-of-proceedings cases: *factor to be taken into account*.

ARVANITAKI-ROBOTI and Others - Greece (N° 27278/03)
KAKAMOUKAS and Others - Greece (N° 38311/02)
Judgments 15.2.2008 [GC]

Facts: In both cases, a single set of proceedings had been brought in the administrative courts jointly by a large number of claimants (91 in *Arvanitaki-Roboti* and 58 in *Kakamoukas*). The claimants subsequently complained to the Court of the excessive length of the proceedings. The Grand Chamber upheld the Chamber's finding of a violation of the "reasonable-time" requirement under Article 6 § 1 of the Convention. It then turned to the question of non-pecuniary damage.

Law: The Government had argued that in length-of-proceedings cases in which a large number of claimants had brought proceedings collectively the amount of individual awards in respect of non-pecuniary damage should be reduced. The Grand Chamber accepted that where common proceedings had been found to be excessively long, the Court had to take account of the manner in which the number of participants may have influenced individual levels of distress, inconvenience and uncertainty and that a high number of participants would very probably have an impact on the amount to be awarded in respect of non-pecuniary damage. In such cases, there were elements that might entail a reduction in the award and others an increase. In both instant cases, the fact that a single set of proceedings with a shared objective had been brought had alleviated the inconvenience and uncertainty experienced on account of the delay and so meant a reduction in the amount of the award. However, an increase was justified in both cases as a result of the large amounts at stake in the proceedings, albeit indirectly, for the applicants (EUR 15,000 and 20,000 in *Arvanitaki-Roboti* and EUR 24,000,000 in *Kakamoukas*). The Court therefore made awards on an equitable basis, having regard to the number of applicants, the nature of the violation found and the need to determine the amounts in such a way that the overall sum was compatible with its case-law and reasonable in the light of what was at stake in the proceedings.

Awards in respect of non-pecuniary damage:
(a) *Arvanitaki-Roboti*: EUR 3,500 to each applicant (fifteen votes to two);
(b) *Kakamoukas*: EUR 2,500 or EUR 4,000 to each applicant (fifteen votes to two).

(for further details see Press Release no. 114).

ARTICLE 46

EXECUTION OF A JUDGMENT
Alleged failure of domestic authorities to abide by previously adopted European Court judgment: *inadmissible*.

HAASE and Others - Germany (N° 34499/04)
Decision 12.2.2008 [Section V]

Facts: In their first application to the Court in 2002, the applicants complained about the withdrawal of parental rights over their seven children and interim injunctions that prohibited all contact with them. In its judgment of 8 April 2004 the Court held that that there had been a violation of Article 8, *inter alia*, on account of the applicants' not having been involved in the decision-making process and the manner in which the measure had been implemented (*Haase v. Germany*, no. 1057/02, CEDH 2004-III (extracts); Information Note no. 63).
The present case concerned the subsequent decisions given by the German courts in the main proceedings confirming the withdrawal of applicants' parental rights – except in respect of two children – as well as contact prohibitions and restrictions.

Inadmissible: Article 8 – In reviewing whether the domestic courts had based their decisions on custody and access on relevant grounds, the Court observed that the German authorities had carefully examined the applicants' situation and given their reasons in detailed decisions that were based on extensive evidence including numerous expert reports. Each court had concluded that the first and second applicants' inability to give the children satisfactory care and education jeopardised the mental, physical and psychological well-being of the children. In the light of those proceedings, the Court found no reason to doubt that the separation of the children from the applicants had been in the children's best interest. Furthermore, given that the applicants had been involved in the decision-making process to the extent necessary to protect their interests and in the absence of any culpable disregard, discernable bad faith or lack of will imputable to the authorities, the Court concluded that the procedural requirements implicit in Article 8 had equally been complied with: *manifestly ill-founded*.

Article 46 – The applicants had alleged that in the decision-making process in the main proceedings, the German courts had failed to comply with the Court's previous judgement in their case since they had not sufficiently taken into account the Convention as interpreted by the Court therein. Under Article 46 the Contracting Parties undertook to abide by the final judgments of the Court in that they not only pay compensation, but also choose, subject to supervision by the Committee of Ministers, the general and/or individual measures to be adopted in order to put an end to the violation found. Consequently, it was not for the Court to verify whether a Contracting Party had complied with the obligations imposed on it by one of the Court's judgments: *incompatible* ratione materiae.

ARTICLE 47

ADVISORY OPINIONS
Refusal of candidate list solely on the basis of gender-related issues: *practice of Parliamentary Assembly incompatible with Convention*.

ADVISORY OPINION - composition of lists of candidates for election as judges of European Court
12.2.2008 [GC]

The Court was asked by the Committee of Ministers for an advisory opinion on certain legal questions concerning gender balance in the composition of the lists of candidates submitted for the election of judges to the Court.

Background and questions: Judges to the European Court are elected in respect of each member State by the Parliamentary Assembly of the Council of Europe on the basis of lists of three candidates put forward by the country concerned. Article 21 § 1 of the Convention stipulates that judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence. Candidates do not have to be nationals of the country concerned, but generally are. In its Resolutions 1366 (2004) and 1426 (2005) the Assembly stipulated that it would not consider lists which did not include at least one candidate of each sex except when the candidates belonged to the sex which was under-represented in the Court. In effect, this means that all-male lists are rejected. As a consequence of this policy an all-male list of candidates submitted in respect of Malta in July 2006 was rejected by the Assembly. The Maltese Government objected that it had fulfilled its obligations under Article 21 § 1 and that there was nothing in the Convention itself about gender balance. Against this background, the Committee of Ministers asked the Court for an advisory opinion on the following two questions:

1. Can a list of candidates for the post of judge at the European Court of Human Rights, which satisfies the criteria listed in Article 21 of the Convention, be refused solely on the basis of gender-related issues?
2. Are Resolution 1366 (2004) and Resolution 1426 (2005) in breach of the Assembly's responsibilities under Article 22 of the Convention to consider a list, or a name on such list, on the basis of the criteria listed in Article 21 of the Convention?

Opinion: (a) *Scope of advisory jurisdiction*: The Court's jurisdiction under Article 47 of the Convention is confined to "legal questions concerning the interpretation of the Convention and the protocols thereto". The restricting of advisory opinions to "legal questions" was stressed during the *travaux préparatoires* to Protocol No. 2. On that occasion it was decided to maintain the adjective "legal" in order to rule out any jurisdiction on the Court's part regarding matters of policy. The first question – whether a list of candidates could be refused solely on the basis of gender related issues – concerned the rights and obligations of the Parliamentary Assembly in the procedure for electing judges, as derived from Article 22 in particular and from the Convention system in general. Accordingly, whatever its implications, it was of a legal character and so within the scope of the Court's advisory jurisdiction. It was also appropriate to give a ruling on this question in the interests of the proper functioning of the Convention system, as there was a need to ensure that the situation which gave rise to the request for an opinion did not cause a blockage in the system. In view of the Court's answer to the first question (see below), there was no need for it to answer the second.
Conclusion: jurisdiction to answer first question (unanimously).

(b) *Merits* (*first question*): Although the Parliamentary Assembly had a certain latitude when it came to establishing the procedure for the election of judges, it was bound first and foremost by Article 21 § 1 and had to ensure in the final instance that each of the candidates on a given list fulfilled all the conditions laid down in that provision as it was vital to the authority of the Court and the quality of its decisions for it be made up of members of the highest legal and moral standing. At the same time, the Assembly could take account of additional criteria it considered relevant for the purposes of choosing between the candidates. The question which therefore arose was whether it was entitled to reject a list on the ground that a condition not explicitly laid down by Article 21 § 1 had not been met. Here the Court drew a distinction between criteria – such as a sufficient knowledge of at least one of the two official languages – which had an implicit link with the general criteria laid down in Article 21 § 1 and those which, like the requirement for at least one candidate from the under-represented sex, did not. Could the latter nevertheless constitute grounds for rejection of a list by the Assembly?
The Court noted that although the criterion in question derived from a gender-equality policy which the Committee of Ministers supported, the Committee of Ministers had nevertheless chosen not to act upon an Assembly proposal to amend Article 22 of the Convention to ensure that the lists contained at least one candidate of each sex, as it took the view that it might in exceptional circumstances conflict with the correct application of the other criteria. By declining to make that amendment the Contracting Parties, which alone had the power to amend the Convention, had thus set the boundaries which the Assembly

could not overstep: the gender-equality policy must not have the effect of making it more difficult for Contracting Parties to put forward candidates who also satisfied all the requirements of Article 21 § 1, which were the primary consideration. Thus, for instance, it would be incompatible with the Convention to require a country to nominate a candidate of a different nationality solely to achieve gender balance. Accordingly, although the aim of ensuring a certain mix in the composition of the lists of candidates was legitimate and generally accepted, it could not be pursued without provision being made for some exceptions designed to enable each country to choose national candidates who satisfied all the requirements of Article 21 § 1. The precise nature and scope of such exceptions had still to be defined. In conclusion, in not allowing any exceptions to the rule that the under-represented sex must be represented, the current practice of the Assembly was not compatible with the Convention where the country concerned had taken all necessary and appropriate steps to ensure the list contained a candidate of the under-represented sex, especially where it had followed the Assembly's recommendations advocating an open and transparent procedure involving a call for candidates, the Assembly might not reject the list in question on the sole ground that no such candidate featured on it. Accordingly, exceptions to the principle that lists must contain a candidate of the under-represented sex should be defined as soon as possible.
Conclusion: question answered in the negative (unanimously).

ARTICLE 1 OF PROTOCOL No. 1

POSSESSIONS
Dismissal of a claim for restitution of works of art that had been deposited in a museum decades earlier: *no violation*.

GLASER - Czech Republic (N° 55179/00)
Judgment 14.2.2008 [Section V]

Facts: In June 1948, following the communist coup d'état of February 1948, the applicant decided to emigrate to the United States. Before leaving, he deposited his collection of works of art with the Jewish Museum in Prague. In 1997, having sought in vain to recover his collection, he brought an action for restitution. The court noted that in the case of such an action, the onus was on the person bringing the action to prove his or her ownership of the objects in question, which the applicant was unable to do. The appeals lodged by the applicant were unsuccessful.

Law: The national courts, having studied the facts of the case and the parties' submissions in minute detail, had concluded that the applicant had not proved with sufficient certainty either that he was the original owner of the works of art he sought to recover, or that the objects in the possession of the National Museum were the same ones he had deposited in the Jewish Museum before his emigration in 1948. The courts had given detailed reasons for their findings.
Admittedly, it had been difficult, if not impossible, for the applicant to furnish any further evidence in support of his action for restitution, given the lengthy period that had elapsed since he had emigrated, especially since the circumstances in which he had left the country had probably not allowed him to make a more detailed inventory of the objects he had handed over to the museum. However, the Court found no appearance of arbitrariness in the way in which the domestic courts had determined the applicant's claim. In short, the applicant had not demonstrated that he had a claim that was sufficiently established to be enforceable, and it could not therefore be said to amount to a "possession".
Conclusion: no violation (six votes to one).

PEACEFUL ENJOYMENT OF POSSESSIONS
Noise nuisance from wind turbine built near a house: *inadmissible*.

FÄGERSKIÖLD - Sweden (N° 37664/04)
Decision 26.2.2008 [Section III]

(see Article 8 above).

ARTICLE 3 OF PROTOCOL No. 1

FREE EXPRESSION OF OPINION OF PEOPLE
Arbitrary invalidation of votes obtained by the leading candidate in several electoral divisions of a parliamentary constituency, resulting in victory for his opponent: *violation*.

KOVACH - Ukraine (N° 39424/02)
Judgment 7.2.2008 [Section V]

Facts: The applicant stood as a candidate in the 2002 parliamentary elections in a single-seat electoral constituency. According to the first results, he had obtained a narrow majority of votes. His main opponent was the Head of the District State Administration. The observers acting on behalf of the latter drew up reports stating that several additional ballot papers (less than ten) had been unlawfully deposited by unknown persons in three electoral divisions. On this basis, the constituency electoral commission declared the results in those divisions invalid. It also declared invalid the results in another division on the grounds that the members of the competent electoral commission had unlawfully opened the sealed polling station and retrieved the originals of the voting records and several invalid ballots. In the four divisions in question the applicant had obtained a vast majority of the votes. As a result of the annulment of the vote in these divisions, the applicant's main opponent was declared to have been elected as a Member of Parliament for the constituency. Upon a complaint by the applicant, the Central Electoral Commission set aside the decision to annul the vote since there was no conclusive evidence of the alleged irregularities or allegation that the number of ballots deposited unlawfully had exceeded 10% of the votes cast in each electoral division, as required by section 70 of the Parliamentary Elections Act (the "Act") in order to invalidate a vote. Shortly afterwards, the constituency electoral commission declared the vote in the four electoral divisions invalid for the same reasons as before, noting that the irregularities which it had established and those noted by the observers could be considered "other circumstances which make it impossible to establish the wishes of the voters", within the meaning of section 72 of the Act. This decision was upheld by the Central Electoral Commission and the Supreme Court, which found that it was within the exclusive competence of the constituency electoral commissions to establish the "other circumstances" provided for in the aforementioned legal provision.

Law: The present case concerned the way in which the outcome of elections had been reviewed by the responsible domestic authorities. The State's latitude remained broad in this field, but could not oust the Court's review of whether a given decision had been arbitrary. The competent authorities had relied on section 72 of the Act when deciding to annul the vote in four electoral divisions. However, there was no legal provision or domestic practice capable of giving an explanation as to which factors could be regarded as "other circumstances which make it impossible to establish the wishes of the voters" and whether they included or not those covered by section 70 addressing specifically the situation of multiple voting by one person. The lack of clarity of the legal provision at issue and hence the potential risks to the electoral rights called for particular caution on the part of the domestic authorities. However, in none of the decisions of the constituency electoral commission, nor in the subsequent decisions of the Central Election Commission or the Supreme Court, had there been a discussion of the conflict between sections 70 and 72 of the Act, or of the credibility of the various actors in the elections. In addition, none of the decisions had contained any explanation as to why the perceived breaches had obscured the outcome of the vote in the four divisions to such an extent that it had become impossible to establish the

wishes of the voters (particularly in the light of section 70 of the Act). Therefore, the decision to annul the vote in the four electoral divisions had to be considered as arbitrary and not proportionate to any legitimate aim pleaded by the Government.
Conclusion: violation (unanimously).

Article 41 – EUR 8,000 for non-pecuniary damage.

Statistical information

Statistical information will no longer be appearing in the Information Note. For monthly and yearly statistics please refer to the following Internet page:
http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+information+by+year/

Court's Annual Report 2007 now available on-line

The Annual Report 2007 was made available on the Court's website on 11 March:
http://www.echr.coe.int/NR/rdonlyres/59F27500-FD1B-4FC5-8F3F-F289B4A03008/0/Annual_Report_2007_Provisional_Edition.pdf.
It will come out in book form by the end of May.

A short history of the Annual Report: in 2001 the need was felt for a more detailed annual record of the Court's organisation and activities than the traditional "Survey". A more comprehensive report was therefore developed, identifying developments and trends in the Court's case-law. The Case-Law Information and Publications Division is responsible for gathering the relevant information from the various sectors of the Court, writing certain sections and finally publishing the report.

The report is a genuinely useful tool, easily and rapidly accessible for all those who are interested in the Court's case-law.

The Court's Annual Report 2007 is made up of various chapters: the history and development of the Convention system; the composition of the Court and the Sections; the speech given by the President of the Court on the occasion of the opening of the judicial year; the speech given by Mrs Louise Arbour, United Nations High Commissioner for Human Rights, on the same occasion; visits; activities of the Grand Chamber and Sections; publication of the Court's case-law; a short survey of the main judgments and decisions delivered by the Court in 2007; a selection of judgments and decisions delivered during the year; cases accepted for referral to the Grand Chamber and cases in which jurisdiction was relinquished by a Chamber in favour of the Grand Chamber; and statistical information.