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COUR EUROPÉENNE DES DROITS DE L'HOMME

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

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ARTICLE 3

Torture

Disability caused by police ill-treatment: *violation*

Savin v. Ukraine - 34725/08
Judgment 16.2.2012 [Section V]

Facts – In October 1999 the applicant was summoned as a witness in a fraud case. He was held at the police station until the following morning where he was so badly beaten about the head that he is now disabled, suffering from sensory and motor impairment and a convulsive disorder. Following his release, the applicant lodged numerous complaints with the prosecution authorities alleging unlawful detention and torture by the police, but it was not until nine years later, in 2008, that the prosecutor instituted criminal proceedings on suspicion of abuse of power, associated with violence and degrading treatment, against the police officer accused by the applicant of ill-treatment. The investigation established that the officer had detained the applicant on the basis of a false report, tied the applicant's hands behind his back and subjected him to extensive beating to the head and body with the aim of forcing him into a confession. The officer was found guilty as charged but released from criminal liability and punishment as the charges were time-barred. The court also decided to leave a civil claim by the applicant without examination. During the criminal proceedings, the officer was temporarily suspended from his duties but later restored to his post.

Law – Article 3

(a) *Torture* – It was undisputed that the applicant had been ill-treated by the police officer. In assessing the treatment to which he had been subjected during two days in police custody, the Court referred to the findings of the domestic investigation and the medical experts. Those findings alone were sufficient for the Court to conclude that the applicant had been subjected to torture. The key considerations were the severity of the ill-treatment, which had impaired the applicant's health to such an extent that he had become disabled, and its intentional nature as the aim had been to extract a confession.

Conclusion: violation (unanimously).

(b) *Investigation* – The investigation into the applicant's allegation of torture had lasted for more than ten years, during which period the investigators had refused to institute criminal proceedings against the police officer six times; all these decisions had later been quashed by higher-level prosecution authorities. As the Court had found in previous cases, the need for repeated remittals as a result of the investigators' disregard for the instructions of higher-level prosecutors was indicative of a structural problem. Having been found guilty, the police officer had faced no criminal liability or sanctions and had been suspended from duty only temporarily. The investigation had not in any way impeded his career: on the contrary, he had been promoted at least twice and appeared still to be employed by the police. This situation showed that no meaningful effort had been made to prevent future similar violations and that the law-enforcement agencies enjoyed virtually total impunity for torture or ill-treatment. The State had thus fallen short of its obligation to conduct an effective investigation into the applicant's allegation of torture by the police.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been a violation of Article 5 § 1 of the Convention.

Article 41: EUR 40,000 in respect of non-pecuniary damage; EUR 1,800 in respect of pecuniary damage.

Inhuman treatment
Degrading treatment

Repeated transfers, over four-year period, of schizophrenic prisoner to and from psychiatric hospital: *violation*

G. v. France - 27244/09
Judgment 23.2.2012 [Section V]

Facts – The applicant suffers from a chronic schizophrenic-type psychotic disorder and is currently being held in a specialist hospital. Between 1996 and 2004 he was alternately in prison and in a psychiatric facility. In May 2005 he was imprisoned after he had caused damage in a psychiatric hospital. In August 2005, after he had set his mattress alight, a fire broke out in the cell he was sharing with another inmate. The latter died four months later from his injuries. In October 2005 the applicant was placed under judicial investigation and taken into pre-trial detention. His lawyer requested the applicant's release, arguing that his client should be in hospital rather than in prison, but the investigating judge refused the request. In

February 2007 the applicant was committed for trial before the assize court. That year and the following year he was admitted on several occasions to the regional psychiatric unit in the prison where he was being detained, and was also compulsorily admitted a number of times to a specialist hospital. In November 2008 a psychiatric report ordered by the president of the assize court concluded that, despite the severity of his disorder, the applicant was fit to stand trial. In a judgment given in November 2008 the assize court sentenced him to ten years' imprisonment. Following the judgment the applicant was taken back to the regional psychiatric unit. In December 2008 the prefect ordered his compulsory admission to hospital; the order remained in place for three months. The applicant was subsequently placed twice in the regional psychiatric unit. When submitting a further application for release he complained that his constant moves back and forth between prison and hospital amounted to inhuman and degrading treatment and that his return to prison constituted a form of torture. In a judgment of September 2009 the assize court, ruling on appeal, found that the applicant lacked criminal responsibility and ordered his compulsory admission to a specialist hospital.

Law – Article 3: The seriousness of the applicant's condition was not disputed. He suffered from a chronic schizophrenic-type psychotic disorder which required continuous treatment and was known to entail a high risk of suicide. While in detention he had suffered frequent relapses, as demonstrated by his compulsory admission to hospital on numerous occasions. The Court had previously held that the suffering associated with relapses in the case of patients with schizophrenia could in principle fall within the scope of Article3 of the Convention.[1]

In the present case the Court observed that the applicant had received medical treatment and care throughout his four years in detention. His compulsory admission to hospital had also been ordered during the many periods when his state of anxiety had been incompatible with detention. While the applicant's periodic admissions had prevented incidents that might have endangered his physical and mental safety and the safety of others, his extreme vulnerability had called for measures to be taken that would not aggravate his mental state. His numerous moves between ordinary prison and hospital had prevented that aim from being achieved. The Court was struck first of all by the applicant's frequent admissions to hospital, which highlighted the serious and chronic nature of his psychiatric disorder. In such circumstances, no purpose had been served by the alternation of periods in the specialist hospital, which had been too short and haphazard, with periods in prison, which had been incomprehensible to and distressing for the applicant. This alternation had clearly impeded the stabilisation of his condition, demonstrating that he had been unfit to be detained from the standpoint of Article 3. Secondly, the Court observed that the physical conditions of detention in the prison psychiatric unit, where the applicant had been held on several occasions, had been severely criticised by the domestic authorities. Combined with the hardship of prison life, those conditions could only have exacerbated his feelings of distress, anxiety and fear. While acknowledging the efforts made by the authorities to treat the applicant's psychiatric disorder, and the difficulty of arranging care for mentally ill prisoners, the Court considered, in view of all these factors, that the applicant's continued detention in the conditions complained of over quite a long period, from 2005 to 2009, had made it more difficult to provide him with the medical treatment his psychiatric condition required and had subjected him to hardship exceeding the unavoidable level of suffering inherent in detention. Accordingly, the Court held that the applicant had been subjected to inhuman and degrading treatment.

Conclusion: violation (unanimously).

The Court also pointed out that, under the 2006 European Prison Rules,[2] prisoners suffering from serious mental illness had to be kept and cared for in a hospital facility which was adequately equipped and possessed appropriately trained staff (see *Sławomir Musiał v. Poland*, no. 28300/06, 20 January 2009, Information Note no. 115).

The Court further held, unanimously, that the applicant's trial had not been in breach of Article 6 § 1 of the Convention.

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

Expulsion

Return of migrants intercepted on the high seas to country of departure: *violation*

1. See *Bensaid v. the United Kingdom*, no. 44599/98, 6 February 2001, Information Note no. 27.

2. Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe on the European Prison Rules, adopted on 11 January 2006.

Hirsi Jamaa and Others v. Italy - 27765/09
Judgment 23.2.2012 [GC]

Facts – The applicants, eleven Somali nationals and thirteen Eritrean nationals, were part of a group of about two hundred individuals who left Libya in 2009 aboard three vessels with the aim of reaching the Italian coast. On 6 May 2009, when the vessels were within the Maltese Search and Rescue Region of responsibility, they were intercepted by ships from the Italian Revenue Police (*Guardia di finanza*) and the Coastguard. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli. The applicants stated that during that voyage the Italian authorities did not inform them of their destination and took no steps to identify them. On arrival in the Port of Tripoli, following a ten-hour voyage, the migrants were handed over to the Libyan authorities. According to the applicants' version of events, they objected to being handed over to the Libyan authorities but were forced to leave the Italian ships. At a press conference held on the following day, the Italian Minister of the Interior stated that the operations to intercept vessels on the high seas and to push migrants back to Libya were the consequence of the entry into force, in February 2009, of bilateral agreements concluded with Libya, and represented an important turning point in the fight against clandestine immigration. Two of the applicants died in unknown circumstances after the events in question. Fourteen of the applicants were granted refugee status by the Office of the High Commissioner for Refugees (UNHCR) in Tripoli between June and October 2009. Following the revolution which broke out in Libya in February 2011 the quality of contact between the applicants and their representatives deteriorated. The lawyers are currently in contact with six of the applicants, four of whom reside in Benin, Malta or Switzerland, where some are awaiting a response to their request for international protection. One of the applicants is in a refugee camp in Tunisia and plans to return to Italy. In June 2011 one of the applicants was awarded refugee status in Italy, which he had entered unlawfully.

Law

Article 1: Italy acknowledged that the ships onto which the applicants had been embarked were fully within Italian jurisdiction. The Court pointed out the principle of international law enshrined in the Italian Navigation Code, according to which a vessel sailing on the high seas was subject to the exclusive jurisdiction of the State of the flag it was flying. The Court did not accept the Government's description of the events as "rescue operations on the high seas", or the allegedly minimal level of control exercised over the applicants. The events had taken place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the period between boarding those ships and being handed over to the Libyan authorities, the applicants had been under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities. Accordingly, the events giving rise to the alleged violations fell within Italy's jurisdiction within the meaning of Article 1 of the Convention.

Conclusion: within the jurisdiction (unanimously).

Article 3

(a) *Risk of ill-treatment in Libya* – While conscious of the pressure put on States by the ever increasing influx of migrants, a particularly complex situation in the maritime environment, the Court nevertheless pointed out that that situation did not absolve them from their obligation not to remove an individual at risk of being subjected to treatment in breach of Article 3 in the receiving country. Noting the deteriorating situation in Libya after April 2010, the Court, for the purposes of examining the case, referred only to the situation prevailing in Libya at the material time. In that regard, it noted that the disturbing conclusions of numerous organisations regarding the treatment of clandestine immigrants were corroborated by the report of the CPT[1] published in 2010. No distinction was made between irregular migrants and asylum-seekers, who were systematically arrested and detained in conditions which observers had described as inhuman, reporting, in particular, cases of torture. Clandestine migrants were at risk of being returned to their countries of origin at any time and, if they managed to regain their freedom, were subjected to precarious living conditions and racism. In response to the Italian Government's argument that Libya was a safe destination for migrants and that that country would comply with its international commitments as regards asylum and the protection of refugees, the Court observed that the existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources had reported practices which were contrary to the

1. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

principles of the Convention. Furthermore, Italy could not evade its own responsibility under the Convention by relying on its subsequent obligations arising out of bilateral agreements with Libya. The Office of the UNHCR in Tripoli had never been recognised by the Libyan government. Since that situation in Libya was well-known and easy to verify at the material time, the Italian authorities had or should have known, when removing the applicants, that they would be exposed to treatment in breach of the Convention. Moreover, the fact that the applicants had failed to expressly request asylum did not exempt Italy from fulfilling its obligations. The Court noted the obligations of States arising out of international refugee law, including the "principle of non-refoulement", also enshrined in the Charter of Fundamental Rights of the European Union. The Court, considering furthermore that the shared situation of the applicants and many other clandestine migrants in Libya did not make the alleged risk any less individual, concluded that by transferring the applicants to Libya, the Italian authorities had, in full knowledge of the facts, exposed them to treatment proscribed by the Convention.

Conclusion: violation (unanimously).

(b) *Risk of ill-treatment in the applicants' countries of origin* – The indirect removal of an alien left the responsibility of the Contracting State intact, and that State was required to ensure that the intermediary country offered sufficient guarantees against arbitrary repatriation, particularly if that State was not a party to the Convention. All the information in the Court's possession clearly showed that the situation in Somalia and Eritrea was one of widespread insecurity – there was a risk of torture and detention in inhuman conditions merely for having left the country irregularly. The applicants could therefore arguably claim that their repatriation would breach Article 3. The Court then ascertained whether the Italian authorities could reasonably have expected Libya to offer sufficient guarantees against arbitrary repatriation. Observing that that State had not ratified the Geneva Convention on Refugee Status and noting the absence of any form of asylum and protection procedure for refugees in Libya, the Court did not subscribe to the argument that the activities of the UNHCR in Tripoli represented a guarantee against arbitrary repatriation. Human Rights Watch and the UNHCR had denounced several forced returns of asylum seekers and refugees to high-risk countries. Thus, the fact that some of the applicants had obtained refugee status in Libya, far from being reassuring, constituted additional evidence of the vulnerability of the parties concerned. The Court concluded that when the applicants were transferred to Libya, the Italian authorities had or should have known that there were insufficient guarantees protecting them from the risk of being arbitrarily returned to their respective countries of origin.

Conclusion: violation (unanimously).

Article 4 of Protocol No. 4

a) *Admissibility* – The Court was called upon for the first time to examine whether Article 4 of Protocol No. 4 applied to a case involving the removal of aliens to a third State carried out outside national territory. It sought to ascertain whether the transfer of the applicants to Libya had constituted a "collective expulsion of aliens" within the meaning of that provision. The Court observed that neither Article 4 of Protocol No. 4 nor the *travaux préparatoires* of the Convention precluded extra-territorial application of that Article. Furthermore, limiting its application to collective expulsions from the national territory of Member States would mean that a significant component of contemporary migratory patterns would not fall within the ambit of that provision and would deprive migrants having taken to the sea, often risking their lives, and not having managed to reach the borders of a State, of an examination of their personal circumstances before being expelled, unlike those travelling by land. The notion of "expulsion" was principally territorial, as was the notion of "jurisdiction". Where, however, as in the instant case, the Court had found that a Contracting State had, exceptionally, exercised its jurisdiction outside its national territory, it could accept that the exercise of extraterritorial jurisdiction by that State had taken the form of collective expulsion. Furthermore, the special nature of the maritime environment could not justify an area outside the law where individuals were covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention. Article 4 of Protocol No. 4 was therefore applicable in the instant case.

Conclusion: admissible (unanimously).

(b) *Merits* – The transfer of the applicants to Libya had been carried out without any examination of each applicant's individual situation. The applicants had not been subjected to any identification procedure by the Italian authorities, which had restricted themselves to embarking and disembarking them in Libya. The removal of the applicants had been of a collective nature, in breach of Article 4 of Protocol No. 4.

Conclusion: violation (unanimously).

Article 13 in conjunction with Article 3 of the Convention and Article 4 of Protocol No. 4: The Italian Government acknowledged that no provision had been made for assessment of the personal circumstances of the applicants on board the military vessels on which they were embarked. There had been no interpreters or legal advisers among the personnel on board. The applicants alleged that they had been given no information by the Italian military personnel, who had led them to believe that they were being taken to Italy and had not informed them as to the procedure to be followed to avoid being returned to Libya. That version of events, though disputed by the Government, was corroborated by a very large number of witness statements gathered by the UNHCR, the CPT and Human Rights Watch, and the Court attached particular weight to it. The Court reiterated the importance of guaranteeing anyone subject to a removal measure, the consequences of which were potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints. Even if such a remedy were accessible in practice, the requirements of Article 13 of the Convention were clearly not met by criminal proceedings brought against military personnel on board the army's ships in so far as that did not satisfy the criterion of suspensive effect enshrined in Article 13. The applicants had been deprived of any remedy which would have enabled them to lodge their complaints under Article 3 of the Convention and Article 4 of Protocol No. 4 with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced.

Conclusion: violation (unanimously).

Article 46: The Italian Government had to take all possible steps to obtain assurances from the Libyan authorities that the applicants would not be subjected to treatment incompatible with Article 3 of the Convention or arbitrarily repatriated.

Article 41: EUR 15,000 each in respect of non-pecuniary damage.

ARTICLE 5

Article 5 § 1

Deprivation of liberty
Procedure prescribed by law

Failure to follow statutory procedure for detention of suspect: *violation*

Creangă v. Romania - 29226/03
Judgment 23.2.2012 [GC]

Facts – The applicant had been an officer in the criminal investigation department since 1995. At 9 a.m. on 16 July 2003 the applicant reported to the National Anti-Corruption Prosecution Service headquarters ("the NAP") after being informed by his hierarchical superior that he was required to go there for questioning. At 10 a.m. he was questioned by a prosecutor. He was detained until 8 p.m., at which point he was informed of the allegations that had been made against him. He was then placed in pre-trial detention on the basis of a temporary warrant for pre-trial detention issued by virtue of the NAP order of 16 July 2003, which mentioned that his detention had been ordered for three days, namely from 10 p.m. on 16 July 2003 to 10 p.m. on 18 July 2003. On 18 July 2003 the Military Court of Appeal, sitting as a single judge, extended his pre-trial detention by twenty-seven days. On the same day, a warrant for pre-trial detention identical to that of 16 July 2003 was issued in respect of the applicant. On 21 July 2003 the Supreme Court of Justice upheld an appeal contesting the lawfulness of the constitution of the court that had delivered the judgment, set aside the judgment and ordered the applicant's release. The applicant was released the same day. The Procurator General then lodged an application with the Supreme Court of Justice to have that judgment quashed. By a final judgment of 25 July 2003 the Supreme Court of Justice, sitting as a bench of nine judges, upheld the application and quashed the judgment of 21 July 2003. On 25 July 2003 the applicant was placed in pre-trial detention. In July 2004 the Military Court of Appeal ordered that the applicant be released and replaced his pre-trial detention by an order prohibiting him from leaving the country.

By a judgment of 15 June 2010 the European Court concluded, unanimously, that there had been a violation of Article 5 § 1 on the ground that there had been no legal basis for the applicant's deprivation of liberty from 10 a.m. to 10 p.m. on 16 July 2003 and his placement in detention on 25 July 2003 following the application to have the judgment of 21 July 2003 quashed, and that there had been no violation of Article 5 § 1 of the Convention as regards the insufficient reasons given for the applicant's placement in temporary detention from 16 to 18 July 2003.

Law – Article 5 § 1: It was not disputed that the applicant had been summoned to appear before the NAP and that he had entered the premises

of the prosecution service at 9 a.m. to make a statement for the purpose of a criminal investigation. The applicant was under the control of the authorities from that moment. Consequently, the Government had to provide an explanation as to what subsequently happened at the NAP premises. The Government were unable to produce the logbooks recording the entry and exit of persons at the NAP premises as they had been destroyed on the expiry of the retention period. Furthermore, the statement of the prosecutor who was responsible for the investigation at the material time was contradicted not only by the statements of the applicant but also by the concordant written statements of two witnesses.

The applicant had not only been summoned but had also received a verbal order from his hierarchical superior to report to the NAP. The head of police had also been informed that several police officers had been summoned on 16 July 2003 so as to ensure their presence at the prosecution service premises. At the material time, police officers were subject to military discipline and it would have been extremely difficult for them not to carry out the orders of their superiors. While it could not be concluded that the applicant had been deprived of his liberty on that basis alone, there were other significant factors pointing to the existence of a deprivation of liberty, at least once verbal notification of the decision to open the investigation had been given at 12 noon: the prosecutor's request to the applicant to remain on site in order to make further statements and participate in multiple confrontations, the applicant's placement under investigation during the course of the day, the fact that seven police officers not placed under investigation had been informed that they were free to leave the NAP headquarters since their presence and questioning was no longer necessary, the presence of the gendarmes at the NAP premises and the information provided by the prosecutor that the applicant could be assisted by a lawyer. In view of their chronological sequence, those events clearly formed part of a large-scale criminal investigation. That procedure was intended to dismantle a petroleum-trafficking network. The opening of proceedings against the applicant and his colleagues fitted into that procedural context, and the need to carry out the various criminal investigation procedures concerning them on the same day tended to indicate that the applicant had indeed been obliged to comply. In conclusion, having regard to the Government's failure to provide convincing and relevant information in support of their version of the facts, namely that the applicant had left the NAP headquarters and that he had been free to leave the prosecution service premises of his own free will after his first statement, as also to the coherent and plausible nature of the applicant's account, the applicant had indeed remained in the prosecution service premises and had been deprived of his liberty, at least from 12 noon to 10 p.m.

The applicant had been summoned to appear at the NAP to make a statement in the context of a criminal investigation, and had not been given any additional information as to the purpose of that statement. Domestic law on the subject required the summons to indicate the capacity in which a person was being summoned and the subject matter of the case. It followed that the applicant had been unaware whether he had been summoned as a witness or a suspect, or even in his capacity as a police officer carrying out investigations himself. In any event, according to the Government's version of the facts, at around 12 noon, when all the police officers had completed their statements, the prosecutor had come back into the room to inform them that a criminal investigation had been opened in the case in respect of ten of the police officers present, including the applicant, and that they were entitled to choose a lawyer or would otherwise be assigned an officially appointed lawyer. When making his first statement, the applicant had been unaware of his legal status and the guarantees arising therefrom. Even though, in such conditions, the Court had doubts about the compatibility with Article 5 § 1 of the Convention of the applicant's situation during the first three hours that he had spent at the NAP premises, it did not intend to examine that issue since it was clear that at least from 12 noon, the applicant's criminal status had been clarified as a result of the opening of the criminal investigation. From that moment, the applicant had undeniably been considered to be a suspect, so that the lawfulness of his deprivation of liberty had to be examined, from that point, under Article 5 § 1 (c). From 12 noon, the prosecutor had had sufficiently strong suspicions to justify the applicant's deprivation of liberty for the purpose of the investigation. Romanian law provided for the measures to be taken in that regard, namely placement in police custody or pre-trial detention, but the prosecutor had decided only at a very late stage to take the second measure, towards 10 p.m. Accordingly, the Court considered that the applicant's deprivation of liberty on 16 July 2003, at least from 12 noon to 10 p.m., had had no basis in domestic law.

Conclusion: violation (unanimously).

The Court also concluded that there had been no violation of Article 5 § 1 (c) as the applicant's deprivation of liberty from 10 p.m. on 16 July 2003 to 10 p.m. on 18 July 2003 had been justified. The Court further concluded that the applicant's deprivation of liberty on 25 July 2003 had not had a sufficient legal basis in domestic law, in so far as it had not been prescribed by a "law".

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

Article 5 § 1 (c)

Reasonable suspicion

Failure to follow statutory procedure for detention of suspect: *violation*

Creangă v. Romania - 29226/03
Judgment 23.2.2012 [GC]

(See Article 5 § 1 above, page 11)

Article 5 § 1 (e)

Persons of unsound mind

Confinement of mentally disabled applicant against her will for over seven years: *no violation*

D.D. v. Lithuania - 13469/06
Judgment 14.2.2012 [Section II]

Facts – The applicant, who had been diagnosed with schizophrenia, was legally incapacitated in 2000 at the request of her adoptive father, who was later appointed her legal guardian. He subsequently requested that the applicant be admitted to a home for individuals with general learning disabilities since, as attested by a social worker, she was unable to take care of herself. The applicant was admitted to the home against her will in July 2004 following a decision of a panel designated by a local city council, supported by the social services. They had concluded that the applicant was unable to cater for her basic needs, did not understand the value of money and had occasional anger outbreaks. In 2005 and with the assistance of her former psychiatrist and then friend D.G., the applicant asked for the guardianship proceedings to be reopened and D.G. appointed as her guardian. She claimed that she had never been informed of or summoned to the court hearing at which her adoptive father had been appointed, that her relationship with her adoptive father was very tense and that she had been placed in the home on his initiative and incapacitated without her knowledge. The court held a closed hearing on 7 November 2005, but refused the applicant's request to be assisted by a lawyer on the grounds that her guardian's lawyer would represent her interests. The applicant alleges that she was taken to the judge's office during a break in the hearing and warned not to say anything negative about her adoptive father. After the break she agreed to her adoptive father remaining her guardian but asked to be released from the home. Subsequently, the court refused to reopen the guardianship proceedings.

Law – (a) *Admissibility*

(i) *Victim status* – The original application form had been signed by D.D. without any indication that her signature might have been forged. She had subsequently appointed a lawyer who, in his observations in reply to the Government, had followed the applicant's initial complaints. It was therefore legitimate to conclude that D.D. had validly lodged an application in her own name and that she could claim to be a victim in respect of the complaints listed in her application.

Conclusion: victim status upheld (unanimously).

(ii) *Abuse of the right of application* – The issue of the applicant's alleged abuse of the right of application, on account of allegedly incorrect information in her application form, was closely linked and thus joined to the merits of her complaints.

(b) *Merits*

Article 6 § 1: Even though the Court was unable to examine the initial appointment of a guardian, as the complaint concerning this aspect of the case had been lodged outside the six-months time-limit, it could not overlook the fact that the applicant had not participated in the court proceedings for her incapacitation. As regards the proceedings for a change of guardian, given the applicant's problematic relationship with her adoptive father and their conflicting interests, her adoptive father's lawyer could not properly represent her and she should have had her own lawyer. The judge had also refused a request by D.G. for an audio recording to be made and it appeared that the applicant had not been allowed to sit next to D.G. during the hearing. The applicant had allegedly been taken to the judge's office during the break and after returning to the hearing room had declared herself content. The general spirit of that hearing had therefore further compounded her feelings of

isolation and inferiority, taking a significantly greater toll on her than would have been the case had she had her own legal representation. In the light of the foregoing, the Court concluded that the applicant's proceedings had been unfair and dismissed the Government's objection of abuse of the right of application.

Conclusion: violation (unanimously).

Article 5 § 1 (e)

(i) *Admissibility* – In order to determine whether an individual had been deprived of his or her liberty account had to be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question. In addition to the objective element of a person's confinement in a particular restricted space for a not negligible amount of time, a person could only be regarded as having been deprived of his or her liberty if an additional subjective element was fulfilled, namely if the person did not validly consent to the confinement in question. Even though the applicant's factual situation in the home was disputed, it was clear that the home's management had exercised complete and effective control over her by medication and by the supervision of her treatment, care, residence and movement for over seven years. According to the rules of the home, patients were not allowed to leave without permission. The facts of the applicant's case differed from those in the case of *H.M. v. Switzerland*, where the applicant, an elderly woman, had agreed to stay in a nursing home and a number of safeguards had been in place to ensure that her placement was justified. In contrast, the applicant in the present case did not wish to stay in the home and had been admitted at the request of her guardian without any involvement of the courts. Furthermore, contrary to the Government's contention, the applicant's case could not be compared to the case of *Nielsen v. Denmark*, which concerned a child hospitalised for therapeutic purposes at the request of his mother for a very limited amount of time. Finally, as regards the applicant's subjective perception, despite the fact that she had been deprived of her legal capacity, she was still able to express an opinion on her situation and had unequivocally objected to her stay in the home throughout and requested her discharge on several occasions. In such circumstances, the Court concluded that the applicant had been "deprived of liberty" within the meaning of Article 5 § 1.

(ii) *Merits* – The Court accepted that the applicant's involuntary admission to the home had been "lawful" in the narrower sense, in that it fulfilled the material and procedural requirements set out under the domestic law. However, the notion of "lawfulness" in the context of Article 5 § 1 (e) also had a broader meaning, requiring fulfilment of three further criteria: the individual concerned had to be reliably shown to be of unsound mind, the mental disorder at issue had to be such as to warrant compulsory confinement and the validity of continued confinement depended on the persistence of such a disorder. The applicant had suffered from mental problems since 1979 and been diagnosed with continuous paranoid schizophrenia only a few weeks prior to her placement in the home. A social worker had testified that she had been unable to cater for her needs when living alone. It had therefore been reliably established that she was suffering from a mental disorder warranting compulsory confinement. Moreover, her confinement appeared to have been necessary since no alternative measures had been appropriate in her case.

Conclusion: no violation (unanimously).

Article 5 § 4: Under the Court's practice, persons of unsound mind who were compulsorily confined in a psychiatric institution should in principle be entitled to take proceedings – attended by sufficient procedural safeguards – at reasonable intervals before the court to challenge the lawfulness of their continued detention. This requirement was all the more important in the circumstances of the applicant's case, where her placement in the home had been requested by her guardian and decided on by municipal and social-care authorities without any involvement of the courts. However, in situations such as the applicant's, the domestic law did not provide for automatic judicial review of the lawfulness of admitting a person to and keeping him or her in an institution such as the home where the applicant stayed. Moreover, a review could not be initiated by a person who had been deprived of legal capacity. The applicant had, therefore, been unable to independently pursue any legal remedy of a judicial character to challenge her continued involuntary institutionalisation. It appeared that she would only have been able to institute such proceedings through her guardian, the very person who had requested her confinement in the first place. In these circumstances, the Court considered that where a person capable of expressing a view, despite being deprived of legal capacity, was also deprived of liberty at the request of his or her guardian, he or she must be accorded the opportunity of contesting that confinement before a court with separate legal representation.

Conclusion: violation (unanimously).

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

(See also *Stanev v. Bulgaria* [GC], no. 36760/06, 17 January 2012, Information Note no. 148; *H.M. v. Switzerland*, no. 39187/98, 26 February 2002, Information Note no. 39; *Nielsen v. Denmark*, no. 10929/84, 28 November 1988; and *Winterwerp v. the Netherlands*, no. 6301/73, 24 October 1979)

Article 5 § 4

Review of lawfulness of detention

Inability for mentally disabled applicant to contest involuntary confinement with separate legal representation: *violation*

D.D. v. Lithuania - 13469/06
Judgment 14.2.2012 [Section II]

(See Article 5 § 1 (e) above, page 13)

ARTICLE 6

Article 6 § 1 (civil)

Fair hearing

Retroactive legislative interference in litigation between private parties: *violation*

Arras and Others v. Italy - 17972/07
Judgment 14.2.2012 [Section II]

Facts – As pensioners and former employees of a banking group, the applicants benefited from an exclusive welfare system with a more favourable equalisation mechanism. Following the privatisation of the group in 1990, their pension system was reformed on a number of occasions. A number of pensioners in the applicants' position instituted proceedings contesting the group's refusal to continue applying the more favourable equalisation mechanism in their case, which refusal had resulted in them receiving lower pensions. In 1994 the domestic courts found in favour of the pensioners. The applicants instituted proceedings in 1996 expecting that the previously established case-law would apply to their cases too. However, after favourable first and second-instance decisions, Law no. 243/04 came into force. It laid down that, with retroactive effect from 1992, retired employees of the group could no longer benefit from the favourable equalisation mechanisms. Subsequently, the Court of Cassation reversed the lower courts' decisions and dismissed the applicants' claims.

Law – Article 6 § 1: Under the Court's constant jurisprudence, the legislature was not prevented from regulating rights derived from the laws in force through new retrospective provisions. However, the principle of the rule of law and the notion of fair trial precluded interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute. Even though the State was not a party to the proceedings at issue, the Court held that its responsibility was engaged in both its legislative and judicial capacities. Law no. 243/04 had retrospectively determined the substance of disputes pending before ordinary courts thus making it pointless for an entire group of individuals in the applicants' position to carry on with the litigation. Consequently, there had been no equality of arms between the two private parties since the State had found in favour of one of them after it enacted the impugned legislation. Moreover, the Government had adduced no compelling reason of general interest capable of justifying legislative interference of that sort.

Conclusion: violation (unanimously).

Article 41: Awards ranging between EUR 5,500 and EUR 30,000 in respect of pecuniary and non-pecuniary damage.

(See also *Zielinski and Pradal & Gonzalez and Others v. France* [GC], nos. 24846/94 et al., 28 October 1999; and *Stran Greek Refineries and Stratis Andreadis v. Greece*, no. 13427/87, 9 December 1994)

Unfairness of guardianship proceedings concerning mentally disabled applicant: *violation*

D.D. v. Lithuania - 13469/06
Judgment 14.2.2012 [Section II]

(See Article 5 § 1 (e) above,– page 13)

Article 6 § 2

Presumption of innocence

Dismissal of an official held in pre-trial detention: *inadmissible*

Tripon v. Romania - 27062/04
Decision 7.2.2012 [Section III]

Facts – In September 2001 the applicant, a civil servant who worked as a customs officer at a border post, was placed in pre-trial detention on an order by the public prosecutor's office on suspicion that he, together with six of his colleagues from the same customs post, had committed an offence of abuse of office to the detriment of the State's interests. In November 2001 the court of first instance extended his detention until 1 December 2001, when he was released. On 28 November 2001, by a decision of the Public Finance Ministry, the applicant was dismissed on the basis of a provision of the Labour Code which made it possible to dismiss an employee if he or she was placed in pre-trial detention for more than sixty days, on whatever grounds. The applicant appealed against his dismissal before the courts, without success. In 2003 the Constitutional Court dismissed a plea of unconstitutionality concerning the legislative provision in question, raised by the court of appeal of its own motion. In 2004 the applicant was sentenced to a suspended term of imprisonment. He lodged an appeal. In 2010 the criminal proceedings against him were discontinued on the ground that the prosecution of the offence was time-barred. The county court held that the applicant could not be acquitted on account of the evidence against him in the case file, which established his guilt.

Law – Article 6 § 2: The right at the relevant time under the Labour Code to dismiss employees placed in pre-trial detention for more than sixty days had been based on an objective factor, namely the extended absence of the employees concerned from their posts, rather than on considerations linked to their guilt or innocence on the charges that had justified their placement in custody. In enacting that provision of the Labour Code the national legislature had undoubtedly sought, as the Constitutional Court had rightly observed, to protect employers, whether in the public or the private sector, against the possibly damaging consequences of the prolonged absence of an employee who did not fulfil his or her contractual obligations as a result of being placed in detention. It was not for the European Court to interfere in such legislative policy choices by the State, particularly where the national legislation provided sufficient safeguards against arbitrary or wrongful treatment of employees who were absent from work for a prolonged period because they were in custody. The Romanian legislation at the material time had contained such safeguards: beyond the time-limit of thirty days within which the public prosecutor's office, at the time, had been empowered to issue a detention order, any extension of a period of pre-trial detention had to be ordered by a court, giving reasons, and had to be necessary. Furthermore, no representative of the State – be it a judge, court or other public authority – had made any statements in the instant case reflecting an opinion that the applicant was guilty of an offence before his guilt had been established by the 2004 judgment of the court of first instance. In particular, the decisions given by the national courts concerning the applicant's dismissal did not contain any statement suggesting that he was considered guilty of the offences with which he had been charged. Furthermore, the court decisions upholding the charges of abuse of office to the detriment of the State's interests and forgery brought against the applicant by the public prosecutor's office had been delivered after detailed examination in the course of adversarial proceedings held in public. In spite of everything, the courts had applied the provisions of the criminal procedure that were most favourable to the applicant, by ordering that the proceedings against him be discontinued on the ground that prosecution of the offence was time-barred. It was true that, had the applicant been acquitted, the law did not require his former employer to reinstate him. Nevertheless, he would have had the option of bringing an action against the State for compensation for the alleged judicial error made in his case. Lastly, the Romanian legislation currently in force – which in 2005 had reduced to thirty days the period of pre-trial detention beyond which an employee could be dismissed on grounds of absence from his or her post – had accompanied this measure, favourable to employers, with heightened safeguards against arbitrary or wrongful treatment of employees. Only an independent and impartial judge for the purposes of Article 6 § 1 of the Convention now had the power to place persons suspected of an offence in pre-trial detention, by means of a reasoned decision which was open to appeal.

In the light of all these considerations, the decision to dismiss the applicant, taken by his employer in accordance with the national legislation in force at

the material time, could not be said to amount to a statement or act reflecting an opinion that he was guilty or prejudging the assessment of the facts by the competent court.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 8

Positive obligations
Respect for private life

Refusal of domestic courts to issue injunction restraining further publication of a photograph of a famous couple taken without their knowledge: *no violation*

Von Hannover v. Germany (no. 2) - 40660/08 and 60641/08
Judgment 7.2.2012 [GC]

Facts – The applicants were Princess Caroline von Hannover, daughter of the late Prince Rainier III of Monaco, and her husband Prince Ernst August von Hannover. Since the early 1990s Princess Caroline had sought, often through the courts, to prevent the publication of photographs of her private life in the press. Two series of photographs, published in German magazines in 1993 and 1997, had been the subject of litigation in the German courts that had led to leading judgments of the Federal Court of Justice in 1995 and of the Federal Constitutional Court in 1999 dismissing her claims. Those proceedings were the subject of the European Court's judgment in *Von Hannover v. Germany*[1] (the first *Von Hannover* judgment), in which the Court found a violation of Princess Caroline's right to respect for her private life under Article 8.

Following that judgment the applicants brought further proceedings in the domestic courts for an injunction restraining further publication of three photographs which had been taken without their consent during skiing holidays between 2002 and 2004 and had already appeared in two German magazines. The Federal Court of Justice granted an injunction in respect of two of the photographs, which it considered did not contribute to a debate of general interest. However, it refused an injunction in respect of the third photograph, which showed the applicants taking a walk during a skiing holiday in St Moritz and was accompanied by an article reporting on, among other issues, Prince Rainier's poor health. That decision was upheld by the Federal Constitutional Court, which found that the Federal Court of Justice had had valid grounds for considering that the reigning prince's poor health was a subject of general interest and that the press had been entitled to report on the manner in which his children reconciled their obligations of family solidarity with the legitimate needs of their private life, among which was the desire to go on holiday. The Federal Court of Justice's conclusion that the photograph had a sufficiently close link with the event described in the article was constitutionally unobjectionable.

Law – Article 8: In response to the applicants' submission that the domestic courts had not taken sufficient account of the Court's decision in the first *Von Hannover* judgment, the Court observed that it was not its task to examine whether Germany had satisfied its obligations under Article 46 of the Convention regarding execution of that judgment: that was the responsibility of the Committee of Ministers. The present applications thus concerned only the new proceedings. Likewise, it was not the Court's task to review the relevant domestic law and practice *in abstracto* following the changes the Federal Court of Justice had made to its earlier case-law in the wake of the first *Von Hannover* judgment; instead its role was to determine whether the manner in which the law and practice had been applied to the applicants had infringed Article 8.

In applying its new approach the Federal Court of Justice had granted an injunction in respect of two of the photographs on the grounds that neither they, nor the articles accompanying them, contributed to a debate of general interest. As regards the third photograph, however, it had found that Prince Rainier's illness and the conduct of the members of his family at the time qualified as an event of contemporary society on which the magazines were entitled to report and to include the photograph to support and illustrate the information being conveyed. The Court found that the domestic courts' characterisation of Prince Rainier's illness as an event of contemporary society could not be considered unreasonable and it was able to accept that the photograph, considered in the light of the article, did at least to some degree contribute to a debate of general interest (in that connection, it noted that the injunctions restraining publication of the other two photographs, which showed the applicants in similar circumstances, had been granted precisely because they were being published purely for entertainment purposes). Furthermore,

1. *Von Hannover v. Germany*, no. 59320/00, 24 June 2004, Information Note no. 65.

irrespective of the question to what extent Princess Caroline assumed official functions on behalf of the Principality of Monaco, it could not be claimed that the applicants, who were undeniably very well known, were ordinary private individuals. They had to be regarded as public figures. As to the circumstances in which the photographs had been taken, this had been taken into account by the domestic courts, which found that the applicants had not adduced any evidence to show that the photographs had been taken surreptitiously, in secret or in otherwise unfavourable conditions.

In conclusion, the domestic courts had carefully balanced the publishing companies' right to freedom of expression against the applicants' right to respect for their private life. In so doing, they had attached fundamental importance to the question whether the photographs, considered in the light of the accompanying articles, had contributed to a debate of general interest and had also examined the circumstances in which they had been taken. The Federal Court of Justice had changed its approach following the first *Von Hannover* judgment and the Federal Constitutional Court, for its part, had not only confirmed that approach, but had also undertaken a detailed analysis of the Court's case-law in response to the applicants' complaints that the Federal Court of Justice had disregarded it. In those circumstances, and regard being had to the margin of appreciation enjoyed by the national courts when balancing competing interests, the domestic courts had not failed to comply with their positive obligations under Article 8.

Conclusion: no violation (unanimously).

(See also *Axel Springer AG v. Germany* under Article 10 below, page 21)

Positive obligations

Shortcomings of proceedings to establish paternity of a minor with disabilities: *violation*

A.M.M. v. Romania - 2151/10
Judgment 14.2.2012 [Section III]

Facts – The applicant is a child who was born in 2001 outside marriage and who has a number of disabilities. Before the European Court, he was first represented by his mother and subsequently, since his mother suffered from a serious disability, by his maternal grandmother. He was registered in his birth certificate as having a father of unknown identity. In 2001 his mother brought paternity proceedings against Z., claiming that the child had been conceived following a relationship with him. She relied on a handwritten statement signed by Z. in which he recognised paternity of the child and promised to pay maintenance. The court ordered forensic medical tests, but Z. did not report to the Institute of Forensic Medicine and did not attend the court hearings. In 2003 the court noted that the applicant's mother had decided to forego the forensic tests and the taking of witness evidence, and dismissed her claims as unsubstantiated. She lodged an appeal against that decision, which was declared inadmissible for lack of reasons. Despite being given notice to appear, the representative of the municipal guardianship office did not attend the court hearings.

Law – Article 8: The Court had to ascertain whether the respondent State, in its conduct of the proceedings to establish the applicant's paternity, had acted in breach of its positive obligation under Article 8. Under the national legislation, the guardianship office was responsible for protecting the interests of minors and persons lacking legal capacity, including in judicial proceedings in which they were involved. However, the guardianship office had not taken part in the proceedings as it was required to do, while neither the applicant nor his mother had been represented by a lawyer at any point in the proceedings. In the face of these continuing shortcomings, the court had not taken any procedural steps to secure the appearance of a representative of the guardianship office. Furthermore, the latter's absence had not been offset by any other measures to protect the child's interests in the proceedings, such as the appointment of a lawyer or the attendance at the hearings of a member of the public prosecutor's office, although the same court had considered this to be necessary. Likewise, no steps had been taken by the authorities to contact the witnesses the child's mother wished to be called, after the first attempt to do so had failed. Regard being had to the child's best interests and the rules requiring the guardianship office or a representative of the public prosecutor's office to participate in paternity proceedings, it had been up to the authorities to act on behalf of the applicant in order to compensate for the difficulties facing his mother and avoid his being left without protection.

The applicant's mother had also been placed under the care of the social welfare authorities on account of her severe disability. Although the Court was unable to establish whether, at the material time, she had been in a position to fully defend her child's interests, it pointed out that, in the context

of exhaustion of domestic remedies, consideration had to be given to the vulnerability of certain individuals and their inability in some cases to plead their case coherently or, indeed, at all. Domestic law did not provide for any measure by which a defendant could be required to undergo a paternity test ordered by the courts; this could reflect the need to protect third parties by ruling out the possibility of their being forced to undergo medical tests of whatever kind, particularly DNA tests. It was common practice for the courts to take into account, in reaching their decision, the fact that one of the parties had sought to prevent certain facts from being established. In the instant case the courts had not drawn any inferences from Z.'s refusal to cooperate.

The domestic courts had not struck a fair balance between the right of the applicant, a child, to have his interests safeguarded in the paternity proceedings and the right of his putative father not to take part in the proceedings or to refuse to undergo a paternity test.

Conclusion: violation (unanimously).

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

Respect for private life

Theft of applicant's identity due to authorities' failure to invalidate his stolen driving licence: *violation*

Romet v. the Netherlands - 7094/06
Judgment 14.2.2012 [Section III]

Facts – In November 1995 the applicant reported to the police that his driving licence had been stolen. In March 1997 he applied for a new licence and was issued one. However, in the meantime 1,737 motor vehicles had been registered in his name in the vehicle registration system. As a consequence, the applicant received a large number of motor-vehicle tax assessments and was on many occasions prosecuted and fined in respect of offences committed with those vehicles. He was also detained for failing to pay the fines and his welfare benefits were stopped since his financial means were considered to be adequate on account of the number of vehicles registered in his name. Following a request by the applicant in 2004 the authorities annulled the registrations, but without retroactive effect as they deemed it impossible for reasons of legal certainty. The applicant's subsequent appeals to the domestic courts were dismissed.

Law – Article 8: The failure to invalidate the applicant's driving licence, which had enabled others to abuse his identity, constituted an interference with his right to respect for his private life. Relying on EU Directive 95/46/EC,[1] the applicant claimed that the interference with his private life had been unlawful. However, noting that, for the purposes of the Convention, an EU Directive bound the domestic authorities only in the form in which it was transposed into domestic law, the Court found that the interference was in accordance with law and pursued the legitimate aim of protecting the rights and freedoms of others.

As to whether the interference had been necessary in a democratic society, the applicant had reported his driving licence stolen in November 1995 and from that moment onward the authorities must have been aware that the licence was no longer in his possession and could have taken swift administrative action to deprive it of its usefulness as an identity document. However, the licence was invalidated only in March 1997, when the applicant obtained a new one. The Government had not explained why such action could not have been taken immediately after the applicant reported it stolen.

Conclusion: violation (unanimously).

Article 41: EUR 9,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

Respect for family life

Insufficiently thorough analysis of best interests of child and unfairness of decision-making process in Hague Convention proceedings: *violation*

Karrer v. Romania - 16965/10
Judgment 21.2.2012 [Section III]

Facts – In 2004 the first applicant, an Austrian national, married a Romanian national, K.T. In 2006 the couple had a daughter, the second applicant, who was in their joint custody. In January 2008 K.T. filed for an injunction against the first applicant seeking his removal from the family home on the grounds of his violent behaviour. The injunction was granted for a period of three months

1. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

and criminal proceedings were instituted against him. The couple separated and K.T. filed for divorce. She also sought temporary sole custody of the second applicant. In July 2008 an Austrian court acquitted the first applicant of inflicting bodily harm. In September 2008, while the divorce and the custody proceedings were still pending before the Austrian courts, K.T. left for Romania together with the second applicant. The first applicant then submitted a request for the return of the child to Austria under Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction. The Romanian authorities established that the second applicant was living with K.T. in her grandparents' home and the social services drew up a report mainly describing her living conditions. The first-instance court found in favour of the second applicant's return to Austria, but the court of appeal reversed that decision finding that a return might expose the second applicant to physical and psychological harm. Meanwhile, in November 2008 the Austrian courts had granted the first applicant sole custody of the child pending the conclusion of the divorce proceedings.

Law – Article 8: The Court firstly examined the manner in which the Romanian authorities had determined the best interests of the child. It was observed in this connection that they had based their assessment on an expired injunction issued in Austria and had decided to set aside the Austrian courts' decision awarding temporary custody to the first applicant only because that decision was delivered after K.T. had left for Romania. Furthermore, the relevant social services' report on which the Romanian courts had based their decision had not assessed the implications of the second applicant's return to Austria. Moreover, the witness testimonies relied on had consisted only of statements of K.T. and her parents and no attempt had been made to contact the first applicant in order to hear his views. In such circumstances, the analysis conducted by the domestic authorities to determine the child's best interests had not been sufficiently thorough. As to the fairness of the decision-making process, the first applicant had never been afforded the opportunity to present his case before the Romanian courts either directly or through written submissions. Finally, the Hague Convention proceedings had lasted a total of eleven months before two levels of jurisdiction, notwithstanding that such proceedings should have been terminated within six weeks.

Conclusion: violation (unanimously).

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

(See also *X v. Latvia*, no. 27853/09, 13 December 2011, Information Note no. 147; and *Šneersone and Kampanella v. Italy*, no. 14737/09, 12 July 2011, Information Note no. 143)

Infrequent and restricted family visits for life prisoner: *violation*

Trosin v. Ukraine - 39758/05
Judgment 23.2.2012 [Section V]

Facts – In 2005 the applicant was sentenced to life imprisonment. Until 2010 he was allowed family visits once every six months. After that date, he received family visits once every three months, for a maximum of four hours. Only three adults could be present for the visit, although the applicant wished to maintain contact with his mother, wife, son and brother. The applicant could only communicate with visitors through a glass partition and a prison officer was present at all times.

Law – Article 8: Even though deprivation of liberty inevitably entailed certain limitations on the detainee's family life, in the applicant's case the relevant provisions of domestic law introduced automatic restrictions on the frequency and length of family visits for all life prisoners, irrespective of whether such restrictions were indeed necessary in each individual case. The Court considered, however, that the regulation of family visits could not amount to such inflexible restrictions and that the States had to develop a mechanism which would allow the authorities to balance the competing individual and public interests and to take into account peculiarities of each individual case. The applicant was only able to see three of his four family members at a time, for a limited period and only through a glass partition that excluded any physical contact. In addition, the presence of a prison officer did not allow the applicant any privacy or intimacy in communication with his family members. In conclusion, the State had failed to take necessary measures to ensure that the applicant's private interest in meeting with his family was properly balanced against the relevant public interest in restricting prisoners' contacts with the outside world.

Conclusion: violation (unanimously).

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

ARTICLE 10

Freedom of expression

Prohibition on reporting arrest and conviction of famous actor: *violation*

Axel Springer AG v. Germany - 39954/08
Judgment 7.2.2012 [GC]

Facts – The applicant company is the publisher of a national daily newspaper with a large-circulation which in September 2004 published a front-page article about the star of a popular television series who had been arrested at the Munich beer festival for possession of cocaine. The article was supplemented by a more detailed article on another page and was illustrated by three pictures of the actor in question. Immediately after that article appeared, the actor obtained an injunction restraining any further publication of the article or photographs. The injunction on publishing the article was upheld on appeal in June 2005 (the applicant company did not challenge the injunction concerning the photographs). In November 2005 the injunction was continued in respect of almost the entire article and the applicant company was ordered to pay an agreed penalty, which, on appeal, was reduced to EUR 1,000.

In the interim, in July 2005, the newspaper had published a second article, reporting that the actor had been convicted of unlawful possession of drugs following a full confession and had been fined. The actor applied for and obtained an injunction restraining publication of the second article on essentially the same grounds as for the first. That judgment was upheld on appeal. The applicant company was later ordered to pay two penalty payments of EUR 5,000 in respect of subsequent breaches of that injunction.

Law – Article 10: It was common ground that the domestic courts' decisions had constituted interference with the applicant company's right to freedom of expression; which interference was prescribed by law and pursued the legitimate aim of protecting the reputation or rights of others. The Court went on to determine whether the interference had been necessary in a democratic society.

Applying the criteria it had established in its case-law for balancing the right to freedom of expression against the right to respect for private life, the Court noted, firstly, that the published articles concerned the arrest and conviction of an actor, that is public judicial facts that could be considered to present a degree of general interest. Second, the actor was sufficiently well known to qualify as a public figure and, even though the nature of the offence was such that it would probably not have been reported on had it been committed by an ordinary individual, the fact that the actor had been arrested in public and had actively sought the limelight by revealing details about his private life in a number of interviews meant that his legitimate expectation that his private life would be effectively protected was reduced. As regards the third criterion – how the information was obtained and whether it was reliable – the first article about the actor's arrest had a sufficient factual basis as it was based on information provided by the public prosecutor's office and the truth of the information related in both articles was not in dispute between the parties. The applicant company had not acted in bad faith: not only had it received confirmation of the information from the prosecuting authorities, there was nothing to suggest that it had not undertaken a balancing exercise between its interest in publishing and the actor's right to respect for his private life before concluding, in the light of all the circumstances, that it did not have sufficiently strong grounds for believing it should preserve the actor's anonymity. As to the content, form and consequences of the publications, the articles had not revealed details about the actor's private life, but had mainly concerned the circumstances of his arrest and the outcome of the criminal proceedings. There had been no disparaging comments or unsubstantiated allegations. The applicant company had not challenged a court injunction prohibiting it from publishing photographs and it had not been shown that the publication of the articles had resulted in serious consequences for the actor. As regards the final criterion, while the sanctions imposed on the applicant company were lenient, they had nevertheless been capable of having a chilling effect and were not justified in the light of the factors referred to above. Accordingly, the restrictions imposed on the company had not been reasonably proportionate to the legitimate aim of protecting the actor's private life.

Conclusion: violation (twelve votes to five).

Article 41: EUR 17,734.28 in respect of pecuniary damage, corresponding to penalties and costs incurred in the domestic proceedings less the two penalty payments of EUR 5,000.

(See also *Von Hannover v. Germany (no. 2)* under Article 8 above – page 17)

Convictions for circulating homophobic leaflets at school: *no violation*

Vejdeland and Others v. Sweden - 1813/07
Judgment 9.2.2012 [Section V]

Facts – In July 2006 the applicants were convicted by the Supreme Court of agitation against a national or ethnic group after leaving homophobic leaflets in pupils' lockers at an upper secondary school. The first three applicants were given suspended sentences combined with fines ranging from approximately EUR 200 to 2,000 and the fourth applicant was sentenced to probation.

Law – Article 10: The applicants' convictions constituted an interference that was "prescribed by law" and served the legitimate aim of protecting the reputation and rights of others.

The Court agreed with the Supreme Court that, even if the applicants' aim of starting a debate about the lack of objectivity of education in Swedish schools had been acceptable, it was necessary to have regard to the wording of the leaflets, which stated that homosexuality was a "deviant sexual proclivity", had "a morally destructive effect" on society and was responsible for the development of HIV and AIDS. The leaflets further alleged that the "homosexual lobby" had tried to play down paedophilia. Even though they made no direct call for violence, these were serious and prejudicial allegations. While acknowledging the applicants' right to express their ideas, the Supreme Court had found that the statements made in the leaflets were unnecessarily offensive. It had further emphasised that the applicants had imposed the leaflets on the pupils by leaving them in or on their lockers. The European Court noted that the pupils had been at an impressionable and sensitive age and that the distribution of the leaflets had taken place at a school which none of the applicants attended and to which they did not have free access. None of the applicants were given an immediate custodial sentence and the sentences they received were not excessive in the circumstances.

Accordingly, the applicants' convictions and sentences were not disproportionate to the legitimate aim pursued and the Supreme Court had given relevant and sufficient reasons for its decision. The interference could therefore reasonably have been regarded by the national authorities as necessary in a democratic society for the protection of the reputation and rights of others.

Conclusion: no violation (unanimously).

Conviction for defamation and order to publish apology in respect of unjustified allegations against a politician made in private correspondence with State-owned television: *no violation*

Gąsior v. Poland - 34472/07
Judgment 21.2.2012 [Section IV]

Facts – The applicant's son-in-law, who owned a construction company, built a villa for a prominent Polish politician. In 2003 and 2004 the applicant sent two letters to Polish television alleging that the politician had refused to pay for the construction of the villa. Her letters were never made public. However, after he was asked for comments by the journalists, the politician lodged a private bill of indictment against the applicant. In 2004 the applicant's son-in-law lodged a civil claim for payment against the politician. In 2006 the applicant was convicted of defamation and ordered to publish a written apology and to pay the costs of the proceedings (300 zlotys). The domestic courts held that the assertions contained in the applicant's letters had been statements of fact and that she had failed to prove their veracity. In this respect, they referred to expert evidence which indicated that the villa was not a faultless construction as claimed by the applicant. The courts also considered that the applicant's letters had formed an unjustified personal attack and that the expressions used, such as "liar", "greedy and mendacious person" and "dishonest", could have resulted in the politician losing public trust necessary for his political career. The criminal proceedings against the applicant were conditionally discontinued. In 2008 the courts dismissed the son-in-law's claim as unsubstantiated since the construction works were faulty.

Law – Article 10: The applicant's letters had contained quite serious allegations of fact which therefore required substantial justification. However, she had based them mainly on guess-work. Her remarks could have formed part of an open discussion of matters of public concern since she had informed the journalists about the politician's alleged misconduct. While the limits of acceptable criticism as regards politicians were wider, this did not mean that politicians should not be given an opportunity to defend themselves. The reasons given by the domestic courts had been "relevant" and "sufficient" to justify the interference. In particular, the terms used by the applicant in her

letters had a very pejorative connotation. In addition, as had been established by the courts, they had no justification on the facts. The applicant had only been ordered to publish an apology. The criminal proceedings had thereafter been discontinued. Moreover, the criminal proceedings against her had had their origin in a bill of indictment lodged by the politician himself, not by a public prosecutor. In view of the margin of appreciation left to the Contracting States, a criminal measure as a response to defamation could not as such be considered disproportionate to the legitimate aim pursued. In sum, the domestic courts had not overstepped their margin of appreciation and there had been a reasonable relationship of proportionality between the measures applied by them and the legitimate aim pursued.

Conclusion: no violation (six votes to one).

ARTICLE 13

Effective remedy

Lack of remedies available for migrants intercepted on the high seas and returned to country of departure: *violation*

Hirsi Jamaa and Others v. Italy - 27765/09
Judgment 23.2.2012 [GC]

(See Article 3 above, page 9)

Limited effectiveness of remedy available to asylum seeker to challenge deportation order: *violation*

I.M. v. France - 9152/09
Judgment 2.2.2012 [Section V]

Facts – The applicant is a Sudanese national. In May 2008 he was arrested by the Sudanese police and spent eight days in detention and a further two months under surveillance by the authorities, who interrogated him on a weekly basis using violence. In December 2008 he travelled to Spain with a view to crossing the border into France, carrying a forged French visa. On his arrival at the French border the applicant was arrested for the offences of illegally entering or staying in France and forgery and use of forged documents. According to his submissions, he immediately said that he wished to apply for asylum but received no response. He was remanded in custody and appeared before the *tribunal de grande instance*, which sentenced him to one month's imprisonment for an offence under the aliens legislation. According to the applicant, he restated before the court his intention to claim asylum. While in detention he applied to the administrative court challenging the order for his removal issued by the prefecture on 7 January 2009. The application was refused. On 16 January 2009 the applicant was placed in administrative detention with a view to his deportation. He was informed the same day of the possibility of applying for asylum, which he did on 19 January 2009. His asylum application was registered on 22 January 2009 under the fast-track procedure, and he was therefore questioned by the French Office for the Protection of Refugees and Stateless Persons (OFPRA) on 30 January 2009. On 31 January 2009 he was notified of the refusal of his application by OFPRA. He appealed against that decision to the National Asylum Tribunal (*Cour nationale du droit d'asile*). Once his asylum application had been refused by OFPRA, the authorities could take steps to deport him. On 16 February 2009 the applicant applied to the European Court under Rule 39 of the Rules of Court, seeking to have the order for his deportation suspended. The Court granted his request for the duration of the proceedings before it. On 19 February 2011 the National Asylum Tribunal granted the applicant refugee status. In the meantime he had obtained a certificate of residence from his municipality of origin in Darfur and a medical report issued by a psychiatrist stating that he had been subjected to violence.

Law – Article 13 in conjunction with Article 3: The applicant had made use of the remedies available in the French system in order to assert his complaint under Article 3 of the Convention, applying to OFPRA and then to the National Asylum Tribunal and appealing to the administrative court against the prefectoral order for his removal. He claimed to have mentioned his plans to apply for asylum in France while he was still in police custody, to no avail. Only after being placed in administrative detention had he been able to submit his asylum application to OFPRA. Having been first in police custody and then in detention, the applicant had been unable to report in person to the prefecture to lodge his asylum claim as required by French law. Furthermore, the police reports provided some indications that he had attempted to apply for asylum while he was still in police custody. The authorities had taken the view that the asylum application lodged by the applicant while in administrative detention had been based on "deliberate fraud" or constituted "abuse of the

asylum procedure" for the purposes of the French legislation, for the simple reason that it had been submitted after the order for his removal had been issued. It was on that basis alone that his application had been registered under the fast-track procedure. The Court could not but note the automatic nature of the decision to fast-track the application, which had been taken on procedural grounds and had not been linked to the circumstances of the applicant's case or to the terms or merits of his application.

Fast-track asylum procedures, which were applied in many European countries, could make it easier to process applications that were clearly unreasonable or manifestly ill-founded. The re-examination of an asylum application under the fast-track procedure did not deprive aliens in administrative detention of a detailed review of their claims, in so far as they had had a first application examined under the normal procedure. However, the present case concerned a first-time application rather than a re-examination. Hence, the consideration of the applicant's application by OFPRA under the fast-track procedure would have been the only examination of the merits of his asylum claim prior to his deportation had his request to the European Court for an interim measure not been granted in time.

The registering of the applicant's asylum claim under the fast-track procedure had had significant repercussions in terms of the procedure applied. For instance, the time-limit for lodging the application had been reduced from twenty-one to five days. This was a very short period which imposed particular constraints, as the applicant was expected to submit, while he was in administrative detention, a comprehensive application in French, with supporting documents, meeting the same requirements as applications submitted under the normal procedure by persons not in detention. During his interview with OFPRA, the applicant had been unable to provide the necessary information, which had been decisive for determining his application. His statements had been found to be very vague, or even incorrect, and his application had accordingly been rejected. The use of the fast-track procedure had not enabled the applicant to clarify these points, whereas he had managed subsequently to clear up the alleged inconsistencies and provide the missing documents. The speedy processing of the applicant's claims should not have been given priority over the effectiveness of the essential procedural guarantees aimed at protecting him against arbitrary removal to Sudan. The registration of his asylum application under the fast-track procedure had resulted in his claims being examined in extremely rapid, not to say summary, fashion by OFPRA. All the constraints imposed on the applicant throughout the procedure, in a situation where he had been in detention and making a first-time asylum application, had undermined in practice his ability to assert his complaints under Article 3 of the Convention.

The application to the administrative court challenging the removal order, meanwhile, had been a remedy with fully suspensive effect before a judge competent to examine the applicant's Article 3 complaints. The remedy in question had theoretically made it possible to conduct an effective examination of the risks allegedly faced by the applicant in Sudan. However, the latter had had only an extremely brief 48-hour period in which to prepare his application, which was particularly short compared with the two months allowed under ordinary law before the administrative courts. The applicant had been able to submit his application only in the form of a letter written in Arabic which an officially appointed lawyer, whom he had met briefly before the hearing, had read out without having the opportunity to add any evidence to it. This lack of conclusive evidence had been the main reason why the judge had rejected the application. The judge had also criticised the applicant for not having previously lodged an asylum application, although it was not demonstrated that the latter had actually been in a position to do so, having been in detention. Accordingly, the Court had serious doubts as to whether the applicant had been in a position to effectively assert his Article 3 complaints before the administrative court.

Accordingly, with regard to the effectiveness of the domestic legal arrangements as a whole, while the remedies of which the applicant had made use had been available in theory, their accessibility in practice had been limited by a number of factors, relating mainly to the automatic registration of his application under the fast-track procedure, the short deadlines for submitting applications and the practical and procedural difficulty of producing evidence while in custody or administrative detention. As to the standard of examination of the applications by OFPRA and the administrative court, this depended at least in part on the standard of the applications themselves. The latter was linked to the conditions in which the applications had been prepared and the legal and linguistic assistance provided to the applicant, which had been inadequate in the instant case. Moreover, the interview with OFPRA had been of short duration given the fact that the case had been complex and

had concerned a first-time asylum claim. Lastly, the shortcomings observed with regard to the effectiveness of the remedies used by the applicant had not been offset at the appeal stage, as he had not had access to any suspensive remedy before the appeal courts or the Court of Cassation. In addition, an appeal to the National Asylum Tribunal against OFPRA's rejection of an asylum application did not have suspensive effect when the fast-track procedure had been applied. The deportation of the applicant, for whom a laissez-passer had already been issued by the Sudanese authorities, had been prevented only by the application of Rule 39 of the Rules of Court. Hence, while the effectiveness of a remedy within the meaning of Article 13 of the Convention did not depend on the certainty of a favourable outcome for the applicant, the Court could not but conclude that, without its intervention, the applicant would have been deported to Sudan without his claims having been subjected to the closest possible scrutiny. Accordingly, the applicant had not had an effective remedy in practice by which to assert his complaint under Article 3 while his deportation to Sudan was in progress.

Conclusion: violation (unanimously).

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

ARTICLE 14

Discrimination (Article 8)

Refusal to grant unmarried homosexual partner leave to remain as member of the family: *communicated*

Taddeucci and McCall v. Italy - 51362/09
[Section II]

The applicants, Mr Taddeucci and Mr McCall, of Italian and New Zealand nationality respectively, have been living together as a couple since 1999. In December 2003 they decided to move to Italy on account of the first applicant's fragile state of health. During their initial period of residence, the second applicant was first granted a temporary residence permit as a student. He subsequently applied for a permit as a family member. His application was rejected by the police authority in 2005. The district court upheld the applicants' appeals but in 2006 the court of appeal found in favour of the authority. The applicants then appealed to the Court of Cassation. In a judgment of September 2008, deposited in March 2009, that court dismissed the applicants' appeals. It stated first that, under Article 29 of Decree no. 286, the notion of "family member" comprised only spouses, minor children, adult children who were not autonomous for health reasons and dependent parents having inadequate support in their country of origin. In addition, as the Constitutional Court had ruled out the possibility of extending to partners the protection afforded to recognised family members, a more extensive interpretation of the article in question was not required by the provisions of the Constitution. The Court of Cassation subsequently held that such an interpretation could not be derived from Articles 8 and 12 of the Convention, since those provisions left to States a broad margin of appreciation as to how the protected rights were to be exercised, in particular when it came to regulating immigration. Moreover, the Court of Cassation found that there had been no discrimination based on the applicants' sexual orientation as the exclusion of unmarried partners from the right to obtain a family residence permit concerned both same-sex and opposite-sex partners. Lastly, it found that EU Directive 2004/38/EC[1] on the right of citizens of the Union to move freely within the territory of member States other than their country of origin was not applicable in the present case because the family reunification in question concerned an Italian national residing in his own country. In July 2009 the applicants moved to the Netherlands, where the second applicant was granted a five-year residence permit.

Before the European Court, the applicants complain of discrimination on grounds of sexual orientation because the second applicant was denied a family residence permit and they have no other possibility of living together in Italy as a couple.

Communicated under Article 14 in conjunction with Article 8 of the Convention.

Discrimination (Article 1 of Protocol No. 1)

Requirement for a landowner to make his land available for hunting: *relinquishment in favour of the Grand Chamber*

1. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States.

Chabauty v. France - 57412/08
[Section V]

The applicant, who has a hunting licence, inherited two plots of land of around ten hectares. In September 1973, before the applicant had acquired the land, the prefect ordered its inclusion in the hunting grounds of an approved municipal hunters' association (ACCA). The object of these associations is to ensure the sound technical management of hunting. In a complaint lodged in August 2002 the applicant requested the prefect to withdraw his plots of land from the association's hunting grounds, as he wished to organise private hunting on the land. As he received no reply, he submitted a second request in December 2003. In a decision of February 2004 the prefect noted, among other things, that, while the law in force allowed the owners of land of less than twenty hectares to lodge an objection, that right was restricted to landowners who did not hunt and who were opposed to hunting because of their personal convictions. Noting that the applicant himself had a hunting licence, the prefect refused to order the withdrawal of his land from the hunting grounds. The applicant requested the prefecture to reconsider the decision. In the absence of a reply from the prefect, the request was deemed to have been rejected. The applicant appealed against that decision to the administrative court. In a judgment of March 2005 the latter set aside the decision, on the ground that the difference in treatment between owners of large and smaller plots of land was contrary to Article 1 of Protocol No. 1 in conjunction with Article 14 of the Convention. The ACCA appealed against that judgment to the administrative court of appeal, which rejected the appeal in July 2006 without an examination on the merits. The ACCA lodged an appeal on points of law. In a judgment of June 2008 the *Conseil d'Etat* set aside the two decisions of the lower courts, finding that the difference in treatment had been objective and reasonable. It ordered the applicant to pay EUR 3,500 to the ACCA for costs and expenses.

In his application to the European Court the applicant alleges discrimination based on the size of landholdings.

(See also *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, 29 April 1999, Information Note no. 5; and *Herrmann v. Germany*, no. 9300/07, 20 January 2011, Information Notes no. 137 and no. 142)

ARTICLE 46

Pilot judgment
Execution of judgment

European Court's decision to resume examination of applications concerning non-enforcement of domestic court judgments in Ukraine

Yuriy Nikolayevich Ivanov v. Ukraine - 40450/04
[Section V]

On 21 February 2012 the European Court of Human Rights examined the state of the implementation of the pilot judgment in this case concerning issues of prolonged non-enforcement of domestic decisions (see Information Note no. 123), and the position in about 2,500 similar cases currently pending before the Court. It noted that Ukraine had not adopted the required general measures to tackle the issues of non-enforcement at the domestic level. It further noted that, while a number of cases had been struck out of the list of cases pending before the Court following either a settlement or a unilateral declaration, no settlement had been proposed so far in about 700 such cases communicated to the Government. It was also noted that about 1,000 new similar applications had been lodged with the Court since 1 January 2011. In accordance with the pilot judgment, the Court decided to resume the examination of applications raising similar issues. It also expressed the hope that the Ukrainian authorities would continue cooperating with the Committee of Ministers in order to implement the pilot judgment without delay and, in so doing, would have due regard to the Committee of Ministers' relevant recommendations, resolutions and decisions.

General measures

Respondent State required to introduce strict time-limits and effective remedy to address systemic problem in restitution of property cases

Mutishev and Others v. Bulgaria - 18967/03
Judgment (just satisfaction)
28.2.2012 [Section IV]

Facts – In a principal judgment delivered on 3 December 2009 the Court found a violation of the applicants' rights under Article 1 of Protocol No. 1, in that the authorities' refusal to complete

the restitution of their agricultural land and the delay in the restitution of some other plots of land had upset the fair balance between the general interest and the applicants' rights and placed a disproportionate burden on them. Following the principal judgment, the authorities took steps to comply with the relevant court judgment in respect of the agricultural land, which had been the source of the violation found. They adopted a decision for the return of the agricultural land to the applicants and instructed them as to the formalities to be complied with in order to complete the restitution process. As regards the other plots of land, the restitution process still appeared to be ongoing.

Law – Article 41: Provided the applicants' co-operated with the authorities, it was reasonable to expect the restitution process to be completed within three months from the date the Court's judgment became final. Failing the actual transfer of the land to the applicants within that time, the respondent State was to pay jointly to all the applicants the current value of the plots at issue (EUR 433,000 for the agricultural land and EUR 120,000 for the other plots) in respect of pecuniary damage. As regards non-pecuniary damage, the Court awarded each of the applicants EUR 1,000.

Article 46: Having received a number of other applications against Bulgaria raising a similar issue to the one in the applicants' case, the Court noted that there might be a systemic problem in Bulgaria in this respect. It therefore ordered that certain general measures be adopted in the execution of its judgment in this case, namely that clear time-limits be set concerning the enforcement of final judgments relating to the restitution of agricultural land and that a remedy be introduced affording the persons concerned an effective means of obtaining compensation should such time-limits not be observed.

ARTICLE 4 OF PROTOCOL No. 4

Prohibition of collective expulsion of aliens

Return of migrants intercepted on the high seas to country of departure: *Article 4 of Protocol No. 4 applicable; violation*

Hirsi Jamaa and Others v. Italy - 27765/09
Judgment 23.2.2012 [GC]

(See Article 3 above, page 9)

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

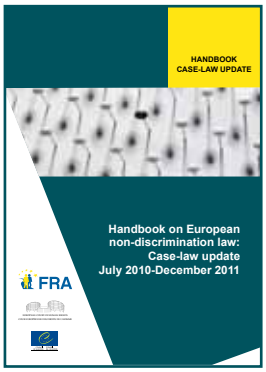
Chabauty v. France - 57412/08
[Section V]

(See Article 14 above, page 25)

RECENT COURT PUBLICATIONS

1. Update to the Handbook on European non-discrimination law

The *Handbook on European non-discrimination law* has been drafted to better disseminate a key aspect of European human-rights law: the standards on non-discrimination. This handbook, which was published in 2011, has now been updated to include the period from July 2010 (when the original text was finalised) to December 2011. The update pdate sets out recent developments in the case-law of the European Court of Human Rights and the Court of Justice of the European Union on non-discrimination. It is available on the Court's website (<www.echr.coe.int> – Case-law).



2. Practical guide on admissibility criteria

The updated version of the guide published at the end of 2011 has now been translated into Russian and Turkish. The translations are available on the Court's website (<www.echr.coe.int> – Case-law).

Практическое руководство по критериям приемлемости (rus)

Kabuledilebilirlik Kriterlerini Uygulama Rehberi (tur)