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

INFORMATION NOTE No. 38
on the case-law of the Court
January 2002

The summaries are prepared by the Registry and are not binding on the Court.

Statistical information[1]

Judgments delivered		January
Grand Chamber		1
Section I		7
Section II		3
Section III		1
Section IV		1
Total		**13**

Judgments delivered in January 2002					
	Merits	Friendly settlements	Struck out	Other	Total
Grand Chamber	1	0	0	0	1
Section I	6	1	0	0	7
Section II	2	1	0	0	3
Section III	1	0	0	0	1
Section IV	0	1	0	0	1
Total	**10**	**3**	**0**	**0**	**13**

[1] The statistical information is provisional. A judgment or decision may concern more than one application: the number of applications is given in brackets.

[* = judgment not final]

Decisions adopted		January	2002
I. Applications declared admissible			
Grand Chamber		1	1
Section I		22	22
Section II		4	4
Section III		11	11
Section IV		6	6
Total		**44**	**44**
II. Applications declared inadmissible			
Section I	- Chamber	7(21)	7(21)
	- Committee	434	434
Section II	- Chamber	16	16
	- Committee	345	345
Section III	- Chamber	13	13
	- Committee	322	322
Section IV	- Chamber	27	27
	- Committee	164	164
Total		**1328(1342)**	**1328(1342)**
III. Applications struck off			
Section I	- Chamber	2	2
	- Committee	8	8
Section II	- Chamber	2	2
	- Committee	1	1
Section III	- Chamber	0	0
	- Committee	4	4
Section IV	- Chamber	5	5
	- Committee	0	0
Total		**22**	**22**
Total number of decisions[1]		**1394(1408)**	**1394(1408)**

[1] Not including partial decisions.

Applications communicated	January	2002
Section I	29	29
Section II	21	21
Section III	25(26)	25(26)
Section IV	14(27)	14(27)
Total number of applications communicated	**89(103)**	**89(103)**

ARTICLE 2

POSITIVE OBLIGATIONS

Prosecution of doctor for involuntary manslaughter time-barred as a result of procedural delays: *no violation*.

CALVELLI and CIGLIO - Italy (Nº 32967/96)
Judgment 17.1.2002 [Grand Chamber]

Facts: In 1987, the applicant's baby died two days after being born. The applicants lodged a complaint against the doctor in charge of the delivery and in 1989 were informed that charges were to be brought. They joined the criminal proceedings as civil parties. In 1991, the doctor was committed for trial on a charge of involuntary manslaughter. He was convicted *in absentia* in December 1993. His appeal was dismissed but in December 1994 the Court of Cassation quashed the conviction and remitted the case to the appeal court for retrial. In July 1995, the appeal court ruled that the prosecution had become time-barred. In the meantime, the applicants had brought a civil action against the doctor and had reached an agreement with his insurers whereby they received compensation of 95 million lire.
Law: The Court joined the Government's preliminary objections to the merits.
Article 2 – The positive obligations incumbent on States require that they make regulations compelling both public and private hospitals to adopt appropriate measures for the protection of patients' lives. They also require an effective independent judicial system to be set up allowing for the cause of a patient's death to be determined and for those responsible to be held accountable. Article 2 was therefore applicable. Although the Convention does not guarantee a right to have criminal proceedings brought against third parties, the effective judicial system required by Article 2 may, and in certain circumstances must, include recourse to the criminal law. Accordingly, the Government's preliminary objection that the applicants could not claim to be victims in that respect had to be dismissed. However, in the case of unintentional infringement of the right to life, the obligation to set up an effective judicial system does not necessarily require the provision of a criminal law remedy in every case, and in the specific sphere of medical negligence it may be satisfied if victims have a remedy in the civil courts, whereby liability can be established and appropriate redress obtained. The Italian legal system affords injured parties both mandatory criminal proceedings and the possibility of bringing a civil action, and disciplinary proceedings may also be brought if a doctor is held liable in civil proceedings. Consequently, the Italian system offers litigants remedies which, in theory, meet the requirements of Article 2. However, that protection must also operate effectively in practice within a time-span that allows the courts to complete their examination of the merits of each individual case.
In the present case, the criminal proceedings became time-barred because of procedural delays. However, the applicants were also entitled to bring civil proceedings, and did so. The fact that no finding of liability was ever made against the doctor by a civil court was due to the intervening settlement which they reached with the insurers. The applicants thus voluntarily waived their right to pursue the proceedings, which could have led in particular to an award of damages against the doctor. In this way, they denied themselves access to the best means of elucidating the extent of the doctor's responsibility for the death of their child, which in the special circumstances of the case would have satisfied the positive obligations arising under Article 2. That conclusion made it unnecessary to examine whether the operation of the time-bar in the criminal proceedings was compatible with Article 2.
Conclusion: no violation (14 votes to 3)
Article 6(1) (length of proceedings) – Although the criminal proceedings concerned only the determination of the criminal charge against the doctor, they were apt to have repercussions

on the claims made by the applicants as civil parties. Article 6 applied to the criminal proceedings, the decisive factor being that, from the moment the applicants were joined as civil parties until the conclusion of those proceedings, the civil limb of the proceedings remained closely linked to the criminal limb. The proceedings lasted more than six years and three months. However, they were undeniably complex and, despite regrettable delays, such a period for proceedings at four levels of jurisdiction could not be regarded as unreasonable.
Conclusion: no violation (16 votes to 1).

LIFE
Refusal of authorities to give undertaking not to prosecute husband of applicant suffering from terminal illness should he assist her to commit suicide: *communicated*.

PRETTY - United Kingdom (N° 2346/02)
[Section IV]

The applicant suffers from motor neurone disease, a disease which is associated with progressive muscle weakness affecting the voluntary muscles of the body. Death usually occurs as a result of weakness of the breathing muscles, together with weakness of the muscles controlling speaking and swallowing, leading to respiratory failure and pneumonia. No treatment can prevent the progression of this disease. In the applicant's case, the disease is at an advanced stage but her intellect and capacity to make decisions remain unimpaired. Her life expectancy being measurable only in weeks or months, she expressed the wish to be able to control how and when she would die so as to be spared the suffering and indignity that she will endure if the disease runs its course. However, she is prevented by her disease from committing suicide without assistance. According to section 2(1) of the Suicide Act 1961, it is a crime to assist another to commit suicide. In July 2001 the applicant's solicitor asked the Director of Public Prosecutions (DPP) to give an undertaking not to prosecute the applicant's husband should he assist her to commit suicide. The DPP refused to give the undertaking. The applicant applied for judicial review of this decision and the following relief: an order quashing the decision of the DPP, a declaration that the decision was unlawful or that the DPP would not be acting unlawfully in giving the undertaking sought, a mandatory order requiring the DPP to give the undertaking sought, or alternatively, a declaration that section 2(1) of the Suicide Act 1961 was incompatible with Articles 2, 3, 8, 9 and 14 of the Convention. The Divisional Court refused the application in October 2001 and the House of Lords refused the applicant's subsequent appeal after a thorough examination of her case.
[The application was given priority pursuant to Rule 41 of the Rules of Court.]
Communicated under Articles 2, 3, 8, 9 and 14.

ARTICLE 5

Article 5(1)

LAWFUL DETENTION
Detention in premises of border police at airport pending deportation: *communicated*.

SHAMSA (Abdel Salam) - Poland (N° 45355/99)
SHAMSA (Anwar) - Poland (N° 45357/99)
Decision 10.1.2002 [Section III]

In May 1997 the two applicants, who are brothers and Libyan nationals, were arrested when they were unable to produce identity papers or a valid residence permit on an identity check. The prefect issued an order for their deportation that was enforceable within ninety days. Between 24 August 1997 (the last day of both their detention and the statutory period allowed for their expulsion) and 11 September 1997 the authorities made three unsuccessful attempts to deport them to Libya. Since there were no direct flights, the applicants had been put on planes for Prague, Cairo and Tunis, where they were to catch connecting flights. However, on each occasion they had been sent back by the authorities in the country of transit as they had refused to continue the journey. Between the attempts to deport them and after their return from Tunis the applicants remained in the custody of immigration officers at Warsaw Airport. They began a hunger strike on 23 September 1997 and were admitted to hospital on 3 October 1997. In the meantime, the prefect's decision had been upheld by the relevant minister. The applicants appealed and on 9 September 1997 the Supreme Administrative Court ordered a stay of execution of the deportation order. The first applicant's appeal was dismissed on 28 October 1997 and the second applicant's appeal on 7 December 1997. In January 1998 the district prosecutor ruled that there were no grounds for prosecuting the immigration officers following a complaint by the applicants about their detention between 25 August and 23 October 1997. He considered that the legal basis for the detention was the Warsaw Airport Immigration-Officers Regulations, which provided that travellers awaiting deportation would be detained on immigration-office premises pending their transfer to the carrier. The district prosecutor noted too that an attempt to execute the deportation order had been made on the final day of the statutory period allowed but had been thwarted by the applicants' resistance. On an appeal by the applicants, the regional prosecutor overturned that decision and remitted the case for re-examination. However, the district prosecutor again ruled that there were no grounds for a prosecution. He noted that every international airport possessed an area set aside for persons who were not authorised to enter a country's territory. Such areas were no longer regarded as places of detention pending deportation, since persons taken there were considered as having been expelled from the territory. He concluded that by refusing to be deported to Libya the applicants had chosen to remain in the immigration offices – which were not designed for lengthy stays – of their own free will. That decision was upheld by the district court sitting as a court of final appeal. The applicants are at liberty in Poland.
Communicated under Article 5(1).

ARTICLE 6

Article 6(1) (civil)

ACCESS TO COURT
Refusal of authorities to enforce court decision ordering closure of power stations: *admissible*.

OKYAY and others - Turkey (N° 36220/97)
Decision 17.1.2002 [Section II]

In 1993 and 1994 the applicants unsuccessfully filed complaints to obtain that three coal-power stations operated by the Ministry of Energy and Natural Resources and a public utility company be closed down. They claimed that these power stations constituted a threat to public health and environment. They instituted proceedings in the Administrative Court against the aforementioned ministry and public utility company as well as the Ministry of Environment and the Governor's Office. They requested that the refusal to shut down the power stations be annulled and that an interim measure to suspend their activities be taken. In February 1996 reports of experts were submitted to the court. The experts noted the emission of toxic fumes from the power stations and the absence of the required filters on the chimneys. In June 1996 the court ordered the suspension of the power stations' activities. The defendants unsuccessfully appealed against this decision. In September 1996 the Council of Ministers decided not to stop the activities of the power stations. In December 1996 the court annulled the administrative decisions refusing to close down the power stations. The Supreme Administrative Court upheld this decision in June 1998 and rejected the request for rectification of the defendant authorities in April 1999. However the three power stations still continue their activities.
Admissible under Article 6(1) (question of applicability joined to the merits).

ACCESS TO COURT
Failure to summon as an interested party an applicant adversely affected by the outcome of the proceedings: *admissible*.

CAÑETE DE GOÑI - Spain (N° 55782/00)
Decision 15.1.2002 [Section IV]

The applicant, a teacher of history and geography, passed a competitive teaching examination and was appointed to a senior teaching post. However, on an application for judicial review by some of the failed candidates the Andalusia High Court of Justice ruled in March 1995 that the examination was invalid; the applicant lost her teaching post as a result. She lodged an appeal with the Constitutional Court complaining that she had not been served with notice to attend the hearing before the High Court of Justice as a party interested in the dispute, as required by section 64(1) of the Law on Administrative Appeals. Her appeal was declared admissible. However, in September 1999 the Constitutional Court dismissed her appeal on the merits, holding that she had been aware of the proceedings so that the failure to serve her with notice to appear had not infringed Article 24 of the Constitution (right to a fair trial).
Admissible under Article 6(1).

ACCESS TO COURT
Prolonged impossibility of obtaining a final court decision in respect of placement of children: *admissible*.

COVEZZI and MORSELLI - Italy (N° 52763/99)
Decision 24.1.2002 [Section II]
(see Article 8, below).

ACCESS TO COURT
Suspension of proceedings due to party's failure to appoint a lawyer after being granted legal aid: *inadmissible*.

RENDA MARTINS - Portugal (N° 50085/99)
Decision 10.1.2002 [Section IV]

Following an accident at work the applicant made an application for legal aid and requested that he be assigned a lawyer to bring an action in damages against his former employer. After being granted legal aid he asked to the Bar Council to assign a lawyer to represent him. Over a period of almost two years four lawyers were assigned to him in turn but each asked to be released from acting. Eventually, the fifth lawyer assigned to represent him issued a civil action, but then declined to act further. Subsequently, after a seventh lawyer had asked to be released from acting for the applicant the President of the Bar Council informed the judge that the reasons given by the assigned lawyers for seeking a release had "primarily" been the applicant's failure to cooperate and his obvious mental problems. One of the lawyers had complained of insulting and physically aggressive behaviour. The president said in conclusion that he would not assign any other lawyer to represent the applicant. The judge then invited the applicant to instruct a lawyer of his choice. Subsequently, noting that the applicant had not done so, he ordered a stay of the proceedings.
Inadmissible under Article 6(1): the State had afforded the applicant the right to assistance by a lawyer through the intermediary of the Bar Council. The decision to stay the proceedings issued by the applicant had been taken "primarily" because the applicant had been uncooperative and had not managed to find a lawyer prepared to represent him in the proceedings. Therefore, that decision had not been arbitrary. Above all, the applicant was still in a position to pursue the proceedings if he found a lawyer ready to represent him and had been granted legal aid by the State for that purpose. Further, the applicant could not complain of the length of the proceedings, the main reason for the delays being his failure to cooperate with the lawyers who had been assigned to him under the legal-aid scheme from which he had benefited: manifestly ill-founded.

ACCESS TO COURT
Refusal of Court of Appeal to grant leave to appeal: *inadmissible*.

DE PONTE NASCIMENTO - United Kingdom (N° 55331/00)
Decision 31.1.2002 [Section III]

In June 1994 the applicant, a Portuguese national, was knocked off his bicycle by a car. In June 1997 he initiated proceedings against the driver of the car. He later left the United Kingdom. In October 1997 the County Court ordered him to file further medical evidence in support of his claim within 28 days, failing which any particulars of injury not substantiated by a medical report would be struck out. Further medical evidence was filed on his behalf, some within 28 days and some later. Following an application lodged by the defendant, the district judge struck out the particulars of injury on the ground that the order of October 1997

had not been complied with. The applicant unsuccessfully appealed against this decision. He then applied to the Court of Appeal for leave to appeal. The Court of Appeal applied a Practice Direction according to which in civil cases leave for a second tier appeal could only be granted if it had a realistic prospects of success and raised a point of principle or disclosed some other reason why it should be heard. Two of the three judges forming the appellate court found after examination that permission to appeal should be refused.
Inadmissible under Article 6(1): As to whether the decision of the Court of Appeal to refuse permission to appeal was a determination of the applicant's civil rights and obligation, the court spent two days hearing oral argument, including on the merits of the case, and two of the three judges engaged in a detailed analysis of the merits of the application in their judgments. Moreover, the effect of the decision of the Court of Appeal was to end the greater part of the applicant's claim. Such a detailed consideration of the case was a determination of the applicant's civil rights and obligations within the meaning of the present provision. As to whether the refusal of leave to appeal was arbitrary, unfair or a denial of the right of access to court, taking into account the State's margin of appreciation, the requirements of the consolidated practice that the applicant would be granted leave for a second tier appeal only if it had a realistic prospect of success and raised a point of principle or disclosed some other reason why it should be heard were reasonable and proportionate measures taken in pursuit of the fair and efficient administration of justice. Contrary to the applicant's contentions, only one of the three judges concluded that the earlier court had reached an incorrect result on the merits. The Court of Appeal's decision to refuse leave to appeal because the majority of the court thought that the application either did not have realistic prospects of success or that the balance of justice lay in upholding the earlier judgment was not arbitrary or unfair: manifestly ill-founded.

REASONABLE TIME
Length of proceedings relating to a winding-up : *violation*.

LAINE - France (Nº 41476/98)
*Judgment 17.1.2002 [Section I]

Facts: In February 1981 a receivership order was made by the commercial court against the applicant, who ran a transport firm in his own name. The court appointed a receiver and an insolvency judge. On application by the receiver the insolvency judge authorised the dismissal of the staff in February 1981, the sale of vehicles in April 1981 and in 1982 and the sale of a piece of land in May 1995. In mid-November 1981 the receiver furnished the insolvency judge with a brief summary of the assets and liabilities and of the reasons for the insolvency. In mid-March 1992 the insolvency judge was replaced. The receiver then took various steps and a number of documents, including a statement of liabilities, were prepared. In October 1995 the commercial court converted the receivership into compulsory bankruptcy in a judgment that was set aside on appeal. A year later the court made a bankruptcy order against the applicant. In the meantime the insolvency judge and the receiver had taken various steps, essentially concerning the creditors. In mid-November 1997 the commercial court declared that the bankrupt's estate had been wound up.
Law: Article 6(1) – the period to be examined ran from the commercial court's judgment in February 1981 to its judgment in mid-November 1997. It had therefore lasted almost sixteen years and nine months. The case had presented no special difficulties and the applicant's conduct had not contributed to any increase in the delays. However, the period of inactivity of almost ten years and four months between mid-November 1981 and mid-March 1992 had been attributable to be national judicial authorities. In the absence of any explanation by the Government, that period of inactivity attributable to the State violated the "reasonable-time" requirement.
Conclusion: a violation (unanimously).

Article 41: the applicant had sustained pecuniary damage as a result of the exceptional length of the proceedings. That justified his being awarded the sums claimed to compensate for the failure to realise assets. The sum was to be revalued at the date of the decision winding up the proceedings. The Court, ruling on an equitable basis, awarded certain sums for non-pecuniary damage and costs and expenses.

IMPARTIAL TRIBUNAL
Same judge carrying out the investigation, submitting the charges and then presiding over the presentation of oral arguments before the Maritime Division of the Regional Court: *communicated*.

BRUDNICKA and others - Poland (N° 54723/00)
[Section III]

The applicants are the widows and mothers of sailors who perished when their ship sank in the Baltic Sea. They took part in an inquiry by the Admiralty Division of the Szczecin Regional Court into the causes of the loss of the vessel. The same judge conducted the investigations and presided over the division. The court held that liability for the loss of the vessel lay with the ship's captain, the ship's technical crew, the Polish Shipping Registry (which had checked the condition of the vessel before the disaster) and the Polish rescue services. That decision was overturned by the Admiralty Appeal Division of the Gdansk Regional Court. Once again, the same judge conducted the investigations and presided over the hearing. Subsequently, the Admiralty Division of the Gdansk Regional Court held that responsibility for the accident lay partly with crew members and that the ship's manager had been at fault for failing to have all necessary repair work carried out, while adverse weather conditions had been a further contributory factor. The Admiralty Appeal Division of the Gdansk Regional Court cleared the ship's manager of all liability for the accident, holding that it was attributable to a breach by the crew members of their duty to act diligently. Some of the judges sitting in the admiralty divisions were retired former employees of the manager and the owner of the vessel concerned. The admiralty divisions did not hear evidence from certain witnesses.
Communicated under Article 6(1) (fair trial/independent and impartial court).

IMPARTIAL TRIBUNAL
Impartiality of judges formerly employed by defending parties: *communicated*.

BRUDNICKA and others - Poland (N° 54723/00)
[Section III]
(see above).

IMPARTIAL TRIBUNAL
Impartiality of Commercial Court due to cumulation of functions of president and *juge-commissaire* in declaration of personal bankruptcy: *inadmissible*.

DELAGE and MAGISTRELLO - France (N° 40028/98)
[Section I]
Decision 24.1.2002 [Section I]

Ms Delage was the manager of a private company (*société à responsabilité limitée*) that was unable to pay its debts owing to financial difficulties. The commercial court, which was presided over by Judge M.K., made an order for the judicial reorganisation of the company under the simplified procedure and appointed M.K. as substitute insolvency judge. A differently constituted bench of the court subsequently ordered the company's liquidation, renewed the appointment of the insolvency judges and appointed a liquidator. At a later date the court ordered an audit of the company of its own motion and appointed M.K. as the full insolvency judge. The liquidator issued proceedings in the same court against Ms Delage, in her capacity as *de iure* manager of the company, and against Mr Magistrello, in his capacity as the *de facto* manager, requesting a receivership order against them, a declaration that they were jointly and severally liable to pay the shortfall in the company's assets and a ruling on whether they were personally bankrupt. State Counsel's Office made submissions at the hearing requesting an order declaring the applicants personally bankrupt. The commercial court, presided over by M.K. assisted by two wing members, made a receivership order and, on the basis of the insolvency judge's report, an order for the liquidation of their assets. Lastly it declared them personally bankrupt for a period of thirty years. The applicants' appeals to the court of appeal and the Court of Cassation were dismissed on the ground that the fact that the insolvency judge had sat on the trial bench was compatible with domestic law and his inclusion in the court that had made the liquidation order against the applicants was compatible with Article 6 of the Convention, even though he was already the insolvency judge responsible for overseeing the company's liquidation.
Inadmissible under Article 6(1): since the judge's subjective impartiality was not disputed, the Court had to examine whether ascertainable facts existed that might raise doubts as to the objective impartiality of the collegiate court that decided the case. Firstly, although it was true that Judge M.K. had presided over the court that had made the order for the judicial reorganisation of the applicants' company, that had been only at an initial stage of the proceedings. Further, in his capacity as substitute insolvency judge, M.K. had not been on the bench that had ordered the company's liquidation having become the full insolvency judge only at a later date, such that there was no appearance of a violation of Article 6 on the facts. The remainder of the complaint concerned the fact that the same judge had acted both as the president of the court and as the insolvency judge when the personal bankruptcy order was made against the applicants. That was a factor that could cause the applicants' doubts as to the court's impartiality. The Court had to examine whether such doubts were objectively justified. The answer depended on the circumstances of the case. The fact that a judge had taken pre-trial decisions, had detailed knowledge of the case file or had carried out a preliminary analysis of the available information could not in itself justify fears of a lack of impartiality. It was necessary to determine whether, regard being had to the nature and extent of the judge's functions before the trial and of the measures adopted, he or she had displayed bias with regard to the decision to be taken at the hearing. That would be the case if the issues dealt with by the insolvency judge were analogous to the issues on which he ruled as a member of the court. In the instant case, in his capacity as insolvency judge, M.K. had made only one order out of a total of seven and that order had not dealt with the issue of the applicants' conduct as managers of the company or the matters that were examined by the court when it declared them personally bankrupt. As to the decision of the court presided over by M.K. to order an audit, summary investigative measures of that type could not suffice to give rise to an objectively justified concern. Furthermore, the court presided over by M.K.

had not assumed jurisdiction to consider the applicants' alleged misconduct as it had been entitled to do but had decided that issue in proceedings brought against the applicants by the liquidator after hearing the submissions of the representative of State Counsel's Office at the hearing. In upholding the allegations of misconduct against the applicants the court had relied on the expert's report and documents produced by the liquidator. There was no reference in the reasons set out in the judgment to the insolvency judge's report or the order he had made. Moreover, the court had not delivered its decision until the parties had been permitted to exchange notes to the court in deliberations and had produced further evidence. The applicants had raised no objection to the fact that the president of the commercial court had acted as the insolvency judge either at the hearing, in which Judge M.K. himself had sat with his wing members, or in a note to the court in deliberations. In determining the applicants' liability, the court had made no reference to the insolvency judge's report. Lastly, the commercial court's judgment had been upheld on appeal after an adversarial hearing. Accordingly, there was no objective reason for believing that the nature and extent of the insolvency judge's functions during the prior proceedings would lead to bias on the separate issue to be decided by the commercial court regarding the managers' conduct. Even supposing that domestic remedies had been exhausted despite the failure to challenge the judge concerned, the applicants' fears were not objectively justified in the instant case: manifestly ill-founded.
[This decision applies the principles established in the case of Morel v. France of 6 June 2000, to be published in ECHR 2000-VI.]

Article 6(1) [criminal]

FAIR HEARING
Fresh evidence adduced by defendant in rape case refused by Court of Appeal: *inadmissible*.

OYSTON - United Kingdom (N° 42011/98)
Decision 22.1.2002 [Section IV]

In May 1996 the applicant was convicted of raping and indecently assaulting J., a young woman, and was sentenced to imprisonment. At the trial, J. gave evidence and explained how the applicant had sexually abused her in 1992. At the end of her examination by the prosecution, the applicant's counsel sought leave, pursuant to section 2(1) of the Sexual Offences (Amendment) Act 1976, to cross-examine her about her sexual experience with another man, M., who had introduced her to the applicant, and notably about how M. had raped her and about the alleged control he exerted over her. Leave was granted. It was the defence's case that J. was obsessed by hatred of M. and it was this which had motivated her allegation against the applicant. L., another young woman who was present at the time of the alleged rape by the applicant, gave evidence for the defence and denied that J. had been sexually abused by him. She was asked in cross-examination about her sexual relationships and about an abortion which she had had at around that time. In June 1997 the applicant was granted leave to appeal against conviction and sentence. He applied at the same time for leave to adduce fresh evidence with a number of new witnesses. One of them was a young man with whom J. had had a sexual relationship in 1992. The applicant's counsel asserted that J.'s relationship with the young man showed that she was not as vulnerable as she appeared to be. In December 1997 the Court of Appeal dismissed the applicant's appeal. It held that to seek to introduce this evidence simply to counter the impression that J. was making in the witness box was a paradigm of the type of conduct that section 2 of the 1976 Act was designed to prevent and that the fact that J. had had a brief relationship with the young man before or after the date on which the offences were alleged to have been committed by the applicant was in

itself of no relevance to the question of whether she was raped and indecently assaulted by the applicant. The court found the other elements of fresh evidence to be of no greater relevance.
Inadmissible under Article 6(1) and (3)(d): Whilst a defendant must be given an adequate and proper opportunity to challenge and question a witness against him, there may be circumstances where restrictions on access to evidence or to a witness may be necessary or unavoidable. In such cases Article 6(1), taken together with Article 6(3), requires that the handicaps under which the defence labours be sufficiently counterbalanced by the procedures followed by the judicial authorities. Although the interests of victims or witnesses are not expressly taken into account in Article 6, they may be regarded as protected by the other substantive provisions of the Convention. Criminal proceedings should be organised in such a way that those interests are not unjustifiably imperilled and this may require striking a fair balance between the interests of the defence and those witnesses or victims called upon to testify. In the instant case, the applicant could not complain of inequality of arms at the trial as regards the questioning of witnesses. Although the 1976 Act places certain restrictions on the cross-examination at trial of an alleged rape victim, it was not alleged that the applicant's counsel was hindered from putting such questions to J. as were regarded as necessary for the applicant's defence. The Court was not prepared to rule, in the abstract, that the operation of section 2(1) of Act differentiated between female victims of rape and female witnesses for the defence in a manner incompatible with Article 6. While the relevance of the question posed to L. about an abortion was less apparent, it could not be regarded as rendering the trial unfair. It would have been possible to object to any improper line of questioning put to L. There were also limits applicable to the questions to L., which were subject to the overriding discretion of the judge. Thus the trial itself was not shown to offend any of the principles of Article 6. The applicant also complained that the proceedings were nonetheless rendered unfair by the way the Court of Appeal had handled his appeal against conviction. According to the applicant, the question of the credibility of J. was crucial as the jury had essentially to decide who of J. or L. was lying. He argued that it was not for the Court of Appeal to attempt to second-guess what effect the additional evidence would have had on the jury's views. In this respect, he referred to the case of Condron v. the United Kingdom, where the Court held that the failure of the trial judge to give proper direction to the jury was a defect that could not be remedied on appeal. However, the facts of the present case were more analogous to those in Edwards v. the United Kingdom where, as in this case, the Court of Appeal had reviewed evidence which had come to light after the applicant's trial. The Court had found that the rights of the defence were secured by the proceeding before the Court of Appeal, where the applicant's counsel had every opportunity to seek to persuade the court that the conviction should not stand in light of the new material, and that the Court of Appeal was able to assess for itself the value of the new evidence and to determine whether the availability of the information at trial would have disturbed the jury's verdict. There was no reason to reach a different conclusion in the present case. The test applied by the Court of Appeal as to the safety of the conviction in the circumstances of the applicant's case was not incompatible with the requirements of Article 6. Taken as whole, the applicant's trial and appeal complied with Article 6: manifestly ill-founded.

FAIR HEARING
Use at trial of private recordings made without the knowledge of the accused: *inadmissible*.

TURQUIN - France (N° 43467/98)
Decision 24.1.2002 [Section I]

The applicant reported the disappearance of his young son to the police. An inquiry into his domestic circumstances revealed that he and his wife had begun divorce proceedings and that relations between them were strained. It emerged from the inquiry that there may have been an abduction by a member of the family and a judicial investigation was consequently started on that basis. The applicant's wife, who had joined the proceedings as a civil party, produced recordings of conversations with the applicant to the investigating judge. They had been made without the applicant's knowledge and contained an admission by him that he had killed their son. A transcript of the recordings was lodged on the case file. The applicant was then charged with murder and detained pending trial. He alleged that the recording was a fabrication, but that suggestion was refuted by an expert. The applicant then acknowledged that the recording was genuine but sought to justify what he had said by the course the conversation with his wife had taken, implying that his words did not reflect the truth but had been a strategy aimed at getting her to come back to live with him. The applicant was committed to stand trial before an assize court on a charge of premeditated murder by the indictment division of the court of appeal after it had dismissed his application for the procedural documents referring to the recordings made by the civil party to be declared invalid. The applicant's appeal against the committal order was dismissed. He lodged a criminal complaint against his wife concerning the recordings that had been made without his knowledge and handed over to the authorities, but to no avail. Meanwhile, even though the child's body had not been found he was convicted and sentenced to twenty-years' imprisonment. He lodged an appeal without success to the Court of Cassation, arguing notably that the assize court had refused to admit in evidence cassettes from separate proceedings which would have supported the defence case.
Inadmissible under Article 6(1): the national courts had not considered the recording to have been obtained in violation of the applicant's right to private life: on the contrary, they regarded it as relevant to the determination of the truth in criminal proceedings. The fact that there were no rules of domestic law governing the admissibility of evidence produced by the parties to proceedings and that that evidence constituted the basis on which the judges reached their verdict, was not in itself incompatible with the requirements of Article 6(1), in that it appeared that the applicant had at no stage denied the content of the recording, had been given various opportunities to make representations during questioning and had been able to lodge with the court the observations he considered necessary regarding the authenticity of the recording and the use made of it. The recording had been authenticated by an expert, the court had answered the applicant's arguments and, lastly, the applicant had not made any observation or claim regarding the authenticity of the recording when it was produced in evidence before the assize court. For those reasons, the applicant had been convicted after adversarial process. It also had to be noted that the recording was not the only evidence the judge and jury had before them when reaching their verdict in their unfettered discretion. Further, the assize court's decision not to grant the applicant's request for an adjournment of the case had not been arbitrary: manifestly ill-founded.

Article 6(3)(d)

EXAMINATION OF WITNESSES
Limitations on cross-examination of alleged rape victim: *inadmissible*.

OYSTON - United Kingdom (N° 42011/98)
Decision 22.1.2002 [Section IV]
(see Article 6(1) [criminal], above).

ARTICLE 8

PRIVATE LIFE
Refusal of authorities to give undertaking not to prosecute husband of applicant suffering from terminal illness should he assist her to commit suicide: *communicated*.

PRETTY - United Kingdom (N° 2346/02)
[Section IV]
(see Article 2, above).

PRIVATE LIFE
House visit ordered and carried out under Article L. 16 B of the Book on Tax Procedure: *inadmissible*.

KESLASSY - France (N° 51578/99)
Decision 8.1.2002 [Section II]
(see below).

FAMILY LIFE
Parents deprived of all contact with their four children as a result of court decisions ordering placement of the children in four different homes: *admissible*.

COVEZZI and MORSELLI - Italy (N° 52763/99)
Decision 24.1.2002 [Section II]

The applicants are a married couple who have four minor children. One of their children's cousins gave a statement to the public prosecutor alleging that she, her brother and her cousins had been subjected to sexual abuse by her parents and other adults, including the applicants' parents. In November 1998, without hearing evidence from the applicants, the youth court found that the applicants had neglected their parental duties by failing to notice that their children had been subjected to repeated sexual abuse and by continuing to let them stay with their grandparents. Consequently, it ordered the removal of the children from the family home and suspended the applicants' parental rights, vesting them in the social-services department. All contact with the children was suspended "until such time as the parents' protective role had been reinstated". The applicants were not informed where the children had been placed. They subsequently learned that they had been put in four different children's homes. At the beginning of 1999 supervised contact between the applicants and their children took place and there were meetings with the social services. In March 1999 a psychologist

confirmed in a report that the applicants' children had been victims of sexual abuse. The applicants were then heard by the youth court in conditions which they said were highly unfavourable. The youth court then ordered an expert report on their personalities, their fitness to exercise parental authority and their relations with their children. The applicants unsuccessfully challenged the care order and the psychologist's report. They also made applications for the children to be put in the care of another local authority and placed together in the same home and for the right to visit their children, but they were dismissed. In the meantime, one of the children stated that he had been subjected to sexual abuse by Mr Covezzi, with Ms Morselli's complicity. Investigations were consequently started into the allegation against the applicants. In October 1999 the public prosecutor obtained an extension of time until April 2000 in which to conduct the preliminary investigation. In March 2001 the applicants were committed to stand trial. Their requests for the children to be placed in the same home were dismissed by the youth court. The applicants also requested that a final decision be taken regarding their children's position. Their appeal against the youth court's decision of December 1999 rejecting their application was declared inadmissible on the ground that it was a provisional, urgent measure against which there was no right of appeal. By a decree issued in 2000 the youth court declared that the applicants' parental authority had lapsed. Their appeal was dismissed. In September 2000 the youth court issued an order prohibiting the applicants from sending anything to the children. At the date this decision was adopted, the case had not been decided on the merits.
Admissible under Articles 6(1), 8 and 13: Government's preliminary objection under Article 34 – at the time the application was made the applicants' parental authority was merely suspended (they had not lost it altogether until a later date) such that, in accordance with the *Scozzari and Giunta v. Italy* precedent, the applicants could, as the natural parents, claim to act before the Court on behalf of their children as well as on their own behalf. Indeed, it was precisely because the case had not yet been decided on the merits that the possibility that the applicants also had vested in them their children's own interests could not be excluded beforehand: objection dismissed.

HOME
House visit ordered and carried out under Article L. 16 B of the Book on Tax Procedure: *inadmissible*.

<u>KESLASSY - France</u> (N° 51578/99)
Decision 8.1.2002 [Section II]

The applicant owned companies whose premises were searched under a judicial warrant. The searches, which involved the seizure of documents, were carried out by senior law-enforcement officers on the companies' business premises, some of which were located in the applicant's home. The warrant had been issued pursuant to Article L.16 of the Code of Tax Procedure for the purpose of seeking evidence that the companies were in breach of their tax obligations. In order to establish the existence of a presumption of fraud by the companies the judge who issued the search warrant referred, *inter alia*, to a typewritten letter, an anonymous statement and to previous proceedings that had been brought on a complaint lodged by the Tax Evasion Department following an audit of the accounts of one of the companies concerned. The Court of Cassation dismissed the applicant's application to have the warrant set aside, holding that there had been sufficient evidence before the judge to give rise to a presumption of tax fraud by the companies and to justify issuing a search warrant.
Inadmissible under Article 8: the applicant's submission that he had been the "victim" of an interference with his right to respect for his home within the meaning of Article 8 of the Convention was well-founded in so far as it concerned his personal residence, which was used both by the companies and by him privately. It was unnecessary for the Court to answer the question whether the applicant could assert that he was a "victim" personally as regards the searches effected in the premises used by the companies which he controlled either directly or

indirectly at the material time, as the application was in any event ill-founded. The searches and seizures amounted to an “interference” in the exercise of the right to respect for his private life and home. That interference was in accordance with the law and pursued the legitimate aims of protecting the economic well-being of the country and the prevention of crime. The judicial authority was entitled to consider, within its margin of appreciation, that the search was necessary for obtaining evidence of the presumed tax offences and the reasons on which it had relied to justify that presumption were relevant and sufficient. The search had been carried out in accordance with the strict guarantees required by the applicable domestic procedure, which essentially entailed duly justified prior judicial authorisation and judicial supervision of the search and seizure procedures, which were effected by senior law-enforcement officers. The judge had issued a reasoned order identifying the factors which gave rise to the presumption of fraudulent conduct. He had given special instructions regarding the implementation of the search and had supervised the entire search operation. Accordingly, regard being had to the strict rules of domestic law governing searches and to the fact that those rules had been complied with during the searches, the interference had been proportionate to the legitimate aims pursued and necessary in a democratic society: manifestly ill-founded.

CORRESPONDENCE
Control of prisoner’s correspondence, in particular with his lawyer and with the European Commission of Human Rights: *violation*.

A.B. - Netherlands (Nº 37328/97)
*Arrêt 29.1.2002 [Section II]

Facts: The applicant was sentenced to a period of imprisonment in the Netherlands Antilles. His lawyer, a former inmate of the prison who had not represented him in the criminal proceedings, complained to various authorities that his letters to the applicant had been opened and withheld, despite being marked “from lawyer to client”. Correspondence between the applicant and the European Commission of Human Rights was also opened by the prison authorities.
Law: Government’s preliminary objection – It appeared from various reports, in particular reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), that the situation in the Netherlands Antilles prisons was, and continued to be, characterised by serious structural problems. There existed a remedy before the civil courts, whereby prisoners might obtain a ruling as to the compatibility of administrative acts with their Convention rights and, if need be, obtain injunctions, and the applicant had not availed himself of that remedy. However, it clearly appeared that the authorities of the Netherlands Antilles had remained totally passive for more than a year in complying with court injunctions ordering them to repair rather serious structural shortcomings of an elementary hygienic and humanitarian nature in prison facilities. In the absence of convincing explanations from the Government for the failure to take the necessary measures within a reasonable time to rectify the problems criticised in the reports and to comply with the court orders, there were special circumstances which dispensed the applicant from the obligation to exhaust the remedy referred to.
Article 8 – It was not contested that the prison authorities had interfered with the applicant’s right to respect for his correspondence. Moreover, the interferences had a legal basis.
(a) correspondence with the Commission – no reasons had been disclosed or substantiated which could justify the control of the applicant’s correspondence with a Convention organ, the confidentiality of which must be respected.
Conclusion: violation (unanimously).
(b) correspondence with lawyer – the rules at the time did not allow a prisoner to correspond with a former inmate, but while it may be necessary to control such correspondence having

regard to the ordinary and reasonable requirements of imprisonment, there were no grounds justifying a blanket prohibition.
Conclusion: violation (unanimously).
(c) other correspondence – the applicant's allegations were wholly unsubstantiated and while under the rules in force at the time his correspondencen would have been subject to control, in the absence of concrete evidence the facts did not disclose a violation.
Conclusion: no violation (unanimously).
(d) limited facilities for letter-writing and telephoning – the rules in force at the time allowed detainees to send two or three letters per week and to receive letters at all times, and the costs of writing materials and postage were borne by the prison authorities. In these circumstances, the possibilities for the applicant to maintain contact by letter with persons outside prison were not arbitrarily or unreasonably restricted. As to telephone facilities, Article 8 cannot be interpreted as guaranteeing prisoners the right to make telephone calls, in particular where the facilities for contact by way of correspondence are available and adequate. Where telephone facilities are provided, they be made subject to legitimate restrictions.
Conclusion: no violation (unanimously).
Article 13 – In view of the finding in respect of the Government's preliminary objection, and in particular the lack of adequate implementation by the authorities of court orders to repair the shortcomings in prisons, as well as the failure to implement the recommendations of the CPT, the applicant did not have an effective remedy in respect of his Convention complaints.
Conclusion: violation (unanimously).
Article 41 – The Court awarded the applicant € 3,500 in respect of non-pecuniary damage.

ARTICLE 10

FREEDOM OF EXPRESSION
Leader of political party prevented from entering south-east Turkey where meetings of his party were to take place: *communicated*.

KARAKOÇ and DEMOKRASİ BARIŞ PARTİSİ - Turkey (N° 43609/98)
[Section III]

The first applicant is the chairman of the Democracy and Peace Party (*Demokrasi Bariş Partisi*), the second applicant. The party's leaders decided that the first applicant should visit several towns in the south east of the country with members of the management committee in order to meet the local population and civilian bodies. The programme for the visit was sent to the governors of the towns concerned in order to obtain the necessary authorisations. Once the party leaders had reached their destination, they were advised that because of the state of emergency that had been declared there the Regional Governor had prohibited their visit to the region on the basis of section 11, sub-paragraph (k) of Law no. 2935, which relates to the "establishment of the region where the State of Emergency has been declared". That provision laid down that any person or group could be banned from entering all or part of the region covered by the state of emergency or be expelled from it.
Communicated under Articles 10, 11, 13 and 14.

FREEDOM OF EXPRESSION
Prohibition on making statements to general public on dangers to health of microwave ovens, allegedly scientifically proved, without referring to current differences of opinion: *inadmissible*.

HERTEL - Switzerland (N° 53440/99)
Decision 17.1.2002 [Section III]

The applicant carried out research into the effects on human beings of the consumption of food cooked in microwave ovens and published a study where he concluded that following consumption of microwaved food a change in the blood was perceptible which seemed comparable to the initial stage of cancer. Subsequently, an article based on the study and including it was published in a periodical. The article was entitled "Microwave ovens: a health hazard. Irrefutable scientific evidence" and the illustration on the cover page of the issue represented the grim reaper with a microwave oven. In March 1993, following an application lodged by the Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances (MHEA), the Commercial Court issued an injunction under the Unfair Competition Act, prohibiting the applicant from making public statements that food cooked in microwave ovens was a danger to health in that it was carcinogenic. The injunction was confirmed by the Federal Court in February 1994. On 25 August 1998, in relation to a first application lodged with the Convention organs by the applicant, the Court found that the injunction in issue constituted a breach of Article 10. In October 1998 the applicant applied to the Federal Court notably for the reopening and annulment of its judgment of February 1994. In a judgment of March 1999 the Federal Court held that the applicant was prohibited only from making statements to the general public whereby dangerous effects of microwaved food were presented as scientifically proved without mention of current differences of opinion. It also prohibited the applicant from using in publications or public lectures any symbols of death. It added that he was not prevented from taking part in the debate on the effects on health of the consumption of food cooked in microwave ovens and that he was free to express his views, provided that he did not do so in statements addressed to the general public in such a way as to convey the false impression that they reflected scientifically proved findings.
Inadmissible under Article 10: The impugned injunction prohibited the applicant from making statements to the general public that the dangers of microwave ovens were scientifically proved without referring to current differences of opinion and also from using symbols of death in relation to the issue. It constituted an interference with the applicant's freedom of expression. In its previous judgment, the Court found that the injunction was prescribed by law, namely by the Unfair Competition Act, and that it pursued the legitimate aim of protection of the rights of others. It remained to be determined whether the interference was necessary in a democratic society. The applicant's freedom of expression had to be balanced against the need to protect the rights of the members of the MHEA. First had to be considered the seriousness of the interference with the applicant's rights. The injunction resulting from the Federal Court's judgment of March 1999 no longer prevented him from generally disseminating his views, but required him to make reference to "current differences of opinion" when referring to scientifically proved results in statements to the general public. This limitation of his right was a minor one, as it no longer affected substantially his ability to put forward his views to the general public. The injunction prohibited the applicant from using the grim reaper as a symbol associated to his views against microwave ovens. However, considering that the applicant submitted that he was not responsible for the use of this symbol in the journal, the restriction it constituted was of a limited nature. As regards the interests of the MHEA, the association had a legitimate interest in having fair competition ensured. It did not appear unreasonable to hold, as the Federal Court did in its judgment of March 1999, that the obligation to refer to current differences of opinion served to prevent inaccurate, misleading or unnecessarily damaging and unfair statements with regard to the competitive position of the MHEA. Having regard to the care

with which the Federal Court balanced the various interests in its judgment of March 1999, the interference with the applicant's rights appeared to be proportionate to the aims pursued and could reasonably be considered necessary in a democratic society: manifestly ill-founded.

ARTICLE 11

FORM AND JOIN TRADE UNIONS
Prohibition of strike organised by trade union: *inadmissible*.

UNISON - United Kingdom (N° 53574/99)
Decision 10.1.2002 [Section III]

The applicant is a trade union for public service employees. In 1998, the University College Hospital in London (UCLH) was negotiating to transfer part or parts of its business to private companies which were to erect and run a new hospital for it. The taking over of this activity by private companies involved most of the employees of UCLH being transferred to these companies. The applicant union tried to obtain from UCLH an assurance that the private companies would offer to the transferred employees the same protection and rights as those existing for UCLH personnel, but UCLH refused to accede to this request. The applicant union called a strike but the High Court, on an application by UCLH, issued an injunction prohibiting the strike. The court noted, *inter alia*, that the dispute related to future terms and disputes with an unidentified future employer which as such were not covered by the relevant legislation on strikes. The appeal lodged by the applicant union was unsuccessful and the House of Lords rejected its petition for leave to appeal.
Inadmissible under Article 11: While Article 11 includes trade union freedom as a specific aspect of freedom of association, it does not secure any particular treatment of trade union members by the State. There is no express inclusion of a right to strike or an obligation on employers to engage in collective bargaining. At most, Article 11 may be regarded as safeguarding the freedom of trade unions to protect the occupational interests of their members. While the ability to strike represents one of the most important of the means by which trade unions can fulfil this function, there are others. Moreover, Contracting States are left with a choice of means as to how the freedom of trade unions ought to be safeguarded. In the present case, the prohibition of the strike had to be regarded as a restriction on the applicant's power to protect the occupational interests of its members and therefore disclosed a restriction on the freedom of association. It was not disputed that the measure was prescribed by law. As to the legitimate aim pursued by the impugned measures, the employer UCLH could claim that its ability to carry out its functions effectively, including the securing of contracts with other bodies, might be adversely affected by the actions of the applicant and accordingly the measures taken to prevent the strike concerned the rights of others, namely those of UCLH. The necessity of the measure remained to be determined. The applicant claimed that the new employer would be in a position to give notice of dismissal while offering new contracts on less advantageous terms and that, to the extent that a transferee company was bound by any existing recognition of the applicant or existing collective agreements, this company would be able to repudiate them. As regards the applicant's first argument, the transferee company could face actions for unfair dismissal by any employee threatened with such a measure. As regards its second argument, any employer, including UCLH, has the ability, in appropriate circumstances, to de-recognise a union or repudiate a collective agreement, which has not been made legally enforceable. Therefore, it appeared to be a risk faced by all trade unions and their members under the legal framework in force. Furthermore, under legislation which recently entered into force (Schedule 1A to the Trade Union and Labour Relations (Consolidation) Act 1992), the applicant could, provided certain conditions were complied with, compel an employer to recognise it for the purposes of

collective bargaining. The applicant strongly objected to the Government's policy whereby public bodies were encouraged to buy services from, or contract out functions to, private companies. Although it was understandable that employees faced with transfer from a public service to the private sector felt vulnerable, it was not for the Court to determine whether this method of providing services was a desirable or damaging policy. The applicant was able to take strike action if the UCLH took any step itself to dismiss employees or change their contracts prior to the transfer and it could seek to take action against any transferee company that in the future threatened the employment of its members or to de-recognise the applicant. While the applicant emphasised that this might involve individual strike action against a number of different companies in the future, as opposed to one large hospital trust before the commercial transfer started, this did not necessarily imply that they were deprived of the possibility of an effective action in the future. As regards the argument that the applicant's interests in protecting its members ought to weigh more heavily than the UCLH's economic interest, the impact of the restriction on the applicant's ability to take strike action was not shown to place its members at any real or immediate risk of detriment or of being left defenceless against future attempts to downgrade pay or employment conditions. When, and if its members were transferred, it could continue to act on their behalf as a recognised union and negotiate with the new employer in ongoing collective bargaining machinery. However, it could not claim under the Convention a requirement that an employer enter into, or remain in, any particular collective bargaining arrangement or accede to its request on behalf of its members. Therefore, the respondent State did not exceed the margin of appreciation accorded to it in regulating trade union action and the prohibition on the applicant's ability to strike could be considered as a proportionate measure and necessary in a democratic society for the protection of the rights of others, namely UCLH: manifestly ill-founded.

FREEDOM OF PEACEFUL ASSEMBLY
Leaders of political party prevented from entering south-east Turkey where meetings of the party were to take place: *communicated*.

KARAKOÇ and DEMOKRASİ BARIŞ PARTİSİ - Turkey (N° 43609/98)
[Section III]
(see Article 10, above).

ARTICLE 34

VICTIM
Victim status accorded to applicant complaining about visit to and seizure of documents in his company offices located in his home.

KESLASSY - France (N° 51578/99)
Decision 8.1.2002 [Section II]
(see Article 8, above).

LOCUS STANDI
Locus standi of applicants whose parental rights have been suspended, in respect of an application purportedly also on behalf of their children.

COVEZZI and MORSELLI - Italy (N° 52763/99)
Decision 24.1.2002 [Section II]
(see Article 8, below).

ARTICLE 35

Article 35(1)

EXHAUSTION OF DOMESTIC REMEDIES (Turkey)
Failure of applicant to appeal against decision of public prosecutor not to prosecute village guards responsible for death of her husband in south-east Turkey: *inadmissible*.

EPÖZDEMİR - Turkey (N° 57039/00)
Decision 31.1.2002 [Section III]

In June 1998 the applicant's husband failed to return home. In September 1998 the applicant filed a petition with the Siirt public prosecutor, informing him of her husband's disappearance. She also told the prosecutor that her husband was suffering from serious psychological problems. In March 1999 the public prosecutor discontinued the investigation into his disappearance. He concluded that he had not disappeared in suspicious circumstances and that no evidence of a crime had been discovered. In April 1999 the uncle of the applicant's husband obtained a copy of the family registry from the registry office for an unrelated matter. There was an entry in the records to the effect that the applicant's husband had been killed in July 1998. Subsequently, the uncle went to see the Dargeçit public prosecutor to ask for clarification. The public prosecutor told him that no one knew where the applicant's husband was buried and that there was no duty for the authorities to hand his body over to the family. He added that following the applicant's husband's death, his file had been sent to the Diyarbakır State Security Court so that the court would decide whether to prosecute him for membership of the PKK. The decision was taken not to prosecute him posthumously. The applicant later obtained a copy of the post mortem report of July 1998. According to the statement of a village guard which had been included in the report, the applicant's husband had been shot dead during a clash between a PKK group, with whom he was, and village guards. In May 1999 the applicant asked for a copy of the investigation file

from the Diyarbakır State Security Court. In June 1999 she asked the court that the village guards whose names appeared in the post mortem report be prosecuted for the murder of her husband. She also stated that her husband had never been involved in any way with the PKK and that he was suffering from psychological problems at the time. In September 1999 the State Security Court prosecutor decided not to prosecute the village guards. The applicant did not appeal against the prosecutor's decision.
Inadmissible under Articles 2 and 13: The applicant argued that she was not required to pursue any further remedies since there was an administrative practice in south-east Turkey which made any remedies illusory. However, she did avail herself of a domestic remedy in requesting the office of the public prosecutor to conduct an investigation to establish the cause of her husband's death and prosecute those responsible for it. Furthermore, she had not sufficiently substantiated that she had been subjected to intimidation or referred to any specific facts indicating that she would have risked reprisals or intimidation had she lodged an appeal. Moreover, in the event that there were no effective domestic remedies, she would have been required under Article 35(1) to lodge her application within six months from the date on which she became aware of her husband's death. She failed to do so and it was assumed that the application to the public prosecutor was a relevant domestic remedy. In the Turkish legal system, in such circumstances an investigation will be carried out by the public prosecutor, who will take the decision whether to prosecute the alleged perpetrators. In the event that a decision not to prosecute is issued, as in the present case, Article 165 of the Code of Criminal Procedure affords the possibility of appealing to a court, leave to appeal being automatically granted in such cases and any interested party being informed about the possibility of lodging an appeal. Therefore, a decision not to prosecute is not final until the time-limit for an appeal has expired. To the extent that it could be argued that the public prosecutor's decision was not being justified by the available evidence, it was open to the applicant to avail herself of this ordinary and accessible remedy and to appeal to an Assize Court, which could have directed that a prosecution or other investigation measures be carried out. Although the decision not to prosecute the village guards, whose names were known, suggested that the clear wording of Article 463 of the Penal Code was disregarded by the prosecutor, the applicant could have brought the issue to the attention of the appeal judge and thus increased substantially her prospects of success, as it was not established that such an appeal would have been devoid of success. Consequently, the applicant could not be considered as having complied with the requirement of exhaustion of domestic remedies: non-exhaustion.

SIX MONTH PERIOD

Six month period starting to run when applicants became or should have become aware of circumstances which made domestic remedies ineffective: *inadmissible*.

HAZAR and others - Turkey (N[os] 62566/00-62577/00 and 62579-62581/00)
Decision 10.1.2002 [Section I]

In October 1993 clashes took place between security forces and PKK militants in the district of Lice in south-east Turkey. The incidents resulted in the deaths of 16 people, injuries to 35 others and the destruction of a great number of properties, including the applicants' homes or shops. Following these incidents, the applicants all applied to the Magistrates' Court for an assessment of the damage sustained. Criminal proceedings are still pending before the Public Prosecutor's office at the State Security Court.
Inadmissible under Articles 3, 5, 6, 8, 13, 14 and 18 of the Convention and 1 of Protocol N° 1: If no effective remedies are available, the six-month time-limit starts running in principle from the date of the act complained of. However, special considerations can apply in exceptional cases where applicants who availed themselves of a domestic remedy only became aware, or should have become aware, at a later stage of circumstances that made that remedy ineffective. In such instances, the six-month period may be calculated from that time.

In the present case, the applicants were aware of the destruction of their properties as of 23 October 1993. Following their request, the Magistrates' Court determined the damage in November 1993. The applicants did not avail themselves of any further remedies, which they considered ineffective. On 29 November 1994, their representative introduced before the Convention organs 201 applications concerning the same incident, in which it was also alleged that no effective remedies were available. In view of these elements, assuming that there were no effective remedies, both the applicants and their representative must have been aware of this situation no later than 29 November 1994 and should have introduced their applications within six months from then. The applications having been introduced on 6 October 2000, they were not submitted to the Court within the six months' time-limit.

SIX MONTH PERIOD
Six month period starting to run when applicants become or should have become aware of circumstances which made domestic remedies ineffective: *inadmissible*.

BAYRAM and YILDIRIM - Turkey (N° 38587/97)
Decision 29.1.2002 [Section IV]

In April 1994 the first applicant's husband and the second applicant's son were travelling in a vehicle which hit a mine placed on the road and exploded. They both died in the explosion. The public prosecutor launched an investigation into the incident. In May 1994 he issued a decision whereby the incident fell within the competence of the prosecutor's office attached to the Diyarbakır State Security Court, as he suspected unidentified members of the PKK of being responsible. In September 1997 the applicants lodged a petition with the office of the public prosecutor of the State Security Court in order to obtain information about the investigation. The public prosecutor replied on the same day that the investigation was ongoing. The applicants have received no information on the investigation ever since.
Inadmissible under Articles 2, 6 and 13: If no effective domestic remedies are available, the six-month time-limit starts running in principle from the date of the act complained of. However, special considerations can apply in exceptional cases where an applicant who availed himself or herself of a domestic remedy only became aware, or should have become aware, at a later stage of circumstances that made this remedy ineffective. In such instances, the six-month period may be calculated from that time. In the present case, the event complained of by the applicants took place in April 1994, while they lodged their petition with the Diyarbakır Public Prosecutor in September 1997, i.e. almost three and a half years later. They argued that they became aware of the ineffectiveness of the domestic remedies following the reply to their petition. However, assuming that there were no effective domestic remedies, the applicants must be considered to have been aware of the lack of any effective criminal investigation long before they petitioned the public prosecutor. If, as they alleged, they became aware of it only in September 1997, it must be attributed to their own negligence. Furthermore, they failed to substantiate the existence of specific circumstances which could have prevented them from observing the six-month time-limit set under Article 35(1).

ARTICLE 41

JUST SATISFACTION
Length of civil proceedings: recognition of pecuniary damage.

LAINE - France (Nº 41476/98)
*Judgment 17.01.2002 [Section I]
(see Article 6(1), above)

ARTICLE 44

Article 44(2)(b)

The following judgments have become final in accordance with Article 44(2)(b) of the Convention (expiry of the three month time limit for requesting referral to the Grand Chamber) (see Information Note No. 35):

STANKOV and THE UNITED MACEDONIAN ORGANISATION ILINDEN - Bulgaria (Nº 29221/95 and Nº 29225/95)
Judgment 2.10.2001 [Section I]

G.B. - France (N° 44069/98)
Judgment 2.10.2001 [Section III]

IŁIOWECKI - Poland (Nº 27504/95)
BEJER - Poland (Nº 38328/97)
Judgments 4.10.2001 [Section IV]

PAREGE - France (Nº 40868/98)
SCHWEIGHOFER and others - Austria
(Nº35673/97, Nº 35674/97, Nº 6082/97 and Nº 37579/97)
Judgments 9.10.2001 [Section III]

HOFFMANN - Germany (Nº 34045/96)
H.T. - Germany (Nº 38073/97)
RODRIGUEZ VALIN - Spain (Nº 47792/99)
DIAZ APARICIO - Spain (Nº 49468/99)
KALANTARI - Germany (N° 51342/99)
Judgments 11.10.2001 [Section IV]

ELIAZER - Netherlands (Nº 38055/97)
Judgment 16.10.2001 [Section I]

BRENNAN - United Kingdom (Nº 39846/98)
O'HARA - United Kingdom (Nº 37555/97)
Judgments 16.10.2001 [Section III]

INDELICATO - Italy (N° 31143/96)
Judgment 18.10.2001 [Section II]

TRIPODI - Italy (Nº 40946/98)
Judgment 23.10.2001 [Section III]

SAGGIO - Italy (N° 41879/98)
Judgment 25.10.2001 [Section II]

PIRES - Portugal (Nº 43654/98)
Judgment 25.10.2001 [Section IV]

BÜRKEV - Turkey (Nº 26480/95)
KANBUR - Turkey (Nº 28291/95)
BAŞPINAR - Turkey (Nº 29280/95)
HASAN YAĞIZ - Turkey (Nº 31834/96)
ADIYAMAN - Turkey (Nº 31880/96)
GENÇ - Turkey (Nº 31891/96)
PEKDAŞ - Turkey (Nº 31960/96)
AKÇAM - Turkey (Nº 32964/96)
KESKIN - Turkey (Nº 32987/96)
KARADEMIR - Turkey (Nº 32990/96)
AKYAZI - Turkey (Nº 33362/96)
İNAN - Turkey (Nº 39428/98)
Judgments 30.10.2001 [Section I]

DEVLIN - United Kingdom (Nº 29545/95)
PANNULLO and FORTE - France (N° 37794/97)
Judgments 30.10.2001 [Section III]

SOUSA MIRANDA - Portugal (Nº 43658/98)
Judgment 30.10.2001 [Section IV]

SOLAKOV - Former Yugoslav Republic of Macedonia (Nº 47023/99)
Judgment 31.10.2001 [Section II]

111 judgments concerning Italy
(see Appendix)

ARTICLE 3 OF PROTOCOL No. 1

VOTE
Restriction on a convicted prisoner's right to vote: *communicated*.

HIRST - United Kingdom (N° 74025/01)
[Section III]

The applicant is a prisoner serving a discretionary life sentence for manslaughter. The applicant's tariff – the period of detention relating to retribution and deterrence – expired in or about 1983 and his continued detention is based on considerations relating to risk and danger to the public. According to section 3 of the Representation of the People Act 1983, the applicant is barred from voting in parliamentary elections. He brought proceedings under section 4 of the Human Rights Act 1998, seeking a declaration that the aforementioned provision was incompatible with the Convention but the Divisional Court rejected his claims.

His application for leave to appeal was refused by a single judge of the Court of Appeal and a renewed application was also refused by the same judge.
Communicated under Article 3 of Protocol N° 1 alone and in conjunction with Article 14, and Article 13.

Other judgments delivered in January 2002

Article 3

Özbey - Turkey (Nº 31883/96)
Judgment 31.1.2002 [Section I]

The case concerns alleged ill-treatment in custody – friendly settlement.

Article 5

Z.R. - Poland (Nº 32499/96)
Judgment 15.1.2002 [Section IV]

The case concerns the length of detention on remand and the absence of a right for a detainee to attend hearings – friendly settlement.

Articles 5 and 6

Lanz - Austria (Nº 24430/94)
*Judgment 31.1.2002 [Section I]

The case concerns the non-communication of the prosecution's submissions in relation to an appeal against the refusal of a request for release from detention on remand, police supervision of a detainee's consultation with his lawyer, and non-communication of the Procurator General's submissions on a plea of nullity and of the Senior Public Prosecutor's submissions on an appeal – violations.

Article 6

Mączyński - Poland (Nº 43779/98)
*Judgment 15.1.2002 [Section II]

Gollner - Austria (Nº 49455/99)
*Judgment 17.1.2002 [Section I]

Guerreiro v. Portugal (Nº 45560/99)
*Judgment 31.1.2002 [Section III]

These cases concern the length of civil proceedings – violation.

Maurer - Austria (Nº 50110/99)
*Judgment 17.1.2002 [Section I]

The case concerns the length of criminal proceedings – violation.

Josef Fischer - Austria (Nº 33382/96)
*Judgment 17.1.2002 [Section I]

The case concerns the non-communication to an appellant of the Procurator General's submissions to the Supreme Court – violation.

Article 6 and Article 1 of Protocol No. 1

Tsirikakis - Greece (Nº 46355/99)
*Judgment 17.1.2002 [Section I]

The case concerns the length of civil proceedings, lengthy delay in payment of compensation for expropriation and a claim by the State to property not included in the expropriation – violation.

Article 14

Fielding - United Kingdom (Nº 36940/97)
Judgment 29.1.2002 [Section II]

The case concerns the availability of certain allowances only to widows and not to widowers – friendly settlement.

APPENDIX

111 judgments concerning Italy, become final

Scannella - Italy (Nº 44489/98), 23.10.2001 [Section III]
Gusso and Grasso - Italy (Nº 44502/98), 23.10.2001 [Section III]
Squillante - Italy (Nº 44503/98), 23.10.2001 [Section III]
Greco - Italy (Nº 44512/98), 23.10.2001 [Section III]
Iezzi and Cerritelli - Italy (Nº 44514/98), 23.10.2001 [Section III]
V.L. - Italy (Nº 44515/98), 23.10.2001 [Section III]
Carrone - Italy (Nº 44516/98), 23.10.2001 [Section III]
Ragas - Italy (Nº 44524/98), 23.10.2001 [Section III]
R.P. and others - Italy (Nº 44526/98), 23.10.2001 [Section III]
Pezzutto - Italy (Nº 44529/98), 23.10.2001 [Section III]
G.D.I. - Italy (Nº 44533/98), 23.10.2001 [Section III]
Aresu - Italy (Nº 44628/98), 23.10.2001 [Section III]
Tartaglia - Italy (Nº 48402/99), 23.10.2001 [Section III]
Minici - Italy (Nº 48403/99), 23.10.2001 [Section III]
Dragonetti - Italy (Nº 48404/99), 23.10.2001 [Section III]
Catillo - Italy (Nº 48405/99), 23.10.2001 [Section III]
Stefanucci - Italy (Nº 48406/98), 23.10.2001 [Section III]
Calò - Italy (Nº 48408/99), 23.10.2001 [Section III]
Reino - Italy (Nº 48409/99), 23.10.2001 [Section III]
Tozzi - Italy (Nº 48410/99), 23.10.2001 [Section III]
Ar.M. - Italy (Nº 48412/99), 23.10.2001 [Section III]
Morese - Italy (no. 2) (Nº 48413/99), 23.10.2001 [Section III]
Carlucci - Italy (Nº 48414/99), 23.10.2001 [Section III]
Siena - Italy (Nº 48415/99), 23.10.2001 [Section III]
Corcelli - Italy (Nº 48416/99), 23.10.2001 [Section III]
Molè - Italy (Nº 48417/99), 23.10.2001 [Section III]
Cesaro - Italy (Nº 48417/99), 23.10.2001 [Section III]
Buonocore - Italy (Nº 48419/99), 23.10.2001 [Section III]
Pisano - Italy (Nº 48420/99), 23.10.2001 [Section III]
Altomonte - Italy (Nº 48421/99), 23.10.2001 [Section III]
E.I. - Italy (Nº 48422/99), 23.10.2001 [Section III]
Campana - Italy (Nº 48423/99), 23.10.2001 [Section III]
Massimo - Italy (no. 1) (Nº 44343/98), 25.10.2001 [Section II]
Rinaudo and others - Italy (Nº 44345/98), 25.10.2001 [Section II]
Venturini - Italy (Nº 44346/98), 25.10.2001 [Section II]
Massimo - Italy (no. 2) (Nº 44352/98), 25.10.2001 [Section II]
Centineo - Italy (Nº 44377/98), 25.10.2001 [Section II]
Finessi - Italy (Nº 44379/98), 25.10.2001 [Section II]
Raffa - Italy (Nº 44381/98), 25.10.2001 [Section II]
Alicino - Italy (Nº 44383/98), 25.10.2001 [Section II]
Valvo and Branca - Italy (Nº 44384/98), 25.10.2001 [Section II]
Scarfone - Italy (Nº 44389/98), 25.10.2001 [Section II]
Servodidio - Italy (Nº 44402/98), 25.10.2001 [Section II]
Guerrera - Italy (no. 1) (Nº 44403/98), 25.10.2001 [Section II]
Rizzo - Italy (Nº 44409/98), 25.10.2001 [Section II]
Quattrone - Italy (Nº 44412/98), 25.10.2001 [Section II]
Di Sisto - Italy (Nº 44414/98), 25.10.2001 [Section II]
Napolitano - Italy (Nº 44415/98), 25.10.2001 [Section II]

Viola - Italy (Nº 44416/98), 25.10.2001 [Section II]
I.P.E.A. S.r.l. - Italy (Nº 44418/98), 25.10.2001 [Section IV]
Galasso - Italy (Nº 44421/98), 25.10.2001 [Section IV]
Guerrera - Italy (no. 2) (Nº 44423/98), 25.10.2001 [Section II]
Follo - Italy (Nº 44424/98), 25.10.2001 [Section II]
Mel Sud S.r.l. - Italy (Nº 44438/98), 25.10.2001 [Section II]
Pastore - Italy (Nº 44444/98), 25.10.2001 [Section II]
Di Girolamo and others - Italy (Nº 44446/98), 25.10.2001 [Section IV]
Castrogiovanni - Italy (Nº 44448/98), 25.10.2001 [Section II]
Porcelli - Italy (Nº 44454/98), 25.10.2001 [Section IV]
De Simine - Italy (Nº 44455/98), 25.10.2001 [Section II]
Atzori - Italy (Nº 44456/98), 25.10.2001 [Section IV]
Bartolini - Italy (Nº 44458/98), 25.10.2001 [Section IV]
Vairano - Italy (Nº 44459/98), 25.10.2001 [Section II]
Condominio Città di Prato - Italy (Nº 44460/98), 25.10.2001 [Section IV]
Paolelli - Italy (no. 2) (Nº 44463/98), 25.10.2001 [Section IV]
Seminara - Italy (Nº 44467/98), 25.10.2001 [Section II]
Ascolinio - Italy (Nº 44469/98), 25.10.2001 [Section IV]
Troiani - Italy (Nº 44478/98), 25.10.2001 [Section IV]
Rosetti and Ciucci & C. - Italy (Nº 44479/98), 25.10.2001 [Section IV]
E.G. - Italy (Nº 44480/98), 25.10.2001 [Section IV]
Spera - Italy (Nº 44487/98), 25.10.2001 [Section IV]
Siper S.r.l. - Italy (Nº 44493/98), 25.10.2001 [Section IV]
Di Francesco - Italy (Nº 44495/98), 25.10.2001 [Section IV]
Masala - Italy (Nº 44496/98), 25.10.2001 [Section IV]
Galgani and de Matteis - Italy (no. 2) (Nº 44497/98), 25.10.2001 [Section IV]
Mantini - Italy (no. 2) (Nº 44498/98), 25.10.2001 [Section IV]
Pomante Pappalepore - Italy (Nº 44499/98), 25.10.2001 [Section IV]
Il Messaggero S.a.s. - Italy (no. 6) (Nº 44501/98), 25.10.2001 [Section IV]
O.B. - Italy (Nº 44506/98), 25.10.2001 [Section IV]
Musti and Iarossi - Italy (Nº 44507/98), 25.10.2001 [Section IV]
Il Messaggero S.a.s. - Italy (no. 7) (Nº 44508/98), 25.10.2001 [Section IV]
D'Ammassa and Frezza - Italy (Nº 44513/98), 25.10.2001 [Section IV]
Stefanini - Italy (Nº 44518/98), 25.10.2001 [Section IV]
G.F. and others - Italy (Nº 44522/98), 25.10.2001 [Section IV]
Fi.C. and F.G. - Italy (Nº 44523/98), 25.10.2001 [Section IV]
Ferrari - Italy (no. 2) (Nº 44525/98), 25.10.2001 [Section IV]
Iacovelli - Italy (Nº 44530/98), 25.10.2001 [Section IV]
Rongoni - Italy (Nº 44531/98), 25.10.2001 [Section IV]
Venturini - Italy (no. 2) (Nº 44535/98), 25.10.2001 [Section IV]
An.M. and S.I. - Italy (Nº 49353/99), 25.10.2001 [Section IV]
Morelli and Levantesi - Italy (Nº 49354/99), 25.10.2001 [Section IV]
Di Fabio - Italy (Nº 49355/99), 25.10.2001 [Section IV]
Valenti - Italy (Nº 49356/99), 25.10.2001 [Section IV]
Rizio - Italy (Nº 49357/99), 25.10.2001 [Section IV]
Bini - Italy (Nº 49358/99), 25.10.2001 [Section IV]
Iannetti - Italy (Nº 49359/99), 25.10.2001 [Section IV]
Rosa - Italy (Nº 49361/99), 25.10.2001 [Section IV]
Baldi - Italy (Nº 49362/99), 25.10.2001 [Section IV]
Marinelli - Italy (Nº 49364/99), 25.10.2001 [Section IV]
Mari - Italy (no. 2) (Nº 49365/99), 25.10.2001 [Section IV]
De Santis - Italy (no. 1) (Nº 49366/99), 25.10.2001 [Section IV]
De Santis - Italy (no. 2) (Nº 49367/99), 25.10.2001 [Section IV]
Savanna and La Selva - Italy (Nº 49368/99), 25.10.2001 [Section IV]
Baroni and Michinelli - Italy (Nº 49369/99), 25.10.2001 [Section IV]

Marcantoni - Italy (Nº 49370/99), 25.10.2001 [Section IV]
Alfonsetti - Italy (Nº 49371/99), 25.10.2001 [Section IV]
De Pilla - Italy (Nº 49372/99), 25.10.2001 [Section IV]
Franco - Italy (Nº 49373/99), 25.10.2001 [Section IV]
Chinnici - Italy (Nº 49374/99), 25.10.2001 [Section IV]
Consalvo - Italy (Nº 49375/99), 25.10.2001 [Section IV]
Lilla Santilli - Italy (Nº 49376/99), 25.10.2001 [Section IV]
Barnaba - Italy (Nº 49377/99), 25.10.2001 [Section IV]

Articles of the European Convention of Human Rights and Protocols Nos. 1, 4, 6 and 7

Convention

Article 2	:	Right to life
Article 3	:	Prohibition of torture
Article 4	:	Prohibition of slavery and forced labour
Article 5	:	Right to liberty and security
Article 6	:	Right to a fair trial
Article 7	:	No punishment without law
Article 8	:	Right to respect for private and family life
Article 9	:	Freedom of thought, conscience and religion
Article 10	:	Freedom of expression
Article 11	:	Freedom of assembly and association
Article 12	:	Right to marry
Article 13	:	Right to an effective remedy
Article 14	:	Prohibition of discrimination
Article 34	:	Applications by person, non-governmental organisations or groups of individuals

Protocol No. 1

Article 1	:	Protection of property
Article 2	:	Right to education
Article 3	:	Right to free elections

Protocol No. 2

Article 1	:	Prohibition of imprisonment for debt
Article 2	:	Freedom of movement
Article 3	:	Prohibition of expulsion of nationals
Article 4	:	Prohibition of collective expulsion of aliens

Protocol No. 6

Article 1	:	Abolition of the death penalty

Protocol No. 7

Article 1	:	Procedural safeguards relating to expulsion of aliens
Article 2	:	Right to appeal in criminal matters
Article 3	:	Compensation for wrongful conviction
Article 4	:	Right not to be tried or punished twice
Article 5	:	Equality between spouses