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ARTICLE 1

RESPONSIBILITY OF STATES
Territorial jurisdiction in relation to detention of Iraqi national by British Armed Forces in Iraq: *communicated*.

AL-JEDDA - United Kingdom (N° 27021/08)
[Section IV]

(See below, under Article 5 § 1).

ARTICLE 3

INHUMAN AND DEGRADING TREATMENT
Inadequate medical care of a prisoner suffering from severe epilepsy who was forced to rely for assistance and emergency medical care on his cellmates: *violation*.

KAPRYKOWSKI - Poland (N° 23052/05)
Judgment 3.2.2009 [Section IV]

Facts: The applicant suffered from severe epilepsy marked by frequent (daily) seizures, encephalopathy and dementia. As a recidivist, he served a number of prison sentences in various detention facilities in Poland. He was first remanded in custody in May 1998. Since then he had been released and remanded in custody again on numerous occasions. In particular, from 5 August 2003 to 30 November 2007, he was in continuous detention either in ordinary detention facilities or prison hospitals. Throughout his incarceration a number of doctors stressed that he needed specialised psychiatric and neurological treatment. Notably, in 2001 medical experts recommended that he should undergo brain surgery and in 2007, on his release from a stay in hospital, doctors clearly stated that he should be placed under 24-hour medical supervision. The Government submitted that the applicant had received adequate medical care and medicine and emphasised that he had been detained with inmates who knew what to do when he had one of his epileptic seizures. The applicant had also been transferred to a remand centre hospital which specialised in neurology to receive better medical care on two occasions. When the applicant was given alternative generic medicines, he was kept under close medical supervision at another remand centre hospital, where he was examined by doctors almost every day.

Law: The Court had no doubts that, during the relevant period, the applicant had been in need of constant medical supervision, without which he faced a major risk to his health. Even though the scope of the applicant's case was limited to three periods of detention in the Poznań Remand Centre, in order to determine whether or not he had suffered inhuman and degrading treatment during that time it was necessary to examine those periods against the entire background of the case. The applicant had been in continuous detention from 5 August 2003 to 30 November 2007, during which period he had to rely solely on the prison health-care system. It was a matter of concern that, during most of that period, he was detained in ordinary detention facilities or, at best, in a prison hospital. He had been detained at a specialised neurological hospital on only two occasions, despite his specific condition. During that time, he would have been aware that he might need serious emergency medical treatment at any moment and that, apart from his fellow inmates, no immediate medical assistance was available to him. Even if he was examined later by in-house doctors, they had no specialist knowledge of neurology. Given his personality disorder, he had not been able to take autonomous decisions or go about more demanding daily tasks. That had to have caused him considerable anxiety and placed him in a position of inferiority *vis-à-vis* other prisoners. In particular, the Court was struck by the Government's argument that the fact that the inmates with whom the applicant shared his cell knew how to react to his seizures could be considered adequate conditions of detention. The Court stressed its disapproval of remand-centre staff who

considered that their duty to provide security and care to more vulnerable detainees could be discharged by making their cellmates responsible for providing daily assistance or, if necessary, emergency aid. A further problem was that the applicant had been transferred about 18 times, often over long distances, between different detention facilities. That had to have been unnecessarily detrimental to his already fragile mental health. The lack of adequate medical treatment in Poznań Remand Centre, which had effectively placed him in a position of dependency and inferiority in relation to his healthy cellmates, had undermined his dignity and entailed particularly acute hardship that had caused anxiety and suffering beyond that inevitably associated with any deprivation of liberty. His continued detention without adequate medical treatment and assistance had therefore constituted inhuman and degrading treatment. *Conclusion*: violation (unanimously).

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

INHUMAN OR DEGRADING TREATMENT
Indefinite detention of foreign nationals suspected of involvement in terrorism: *no violation*.

A. and Others - United Kingdom (N° 3455/05)
Judgment 19.2.2009 [GC]

(See Article 5 § 1 (f) below).

INHUMAN TREATMENT
POSITIVE OBLIGATIONS
Police brutality and lack of an effective investigation into allegations: *violations*.

TOMA - Romania (N° 42716/02)
Judgment 24.2.2009 [Section III]

(See Article 8 below).

EXPULSION
Risk of ill-treatment owing to deportation to Tunisia of a terrorist convicted in his absence: *violation.*

BEN KHEMAIS - Italy (N° 246/07)
Judgment 24.2.2009 [Section II]

(See Article 34 below).

ARTICLE 5

Article 5 § 1

LAWFUL ARREST OR DETENTION
Continued preventive detention of Iraqi national by British Armed Forces in Iraq on basis of United Nations Security Council Resolution: *communicated*.

AL-JEDDA - United Kingdom (N° 27021/08)
[Section IV]

In March 2003, a United States of America-led coalition, including British armed forces, invaded Iraq. Major combat operations in Iraq were declared complete in May 2003. As from that date, the United Kingdom became an occupying power under the relevant provisions of the regulations annexed to the 1907 Hague Convention and the 1949 Fourth Geneva Convention. A United Nations Assistance Mission for Iraq (UNAMI) was established. In its Resolutions 1511(2003) and 1546 (2004), the United Nations Security Council ("UNSC") described the role of UNAMI, reaffirmed its authorisation for the multinational force under unified command and decided "that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq". The applicant is an Iraqi national. In October 2004 he was arrested and was detained by British troops at a detention facility in Basra, Iraq. He was held for over three years, on suspicion of involvement in terrorism, without any prospect of criminal charges being brought against him. His detention was subject to periodic reviews by the Commander of the multi-national division. In June 2005 he brought a judicial review claim in the United Kingdom, challenging the lawfulness of his continued detention and also the refusal of the Secretary of State for Defence to return him to the United Kingdom. His claim was dismissed. The domestic courts acknowledged that the actions of the British troops in Iraq were attributable to the United Kingdom and not the United Nations. However, they found that the applicant's preventive detention was not unlawful since UNSC Resolution 1546 authorised British forces within the multi-national force to use internment "where necessary for imperative reasons of security in Iraq". The domestic courts held that Article 103 of the UN Charter gave primacy to resolutions of the UNSC, even in relation to human-rights agreements such as the Convention.
Communicated under Articles 1 and 5 § 1 of the Convention.

See also *Al-Skeini and Others v. the United Kingdom*, in Case-Law Information Note no. 114 (communicated under Articles 1, 2 and 3 of the Convention).

Article 5 § 1 (f)

DEPORTATION OR EXTRADITION
Indefinite detention of foreign nationals suspected of involvement in terrorism: *violation*.

A. and Others - United Kingdom (N° 3455/05)
Judgment 19.2.2009 [GC]

Facts: Following the terrorist attacks of 11 September 2001 on the United States of America, the British Government considered the United Kingdom to be under threat from a number of foreign nationals present in the country who were providing a support network for extremist Islamist terrorist operations linked to al-Qaeda. Since certain of these individuals could not be deported because they risked ill-treatment in their country of origin, the Government considered it necessary to create an extended power permitting their detention where the Secretary of State reasonably believed that their presence in the

United Kingdom was a risk to national security and reasonably suspected that they were an "international terrorist". Since the Government considered that this detention scheme might not be consistent with Article 5 § 1 of the Convention, they issued a derogation notice under Article 15, in which they referred to the provisions of Part 4 of the Anti-Terrorism, Crime and Security Act 2001 ("the 2001 Act"), including the power to detain foreign nationals certified as "suspected international terrorists" who could not "for the time being" be removed from the United Kingdom.
Part 4 of the 2001 Act came into force in December 2001 and was repealed in March 2005. During the lifetime of the legislation 16 foreign nationals, including the 11 applicants, were certified and detained. Six of the applicants were detained in December 2001 and the others on various dates up until October 2003. The second and fourth applicants were released after electing to leave the United Kingdom, the second for Morocco within three days of his arrest and the fourth for France within three months. The others remained in detention at Belmarsh Prison, although three were transferred to a secure mental hospital following a deterioration in their mental health (which in one instance led to a suicide attempt) and another was released on bail in April 2004, under conditions equal to house arrest, again because of serious concerns over his mental health.
The decision to certify the applicants under the 2001 Act was subject to six-monthly review before the Special Immigration Appeals Commission (SIAC). Each of the applicants appealed against the Secretary of State's decision to certify him. SIAC used a procedure which enabled it to consider both evidence which could be made public ("open material") and sensitive evidence which could not be disclosed for reasons of national security ("closed material"). The detainee and his legal representatives were given the open material and permitted to comment on it in writing and at a hearing. The closed material was not disclosed to the detainee or his lawyers but to a "special advocate", appointed on behalf of each detainee by the Solicitor General. In addition to the open hearings, SIAC held closed hearings to examine the secret evidence, where the special advocate could make submissions on behalf of the detainee on procedural matters, such as the need for further disclosure, and as to the substance and reliability of the closed material. However, once the special advocate had seen the closed material he could not have any contact with the detainee or his lawyers, except with the leave of the court. SIAC dismissed each of the applicants' appeals against certification.
The applicants also brought proceedings in which they challenged the fundamental legality of the derogation under Article 15. These proceedings were eventually determined by the House of Lords on 16 December 2004. It held that although there was a public emergency threatening the life of the nation the detention scheme did not rationally address the threat to security and was therefore disproportionate. In particular, there was evidence that United Kingdom nationals were also involved in terrorist networks linked to al-Qaeda and that the detention scheme discriminated unjustifiably against foreign nationals. It therefore made a declaration of incompatibility under the Human Rights Act and quashed the derogation order. Part 4 of the 2001 Act was repealed by Parliament in March 2005 and those applicants still in detention were released and made subject to control orders under the Prevention of Terrorism Act 2005.

Law: Articles 5 § 1 (f) and 15 – (a) *Scope of case*: The Government were not estopped from relying on subparagraph (f) before the Court even though they had not done so before the domestic courts, as they had expressly kept open the question of the application of Article 5 in the text of the derogation and in the domestic proceedings, and the House of Lords had considered the compatibility of the detention with Article 5 § 1 before assessing the validity of the derogation. Nor was there was any reason of principle to prevent the Government from raising all the arguments open to them to defend the proceedings before the Court, even if that involved calling into question the conclusion of their own supreme court. The applicants' preliminary objections on these two points were therefore dismissed.

(b) *Merits*: The Court would first ascertain whether the applicants' detention was permissible under Article 5 § 1 (f). Only if it was not would it need to determine the validity of the derogation.

(1) *Whether the detention was permissible*: The deprivation of liberty of persons "against whom action is being taken with a view to deportation or extradition" was justified only for as long as the deportation or extradition proceedings were in progress and provided they were prosecuted with due diligence. The Court found no violation in respect of the second and fourth applicants, who had been detained for only short periods before electing to leave the United Kingdom. However, it was clear that

the remaining nine applicants had been certified and detained because they were suspected of being international terrorists whose presence at liberty in the United Kingdom gave rise to a threat to national security. One of the principal assumptions underlying the derogation notice, the 2001 Act and the decision to detain the applicants had been that they could not be removed or deported "for the time being". There was no evidence that there had been any realistic prospect of their being expelled without being put at real risk of ill-treatment. In these circumstances, the Government's policy of keeping the possibility of deporting the applicants "under active review" was not sufficiently certain or determinative to amount to "action ... being taken with a view to deportation". Accordingly, the applicants' detention did not fall within the exception set out in Article 5 § 1 (f).

(2) *Whether the derogation was valid*: The highest domestic court had examined this question and concluded that, though there had been a public emergency threatening the life of the nation the measures taken in response had not been strictly required by the exigencies of the situation. The Court therefore considered that it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the related case-law or reached a conclusion that was manifestly unreasonable.

(i) *"Public emergency threatening the life of the nation"*: Before the domestic courts, the Secretary of State had provided evidence to show the existence of a threat of serious terrorist attacks planned against the United Kingdom. Additional closed evidence had been provided before SIAC. All but one of the national judges had accepted that danger to have been credible. Although no al-Qaeda attack had taken place within the territory at the time the derogation was made, the national authorities could not be criticised for fearing such an attack to be imminent. A State could not be required to wait for disaster to strike before taking measures to deal with it. The national authorities enjoyed a wide margin of appreciation in assessing the threat on the basis of the known facts. Weight had to attach to the judgment of the executive and Parliament and, specifically, to the views of the national courts, who were better placed than the European Court to assess the relevant evidence. The Court therefore accepted that there had been a public emergency threatening the life of the nation.

(ii) *Whether the derogating measures were strictly required*: The Government had challenged the House of Lords' finding that the applicants' detention was disproportionate on five grounds. In response to their first argument that the domestic courts had afforded the State too narrow a margin of appreciation in assessing what measures were strictly necessary, the Court explained that the margin of appreciation doctrine had always been meant as a tool to define relations between the domestic authorities and the Court; it could not have the same application to relations between the different organs of State at the domestic level. The question whether the measures were strictly required was ultimately a judicial decision, particularly where, as here, the applicants had been deprived of their fundamental right to liberty over a long period. In any event, the House of Lords had approached the issues carefully and could not be said to have given inadequate weight to the views of the executive or Parliament. As to the Government's second argument, that the House of Lords had examined the legislation in the abstract rather than the applicants' concrete cases, the Court noted that the approach under Article 15 was necessarily focused on the general situation and that where, as in the instant case, the measures had been found to be disproportionate and discriminatory, there was no need to examine their application in each individual case. As to the Government's third point, that the House of Lords' conclusion had turned not on a rejection of the necessity to detain the applicants but on the absence of legislative power to detain nationals who posed a risk to national security, the Court considered that the House of Lords had been correct in holding that the extended powers of detention were not to be seen as immigration measures, where a distinction between nationals and non-nationals would be legitimate, but instead as concerned with national security. The choice of an immigration measure to address what had essentially been a security issue had resulted in a failure adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. There was no significant difference in the potential adverse impact of detention without charge on a national or on a non-national who in practice could not leave the country because of fear of torture abroad. The Government's final two arguments – that it had been legitimate to confine the detention scheme to non-nationals to avoid alienating the British Muslim population and that the State could better respond to

the terrorist threat if it were able to detain its most serious source, namely non-nationals – failed for want of evidence. In sum, the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals.
Conclusion: violation save in respect of the second and fourth applicants (unanimously).

Article 5 § 4 – The applicants had complained that the procedure before SIAC was unfair because the evidence against them was not fully disclosed. The Court declared the complaints of the second and fourth applicants inadmissible as they were already at liberty when the proceedings to determine the lawfulness of the detention under the 2001 Act commenced. With regard to the remaining applicants, the strong public interest in obtaining information about al-Qaeda and its associates and keeping the sources secret had to be balanced against the applicants' right to procedural fairness in their appeals. It was therefore essential that as much information about the allegations and evidence against them was disclosed as was possible without compromising national security or the safety of others and that they had the possibility effectively to challenge the case against them. The Court accepted that SIAC was a fully independent court that could examine all the relevant evidence and ensure that no material was unnecessarily withheld, that the special advocate provided an important additional safeguard and that there was nothing to indicate that excessive and unjustified secrecy had been employed or that there had not been compelling reasons for the lack of disclosure in each case. Ultimately, however, the question was whether, in cases where the underlying evidence was not disclosed, the allegations in the open material were sufficiently specific to enable the applicant to provide his representatives and the special advocate with information with which to refute them.
Applying that test, the Court noted that the open material against five of the applicants had included allegations (for example, about the purchase of specific telecommunications equipment, possession of specific documents linked to named terrorist suspects and meetings with named terrorist suspects with specific dates and places) that were sufficiently detailed to permit an effective challenge. The procedural requirement was thus satisfied in their case. However, the open evidence in the cases of the remaining four applicants was adjudged to have been insufficient to permit an effective challenge, either because a crucial element was missing (evidence of a link between money the applicants were alleged to have raised and terrorism) or because it was of a general and insubstantial nature such that SIAC had had to rely largely on the closed material.
Conclusion: violation in respect of four applicants, no violation in respect of five applicants and inadmissible in respect of remaining two (unanimously).

Article 5 § 5 – Since the violations of Article 5 §§ 1 and 4 could not give rise to an enforceable claim for compensation before the national courts, whose powers were limited to issuing a declaration of incompatibility with the Convention, there had been a violation of that provision too.
Conclusion: violation in respect of all but the second and fourth applicants (unanimously).

Article 3 – The European Convention prohibited in absolute terms torture and inhuman or degrading treatment and punishment even in the most difficult of circumstances, such as the fight against terrorism, and irrespective of the conduct of the person concerned.
The second applicant's complaint was declared inadmissible as he had been held for only a few days without undue hardship. As to the remaining ten applicants, their detention had not reached the high threshold of inhuman and degrading treatment for which a violation of Article 3 could be found. While the uncertainty and fear of indefinite detention must have caused them anxiety and distress, and had probably affected the mental health of some of them, the applicants had not been without any prospect or hope of release. They had successfully challenged the legality of the detention scheme under the 2001 Act before SIAC and the House of Lords. In addition, they had been able to bring individual challenges to the decision to certify them and SIAC was required by statute to review the continuing case for detention every six months. The applicants' situation was accordingly not comparable to an irreducible life sentence. The conditions in which they were detained could not be taken into account as they had not attempted to exhaust the remedies available to all prisoners under administrative and civil law.
Conclusion: no violation in respect of ten applicants, inadmissible in respect of remaining applicant (unanimously).

Article 41 – Individual awards ranging from EUR 1,700 to EUR 3,900 in respect of pecuniary and non-pecuniary damage. These awards were substantially lower than in past cases of unlawful detention, in view of the fact that the detention scheme had been devised in the face of a public emergency and as a bona fide attempt to reconcile the need to protect the public against terrorism with the obligation not to send the applicants back to countries where they faced a real risk of ill-treatment. Further, since all the applicants in respect of whom the Court had found a violation of Article 5 § 1 had become the subject of control orders after their release in March 2005, it could not be assumed that they would not have been subjected to some restriction on their liberty even if the violations had not occurred.

Article 5 § 3

BROUGHT PROMPTLY BEFORE A JUDGE OR OTHER OFFICER
Minors detained for three days and nine hours before being brought before a judge: *violation*.

IPEK and Others - Turkey (N^{os} 17019/02 and 30070/02)
Judgment 3.2.2009 [Section II]

Facts: At around 1.20 a.m. on 1 December 2001 the police came to the second applicant's house and arrested him on suspicion of being a member of an illegal terrorist organisation. The police searched the house and also arrested the first and the third applicants, who happened to be there at the time, in order to establish any link they might have with the organisation. All three applicants were 16 years of age at the time of the arrest. Two days later the applicants were questioned by the police without benefiting from the assistance of a lawyer since the accusations against them concerned offences within the jurisdiction of the state security courts. On the same day, the prosecutor prolonged their detention for another two days. According to the police records, the applicants' custody ended at 10.40 a.m. on 4 December 2001. They were then taken for a medical examination and ultimately brought before the competent State Security Court, which remanded them in custody.

Law: Article 5 § 1 (c) – In order for an arrest on reasonable suspicion to be justified, Article 5 § 1 (c) required the existence of facts or information which would satisfy an objective observer that the arrested person might have actually committed an offence. As to the second applicant, he was arrested in the course of a police investigation into an illegal terrorist organisation. He was suspected of being a member of that organisation and of having conducted activities on its behalf. In such circumstances, the suspicion against the second applicant had reached the level required by Article 5 § 1 (c), since the purpose of his arrest had been to confirm or dispel suspicions of his involvement with the illegal organisation. However, the first and third applicants were arrested merely because they were at the second applicant's house at the time of his arrest. In the absence of any information to the contrary, the Court considered that, at the time of their arrest, they had not been detained on reasonable suspicion of having committed an offence.
Conclusion: no violation in respect of the second applicant, violation in respect of the first and third applicants (unanimously).

Article 5 § 3 – Even though the investigation of terrorist offences undoubtedly presented the authorities with particular problems, they were not given unrestricted power under Article 5 to arrest suspects for questioning free from effective control by the domestic courts or, ultimately, the Court. Pursuant to the latter's well-established practice, the strict time constraint imposed for detention without judicial control amounted to a maximum of four days. However, in the applicants' case, the Court attached great importance to the fact that they were minors and that they were detained without any procedural safeguards, such as the assistance of a lawyer, against arbitrary acts by the State authorities. The only investigative measure undertaken during the three days and nine hours of their detention was their questioning some two days after their arrest and a day before they were brought before a judge. No other argument submitted by the Government was sufficient to justify the applicants' detention without judicial control for more than three days, even in the context of a terrorist organisation.
Conclusion: violation (unanimously).

The Court further found violations of Article 5 §§ 4 and 5.

Article 41 – EUR 1,500 to the first and the third applicants, EUR 1,000 to the second applicant in respect of non-pecuniary damage.

BROUGHT PROMPTLY BEFORE JUDGE OR OTHER OFFICER
Failure to bring applicant before a court until 20 days after his arrest: *violation.*

TOMA - Romania (N° 42716/02)
Judgment 24.2.2009 [Section III]

(See Article 8 below).

Article 5 § 4

TAKE PROCEEDINGS
Withholding on national security grounds of material relevant to lawfulness of detention: *violations/no violations*.

A. and Others - United Kingdom (N° 3455/05)
Judgment 19.2.2009 [GC]

(See Article 5 § 1 (f) above).

SPEEDINESS OF REVIEW
Unexplained and excessive delay in examination of lawfulness of pre-trial detention: *violation.*

TOMA - Romania (N° 42716/02)
Judgment 24.2.2009 [Section III]

(See Article 8 below).

ARTICLE 6

Article 6 § 1 [civil]

APPLICABILITY
Disciplinary proceedings against a judge fulfilling the *Eskelinen* test: *Article 6 applicable*.

OLUJIĆ - Croatia (N° 22330/05)
Judgment 5.2.2009 [Section I]

Facts: The applicant was the President of the Supreme Court. In 1996 he was accused of having sexual relationships with minors and of using his position to protect the financial activities of two individuals known for their criminal activities. Disciplinary proceedings were brought against him before the National Judicial Council ("the NJC"). In January 1997 the NJC found it established that the applicant had used his position in an improper way by fraternising in public with two individuals who had a criminal background, and decided to remove him from judicial office. Over the following months, three members of the NJC – A.P., V.M. and M.H. – gave interviews in the press expressing unfavourable views on the

applicant's case. The NJC's decision was subsequently upheld by the Parliament's Chamber of the Counties. However, in April 1998 the Constitutional Court quashed both decisions and remitted the case for fresh consideration. In the resumed proceedings, the applicant filed unsuccessful motions for the withdrawal of A.P., V.M. and M.H. and for the proceedings to be held in public. In October 1998 the applicant was again found guilty and removed from office. The Chamber of the Counties upheld the NCJ's decision. In December 1998 the applicant lodged a complaint with the Constitutional Court alleging, among other things, that the disciplinary proceedings had not been held in public, that three members of the NJC had not been impartial, and that witnesses in his favour had not been heard. In December 2004 the Constitutional Court dismissed his complaint as ill-founded.

Law: (a) *Applicability*: The Government argued that Article 6 was not applicable to the case under either its civil or criminal head, in particular given the specific nature of the applicant's position of President of the Supreme Court. That fact was, however, deemed irrelevant by the Court, since as a consequence of the impugned disciplinary proceedings, the applicant had not only been removed from his post but had also been discharged from judicial office. Recalling the test in the *Vilho Eskelinen and Others v. Finland* judgment ([GC], no. 63235/00, ECHR 2007-…, Information Note No. 96), the Court noted at the outset that the domestic law expressly excluded judicial protection in connection with disciplinary proceedings against judges. However, the scope of that exclusion only referred to protection before the ordinary courts. The applicant had filed a constitutional complaint raising the same complaints as those before the Court, which the Constitutional Court had examined on its merits. Given the scope of the Constitutional Court's review, and in particular the fact that it had the power to quash the NJC's decision and remit the case for fresh consideration, the Court concluded that such a review provided the applicant with access to a court under domestic system and satisfied the Eskelinen test. It further concluded that the NJC had exercised judicial powers in determining the applicant's disciplinary responsibility and was to be regarded as an independent tribunal established by law for the purposes of Article 6 of the Convention. Consequently, that Article was applicable under its civil head in the applicant's case.

(b) *Impartiality of the National Judicial Council*: The Court noted that an interview with V.M. had been published in a national daily newspaper in February 1997, when the applicant's case was pending before the Chamber of the Counties for the first time. The revelation that V.M. had voted against the applicant's appointment as President of the Supreme Court, coupled with the fact that he himself had been a potential candidate for the same post and had considered therefore that he should have withdrawn from the disciplinary proceedings against the applicant, had created a situation which could raise legitimate doubts as to his impartiality. As to A.P., who at the time was the President of the NJC, the Court noted that an interview with him had been published in the same newspaper in March 1997, when the case was pending before the Constitutional Court. In that interview A.P. had stated that the applicant had used his personal influence and contacts in order to protect the interests of two people with a criminal background, and had added that the defence's allegations that the case was politically motivated had been untrue. Those statements implied that A.P. had already formed an unfavourable view of the applicant's case and were clearly incompatible with his further participation in the resumed proceedings against the applicant. In September 1997, while the case was still pending before the Constitutional Court another national daily newspaper published an interview in which M.H. described the applicant as lacking experience and knowledge, and as a *corpus alienum* in the Croatian judiciary. The Court considered that those expressions had clearly shown M.H.'s bias against the applicant and that his participation in the proceedings after the publication of the interview had been incompatible with the requirement of impartiality.

(c) *Right to a public hearing*: The NJC excluded the public from the hearing in the applicant's case on the ground that it was necessary to protect the dignity of both the applicant personally and the judiciary as a whole, without further elaborating on these points. However, the applicant himself had asked for the proceedings to be held in public thus showing that he did not consider that his dignity required protection. Moreover, given that the proceedings concerned such a prominent public figure and that public allegations had already been made suggesting that the case against him was politically motivated, it was evidently in the interest of both the applicant and the general public for the proceedings before the NJC to be open to

public scrutiny. However, the lack of public access was not rectified in either the proceedings before the Chamber of the Counties or those before the Constitutional Court.

(d) *Equality of arms*: The NJC had justified its refusal to hear evidence from any of the witnesses called on behalf of the applicant by stating that the circumstances referred to in the evidence on which he relied had already been established or had not been important for the case. However, even though it was not for the Court to express an opinion on the relevance of the evidence or on whether the allegations against the applicant were well-founded, it considered that the evidence of the witnesses concerned had been relevant to the applicant's case in that it would have been likely to support his line of defence. Moreover, the reasons relied on by the NJC had not been sufficient to justify the refusal to hear any of the witnesses called on behalf of the applicant, which ultimately limited his ability to present his case in a manner compatible with the guarantees of a fair trial.
Conclusion: violations (unanimously).

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

APPLICABILITY
Appeal by local environmental protection association not in nature of an *actio popularis*: *Article 6 applicable.*

L'ERABLIERE A.S.B.L - Belgium (N° 49230/07)
Judgment 24.2.2009 [Section II]

Facts: The applicant was a non-profit-making association campaigning for the protection of the environment in the Marche-Nassogne region, which mainly comprised five Belgian municipalities. In 2004 one of the municipalities informed the applicant association by letter that planning permission had been granted to expand a landfill site. The applicant association sought judicial review of that decision and requested that it be stayed. Later in 2004, the *Conseil d'État* dismissed the application for the decision to be stayed on the grounds that it did not include a proper statement of the facts explaining the background to the dispute. In a judgment of 2007 it declared the association's application for judicial review inadmissible because it did not contain a statement of facts that provided any additional information but simply referred back to the impugned measure. Furthermore, the *Conseil d'Etat*, in the same composition as that which delivered the judgment in 2007, had heard a planning permission case on the same subject in 2001, on an urgent application, and in 2005, on the merits. The rapporteur had been the same in all three cases.

Law: *Applicability of Article 6*: The articles of the applicant association showed that its aim was limited in space and in substance, consisting as it did in protecting the environment in the Marche-Nassogne region, a region covering five municipalities in a limited area. All the founding members and administrators of the applicant association resided in the municipalities concerned, and could therefore be considered as local residents directly affected by the project to expand the landfill site. Increasing the capacity of the landfill site by more than a fifth of its initial capacity was likely to affect the quality of their private lives in non-negligible ways, because of the everyday nuisances it would generate, which would in turn affect the value of their properties in the municipalities concerned. The reason the Convention did not allow any *actio popularis* was to avoid cases being brought before the Court by individuals complaining of the mere existence of a law applicable to any citizen of a country, or of a judicial decision to which they were not party. However, in view of the circumstances of the present case, and in particular the nature of the impugned measure, the status of the applicant association and its founders, the fact that the aim it pursued was limited in space and in substance and the "general interest" it was defending, the applicant association's action could not be regarded as an *actio popularis*. Accordingly, the "issue" raised by the applicant association had a sufficient link with a "right" to which it could claim to be entitled as a legal entity for Article 6 to be applicable.

The applicant association's right of access to a court: did the reason given by the *Conseil d'Etat* for rejecting the applicant association's application for judicial review effectively deprive that association of its right to have its case heard on the merits? In this particular case it could not be said that the way in which the application for judicial review was presented had prevented the *Conseil d'Etat*, much less the opposing party, from acquainting themselves with the facts of the case. Furthermore, the *Conseil d'Etat* had dealt with an earlier application for planning permission concerning the same subject, in a judgment on an appeal from an order made on an urgent application and in a judgment on the merits, delivered by the same judges that had delivered the judgment complained of. The rapporteur had also been the same in all three cases. That being so, the restriction imposed on the applicant association's right of access to a court had not been proportionate to the aim of guaranteeing legal certainty and the proper administration of justice.
Conclusion: violation (unanimously).

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

ACCESS TO COURT
Grant of immunity to a member of parliament concerning statements made to press unconnected with his parliamentary activity proper: *violation.*

C.G.I.L. and COFFERATI - Italy (N° 46967/07)
Judgment 24.2.2009 [Section II]

Facts: A Labour Ministry consultant was murdered by the Red Brigades. His ideas on flexible employment contracts had been challenged by the applicants, a trade-union federation. The Chamber of Deputies repeatedly announced the news of the murder and the subsequent declarations of its members. A daily newspaper published an article relating statements made by an MP in an interview. Eventually comments similar to those made by the MP in that interview were repeated by several MPs during a session. Considering that the MP's statements were damaging for their reputation, the applicants brought proceedings in the civil court against the MP, the editorial director of the newspaper and its publishing house, seeking damages. They alleged that the impugned article suggested that there was a cause-and-effect relationship between the murder and the work done by the union organisation and its General Secretary to defend the workers, and that the terrorists came from trade-union circles. The Chamber of Deputies, confirming a proposal made by the Committee on Parliamentary Immunity, found that the MP's offending statements were opinions he had expressed in the course of his duties. He therefore enjoyed the immunity provided for by the Constitution. The court raised a conflict of State powers before the Constitutional Court and stayed the proceedings brought by the applicants, asking for the decision of the Chamber of Deputies to be set aside. The Constitutional Court declared the conflict of State powers submission inadmissible on procedural grounds.

Law: *Preliminary objection (application manifestly ill-founded or lack of victim status) dismissed*: Assuming that the MP had actually made the offending remarks, the action taken by the applicants against the director and publishers of the newspaper seemed in any event to have little prospect of succeeding. So the theoretical possibility of bringing defamation proceedings against the director and publishers of the newspaper did not deprive the applicants of their victim status in respect of the immunity granted to the MP and provided no basis for a finding that the application was manifestly ill-founded.

Preliminary objection (failure to exhaust domestic remedies) dismissed: Concerning the possibility of continuing the action taken against the director and publishers of the newspaper, the Court could only reiterate its reasons for dismissing the objection concerning the applicants' lack of victim status. As to the possibility of seeking a first-instance judgment acknowledging the MP's immunity in order to be able to appeal against that judgment and invite the second-instance court to raise a new conflict of State powers, obliging an applicant to embark on such a course when a negative decision had already been taken by a supreme court was like expecting him to resort to procedural subterfuges in order to have his case reviewed, with no apparent chance of success. In any event, under Italian law individuals did not have

direct access to the Constitutional Court. That being so, that course of action could not be said to be a remedy that had to be exhausted for the purposes of the Convention.

Article 6 § 1 – In its resolution the Chamber of Deputies declared that the MP's statements were covered by the immunity enshrined in the Constitution, which made it impossible to continue any criminal or civil proceedings to determine responsibility and obtain compensation for the damage sustained. The legitimacy of the resolution had been examined by the court, then by the Constitutional Court, which had declared the conflict of State powers submission inadmissible for procedural reasons. However, such an examination could not be equated with a decision on the applicants' right to protect their reputation, nor could a degree of access to a court limited to the right to ask a preliminary question be considered sufficient to secure the applicants' right of access to a court. Following the resolution, plus the Constitutional Court decision, the civil action against the MP had been paralysed and the applicants had been deprived of the possibility of securing compensation for the damage allegedly sustained. As to the Government's submissions concerning the possibility of continuing the civil action against the director of the newspaper and its publishing house, the Court reiterated the considerations that led it to dismiss the preliminary objections. It accordingly found that there had been interference with the applicants' right, provided for in the Constitution, of access to a court, and that the interference had pursued the legitimate aim of protecting freedom of parliamentary debate and the separation of the judicial and legislative powers. As the MP's statements had been uttered in interviews with the press, and therefore outside the legislative chamber, they had strictly speaking had no connection with his parliamentary activity. It was true that the murder had been debated in the Chamber of Deputies. However, there was no evidence in the file that the MP had contributed, orally or in writing, to any debate on the subject in a legislative chamber, or suggested that the applicants were in any way morally or politically responsible for the murder in question. In addition, the parliamentary debates had taken place after the MP's interview in the press. For the Court the MP's statements, as reported in the newspaper, appeared to suggest, in substance, that through their action contesting the Government's planned labour law reforms, the applicants were responsible, at least in part, for the climate of social tension that had led to the murder. That being so, access to justice could not be denied solely because the dispute might be of a political nature or linked to a political activity. Therefore, the lack of any clear connection with a parliamentary activity called for a narrow interpretation of the notion of proportionality between the aim pursued and the means employed. The contrary would restrict the individual's right of access to a court in a manner incompatible with Article 6 § 1 whenever the offending statements at the origin of legal proceedings were uttered by a Member of Parliament. The resolution of the Chamber of Deputies granting immunity to the MP, which had paralysed the applicants' attempt to protect their reputation, had not struck the requisite fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Furthermore, after that resolution and the Constitutional Court's ruling, the applicants had had no other reasonable means of effectively protecting their rights under the Convention. Even if the Constitutional Court now considered that an MP's immunity should not cover statements the MP might be considered to have echoed which had no substantial bearing on prior parliamentary matters, in the present case the Constitutional Court had found a procedural obstacle in the wording of the district court's order and refused to examine whether the MP's remarks had been made in the course of his parliamentary duties and were covered by the Constitution. The restriction of the applicants' right of access to a court had not been proportionate to the legitimate aims pursued.
Conclusion: violation (five votes to two).

Article 41 – EUR 8,000 in respect of non-pecuniary damage (five votes to two).

See *Cordova v. Italy (no. 1)*, no. 40877/98 and *Cordova v. Italy (no. 2)*, no. 45649/99, ECHR 2003-I, Information Note no. 49; and *De Jorio v. Italy* , no. 73936/01, 3 June 2004, press release no. 280 of 3 June 2004.

ACCESS TO COURT
Ruling that appeal was inadmissible because it referred to the impugned decision for a statement of the facts: *violation.*

L'ERABLIERE A.S.B.L - Belgium (N° 49230/07)
Judgment 24.2.2009 [Section II]

(See Article 6 § 1 above).

INDEPENDENT AND IMPARTIAL TRIBUNAL
Aspersion cast on applicant's conduct in interviews given to press by members of disciplinary panel prior to hearing: *violation*.

OLUJIĆ - Croatia (N° 22330/05)
Judgment 5.2.2009 [Section I]

(See Article 6 "Applicability" above).

ARTICLE 8

PRIVATE LIFE
Status of potential victims; lack of clarity or adequate safeguards in legislation on interception of communications: *violation*.

IORDACHI and Others - Moldova (N° 25198/02)
Judgment 10.2.2009 [Section IV]

Facts: The applicants believed that they were at serious risk of having their telecommunications tapped as they were members of a Moldovan non-governmental organisation specialising in the representation of applicants before the Court. Although they did not claim that any of their communications had in fact been intercepted, they considered that the domestic legislation did not contain sufficient guarantees against abuse and pointed to Supreme Court statistics showing that over 98% of all requests by the investigating bodies for permission to monitor communications had been authorised by the domestic courts in the years 2005-2007. The relevant legislation is contained in the Operational Investigators Activities Act 1994 and the Code of Criminal Procedure, both as amended. It permits the authorities, *inter alia*, to intercept telephone and other conversations with a view to preventing crime and protecting national security.

Law: Article 8 – (a) *Interference*: An individual could, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures had in fact been applied to him. The relevant conditions were to be determined in each case according to the Convention rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures. The Court could not exclude the possibility that secret surveillance measures had been applied to the applicants as (i) under the Operational Investigative Activities Act the authorities were authorised to intercept communications of categories of persons with whom the applicants, in their capacity as human-rights lawyers, had extensive contact; (b) the NGO of which the applicants were members had acted in a representative capacity in roughly half the Moldovan cases communicated to the Government; and (c) in a move that had been endorsed by the Government, the Prosecutor General had threatened to prosecute any lawyer who damaged the image of the Republic of Moldova by complaining to international human-rights organisations (see *Colibaba v. Moldova*, 23 October 2007, Information Note

no. 101). The mere existence of the legislation thus entailed a menace of surveillance that necessarily struck at freedom of communication and so constituted interference.

(b) *"In accordance with the law"*: The issue here was whether the domestic legislation satisfied the foreseeability requirement. As regards the initial stage of the telephone-surveillance procedure (the grant of authorisation), despite improvements made by amendments in 2003, the legislation lacked clarity and detail; in particular, it did not define clearly the nature of the offences for which interception might be sought or the categories of persons liable to have their telephones tapped, which, in addition to suspects and defendants, included "any other person involved in a criminal offence". Further, the law did not prevent the prosecution authorities from seeking a new interception warrant after the expiry of the initial six-month period and the legislation was unclear as to under what circumstances and against whom a warrant could be obtained in non-criminal cases. In respect of the second stage (surveillance proper), the investigating judge's role was unduly limited as the law made no provision for acquainting him with the results of the surveillance and did not require him to review whether the statutory requirements had been complied with. Indeed, it appeared to place such supervisory duties on the prosecuting authorities. Moreover, the interception procedure and guarantees appeared only to apply in the context of pending criminal proceedings and not to other cases. There were no clear rules on the procedures for screening, preserving and destroying collected data. Lastly, there was no procedure governing the activity of the Parliamentary special commission responsible for exercising overall control of the system or for protecting the secrecy of lawyer-client communications. In the light of the fact that the Moldovan courts had authorised virtually all requests for interception made by the prosecuting authorities in 2007, the Court concluded that the investigating judges did not address themselves to the existence of compelling justification for authorising measures of secret surveillance and that the system was largely overused. In conclusion, the law did not provide adequate protection against abuse of State power and so was not "in accordance with the law".
Conclusion: violation (unanimously).

PRIVATE LIFE
Journalists contacted by police and allowed to film applicant in police custody with a view to broadcasting the images: *violation*.

TOMA - Romania (N° 42716/02)
Judgment 24.2.2009 [Section III]

Facts: In September 2002 the applicant and another individual, A.M., were arrested by drug squad officers in possession of 800 g of cannabis which, according to the authorities, they intended to sell. The applicant alleged that he had been struck by several armed police officers during the arrest. He also alleged that on the same day, without being assisted by a lawyer and in the presence of the public prosecutor in charge of the investigation, police officers had beaten him and forced him, under duress, to write a statement dictated by them. The applicant and his mother alleged that they had complained about the police violence to the public prosecutor and requested a medical examination, but the prosecutor had postponed the medical examination several times. The Government referred to a medical report dated the day after the arrest and drawn up, they submitted, at the prison. Under the heading "state of health upon admission to prison" the words "clinically healthy" had been entered in the report, which bore the doctor's signature.
On the day of the arrest journalists from a local channel and a newspaper filmed and took photos of the applicant at the police station. The next day a photo of the applicant showing visible traces of violence was published on the front page of the newspaper, together with an article calling the applicant a "drug trafficker". According to the applicant, the journalists had been called by the police. On the same day the applicant was remanded in custody. A few days later he filed a complaint against the detention order. The complaint reached the public prosecutor the following day and he delivered it in person to the court the day after that, where it was registered two days later. Four days later the County Court dismissed the applicant's complaint as manifestly ill-founded. The applicant appealed on points of law. Six days passed before the appeal was transmitted to the appeal court, which registered it the following day. After

having adjourned examination of the appeal at the request of the applicant's mother, the court eventually rejected it.
In 2003 the County Court sentenced the applicant to three years' imprisonment for unlawful possession of drugs intended for sale. On appeal that sentence was reduced to one year and six months.

Law: Article 3 – *The allegations of ill-treatment*: Examination of the medical report that was meant to detail the applicant's state of health when he was remanded in custody revealed several contradictions and errors. In the circumstances, the mere words "clinically healthy" on the card did not suffice to dismiss the applicant's allegations as unsubstantiated. Moreover, the applicant's allegations of violence inflicted during his arrest were supported by the coexistence of sufficiently strong, clear and concordant inferences. In the light of all the facts before it and in the absence of any explanation by the Government, the Court found it established that the traces of violence revealed by the pictures filmed in September 2002 had been caused by treatment for which the Government were responsible and which could be regarded as inhuman treatment within the meaning of Article 3 of the Convention.
Conclusion: violation (unanimously).

Obligation for the authorities to conduct an effective investigation: Although the applicant had complained and adduced evidence of police brutality, the authorities had not opened an inquiry to investigate the applicant's arguable claim.
Conclusion: violation (unanimously).

Article 5 § 3 – The Government acknowledged that the requirements of Article 5 § 3 of the Convention concerning the automatic supervision of detention by an officer authorised by law to exercise judicial power had not been met in this case, regard being had to the relevant domestic law at the material time. The Court had already found violations of Article 5 § 3 of the Convention in several similar cases where the applicants had not been brought "promptly" before an officer authorised by law to exercise judicial power in order to verify the lawfulness of the arrest or detention, and saw no grounds for reaching a different conclusion in this case, where the applicant had not been brought before the first-instance court until twenty days after his arrest.
Conclusion: violation (unanimously).

Article 5 § 4 – Although a twenty-two-day time lapse – of which four days were attributable to the applicant – did not appear excessive as such for two levels of jurisdiction, it had to be examined in the light of the deadlines provided for in domestic law and the circumstances of the case. Three days had elapsed before the applicant's complaint was registered with the County Court concerned, and seven days before the court had examined it. But above all, seven more days had passed before the appeal court had registered the applicant's appeal against the County Court judgment, as the public prosecutor had not forwarded it until six days after receiving it. In the absence of any justification for the above-mentioned delays and because it was a matter of verifying the lawfulness of the detention order, the Court held that the procedure in question had not been "speedy", as required by Article 5 § 4, within the meaning of the Court's case-law.
Conclusion: violation (six votes to one).

Article 8 – The behaviour of the police in calling journalists and allowing them to film the applicant at the police station on the day proceedings were brought against him, without his consent, with a view to publishing the pictures in the media, amounted to an interference with the applicant's right to respect for his private life. The Government had offered no explanation to justify such interference. However, even assuming that a legal basis for the impugned interference could be found, the question of the "legitimate aim" pursued would still remain. At the time concerned the applicant had not been on the run, but under arrest at the police station, and the public criminal proceedings against him had not even started. The pictures concerned, which had no real news value as such, had been meant to serve the interests of justice, for example by making sure the applicant appeared in court, or preventing him from committing a crime, as the bill of indictment had not yet been drawn up at the time. That being so, in the light of the circumstances of the case, the Court found that the interference with the applicant's right to respect for his private life had not pursued one of the legitimate aims provided for in Article 8 § 2 of the Convention.

Conclusion: violation (unanimously).

Article 41 – EUR 8,000 in respect of non-pecuniary damage.

FAMILY LIFE
Refusal without valid reason or advance notice to allow single parent to return to country of residence with consequence that he was unable to rejoin his infant child: *violation*.

NOLAN and K. - Russia (N° 2512/04)
Judgment 12.2.2009 [Section I]

(See Article 9 below).

CORRESPONDENCE
Status of potential victims; lack of clarity or adequate safeguards in legislation on interception of communications: *violation*.

IORDACHI and Others - Moldova (N° 25198/02)
Judgment 10.2.2009 [Section IV]

(See Article 8 "Private life" above).

CORRESPONDENCE
Failure to provide prisoner with stamps for correspondence with Court: *violation*.

GAGIU - Romania (N° 63258/00)
Judgment 24.2.2009 [Section III]

(See Article 37 § 1 below).

ARTICLE 9

FREEDOM OF RELIGION
Exclusion of foreign Unification Church activist from country on national security grounds: *violation*.

NOLAN and K. - Russia (N° 2512/04)
Judgment 12.2.2009 [Section I]

Facts: The first applicant, an American citizen, had sole custody of his eleven-month-old son (the second applicant). He was a member of the Unification Church founded by Sun Myung Moon and had been living in Russia on a renewable one yearly visa since 1994 after the said Church invited him to assist with its activities there. In January 2000 the Concept of National Security of the Russian Federation was amended to include "opposing the negative influence of foreign religious organisations and missionaries". In May 2002, the first applicant went on a trip to Cyprus leaving his son behind in the care of a nanny. On his return to Russia, he was taken aside by passport control officers at Moscow Airport and locked overnight in a small room. After being told that his visa had been cancelled and he would not be allowed to re-enter the country, he left on a flight to Estonia. A month later he was again denied entry to Russia without explanation after trying to re-enter on a new multiple-entry visa he had obtained following various complaints to the Russian authorities. A challenge to the decision to refuse him entry was dismissed by a regional court on national-security grounds on the basis of a classified report issued in

February 2002 by the Russian Federal Security Service (FSB). The regional court further found that the Russian authorities had not prevented the first applicant from being reunited with his son in a country other than Russia and that his overnight stay at the airport did not amount to deprivation of liberty. An appeal by the first applicant to the Supreme Court was dismissed. He was not reunited with his son until April 2003, when the boy's nanny brought him to Ukraine.

Law: Article 9 – (a) *Interference*: Immigration controls had to be exercised consistently with Convention obligations. Accordingly, in so far as a measure relating to residence in a State was imposed in connection with the exercise of the right to freedom of religion, it could disclose an interference with that right. The Russian Government had consistently maintained that the threat to national security had been posed by the first applicant's "activities" rather than his "religious beliefs", but had never specified the nature of those activities and had refused to produce the FSB report, which might have helped substantiate that claim. Further, the unqualified description in the Concept of National Security of the activities of foreign religious missionaries as harmful to national security indicated that the first applicant's religious beliefs and status as a foreign missionary of a foreign religious organisation may have been at the heart of the authorities' decision to prevent his return. In sum, since he had not been shown to have engaged in any non-religious activities and since there was a general policy that foreign missionaries posed a threat to national security, the first applicant's exclusion from Russia had been designed to repress the exercise of his right to freedom of religion and so constituted interference with his rights guaranteed under Article 9.

(b) *Justification for the interference*: There had been no evidence in the domestic proceedings to show that it was necessary to ban the applicant from entering Russia. Counsel for the FSB had not made any specific submissions on the factual circumstances underlying the findings in its report and the domestic courts had not reviewed whether the conclusion that the applicant constituted a danger to national security had a reasonable basis in fact. In any event, Article 9 of the Convention did not allow restrictions on the ground of national security. That was not an accidental omission, but reflected the primordial importance of religious pluralism. The interests of national security could not, therefore, serve as a justification for the measures taken by the Russian authorities against the first applicant. Nor was there any indication that his religious activities had affected the rights and freedoms of others. The Government had, therefore, not put forward any plausible legal and factual justification for his exclusion from Russia.
Conclusion: violation (unanimously).

Article 5 § 1 – The absence of any administrative or criminal detention procedure in the first applicant's case was not relevant to the Court's assessment of whether or not there had been a *de facto* deprivation or restriction of his liberty. The conditions of his overnight stay in the transit hall (in a locked room under constant supervision) were equivalent in practice to a deprivation of liberty, for which the Russian authorities were responsible. Indeed, the Border Crossing Guidelines actually provided for persons in the first applicant's situation to be escorted to "isolated premises" and placed "under guard" until such time as they left Russian territory. As to whether the deprivation of liberty was in accordance with a procedure prescribed by law, the Government had not referred to any domestic legal provisions; the Border Crossing Guidelines, on whose basis it might have been effected, had never been published or made accessible to the public and so were not sufficiently accessible and foreseeable to satisfy the "quality of law" requirement.
Conclusion: violation (unanimously).

Article 5 § 5 – The first applicant had been denied an enforceable right to compensation by the national courts' finding that he had not been deprived of his liberty.
Conclusion: violation (unanimously).

Article 8 – The first applicant's ten-month physical separation from his infant son was the direct consequence of a combination of the decision to exclude him from Russia and of the failure to notify him of that decision and to take measures to enable his son to leave Russia. The first applicant was the only parent and legal guardian of the boy, who was at a vulnerable and formative age. The only justification the Government had put forward for severing their contact was national security, a ground which the Court had found unsubstantiated and which could not therefore outweigh the applicants' legitimate

interest in staying together. The authorities had compounded matters by not giving the first applicant advance notice of the decision to exclude him or facilitating his son's exit from Russia and their reunion elsewhere. Their manifest failure to assess the impact of their decisions and actions on the boy's welfare fell outside any acceptable margin of appreciation.
Conclusion: violation (unanimously).

Article 1 of Protocol No. 7 – (a) *Applicability*: In determining whether this provision was applicable the Court had to consider whether the first applicant had been "resident" in Russia, whether his residence was "lawful" and whether he had been "expelled" from Russia. Like the autonomous concept of "home" developed under Article 8 of the Convention, the notion of "residence" was not limited to physical presence but depended on the existence of sufficient and continuous links with a specific place. The first applicant had been continuously resident in Russia since 1994 and had not established his residence elsewhere. His absence abroad had been short and he had expected to return, especially since he had left his infant son there. He was therefore "resident" in Russia at the material time. As to the question of lawfulness, the first applicant had been lawfully resident in Russia for over seven years and at the material time possessed a valid multiple-entry annual visa. The Government had not explained why they considered his visa invalid. The cancellation of his visa on his arrival from Cyprus could not have deprived him of his status as a "lawful resident" as otherwise a decision to expel would in itself remove the individual from the protection of Article 1 of Protocol No. 7. The notion of "expulsion" was also an autonomous concept. With the exception of extradition, any measure compelling the alien's departure from the territory where he was lawfully resident constituted "expulsion". The decision to bar the first applicant from returning to Russia had prevented him from re-entering the territory and so amounted to "expulsion".

(b) *Compliance*: Under Article 1 of Protocol No. 7 lawfully resident aliens could be expelled only in pursuance of a decision reached in accordance with law and subject to certain procedural guarantees, although those guarantees did not apply when expulsion was necessary in the interests of public order or national security. As the Government had not established that the first applicant's expulsion had been necessary on those grounds, the exception did not apply and he should have benefited from the procedural safeguards prior to his expulsion. These had, however, been deficient in three respects: the time it had taken to communicate the decision to expel him (more than three months), his inability to submit reasons opposing his expulsion and the denial of a review of his case with the participation of counsel.
Conclusion: violation (unanimously).

Article 38 § 1 (a) – The Government had refused to produce a copy of the FSB report on the grounds that there was no established procedure for making documents containing State secrets available to international organisations. However, the Convention obligation to furnish all necessary facilities for the effective conduct of the Court's investigation implied putting in place any procedures necessary for the unhindered communication and exchange of documents with the Court. In these circumstances, a mere reference to a structural deficiency of the domestic law which made it impossible to communicate sensitive documents to international bodies was insufficient to justify the withholding of key information requested by the Court. Furthermore, the fact that the report had been examined in the domestic proceedings and the applicant's representative had been given access to it subject to signing a confidentiality undertaking indicated that the nature of the information it contained did not require a wholesale exclusion on access. Any legitimate State security concerns could have been addressed by editing out the sensitive passages or supplying a summary of the relevant factual grounds.
Conclusion: failure to comply (six votes to one).

Article 41 – EUR 7,000 to the first applicant in respect of non-pecuniary damage.

ARTICLE 10

FREEDOM OF EXPRESSION
Refusal to allow into territorial waters vessel chartered for use in support of campaign for decriminalisation of voluntary termination of pregnancy: *violation.*

WOMEN ON WAVES and Others - Portugal (N° 31276/05)
Judgment 3.2.2009 [Section II]

Facts: The three applicant associations were particularly active in promoting debate on reproductive rights. In 2004 *Women on Waves* chartered the ship *Borndiep* and set sail for Portugal, where they had been invited by the other two applicant associations to go and campaign for the decriminalisation of abortion. Meetings on sexually transmissible disease prevention, family planning and the decriminalisation of abortion were to be held on board. The ship was banned by a ministerial order from entering Portuguese territorial waters, and its entry was blocked by a Portuguese warship. The Administrative Court rejected a request by the applicant associations for an order allowing the ship's immediate entry. They appealed, but the Central Administrative Court dismissed the appeal, considering it devoid of purpose because the ship had already left Portuguese territorial waters. The Supreme Administrative Court declared their subsequent appeal inadmissible, finding that the matter in dispute was not of sufficient legal or social significance to justify its intervention.

Law: *The provision applicable in the instant case*: In this particular case the question of freedom of expression was difficult to separate from that of freedom of assembly. Taking into account the specific circumstances of the case, and particularly the fact that the applicant associations' complaints mainly concerned the alleged interference by the authorities with their right to inform the public of their position on abortion and on women's rights in general, it was easier to examine the matter under Article 10 alone, so there was no need to consider it separately under Article 11.

Compliance with Article 10 of the Convention: In preventing the ship from entering Portuguese territorial waters the authorities had prevented the applicant associations from transmitting information and staging the planned meetings and activities on board the ship in what they considered to be the most effective manner. The interference had pursued legitimate aims, namely the prevention of disorder and the protection of health. In certain situations the way information and ideas were communicated was so important that restrictions such as those imposed in this case could affect the very substance of the ideas and information concerned. Here it was not only the content of the ideas defended by the applicant associations that was at issue but also the fact that the activities chosen to promote them would take place on board the ship, a factor of vital importance to the applicant associations which corresponded to a method the first applicant association had been using for some time in other European countries.
Furthermore, unlike in the *Appleby and Others* case cited by the Government, this case did not involve private land or publicly owned property but the territorial waters of the respondent State, which by their very nature were an open, public space. Nor did it concern positive obligations, and the State's margin of appreciation was narrower in respect of the negative obligations resulting from the Convention.
Lastly, there was no serious evidence in the case file that the applicant associations had intended to deliberately breach Portuguese legislation on abortion. The Court reiterated that freedom to express opinions in the course of a peaceful assembly was so important that it could not be restricted in any way, so long as the person concerned did not commit any reprehensible acts.
The Portuguese authorities could have resorted to other means of preventing disorder and protecting health than preventing the *Borndiep*, a civilian ship, from entering its territorial waters, especially by dispatching a warship to meet it. Such a radical measure could not fail to have a deterrent effect, not only on the applicant associations but on other parties wishing to share ideas and information which challenged the established order. The interference in question had therefore not answered a "pressing social need" and could not be regarded as "necessary in a democratic society".
Conclusion: violation (unanimously).

Article 41 – EUR 2,000 to each applicant association in respect of non-pecuniary damage.

FREEDOM OF EXPRESSION
Conviction for defamation arising out of particularly virulent remarks and serious allegations of criminal conduct that had not been proved beforehand in a criminal court: *no violation*.

BRUNET-LECOMTE and Others - France (N° 42117/04)
Judgment 5.2.2009 [Section V]

Facts: The first applicant was the publication director of a magazine and the third was the company which published it. The magazine featured an interview with the second applicant, the former manager of a branch of a bank, in which he reported large-scale money laundering and black-market money from tax evasion and criminal activities in reference to the bank concerned. The bank's branch office brought proceedings against the first and second applicants for public defamation of a private person, submitting that the interview and the commentary introducing it were defamatory and infringed the presumption of its innocence. The applicants argued that the interview was in the public interest. The *tribunal de grande instance* held that the second applicant's statements were defamatory and emphasised their virulent nature and the serious implications they entailed for all or part of the bank's management, while also noting the context of the dispute between the bank and the second applicant since his dismissal. The court further noted that the first applicant had not verified the second applicant's accusations. Ruling on the civil claim, it ordered the applicants to pay 1 euro in damages. The first two applicants appealed unsuccessfully. The Court of Appeal upheld the award of damages and observed that the applicants had acted in bad faith, displaying a lack of caution and moderation. The Court of Cassation dismissed an appeal on points of law.

Law: The ruling against the applicants was an interference with their right to freedom of expression which was prescribed by law. It pursued the legitimate aim of protecting the reputation or rights of others, in this case the bank. The first applicant had been held liable for publishing an interview which, according to the domestic courts, contained defamatory accusations against the bank, together with comments that lacked moderation. The second applicant had been held liable for making the offending statements. The third applicant, the publishing company, had been held civilly liable for the sums awarded against the first applicant. The second applicant's status as a former branch manager of the bank had conferred credibility on his statements in the eyes of the reader. However, the statements concerned acts punishable under criminal law, although no such conduct had been established by the criminal courts. They had been particularly virulent, unambiguous and unmitigated, clearly affirming that after the second applicant's departure the bank had laundered money on a large scale. As to the first applicant, the domestic courts had found that as a professional journalist he had published an interview containing particularly virulent comments and serious accusations, without qualifying them or reminding the reader that no criminal convictions had been pronounced against the bank or its management. Instead, in his introductory comments, he had tried to lend credit to the second applicant's allegations. The first applicant had therefore not simply published statements made by a third party, but had added virulent comments that undeniably went beyond a certain degree of exaggeration, or even provocation. Furthermore, the managers of the bank concerned had not been contacted prior to the publication of the interview. According to the domestic courts the fact that the first applicant had not taken the trouble to seek a second opinion was proof of his bad faith. In accordance with the ethics of their profession, however, journalists are expected to act in good faith. In this case, like the domestic courts, the Court found that the lack of moderation and caution in the statements reported by the first applicant had made it impossible to consider that he had acted in good faith. The civil action had culminated in the three applicants being ordered to pay nominal damages of one euro. Taking into consideration the content of the statements published without reservation and held to be defamatory, their potential public impact and the nominal amount awarded in damages, the Court concluded that the French authorities' interference with the applicants' right to freedom of expression had been proportionate to the aim pursued and necessary in a democratic society.
Conclusion: no-violation (unanimously).

FREEDOM OF EXPRESSION
Insufficiency of grounds given by Supreme Court for awarding damages against magazine for identifying criminal defendant: *violation*.

EERIKÄINEN and Others - Finland (N° 3514/02)
Judgment 10.2.2009 [Section IV]

Facts: The applicants were the publishing company and editor-in-chief of a magazine and one of its journalists. In 1997 the magazine published an article on the abuse of social benefits and, under the headline: "It seemed legal, but... a woman entrepreneur cheated to obtain a pension of over 2 million marks?", cited the case of a businesswoman who was facing criminal charges for fraud. Although the article did not mention the woman's name, it was accompanied by an article on a completely unrelated matter which the journalist had written with her consent for another magazine some years earlier and which did contain her full name and two photographs. The woman sued and the applicants were held jointly liable in damages by a district court for defamation. The district court's judgment was overturned by a court of appeal. However, following on appeal, the Supreme Court held that, though not guilty of defamation, the applicants had violated the woman's right to privacy as there had been no need to reveal her identity. They were ordered to pay FIM 20,000 (EUR 3,364) in damages.

Law: The award of damages constituted an interference that was prescribed by law and pursued the legitimate aim of protecting the reputation or rights of others. As to the necessity for the interference, the reporting of the businesswoman's criminal case in the 1997 article was based on a public document (the bill of indictment) and concerned a matter of legitimate public interest (the abuse of public funds). Its purpose had been to contribute to a public discussion on that subject. The impugned headline was neither excessive nor misleading as it was clearly phrased as a question. The issue of necessity thus fell to be examined essentially from the standpoint of the relevancy and sufficiency of the reasons given by the Supreme Court for requiring the applicants to pay compensation. In the Court's view, it was not evident that the Supreme Court had attached any importance to the fact that the information in the 1997 article was based on a bill of indictment prepared by the public prosecutor and that the article had clearly stated that the woman had merely been charged. Nor had the Supreme Court analysed the significance of the fact that the photographs had been taken with her consent with a view to publication, albeit in connection with an earlier article and in a different context. Accordingly, the grounds relied on, although relevant, were not sufficient to justify the interference with the applicants' right to freedom of expression.
Conclusion: violation (unanimously).

Article 41 – EUR 9,179 to the publishing company in respect of pecuniary damage, and EUR 5,000 each to the editor and journalist in respect of non-pecuniary damage.

FREEDOM OF EXPRESSION
Public servant sentenced to a suspended prison term for publicly accusing his superior of misappropriation and requesting an official investigation: *violation*.

MARCHENKO - Ukraine (N° 4063/04)
Judgment 19.2.2009 [Section V]

Facts: The applicant was a teacher and the head of a trade union in the school where he worked. Following allegations against the school director of misuse of school property, the applicant lodged a series of complaints in early 1997 with a public auditing service responsible for examining the use of funds by State-owned entities. He alleged that the director had misappropriated humanitarian aid given to the school, had used the school car, TV set and video equipment for private purposes and had taken bricks from one of the school walls. The public auditing service found no evidence to suggest misappropriation of school property by the director. Subsequently, the applicant lodged two criminal complaints against the director, both of which were dismissed for lack of evidence. Representatives of the applicant's trade union organised a picket at the local administration offices and displayed banners with slogans accusing the

director of professional misconduct and abuse of office. The director brought a private prosecution against the applicant, who was convicted of defamation in 2001. The courts gave him a suspended one-year prison sentence and a fine and ordered him to pay damages to the director.

Law: The signalling by an employee in the public sector of illegal conduct or wrongdoing in the workplace had to be protected. However, despite being a union representative acting on a matter of public concern, the applicant had a duty to respect the reputation of others, including their right to be presumed innocent, and owed loyalty and discretion to his employer. In the light of that duty, any disclosure should be made in the first place to the person's superior or other competent authority or body and, only as a last resort, to the public. In so far as the applicant's conviction was based on the letters he had sent to the public auditing service and the prosecutor's office demanding investigations into the director's purported official misconduct, he could not be accused of bad faith, as he had acted on behalf of his trade union and presented various evidence in support of his allegations. That interference with his freedom of expression had therefore not been "necessary". In so far as the applicant's conviction was, however, based on his participation in the picketing, the accusations against the director, phrased in particularly strong terms and displayed in the slogans, could be taken as allegations of fact, which, in the absence of sufficient proof of their validity, could have reasonably been deemed defamatory and undermining of the director's right to be presumed innocent of serious offences. Moreover, neither the applicant, nor his supporters had ever attempted to employ any of the procedural means available under domestic law to challenge the inefficiencies of the investigations and the refusals to institute criminal proceedings against the director. The domestic authorities had therefore acted within their margin of appreciation in considering it necessary to convict the applicant of defamation on this account. However, a one-year prison sentence could not be justified in the context of a classic defamation case concerning a debate on a matter of public interest. The fact that the sentence was suspended did not alter that conclusion as the conviction itself had not been expunged. The domestic courts had therefore gone beyond what would have amounted to a "necessary" interference with the applicant's freedom of expression.
Conclusion: violation (unanimously).

Article 41 – EUR 1,000 in respect of pecuniary and non-pecuniary damage.

See also *Guja v. Moldova*, Information Note no. 105.

FREEDOM OF EXPRESSION
Removal from judicial office for making critical statements about the Russian judiciary: *violation*.

KUDESHKINA - Russia (N° 29492/05)
Judgment 26.2.2009 [Section I]

Facts: In 2003 the applicant, who at the time held judicial office at the Moscow City Court, was appointed to sit in a high-profile criminal case concerning abuse of powers by a police investigator, Mr Zaytsev. The applicant submitted that during the proceedings in question, the President of the Moscow City Court, Ms Yegorova, called her to her office and asked her certain questions regarding the conduct of the trial. The parties disagreed on the circumstances of the applicant's withdrawal from the case. The applicant herself submitted that Ms Yegorova had removed her from the case without giving reasons, while the Government claimed that the case had been assigned to another judge on the grounds that she had delayed its examination. The applicant subsequently asked for Ms Yegorova to be charged with a disciplinary offence for having allegedly exercised unlawful pressure on her. The judge appointed to examine the applicant's allegations concluded that Ms Yegorova had decided to re-assign the case because she disapproved of the way the applicant was conducting the hearing and because there existed "confidential reports by relevant agencies" on the applicant's examination of the Zaytsev case. The competent authority therefore decided not to institute disciplinary proceedings against Ms Yegorova.
Several months later the applicant stood as a candidate in a general election to the Russian Duma. During her campaign, which included a programme for judicial reform, she gave interviews to two newspapers and a radio station in which she was highly critical of the Russian judiciary. Among other things, she

expressed doubts as to the independence of the courts in Russia and fears of "judicial lawlessness" within the country. She was not elected to the Duma but was reinstated in her previous judicial office.
Meanwhile, the President of the Moscow Judicial Council sought the applicant's removal from office claiming that during her election campaign she had behaved in a manner that was incompatible with the authority and standing of a judge. In May 2004, without hearing representations from the applicant who was absent, apparently without a valid excuse, the competent authority decided to remove her from office, stating that she had "disseminated … false and untruthful fabrications" and that the statements were "clearly based on fantasies, on knowingly false and distorted facts". The authority further concluded that the applicant had "disclosed specific factual information concerning the criminal proceedings against Mr Zaytsev before the judgment in this case had entered into legal force". The applicant subsequently appealed to the Moscow City Court and requested the transfer of her case owing to lack of impartiality, to no avail.

Law: The Court reiterated that Article 10 applied to the workplace, that civil servants also enjoyed the right to freedom of expression and that disclosure of information obtained in the course of their work, even on matters of public interest, always needed to be examined in the light of their duties of loyalty and discretion. As regards the applicant's alleged disclosure of facts concerning pending criminal proceedings, the domestic authorities had not relied on any specific statements and the Court saw nothing in the impugned interviews that would amount to a "disclosure". Although the applicant had referred to her experience in the Zaytsev case and the alleged pressure exercised by Ms Yegorova, this was only in support of her criticism of the role of court presidents, and in no way constituted divulgation of classified information acquired in her official capacity. Moreover, the applicant's accounts of her experience in the Zaytsev case were regarded as statements of fact which needed to be supported by facts and which, in the context, were inseparable from her opinions expressed in the same interviews. As to the factual substantiation of her claims, the Government had relied on the competent domestic authorities' findings that there was no evidence that Ms Yegorova had attempted to influence the applicant in the conduct of the case. Although it was difficult to establish the content of communications between the applicant and Ms Yegorova in private, the Court attached importance to the manner in which the applicant had been removed from the Zaytsev case. In particular, in addition to the existence of witnesses in support of the applicant's allegations against Ms Yegorova, the suggestion that "the existence of confidential reports by relevant agencies" concerning the applicant's conduct may have triggered the transfer of the case to another judge should not have been overlooked by the competent authorities which therefore had failed to convincingly dispel the applicant's allegations of pressure. Noting that the applicant had publicly criticised the conduct of various officials and alleged that pressure on judges was common practice in Russian courts, the Court found that she had undoubtedly raised a very important matter of public interest which had to be open to free debate in a democratic society. Even allowing for a certain degree of exaggeration and generalisation, the Court found that her statements were not entirely devoid of factual grounds and consequently had to be regarded as fair comment on a matter of great public importance.
As to her fears concerning the impartiality of the Moscow City Court, the Court considered them justified given the allegations she had made against that court's President. Since her arguments were not considered in the domestic proceedings, the Court concluded that she had been denied important procedural guarantees. Finally, the penalty – dismissal from judicial service – was disproportionately severe and capable of having a "chilling effect" on judges wishing to participate in public debate on the effectiveness of the judicial institutions.
Conclusion: violation (four votes to three).

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

ARTICLE 13

EFFECTIVE REMEDY
Lack of effective remedies for length-of-proceedings complaints: *violation*.

ABRAMIUC - Romania (N° 37411/02)
Judgment 24.2.2009 [Section III]

Facts: In 1984 the applicant, a chemical engineer in a State-owned company, was acknowledged as the author of an invention and issued with a patent by the National Patent Office. Between 1984 and 1991 his invention was used industrially by the State-owned company concerned. In 1991 the company was reorganised into a publicly funded joint-stock company and continued to use the applicant's invention in its production process, but without paying him any royalties, leading him to take legal action against the company in 1992. In 1994 the County Court found in the applicant's favour and ordered the company to pay him 253,942,510 Romanian lei (ROL) together with interest at an annual rate of 6 %. Appeals lodged by the company were rejected. With a view to securing the enforcement of the 1994 judgment the applicant referred the case to the bailiffs and brought various actions, none of which resulted in prompt and full enforcement of the judgment, partly because of stays of execution granted by the Principal State Prosecutor or the courts. The debtor company also lodged several actions to oppose the enforcement, one of which began in 1996 and ended with a final judgment of the Court of Appeal in June 2002.
Meanwhile, in 1995 the applicant brought a new action against the company alleging that it had continued to use his invention after he lodged his first action seeking payment of royalties. This new action also ended with a judgment of the Court of Appeal in June 2002.
In 2005 a transaction certified by a solicitor was concluded between the debtor company on the one hand and the applicant and another creditor of the company on the other. Under the terms of that transaction the company paid them a total of ROL 4,500,000,000 to terminate all proceedings linked to the enforcement of the 1994 judgment and pending before the domestic courts or the bailiffs.

Law: Articles 6 § 1 and 1 of Protocol No. 1 – *Violation of the applicant's right of access to a court as a result of the non-enforcement of the judgment of 1994*: The judgment of 1994 had given rise to a "possession" in respect of the first applicant within the meaning of Article 1 of Protocol No. 1. In order to secure the enforcement of that judgment the applicant had had to institute several legal actions, even though the debtor company had been publicly owned until its privatisation in 2003. But it was not fitting for an individual who had won a claim against the State in court to have subsequently to take legal action to obtain satisfaction. Enforcement of the judgment concerned had been hindered by a number of stays of execution granted by both the Principal State Prosecutor and the courts which examined the debtor company's objections, parallel proceedings or special appeals. As the judgment of 1994 had not been executed until 7 July 2005, the stays of execution had resulted in an abnormally lengthy delay. Having regard to its case-law on the matter and the facts of the case, the Court found that the State had failed to make all the necessary efforts, through its specialised bodies, to have the judgment of 1994 enforced.
Conclusion: violation (unanimously).

Article 6 § 1 – *Length of the proceedings brought to a conclusion by the judgments of June 2002*: The first set of proceedings had lasted five years, six months and three days and the second seven years one month and seven days. Under Romanian law the first set of proceedings, opposing the enforcement of the judgment, should have been examined urgently, as a priority; however, the proceedings had been stayed pending the outcome of other proceedings lodged by the debtor company, aimed solely at delaying enforcement. Turning to the second set of proceedings, concerning the payment of royalties to the applicant, the Court observed that they had been stayed for about five years pending the outcome of proceedings concerning the validity of the applicant's patent. Having regard to its case-law on the matter, the Court considered that the length of the proceedings concerned had been excessive and failed to meet the "reasonable-time" requirement.

Conclusion: violation (unanimously).

Article 13 – First of all, the Government referred to the possibility of lodging a disciplinary complaint with the Judicial Service Commission in the event of excessively lengthy proceedings. However, it was not established, in accordance with the conditions laid down by the Venice Commission in its report on the effectiveness of domestic remedies against the excessive length of proceedings, that such a remedy – aimed primarily at establishing the disciplinary liability of judges – would have had any direct and immediate effect on the length of the proceedings of which the applicant complained. Moreover, the Government had presented no example of national practice proving that the applicant could have obtained proper redress by that means. Thus disciplinary action against judges could only affect the personal situation of the judges concerned and could therefore not be regarded as an effective remedy against the excessive length of proceedings.
The Government also referred to the possibility of court action. However, most of the national court decisions the Government had presented mentioning provisions of the Convention or the Court's case-law had been delivered well after the proceedings at the origin of the applicant's length-of-proceedings complaints had been finally determined. In addition, the decisions concerned had generally been delivered at first instance and on appeal, and only one had concerned the length of proceedings and the corresponding remedy. Lastly, deficiencies in the functioning of Romania's judicial system due to repeated procedural errors in, and remittals to, the courts below had already been identified. Accordingly, without prejudging any positive developments domestic law and case-law might undergo in this connection in the future, the Government had not adequately proved in this case that the applicant had had an effective remedy within the meaning of Article 13 of the Convention which he could have used to complain about the length of the proceedings.
Conclusion: violation (unanimously).

Article 41 – EUR 7,000 in respect of non-pecuniary damage.

ARTICLE 14

DISCRIMINATION
Refusal to take applicant's years of employment in former Soviet Union into account when calculating her entitlement to a retirement pension because she did not have Latvian citizenship: *violation*.

ANDREJEVA - Latvia (N°55707/00)
Judgment 18.2.2009 [Grand Chamber]

Facts: The applicant first entered Latvian territory in 1954 at the age of 12, when it was part of the Soviet Union. She has been permanently resident there ever since. Having previously been a national of the former USSR, she currently holds the status of a permanently resident non-citizen of Latvia. In 1966 she started working at a recycling plant at the Olaine chemical complex, formerly a public body under the authority of the USSR Ministry of Chemical Industry. The complex was situated in what was then the USSR and has since become Latvian territory. Until 1981 she was under the authority of a State enterprise whose head office was in Kiev. She was later placed under the authority of a subdivision of the same enterprise whose head office was in Moscow. Although the applicant's salary was paid by post-office giro transfer, initially from Kiev and then from Moscow, her successive reassignments did not entail any significant change in her working conditions, as she continued her duties at the recycling plant. Following the declaration of Latvia's independence, in November 1990 the applicant came under the direct authority of the plant management. On retiring in 1997 she asked her local social insurance board to calculate her retirement pension. She was informed that, in accordance with paragraph 1 of the transitional provisions of the State Pensions Act, only periods of work in Latvia could be taken into account in calculating the pensions of foreign nationals or stateless persons who had been resident in Latvia on 1 January 1991. As the applicant had been employed from 1 January 1973 to 21 November 1990 by entities based in Kiev and Moscow, the Board calculated her pension solely in respect of the time she had worked before and after

that period. As a result, she was awarded a monthly pension of 20 Latvian lati (approximately EUR 35). The applicant brought administrative and judicial proceedings challenging this decision. Ultimately, the appeal on points of law lodged with the Senate of the Supreme Court by the public prosecutor, which was examined at a public hearing on 6 October 1999, was dismissed. The Senate upheld the district and regional courts' findings that the period during which the applicant had been employed by Ukrainian and Russian enterprises could not be taken into account in calculating her pension. It further held that, as those employers were not taxpayers in Latvia, there was no reason for her to be covered by the Latvian mandatory social-insurance scheme. The applicant requested the re-examination of her case because she had been unable to attend the hearing of 6 October 1999 as it had started earlier than scheduled. That request was also dismissed. In February 2000 she was informed that, on the basis of an agreement reached between Latvia and Ukraine, her pension had been recalculated, with effect from 1 November 1999, to take account of the years she had worked for her Ukrainian-based employers.

Law: Article 14 in conjunction with Article 1 of Protocol No. 1 – With regard to the applicability of Article 1 of Protocol No. 1, the Government attached considerable importance to the difference between Soviet pensions, which were paid by the State from common budgetary resources in accordance with the solidarity principle, and the system gradually implemented from 1991 onwards, which was based on individual contributions by each beneficiary. The Court pointed out, however, that when a State chose to set up a pension scheme, the individual rights and interests deriving from it fell within the ambit of Article 1 of Protocol No. 1, irrespective of the payment of contributions and the means by which the pension scheme was funded. Furthermore, where a State decided of its own accord to pay pensions to individuals in respect of periods of employment outside its territory, thereby creating a sufficiently clear legal basis in its domestic law, the presumed entitlement to such benefits also fell within the scope of Article 1 of Protocol No. 1. In the applicant's case the transitional provisions of the Latvian State Pensions Act created an entitlement to a retirement pension in respect of aggregate periods of employment prior to 1991 in the territory of the former USSR, regardless of the payment of any kind of contributions, but it reserved this right to Latvian citizens. The applicant was thus refused the pension in question solely because she did not have Latvian citizenship. This sufficed for the Court to consider that the applicant's pecuniary claim fell within the ambit of Article 1 of Protocol No. 1.
As to the merits of the case, the Court reiterated that once an applicant had established the existence of a difference in treatment, it was for the Government to show that such difference was justified. In the applicant's case the difference in treatment pursued at least one legitimate aim compatible with the general objectives of the Convention, namely the protection of the country's economic system. The Court proceeded to examine the proportionality of that aim and the means employed to achieve it. The national authorities' refusal to take into account the applicant's work "outside Latvian territory" was based solely on her nationality, as it had not been disputed that a Latvian citizen in the same position as the applicant, having worked in the same enterprise during the same period, would have been granted the disputed portion of the retirement pension. Moreover, the parties agreed that if the applicant became a naturalised Latvian citizen she would automatically receive the pension in respect of her entire working life. The Court observed that very weighty reasons would have to be put forward before it could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention; it found no such reasons in the applicant's case. Firstly, it had not been established, or even alleged, that the applicant had not satisfied other statutory conditions entitling her to a pension in respect of all her years of employment. She was therefore in an objectively similar situation to persons who had had an identical or similar career but who, after 1991, had been recognised as Latvian citizens. Secondly, there was no evidence that during the Soviet era there had been any difference in treatment between nationals of the former USSR as regards pensions. Thirdly, the applicant was not currently a national of any State, but enjoyed the status of a "permanently resident non-citizen" of Latvia, the only State with which she had any stable legal ties and thus the only State which objectively could have assumed responsibility for her in terms of social security. In those circumstances, the arguments submitted by the Government were not sufficient to satisfy the Court that there was a "reasonable relationship of proportionality" in the applicant's case that rendered the impugned difference of treatment compatible with the requirements of Article 14. Notwithstanding the Government's view that the reckoning of periods of employment was essentially a matter to be addressed through bilateral inter-State agreements on social security, the Court reiterated that by ratifying the Convention, Latvia had undertaken to secure "to everyone within [its]

jurisdiction" the rights and freedoms guaranteed therein. Accordingly, the Latvian State could not be absolved of its responsibility under Article 14 on the ground that it was not bound by inter-State agreements on social security with Ukraine and Russia. Nor could the Court accept the Government's argument that it would be sufficient for the applicant to become a naturalised Latvian citizen in order to receive the full amount of her pension. The prohibition of discrimination in Article 14 was meaningful only if an applicant's personal situation was taken into account exactly as it stood.
Conclusion: violation (sixteen votes to one).

Article 6 – The Court noted, among other things, that the appeal on points of law had been lodged not by the applicant herself or her lawyer but by the public prosecutor attached to the Riga Regional Court. The Government argued that the favourable position adopted by the public prosecutor had relieved the Senate from having to afford the applicant the opportunity to attend the hearing herself. The Court was not persuaded by that argument, in particular since it did not appear that under Latvian law, a public prosecutor could represent one of the parties or replace that party at the hearing. The applicant had been a party to administrative proceedings which had been instituted at her request. Accordingly, as the main protagonist in those proceedings she should have been afforded the full range of safeguards deriving from the adversarial principle. The fact that the appeal on points of law had been lodged by the prosecution service had in no way curtailed the applicant's right to be present at the hearing of her case, a right she had been unable to exercise despite wishing to do so.
Conclusion: violation (unanimously).

Article 41 – EUR 5,000 in respect of all damage sustained.

ARTICLE 15

DEROGATION IN TIME OF EMERGENCY
Validity of derogation from Article 5 § 1 obligations in respect of powers to detain foreign nationals suspected of terrorism who could not be deported for fear of ill-treatment: *not valid*.

A. and Others - United Kingdom (N° 3455/05)
Judgment 19.2.2009 [GC]

(See Article 5 § 1 (f) above).

ARTICLE 34

HINDER THE EXERCISE OF THE RIGHT OF PETITION
Pressure by the authorities on a witness in a conditions-of-detention case before the Court: *failure to comply with Article 34.*

NOVINSKIY - Russia (N° 11982/2)
Judgment 10.2.2009 [Section III]

Facts: In 1999 the applicant was remanded in custody pending the outcome of criminal proceedings against him. He complained about overcrowding and hygiene in the pre-trial detention centres and submitted a number of statements from his fellow prisoners in support of his allegations. One of these witnesses, Mr S., was interviewed twice by the respondent Government while he was still in prison and once more after his release on parole. Even though no direct threats or overt intimidation were used, the witness stated that he had felt pressurised by the State in connection with the applicant's case. The applicant died in 2009 when serving a prison sentence. His widow pursued the application.

Law: The Court found a violation of Article 3 on account of the applicant's conditions of detention.
Article 34 – Even though the main purpose of this provision was to protect applicants or potential applicants, in certain cases the effective exercise of an applicant's right of individual petition depended to a large extent on his or her ability to substantiate the claims by providing, among other things, statements from witnesses. It was especially true in conditions-of-detention cases where the Government alone had access to information capable of firmly corroborating or refuting the allegations and where, if they failed to provide such information, it would be extremely difficult, if not impossible for the Court to make findings of fact. In the applicant's case, the Government had been found to have failed to submit appropriate information in respect of his allegations without good reason. The witness statements submitted by the applicant, including those of Mr S., had played a crucial role in the determination of the factual background to the applicant's Article 3 complaints. The Court could not avoid the impression that the officials had gone beyond mere verification of the witness's statements and acted in a manner which he could reasonably have perceived as unnecessarily intimidating and coercive. In his initial statement, the witness had confirmed the applicant's account of the conditions of detention. Subsequently, the Government had produced another statement in which he had fully retracted his support for the applicant's case. After the Court had requested the Government to comment on the applicant's allegations of undue coercion and pressure on witnesses, the Government had submitted yet another statement by Mr S., in which he had essentially retracted his previous submission and endorsed his initial statement supporting the applicant's case. No specific reason for such a drastic change of position had been provided by the Government. In a further statement produced by the applicant, the witness had accused the authorities of having put pressure on him by using his pending application for release on parole as leverage. Even though that statement might not be conclusive, subsequent developments amply illustrated that he had indeed been subjected to pressure. After his release on parole, the prosecutor's office had sent a police patrol to his home address to escort him to the police station under threat of being brought by force or fined. The Government had failed to produce any document to prove the existence of a criminal case in connection with which Mr S. could have been summoned as a witness. Therefore, the Court found that it was totally inappropriate for him to have been summoned in the manner described. As regards the purpose of the interview, the Government had cited the need to check his earlier statements concerning undue pressure from the prison authorities. However, in the absence of any formal disciplinary or criminal inquiry into that issue and in view of the ominous form the interview had taken, the Court could not accept that explanation. In its view, the interview had been intended to put additional pressure on the witness whose depositions played a key role in the establishment of the facts in the proceedings before the Court and were indispensable to the effective exercise of the applicant's right of individual petition.
Conclusion: violation (unanimously).

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

HINDER THE EXERCISE OF THE RIGHT OF PETITION
Deportation despite interim measure ordered by Court: *failure to comply with Article 34*.

BEN KHEMAIS - Italy (N° 246/07)
Judgment 24.2.2009 [Section II]

Facts: The applicant was convicted of assault at first instance and on appeal and the judgment stated that he was to be expelled from Italian territory after serving his sentence. The outcome of an appeal on points of law was unknown. In the meantime, in 2002 the Tunis Military Court had sentenced the applicant *in absentia* to ten years' imprisonment for being a member, in peacetime, of a terrorist organisation. The applicant allegedly did not learn about his conviction in Tunisia until one of his co-defendants was expelled there. On that occasion, members of the co-defendant's family allegedly informed the applicant that the co-defendant had been tortured and imprisoned in Tunis and had not been allowed to contact a lawyer. In March 2007 the President of the Second Section of the Court decided to inform the Italian Government, by virtue of Rule 39 of the Rules of Court, that in the interest of the parties and of the proper conduct of the proceedings it was advisable not to expel the applicant to Tunisia until further notice. In June 2008 the applicant's representative informed the Registry that his client had been taken to Milan

airport for deportation to Tunisia. The Government informed the Court that an expulsion order had been issued against the applicant in May 2008 because of the part he had played in the activities of Islamic extremists planning terrorist attacks.

Law: Article 3 – The Court referred to the case of *Saadi v. Italy* (no. 37201/06, [GC], judgment of 28 February 2008, see also Information Note no. 105 for further details) and saw no reason in the present case to revise the conclusions it had reached in that case concerning the situation in Tunisia. There were substantial grounds in the present case for believing that there had been a real risk that the applicant, who had been sentenced to a long term of imprisonment for belonging to a terrorist organisation in peacetime, would be subjected to treatment contrary to Article 3 of the Convention if sent to Tunisia. Concerning the diplomatic assurances offered by the Tunisian authorities and considering the circumstances of the case, the Government's argument that the assurances given afforded effective protection against the serious risk of the applicant being subjected to treatment contrary to Article 3 of the Convention could not be accepted. On the contrary, according to the principle laid down by the Parliamentary Assembly of the Council of Europe in its Resolution 1433(2005), diplomatic assurances were not enough unless the absence of a risk of ill-treatment was firmly established. Furthermore, as regards the information supplied by the Government concerning the applicant's situation in Tunisia, while there was evidence that the applicant had not suffered any treatment contrary to Article 3 of the Convention in the weeks following his expulsion, there was no knowing what might happen to him in the future. In that connection the Court could but note that the applicant's representative before the Court and the Italian Ambassador in Tunis had not been allowed to visit the applicant in prison and verify that he was being treated with due respect for his physical integrity and his human dignity.
That being so, the applicant's expulsion to Tunisia had violated Article 3 of the Convention.
Conclusion: violation (unanimously).

Article 34 – As Italy had deported the applicant to Tunisia, the level of protection of the rights enshrined in Articles 2 and 3 of the Convention which the Court could guarantee the applicant had been irreversibly diminished. The expulsion had deprived of its effect any finding of a violation of the Convention, the applicant having been deported to a country which was not party to the Convention, where he alleged he was at risk of being subjected to treatment contrary to the Convention. Furthermore, having lost all contact with his lawyer, the applicant had been denied an opportunity to have additional inquiries made in order to obtain evidence in support of his allegations, inquiries that could have been carried out even after the exchange of submissions. In addition, before deporting the applicant the Government had not requested the lifting of the interim measure adopted under Rule 39 of the Rules of Court, which they knew was still applicable, and had gone ahead with the expulsion even before obtaining the diplomatic assurances it referred to. The facts of the case as described above clearly show that as a result of his expulsion to Tunisia the applicant had not been able to submit all the relevant arguments in his defence and the Court's judgment was likely to be deprived of its effect. In particular, the fact that the applicant had been removed from Italy's jurisdiction was a serious obstacle that might prevent the Government from honouring their obligations, under Articles 1 and 46 of the Convention, to protect his rights and make reparation for the consequences of any violations found by the Court. That situation had hindered the applicant's effective exercise of his right of individual application guaranteed by Article 34 of the Convention, which his expulsion had rendered nugatory. That being so, by failing to comply with the interim measure indicated in conformity with Rule 39 of the Rules of Court, Italy had failed in this case to honour its commitments under Article 34 of the Convention.
Conclusion: violation (unanimously).

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

HINDER THE EXERCISE OF THE RIGHT OF PETITION
Dissuasive remarks by prison authorities and unexplained delays in supplying materials for correspondence and documents needed for application to Court: *failure to comply with Article 34.*

GAGIU - Romania (N° 63258/00)
Judgment 24.2.2009 [Section III]

(See Article 37 § 1 below).

ARTICLE 37

Article 37 § 1

SPECIAL CIRCUMSTANCES REQUIRING FURTHER EXAMINATION
Continued examination of application despite applicant's death and lack of any request from a relative.

GAGIU - Romania (N° 63258/00)
Judgment 24.2.2009 [Section III]

Facts: The applicant, having no family, was brought up in an orphanage. Arrested and charged with murder in 1994, he was sentenced to twenty years' imprisonment. His medical file mentioned that the applicant suffered from chronic hepatitis and a chronic ulcer. In 1998 and again in 2000 he was hospitalised in the prison hospital, where he underwent various examinations that revealed that he was suffering from, *inter alia*, chronic obstructive bronchopneumonia and persistent chronic hepatitis. The applicant returned to prison, where he was treated for chronic obstructive bronchopneumonia. Later in 2001 the doctors at another prison reported that he had contracted scabies. Then, in August 2001, suspecting chronic hepatitis, they sent him to the municipal hospital where, following analyses, surgery was envisaged as well as further analyses at the prison hospital. The applicant's medical file made no mention of whether or not the authorities actually followed the prescriptions made out by the specialists, or what treatment was administered to him between that visit and September 2001, in particular for his liver cirrhosis. In September 2001 he was sent to another prison hospital until the outcome of the proceedings. In addition to the ailments already mentioned, the doctors there diagnosed early peritonitis. While under treatment at that hospital, the applicant died. The forensic report stated that death had been caused by liver and kidney failure with underlying liver cirrhosis, complicated by early peritonitis and haemorrhage of the upper digestive tract. In October 2001 the public prosecutor's office decided to discontinue the proceedings, finding that the applicant had died of non-violent causes and that there were no grounds for criminal proceedings. A medical committee found that the treatment the applicant had received had been appropriate and that death had occurred following foreseeable complications.
Prior to his death, the Registry having asked him to send copies of the relevant documents to enable the Court to examine his application, the applicant complained that he could not obtain the copies as the prison authorities required him to pay for them and he had no money. He had also been told that if he insisted on having copies of the documents concerned, he would make life in prison more difficult for himself, including being transferred to a higher-security section. Lastly, the applicant informed the Court that, having no family and no resources, he had had difficulty finding envelopes and stamps for his correspondence with the Court. In four letters he mentioned that he had received the Court's application form, filled it in and given it to a prison warder to post within the required time-limit. When the Registry informed him that it had never received the first form, he had lodged a complaint for interference with his correspondence. The applicant had then been transferred to another prison, without any justification.

Law: Article 37 § 1 – The Government had informed the Court of the applicant's death at the prison hospital in 2001 and requested that the application be struck out of the list. In 2004, taking into account the fact that the applicant had no family, and the complaints he had submitted before he died, the Court

had decided to reject the Government's request and continue examining the application in conformity with Article 37 § 1 *in fine* of the Convention.

Article 2 – (a) *The substantive obligation to protect life*: From 1994 the applicant had been in the hands of the authorities, who had been aware of his existing medical conditions and of the other serious illnesses detected during his detention, as well as the fact that his state of health required constant appropriate medical supervision and treatment. The complications that led to the applicant's death had been qualified as foreseeable by a medical committee. Although the applicant's medical file had mentioned chronic hepatitis, he had not received proper treatment for that specific condition, but had been treated in the main for the bronchopneumonia from which he also suffered. As a result his chronic disease had become much more serious. The applicant had eventually been examined by two specialists, but none of the measures they recommended had been taken by the authorities in charge of him. Not only was he not admitted to the prison hospital but, instead, he was placed in his cell, without the necessary medical care, until the day before he died. By the time he was hospitalised it was too late. He had died the following day in spite of the treatment he was given. The prison authorities had therefore failed to show due diligence in providing the applicant with the requisite medical care. The prison and medical authorities had failed in their positive obligation.
Conclusion: violation (unanimously).

(b) *The procedural obligation to carry out an effective investigation*: although the public prosecutor's office had immediately opened an investigation, it had been confined to the treatment administered to the applicant at the prison hospital the day before he died, paying no attention to the possible negligence of the authorities responsible for monitoring his state of health in prison. The investigation could certainly not be said to have been effective and thorough: as it had focused solely on the treatment administered at the hospital where the dying prisoner had been taken, it was unlikely to look into the negligence of the prison authorities whose obligation it was to provide the applicant, during the period preceding his death, with the constant medical care he needed in order to keep him alive. In addition, the findings of the medical committee had not been announced until two years after the investigation. The authorities had therefore failed in their obligation to conduct an effective, thorough and timely investigation.
Conclusion: violation (unanimously).

Article 3 – Almost the whole time he was in prison the applicant had had to share a 7.60 m^2 cell with five other detainees, so they had only had 1.25 m^2 each. Furthermore, he had had to use the toilet in full view of his fellow prisoners. And the scabies the applicant had contracted was an indication of the sanitary and hygiene conditions in the cell. Consequently, the conditions of detention the applicant had endured for a number of years had submitted him to hardship that exceeded the unavoidable level of suffering inherent in detention, undermined his dignity and aroused in him feelings of humiliation and debasement that amounted to degrading treatment.
Conclusion: violation (unanimously).

Article 8 – The applicant alleged that, being without aid and without resources, he had had to sell some of his food to other detainees in order to buy stamps for his letters to the Court. He had constantly kept the Court informed of this state of affairs and requested its help; he had certainly received no assistance and his resources had been insufficient in view of the very small allowance he received in prison and the fact that he had no family to support him and was ill and unfit for work. The Government, who submitted that they had provided the applicant with the stamps he needed, had offered no valid explanation to disprove the applicant's allegations. That being so, the prison authorities had failed in their positive obligation to provide the applicant with the necessary material, particularly stamps, for his correspondence with the Court.
Conclusion: violation (unanimously).

Article 34 – The prison authorities had asked the applicant to pay the cost of copies of the documents he needed, knowing full well that he had no resources and what the consequences of failure to send the documents to the Court would be. They had made several attempts to dissuade the applicant from applying to the Court and no explanation had been offered for his transfer the day after he complained

about the incident concerning the alleged disappearance of his first application form. In the situation of vulnerability and dependence in which he had found himself, the dissuasive remarks of the prison authorities and the unjustified delay in supplying the applicant with the necessary material for his correspondence and the requisite documents for his application to the Court had obstructed the effective exercise of his right of individual application.
Conclusion: violation (unanimously).

ARTICLE 38

FURNISH ALL NECESSARY FACILITIES
Refusal to communicate classified report to Court regarding reasons for denying entry to a resident foreign national: *failure to comply with Article 38*.

NOLAN and K. - Russia (N° 2512/04)
Judgment 12.2.2009 [Section I]

(See Article 9 above).

ARTICLE 41

JUST SATISFACTION
Entitlement where unlawful detention was result of public emergency and State's inability to deport applicants to their country of origin for fear of ill-treatment: *reduced award*.

A. and Others - United Kingdom (N° 3455/05)
Judgment 19.2.2009 [GC]

(See Article 5 § 1 (f) above).

JUST SATISFACTION
Entitlement following unlawful deprivation of hotel: *restitution or compensation in lieu based on current market value plus, in either case, any additional losses*.

DACIA S.R.L. - Moldova (N° 3052/04)
Judgment 19.2.2009 [Section IV]

Facts: In 1999 the applicant company purchased a hotel belonging to the State at auction under legislation permitting the privatisation of State property. It paid the purchase price and went on to purchase the land on which the hotel was built from the local municipality. It spent money renovating and refurbishing the hotel, which it ran for the next four years. However, following an application by the Prosecutor General's Office, in 2003 the Economic Court annulled the sale of the hotel on the grounds of procedural irregularities and ordered its return to the State and the repayment of the 1999 purchase price to the applicant company. The purchase price was repaid the following year. The sale of the land was also annulled.
In its principal judgment of 18 March 2008 the European Court held that the applicant company's rights under Article 1 of Protocol No. 1 to the Convention had been violated, after finding that the irregularities in the privatisation of the hotel had been formal in character or unsubstantiated and were not attributable to the applicant company, which had been forced to bear an individual and excessive burden. It was the State authorities which had set out the rules, determined the reserve price and carried out the auction and the applicant company had merely complied with the conditions imposed on it. The Court also found a violation of Article 6 § 1 on the grounds that the Prosecutor General's Office's application to annul the

sale had been made outside the limitation period that would have applied to a private person so that the State had gained a discriminatory advantage without any compelling reason. The question of just satisfaction was reserved. The Moldovan Supreme Court of Justice then set aside the judgments annulling the applicant company's purchase of the hotel and land and remitted the case for a full rehearing by the Appeals Chamber of the Economic Court. Those proceedings were still pending when the Court delivered its judgment on just satisfaction.

Law: The applicant company's case did not concern nationalisation or the otherwise lawful deprivation of property, but deprivation of property without valid reason and in breach of the principle of legal certainty. Consequently, the reparation had to aim at putting the applicant company in the position in which it would have found itself had the violation not occurred. The most appropriate remedy would therefore be for the hotel and land to be returned to it. Failing that, it should receive compensation in lieu based on the current market value of the property. In either case, the applicant company was also entitled to an award for any additional losses, but would have to reimburse the amount the Government had paid for the hotel in 2004. As regards the value of the hotel, the parties had each provided an expert valuation. The Government's valuation was substantially lower than the applicant company's. Of these, the Court preferred the latter. The extremely short preliminary valuation that had been lodged by the Government could not be taken into account as it contained no calculations or other explanations as to how the sum had been arrived at. In contrast, the applicant company's valuation, which was detailed, had been prepared by an experienced valuer who had used three different methods of calculation to arrive at an average that was in turn consistent with the value of a similar property nearby. Accordingly, that valuation (EUR 7,612,000) was the amount of compensation due to the applicant company for the hotel in the absence of *restitutio in integrum*. The fact that proceedings were still pending at the domestic level made no difference here as, despite the clear terms of the principal judgment, the Supreme Court of Justice had, without giving any reasons, decided to send the case back for a full rehearing, rather than to annul the impugned judgments and make consequential orders itself. As to the additional losses, the Court awarded EUR 890,625 in respect of pecuniary damage (including lost profits of EUR 763,540).
Thus, if the hotel was returned, the applicant company was required to pay the Government EUR 374,299, being the difference between the price paid by the Government in 2004 and the award in respect of the additional losses. Failing restitution, the Government was required to pay EUR 7,237,700 being the current value of the hotel plus the additional losses less the price paid by the Government in 2004. The Court also awarded EUR 25,000 in respect of non-pecuniary damage.

ARTICLE 46

EXECUTION OF A JUDGMENT
Respondent State required to adopt further measures to eliminate structural problem of length of pre-trial detention.

KAUCZOR - Poland (N° 45219/06)
Judgment 3.2.2009 [Section IV]

Facts: In 2000 the applicant was arrested and detained on suspicion of murder. His detention was extended by numerous court decisions. In 2006 the competent court dismissed his complaint about the length of the criminal proceedings. In December 2007 he was released; the criminal proceedings were, however, still pending when the European Court's judgment was delivered. In 2007 the Committee of Ministers of the Council of Europe adopted a Resolution concluding that the great number of Court judgments finding Poland in violation of Article 5 § 3 of the Convention on account of the unreasonable length of pre-trial detention revealed a structural problem. The Council of Europe Commissioner for Human Rights also raised the issue in a memorandum to the Polish Government. In 2007 the Code of Criminal Procedure was amended with a view to preventing delays (notably in the event of defence counsel ceasing to act) and strengthening the powers of the authorities to discipline participants in proceedings (by fines and other admonishment). In addition, the trial courts and prosecution authorities

took a series of practical measures designed to make criminal proceedings more efficient by setting time-limits for hearings well in advance, holding hearings on Saturdays or severing charges against co-accused to separate proceedings. Moreover, the Government ordered that information relating to the length of pre-trial detention requirements under the Convention and the Court's case-law in Polish cases be circulated among judges and prosecutors on a regular basis.

Law: Articles 5 § 3 and 6 § 1 – violations (unanimously).

Article 46 – The Court had recently delivered a considerable number of judgments against Poland in which a violation of Article 5 § 3 on account of the excessive length of detention was found (65 in 2007-2008). In addition, approximately 145 applications raising the same issue were currently pending before the Court. The Court had previously held that the reasons relied on by the domestic courts in their decisions to extend pre-trial detention were limited to paraphrasing the grounds for detention provided for by the Code of Criminal Procedure and that the authorities had failed to envisage the possibility of imposing other preventive measures. Moreover, while the relevant provisions of the domestic law defined detention as the most extreme preventive measure, it appeared to be frequently used by the domestic courts. The Resolution of the Committee of Ministers and statistical data demonstrated that the violation of the applicant's right under Article 5 § 3 had originated in a widespread problem arising out of the malfunctioning of the Polish criminal-justice system which had affected, and might still affect in the future, an as yet unidentified, but potentially considerable, number of persons charged in criminal proceedings. The Court therefore agreed with the Committee of Ministers that the excessive length of pre-trial detention in Poland revealed a structural problem consisting of "a practice that was incompatible with the Convention". The Court welcomed the steps the respondent State had already taken to remedy the structural problems and considered that they might contribute to reducing the excessive use of detention as a preventive measure. However, in view of the extent of the problem, consistent and long-term efforts, such as the adoption of further measures, had to continue in order to achieve compliance with Article 5 § 3 of the Convention.

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

EXECUTION OF A JUDGMENT
Structural inadequacy of medical care in prisons, in particular as regards the treatment of Hepatitis C: *indication of appropriate legislative and other measures*.

POGHOSYAN - Georgia (N° 9870/07)
Judgment 24.2.2009 [Section II]

Facts: Whilst serving a prison sentence, the applicant complained of pain and was taken to the prison hospital, where he underwent a surgical operation. One month later he returned to prison. According to him the scar had not yet fully healed. Blood tests revealed that the applicant had contracted viral hepatitis C, and his lawyer asked the prison authorities to place her client in the prison hospital to undergo the necessary examinations and receive effective medical treatment. She also complained that her client had been sent back to prison too soon after his operation, before the scar had properly healed. Blood tests subsequently revealed the presence of an inflammation. When her request for proper medical treatment for her client remained unanswered, she again requested his transfer to the hospital. The prison Governor informed her that her client had undergone general and serological blood tests, but that a biochemical analysis was also needed. The result of that would determine what treatment was needed. The analyses revealed the presence of viral hepatitis C antibodies in the blood and a sedimentation rate twice as high as the normal upper limit. New blood tests were carried out. The enzyme count they revealed was well in excess of the normal upper limit. In the meantime the lawyer drew the prison Governor's attention to the fact that his establishment employed no hepatologist, and requested authorisation to have the applicant examined by an outside specialist. He replied that the applicant had been examined by a hepatologist, who had detected the presence of chronic viral hepatitis C but found that it was not very active. Out-patient treatment should suffice. The lawyer replied that according to the medical documents she had submitted,

the applicant was suffering from acute viral hepatitis C, and questioned the professional competence of the specialist who had examined her client. She complained that the findings of the examination concerned and the treatment recommended had not been communicated to her. She again requested authorisation to have the applicant examined by a specialist of her choice. She complained that the applicant had been incarcerated with an open wound without any treatment to prevent infection. In addition, all her complaints about this had gone unanswered. Lastly, the lawyer asked the Governor to take the necessary measures prescribed by law to enable the applicant to receive adequate and effective medical treatment. Her request went unanswered.

Law: Article 3 – (a) *Post-operative care*: Before being sent back to prison the applicant had received the medical care which was necessary and appropriate, his return had been justified with regard to his state of health and his health had continued to be monitored once he was back in prison.
Conclusion: no violation (unanimously).

(b) *Viral hepatitis C*: The three series of tests had confirmed that the applicant had viral hepatitis C. The file did not indicate, however, that once that diagnosis had been made the authorities had taken the trouble to evaluate the need for further appropriate analyses to be carried out in order to determine what treatment should be administered and what the chances of recovery were, as each genotype responded differently to treatment. These tests had proved all the more necessary as a hepatologist had found that the disease was chronic and the virus was continuing to multiply. As it was not possible to prescribe the right treatment without knowing the extent of the damage to the liver, and the genotype and blood levels of the virus, the authorities had not taken proper care of the applicant. It was not enough to have the patient examined and a diagnosis made. To protect the prisoner's health it was essential to provide treatment corresponding to the diagnosis, as well as proper medical supervision.
Conclusion: violation (unanimously).

Article 46 – This was not a unique case. At the time forty-odd applications concerning lack of medical care in Georgian prisons were pending before the Court. More than thirty of them had already been brought to the attention of the respondent Government. In about eighteen cases the applicants were suffering from viral hepatitis C, amongst other ailments. Without prejudging the merits of those cases, their number appeared to indicate that the problem of medical care in prisons, particularly care administered to detainees suffering from viral hepatitis C, *inter alia*, was a structural one. That was not only an aggravating factor with regard to the State's responsibility under the Convention, but also a threat to the future effectiveness of the Convention machinery. That being so, the Court considered, with no doubt whatsoever, that general measures were called for at the national level in connection with the enforcement of its judgment in this case. The necessary legislative and administrative measures should therefore be taken without delay in order to prevent the spread of viral hepatitis C in Georgian prisons, introduce a screening system and guarantee the prompt and effective treatment of the disease.

ARTICLE 1 OF PROTOCOL No. 1

DEPRIVATION OF PROPERTY
Failure to take special characteristics of listed building into account when assessing compensation for its expropriation: *violation.*

KOZACIOGLU - Turkey (N° 2334/03)
Judgment 19.2.2009 [GC]

Facts: In April 2000 a building belonging to the applicant was expropriated by the Ministry of Culture on the grounds that it had been classified as "cultural property". The applicant was paid approximately EUR 65,326 on the transfer of the property. In October 2000 the applicant lodged an application for increased compensation, requesting that a new panel of experts re-assess the property and take into account its historical value. Two different panels of experts found in 2001 that, in view of the

architectural, historical and cultural features of the property, its value should be increased by 100 %. In June 2001 the domestic court instructed the authorities to pay the applicant approximately EUR 139,728 in additional compensation. In November 2001 the Court of Cassation set aside that judgment, holding that under Turkish law a building's rarity and its architectural and historical features could not be factors for consideration in the assessment of its value. In May 2002, the domestic courts awarded the applicant a final sum of approximately EUR 45,980 in additional compensation.

Law: The protection of a country's cultural heritage was a legitimate aim capable of justifying the expropriation by the State of a building classified as "cultural property". The conservation of the cultural heritage and, where appropriate, its sustainable use were an essential value the protection and promotion of which were incumbent on the public authorities. While failure to pay full compensation did not necessarily make the transfer of the property in issue unlawful *per se*, it remained to be determined whether, in deciding the criteria and arrangements for compensation of the applicant in this particular case, the domestic authorities had upset the requisite fair balance and whether the applicant had had to bear a disproportionate and excessive burden. In conformity with Turkish law neither the rarity of the expropriated building nor its architectural or historical features had been taken into consideration in calculating the amount of expropriation compensation in this case. While it was undeniably difficult to calculate the commercial value of property classified as being of cultural, historical, architectural or artistic value, such difficulties could not justify a failure to take those features into consideration in any way. The issue at the heart of this case was the fact that, when calculating the expropriation compensation for a listed property, it was impossible under Turkish law to take into account that part of a property's value that resulted from its rarity and its architectural and historical features. The Turkish legislature had deliberately set limits on such valuations by excluding the taking into account of such features. Thus, even where those features seemed to warrant an increase in the price of the listed property, the domestic courts could not take them into consideration. In contrast, however, it appeared from the Court of Cassation's case-law that where the value of an expropriated property had decreased on account of its registration as a listed building, the courts took such depreciation into account in determining the compensation to be awarded. This valuation system was unfair, in that it placed the State at a distinct advantage. It enabled the depreciation resulting from a property's listed status to be taken into account during expropriation, while any eventual appreciation was considered irrelevant in determining the compensation for expropriation. Thus, not only was such a system likely to penalise those owners of listed buildings who assumed burdensome maintenance costs, but it deprived them of any value that might arise from the specific features of their property. Moreover, the practice of a number of Council of Europe member States in the area of expropriation of listed buildings indicated that, despite the absence of a precise rule or common criteria for valuation, the option of taking into account the specific features of the properties in question when ascertaining appropriate compensation was not categorically ruled out. Therefore, in order to satisfy the requirements of proportionality between the deprivation of property and the public interest pursued, it was necessary, when expropriating a listed building, to take account, to a reasonable degree, of the property's specific features in determining the compensation due to the owner.
Conclusion: violation (unanimously).

Article 41 – The finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage suffered (unanimously); EUR 75,000 in respect of pecuniary damage (sixteen votes to one).

CONTROL OF THE USE OF PROPERTY
Disproportionate customs penalty consisting of automatic confiscation plus a fine: *violation*.

GRIFHORST - France (N° 28336/02)
Judgment 26.2.2009 [Section I]

Facts: In 1996, on his way into France from Andorra, the applicant was stopped by French customs officers. He told the customs officers that he had no money to declare. The officers searched the applicant, his bag and his vehicle and found 500,000 Netherlands guilders (EUR 233,056). The applicant was found

guilty of failure to comply with the obligation under Article 464 of the Customs Code to declare money, securities or valuables. He was sentenced, under Article 465 of the Customs Code, to the confiscation of the full amount plus a fine equal to half the amount he had failed to declare, and to immediate imprisonment. The sentence was upheld on appeal and the Court of Cassation dismissed an appeal on points of law.

Law: Concerning the confiscation of the sum the applicant was carrying, although the measure had deprived him of a possession, it had been a form of control of the use of property. It had been provided for by law, in a manner that was adequately clear, accessible and foreseeable, and had pursued an aim that was in the public interest. The only offence the applicant was known to have committed was that of deliberately not declaring the money he had been carrying across the border into France. The penalty imposed on the applicant had combined the confiscation of the full sum he had been carrying and a fine of half that amount. Under Article 465 of the Customs Code as applicable at the material time, failure to declare money automatically led to confiscation of the full amount; the domestic courts could change only the size of the fine (from 25 to 100% of the sum not declared). However, the law had since been amended following a reasoned opinion of the European Commission of July 2001. The version that entered into force on 1 October 2004 no longer provided for automatic confiscation and the fine had been reduced to a quarter of the sum not declared. The undeclared sum was henceforth sequestered for a maximum period of six months, during which time its confiscation could be ordered by the competent courts when there was evidence or a reasonable suspicion that the person had committed or taken part in other offences under the Customs Code. That solution struck a fair balance between the general interest and the need to protect individual rights. Lastly, most of the international and Community instruments applicable referred to the need for penalties to be "proportionate". In view of the above and in the particular circumstances of the present case, the penalty imposed on the applicant, combining confiscation and a fine, had been disproportionate to the offence committed and a fair balance had not been struck.
Conclusion: violation (unanimously).

Article 41 – The question was not ready for decision and was reserved (six votes to one).

ARTICLE 1 OF PROTOCOL No. 7

EXPULSION OF ALIENS
Lack of procedural guarantees to contest decision to refuse entry to lawfully resident foreign national: *violation*.

NOLAN and K. - Russia (N° 2512/04)
Judgment 2.2.2009 [Section I]

(See Article 9 above).

ARTICLE 4 OF PROTOCOL No. 7

NON BIS IN IDEM
Administrative conviction of "minor disorderly acts" and subsequent criminal prosecution for "disorderly acts" concerning the same facts: *violation*.

SERGEY ZOLOTUKHIN - Russia (N° 14939/03)
Judgment 10.2.2009 [GC]

Facts: In January 2002 the applicant was arrested for bringing his girlfriend into a military compound without authorisation and was taken to the district police station. According to the police report, he was drunk, behaved insolently, used obscene language and attempted to escape. On the same day a district

court found him guilty of swearing at police employees and breaching public order shortly after his arrival at the police station. It convicted him of "minor disorderly acts" under Article 158 of the Code of Administrative Offences and sentenced him to three days' detention. Subsequently, criminal proceedings were brought against him in relation to the same events. He was charged with "disorderly acts" under Article 213 of the Criminal Code for swearing at police employees and breaching public order in the immediate aftermath of his arrival at the police station. He was also charged with insulting a public official under Article 319 of the Criminal Code for swearing at a major who was drafting the administrative offence report. Lastly, he was charged with threatening violence against a public official under Article 318 of the Criminal Code it being alleged that he had threatened to kill the major en route to the regional police station. In December 2002 the same district court found the applicant guilty of the charges under Articles 318 and 319 of the Criminal Code, but acquitted him of the charges under Article 213, after finding that that his guilt had not been proven to the requisite standard.

Law: In its Chamber judgment of 7 June 2007, the Court had held unanimously that there had been a violation of Article 4 of Protocol No. 7. The case had been referred to the Grand Chamber at the Government's request. As to the existence of a "criminal charge" for the purposes of that Article, the Grand Chamber endorsed the Chamber's finding that although the initial set of proceedings against the applicant were classified as administrative in national law, they were to be equated with criminal proceedings on account, in particular, of the nature of the offence of "minor disorderly acts" and the severity of the penalty. As to whether the offences were the same, the Court had adopted a variety of approaches in the past, placing the emphasis on identity of the facts irrespective of their legal characterisation, on the legal classification as the same set of facts could give rise to different offences, or on the existence of essential elements common to both offences. Taking the view that the existence of these different approaches was a source of legal uncertainty which was incompatible with the fundamental right guaranteed by Article 4 of Protocol No. 7, the Court decided to define in detail what was to be understood by the term "same offence" for the purposes of the Convention. After examining the scope of the right not to be tried and punished twice as set forth in other international instruments, in particular the United Nations Covenant on Civil and Political Rights, the European Union's Charter of Fundamental Rights and the American Convention on Human Rights, it stated that Article 4 of Protocol No. 7 should be construed as prohibiting the prosecution or trial of an individual for a second offence in so far as it arose from identical facts or facts that were "substantially" the same as those underlying the first offence. This guarantee came into play where a new set of proceedings was instituted after a previous acquittal or conviction had acquired the force of *res judicata*. In the instant case, no issue arose under Article 4 of Protocol No. 7 in respect of the applicant's prosecution under Articles 319 and 318 of the Criminal Code, as the charges relating to his conduct towards the major had been raised for the first and only time in the criminal proceedings. The situation was, however, different with regard to the disorderly conduct in respect of which he had first been convicted in the administrative proceedings under Article 158 of the Code of Administrative Offences and had subsequently been prosecuted under Article 213 of the Criminal Code. The facts underlying the two sets of administrative and criminal proceedings against the applicant differed in only one element, namely the threat to use violence against a police officer, and should therefore be regarded as substantially the same. As to whether there had been a duplication of proceedings, the Court endorsed the Chamber's conclusion that the judgment in the "administrative" proceedings sentencing the applicant to three days' detention had amounted to a final decision. The fact that the applicant had been acquitted in the criminal proceedings had no bearing on his claim that he had been prosecuted twice for the same offence. The Court reiterated that Article 4 of Protocol No. 7 contained three distinct guarantees and provided that no one shall be (i) liable to be tried, (ii) tried or (iii) punished for the same offence. Nor had the acquittal deprived the applicant of his victim status, as he had been acquitted solely on the ground of insufficient evidence against him. At no point had the Russian authorities acknowledged a breach of the *non bis in idem* principle. In sum, the proceedings instituted against the applicant under Article 213 of the Criminal Code concerned essentially the same offence as that of which he had already been convicted under Article 158 of the Code of Administrative Offences.
Conclusion: violation (unanimously).

Article 41 – EUR 1,500 in respect of non-pecuniary damage.

ARTICLE 1 OF PROTOCOL No. 12

GENERAL PROHIBITION OF DISCRIMINATION
Inability of a Roma and a Jew to stand for election to highest political posts in the country: *relinquishment in favour of Grand Chamber*.

SEJDIĆ and FINCI - Bosnia and Herzegovina (N^{os} 27996/06 and 34836/06)
[Section IV]

The applicants, who are both citizens of Bosnia and Herzegovina, are respectively of Roma and Jewish origin. They have held in the past, and still hold, prominent public positions. Under the 1995 Constitution of Bosnia and Herzegovina only Bosniacs, Croats and Serbs are eligible to stand for election to the tripartite State presidency and the upper chamber of the State parliament. The applicants complain that, despite possessing experience comparable to the highest elected officials in the country, they are prevented by the Constitution from being candidates for such posts solely on the grounds of their ethnic origin.
The cases were communicated in March 2008 under Article 14, read in conjunction with Article 3 of Protocol No. 2, and under Article 1 of Protocol No. 12.

Cases selected for publication[1]

The Publications Committee has selected the following cases for publication in *Reports of Judgments and Decisions* (where applicable, the three-digit number after each case-title indicates the issue of the Case-Law Information Note where the case was summarised):

Grand Chamber judgments

KOVACIC and Others – Slovenia (44574/98, 45133/98 and 48316/99) (extracts) (112)
DEMIR and BAYRAK – Turkey (34503/97) (113)
SALDUZ – Turkey (6391/02) (113)
S. and MICHAEL MARPER – United Kingdom (30562/04 and 30566/04) (114)

Chamber judgments

PANOVITS – Cyprus (4268/04) (114)
TALIADOROU and STYLIANOU – Cyprus (extracts) (39627/05, 39631/05) (112)
K.U. – Finland (2872/02) (114)
JUPPALA – Finland (18620/03) (114)
DOGRU – France (27058/05) (114)
RENOLDE – France (extracts) (5608/05) (112)
MOLNAR – Hungary (10346/05) (112)
BALSYTE-LIDEIKIENE – Lithuania (extracts) (72596/01) (113)
TANASE and CHIRTOACA – Moldova (extracts) (7/08) (113)
TV VEST AS and ROGALAND PENSJONISTPARTI – Norway (extracts) (21132/05) (114)
BOGUMIL – Portugal (extracts) (35228/03) (112)
MIRILASHVILI – Russia (extracts) (6293/04) (114)
TIMERGALIYEV – Russia (extracts) (40631/02)
KHURSHID MUSTAFA and TARZIBACHI – Sweden (23883/06) (114)
CARLSON – Switzerland (49492/06) (113)
KATS and Others – Ukraine (extracts) (29971/04)
CARSON and Others – United Kingdom (42184/05) (113)

Decisions

OOMS – France (38126/06) (111)
ADA ROSSI and Others – Italy (55185/08) (114)
E.G. – Poland (extracts) (50425/99)
PREUSSISCHE TREUHAND GmbH & Co. KG A.A. – Poland (extracts) (47550/06) (112)
MONEDERO ANGORA – Spain (41138/05) (112)
K.R.S. – United Kingdom (32733/08) (114)

[1] For a list of previously selected cases please see Composition of Reports of Judgments and Decisions from 1999 at: http://www.echr.coe.int/NR/rdonlyres/F81AF3C4-F231-4E01-87E4-C54A3622B3E6/0/Publication_list.pdf

New film about the Court

"The Conscience of Europe", which has just been updated, is a film about the Court and its working practices and activities. The documentary lasts 15 minutes and is intended for the general public. It shows specific examples of cases examined by the Court and considers its prospects over the forthcoming years and the challenges facing it. It is currently available in French, English and German:
http://www.echr.coe.int/ECHR/EN/Header/The+Court/Introduction/Video+on+the+Court/