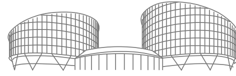

European Court of Human Rights
Cour Européenne des Droits de l'Homme

Information Note on the Court's case-law

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The Information Note, compiled by the Registry's Case-Law Information and Publications Division, contains summaries of cases examined during the month in question which the Jurisconsult, the Section Registrars and the Head of the aforementioned Division have indicated as being of particular interest. The summaries are not binding on the Court. In the provisional version the summaries are normally drafted in the language of the case concerned, whereas the final single-language version appears in English and French respectively. The Information Note may be downloaded at http://www.echr.coe.int/echr/NoteInformation/en. A hard-copy subscription is available from mailto:publishing@echr.coe.int for EUR 30 (USD 45) per year, including an index.

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ARTICLE 2

POSITIVE OBLIGATIONS
Lack of accountability for disappearance of a patient from a nursing home: *violation*.

DODOV - Bulgaria (N° 59548/00)
Judgment 17.1.2008 [Section V]

Facts: In May 1994 the applicant's mother was admitted to the Sofia Nursing Home. According to a medical opinion her memory and other mental faculties were progressively deteriorating as a result of Alzheimer's disease and she needed constant supervision. The nursing home staff had therefore been instructed not to leave her unattended. On a visit to his mother in December 1995, the applicant was informed that she had gone missing. It was explained to him that his mother had been accompanied by a medical orderly to consult a dermatologist outside the nursing home and had been left alone in the courtyard for a few minutes during which time she had disappeared. The police, alerted to the disappearance the same day, interviewed witnesses from the nursing home who testified that they had immediately searched the area of the nursing home in vain. Four days later the applicant's mother was recorded as a person sought by the police and, seven days thereafter, a press release was issued. The police also subsequently checked admissions to psychiatric clinics and leads given by the public. The applicant's mother has never been seen since. In July 1996 the applicant brought criminal proceedings against the nursing home staff alleging that they had been negligent and were responsible for his mother's disappearance. The ensuing investigation was discontinued and reopened four times. In 1998 and 2000, the prosecuting authorities decided to discontinue the proceedings on the ground that the staff had acted in accordance with normal practice in leaving residents in the courtyard, which was surrounded by a fence and guarded. In 2001 the prosecutors stated that the staff had been negligent but discontinued the proceedings on the ground that such negligence was not punishable under Bulgarian criminal law. Finally, in 2003 the proceedings were terminated as prosecution of those responsible had become time-barred. In that decision it was suggested that the applicant's mother might have scaled the fence of the nursing home or left through another exit. It was also found that regulations on the duties of staff in the nursing home were not clear. The applicant had also filed a complaint against the police, accusing them of failing to take the necessary steps to search for his mother. It was decided however not to open criminal proceedings. Finally, the applicant brought civil proceedings against the Ministry of Labour and Social Care, the Ministry of the Interior and the Sofia Municipality for compensation for non-pecuniary damage caused by his mother's disappearance. Those proceedings are apparently still pending.

Law: The Court found it reasonable to assume that the applicant's mother had died. It also found that there was a direct link between the failure to supervise his mother, despite the instructions never to leave her unattended, and her disappearance. However, a simple error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient could not be sufficient by themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2. It was therefore necessary to examine whether the available legal remedies, taken together, as provided in law and applied in practice, could be said to have secured legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim. In this respect, the Court observed that there had been lengthy periods of inactivity in the criminal investigation and that basic investigative measures, such as questioning the nursing home staff, had been taken several years after the applicant's mother had disappeared and only at his insistence. Furthermore, the prosecuting authorities' various decisions to terminate the investigation had been contradictory: the facts had changed in each decision and the legal grounds for refusing to bring proceedings against the nursing home staff were unclear. In particular, the decisions of 1998 and 2000 had essentially been based on the argument that staff had acted in accordance with normal practice, without analysing whether that practice had indeed revealed negligence. Furthermore, no disciplinary measures had been taken against the nursing home staff despite the prosecutors' finding that staff members had been negligent. Moreover, it appeared that at no time had the relevant authorities sought to identify any

errors in management, training or control. Lastly, the subsequently instituted civil proceedings had thus far lasted more than ten years and had not yet produced even a first-instance decision. That delay was in itself sufficient to conclude that the civil proceedings had not established the facts surrounding the disappearance and presumed death of the applicant's mother, nor did they call to account those responsible in an effective and timely manner. The Court therefore concluded that, despite the availability in Bulgarian law of three avenues of redress – criminal, disciplinary and civil – the authorities had not, in practice, provided the applicant with the means to establish the facts surrounding the disappearance of his mother and bring to account those people or institutions that had breached their duties. Faced with an arguable case of negligent acts endangering human life, the legal system as a whole failed to provide an adequate and timely response as required by the State's procedural obligations under Article 2.
Conclusion: violation (unanimously).

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

POSITIVE OBLIGATIONS
Failure to conduct effective investigation into fate of Greek-Cypriots who had gone missing during the Turkish military operations in northern Cyprus in 1974: *violation*.

VARNAVA and Others - Turkey (N° 16064/90 and 8 Other cases)
Judgment 10.1.2008 [Section III]

Facts: The applicants are nine Cypriot nationals who disappeared during Turkish military operations in northern Cyprus in July and August 1974 and relatives of theirs. The facts were disputed. Eight of the missing men were members of the Greek-Cypriot forces and it is alleged that they disappeared after being captured and detained by Turkish military forces. Witnesses have testified to seeing them in Turkish prisons in 1974 and some of the men were identified by their families from photographs of Greek-Cypriot prisoners of war that were published in the Greek press. The Turkish Government denied that the applicants were taken into captivity by Turkish forces and said that they had died in action during the conflict. The ninth missing man, Mr Hadjipanteli, was a bank employee. The applicants alleged that he was one of a group of people taken by Turkish forces for questioning in August 1974 and who had been missing ever since. His body was discovered in 2007 in the context of the activity of the United Nations Committee of Missing Persons (CMP). The CMP was set up in 1981 with the task of drawing up comprehensive lists of missing persons on both sides and specifying whether they were alive or dead. It has no power to attribute responsibility or to make findings as to the cause of death. Mr Hadjipanteli's remains were exhumed from a mass grave near a Turkish-Cypriot village. A medical certificate indicated that he had received bullet wounds to the skull and right arm and a wound to the right thigh. The Turkish Government denied he had been taken prisoner, noting that his name was not on the list of Greek Cypriots held in the alleged place of detention, which had been visited by the International Red Cross.

Law: Article 35 – (a) *Temporal jurisdiction*: The Turkish Government had submitted that, as the missing men had to be presumed to have died in 1974, the complaints concerned instantaneous acts that had occurred long before Turkish ratification of the right of individual petition in 1987. In rejecting that argument, the Court reaffirmed its ruling in the inter-State case of *Cyprus v. Turkey* (application no. 25781/94 – Information Note no. 30) that a failure to conduct an effective investigation into disappearances in life-threatening circumstances disclosed a continuing violation, as cases involving disappearances were characterised by ongoing uncertainty and were distinguishable from conventional cases of unlawful killing in which the fate of the victim was known. To the extent therefore that the facts of the applicants' cases disclosed a continuing obligation under Article 2, the Court had competence *ratione temporis*.

(b) *Six-month rule*: The Turkish Government had argued that the applicants should have brought their applications to Strasbourg within six months of Turkish ratification of the right of individual petition. In rejecting that argument, the Court drew a distinction between two differing types of "continuing situations": cases where the applicant was subject to an ongoing violation, due for example, to a

legislative provision which intruded, continuously, on his private life, and cases, such as disappearances, where the continuing situation flowed from a factual situation that had arisen at a particular point in time. While accepting that applicants in the latter type of case had to act with reasonable expedition, it found that there had been no unnecessary delay in the instant case, as the applications had been lodged within three days of Turkey recognising the jurisdiction of the old Court. The issue whether applications introduced at a later date (in particular, long after the inter-State judgment) would comply was left open.
Conclusion: objections dismissed (six votes to one).

Article 2 – (a) *Procedural obligation*: The Grand Chamber had established in the inter-State case that many people who went missing in 1974 had been detained by Turkish or Turkish-Cypriot forces at a time when military operations were accompanied by large scale arrests and killings. The climate of risk and fear and the real dangers to which detainees were exposed disclosed a life-threatening situation. It was against that same background that the nine missing men in the applicants' case had disappeared. The eight combatants had last been seen in areas surrounded or about to be overrun by Turkish forces and several witnesses had attested to seeing Mr Hadjipanteli being taken away by Turkish-Cypriot fighters. Given previous findings and the circumstances of the disappearances at locations which at the time or very shortly afterwards were under the control of Turkish forces or those acting under their aegis, Turkey had an obligation to account for their fate.

(b) *Evidential requirements*: Although individual applicants to the Court in cases arising out of events in south-east Turkey and the Chechen Republic had, despite numerous reported instances of forced disappearances, nonetheless been required to adduce evidence that their relatives had been taken into custody by State agents, the situation in the applicants' case could be distinguished. A zone of international conflict where two armies were engaged in acts of war was *per se* life-threatening for those present. The relevant events would frequently be within the exclusive knowledge of the military and it would be unrealistic to expect applicants to provide more than minimal information placing their relatives in the area at risk. International treaties imposed obligations on combatant States as regards the care of prisoners of war, the wounded and civilians. Article 2 certainly extended so far as to require States which had ratified the Convention to take reasonable steps to protect the lives of persons not or no longer engaged in the hostilities. Disappearances in such circumstances therefore attracted the protection of Article 2.

(c) *Compliance*: The obligation to carry out an effective investigation could not be discharged through the respondent State's contribution to the investigatory work of the CMP. Whatever its humanitarian usefulness, the CMP did not provide procedures sufficient to meet the standard required by Article 2, especially in view of the narrow scope of its investigations. The recent discovery of the remains of Mr Hadjipanteli did not demonstrate that the CMP had been able to take any meaningful investigative steps beyond the belated location and identification of remains. Nor, given the location of the remains in an area under the control of the "Turkish Republic of Northern Cyprus" after a lapse of some 32 years, had that event displaced the Turkish Government's accountability for the investigative process during the intervening period.
Conclusion: continuing procedural violation (six votes to one).

Article 3 – The Court followed the principles and findings set out in the inter-State case and noted that the silence of the Turkish authorities in the face of the real concerns of the missing men's relatives could only be categorised as inhuman treatment.
Conclusion: continuing violation (six votes to one)

Article 5 – (a) *Substantive limb*: It had not been established that the missing men had actually been detained by the Turkish or Turkish Cypriot authorities during the period under consideration.
Conclusion: no violation (unanimously).

(b) *Procedural limb*: The Turkish authorities had failed to conduct an effective investigation into the missing men's whereabouts and fate when there was an arguable claim that they had been deprived of their liberty at the time of their disappearance.
Conclusion: continuing violation (six votes to one).

Article 41 – The claims for non-pecuniary damage were very high. While the Court noted the applicants' concern to induce the respondent Government to take action as promptly as possible under pain of increased damages, it found no precedent for such an ongoing, indefinite and prospective award in its case-law and perceived no basis of principle on which to embark on such a course.
Noting that the individual interest was subordinate to the Court's primary purpose of setting and applying minimum human-rights standards, the Court found that in the unique circumstances of the case, it would not be appropriate, constructive or even just, to make additional specific awards or recommendations for non-pecuniary damage sustained by individual applicants. In so deciding, it observed that (i) consideration of the possible application of Article 41 had been adjourned in the inter-State case; (ii) the situation was sensitive with over 1,400 people having been declared missing on the Greek-Cypriot side and some 500 claimed missing on the Turkish-Cypriot side; and (iii) the Committee of Ministers had an ongoing execution function in the context of the inter-State case, with the crucial element being the provision of measures enabling light to be shed on the fate of as many of the missing men, women and children as possible.
Conclusion: finding of violations sufficient just satisfaction (six votes to one).

POSITIVE OBLIGATIONS
Failure by authorities to take proper steps to trace applicant's son following his reported abduction in south-east Turkey: *violation*.

OSMANOĞLU - Turkey (N° 48804/99)
Judgment 24.1.2008 [Section I]

Facts: The facts of the case were disputed. According to the applicant, he and his family had moved to Diyarbakır in 1992 after his son was threatened by a police officer. In 1994 the applicant himself was held in police custody for 28 days and subjected to ill-treatment before being acquitted of all charges against him. In 1996 the applicant's son disappeared. The applicant said that on the morning of his disappearance he arrived at his grocery shop to see his son being escorted to a car by two armed men carrying walkie-talkies who said that they were police officers and were taking his son to police headquarters. The following day and on a number of subsequent occasions the applicant made enquiries about his son's whereabouts at the governor's office and at the chief prosecutor's office at the state security court. The prosecutor informed him that his son was not mentioned in any of the custody records. In May 1996 the applicant was interviewed by the police. He gave a description of the two men who had taken his son away and said that he and a neighbouring shop owner would be able to identify them if required. In July 2006 the newspaper *Özgür Gündem* published an alleged confession in which a former agent of the *JİTEM* (the anti-terror intelligence branch of the gendarmerie) described the abduction and killing of the applicant's son at the hands of the *JİTEM* and identified the killer and the place where the body had been buried. The Government denied any involvement of Turkish security forces in the abduction or killing. They submitted that the reason no investigation had been carried out was that there were no custody records to prove that the applicant's son had been detained or evidence to indicate that he had been kidnapped. The newspaper allegations had not been investigated either as they were considered vague and based on hearsay. The applicant was shown pictures of the body buried at the place referred to in the newspaper report but was unable to make a positive identification.

Law: Article 2 – The Court had concluded in a number of previous cases that disappearances in south-east Turkey at the relevant time could be regarded *per se* as life-threatening. The lack of any suggestion that the applicant's son was involved in PKK-related activities did not alter the position and the manner of his abduction bore many similarities to the disappearances in south-east Turkey at about that time of people

who were later found dead. Accordingly, in the absence of any information about his whereabouts for more than 11 years, the applicant's son had to be presumed dead.

(a) *Responsibility for the alleged abduction and killing*: The Court was unable to decide from the evidence whether the two men who had taken away the applicant's son were in fact police officers and so was unable to establish who might have been responsible for his disappearance.
Conclusion: no violation (unanimously).

(b) *Positive obligation to protect the right to life*: The applicant's son had disappeared in south-east Turkey in life-threatening circumstances after receiving threats. The authorities had been informed the following day. From that point on, they were under an obligation to take immediate steps to protect his right to life, which was at real and immediate risk. Nevertheless, they had failed to launch an investigation. Merely checking custody records was not sufficient. A number of basic steps could have been taken, such as taking statements from eyewitnesses, verifying whether the two men were indeed police officers, inspecting premises to which the applicant's son might have been taken and interviewing the duty officers and detainees. Police and gendarmerie checkpoints in the area could also have been alerted to the disappearance. However, the prosecutor had remained completely and incomprehensibly inactive. The authorities had thus failed to take reasonable measures available under Turkish criminal law to prevent a real and immediate risk to the life of the applicant's son.
Conclusion: violation (four votes to three).

(c) *Effectiveness of the investigation*: No investigation had been carried out into the disappearance of the applicant's son. It was also regrettable that the allegations of the former *JİTEM* agent had not spurred the Government into action, as they were not abstract or unsubstantiated and merited consideration by the authorities. It was illogical for the authorities to assert that the allegations were unsubstantiated without first investigating them.
Conclusion: violation (unanimously).

Article 3 – The applicant had suffered, and continued to suffer, distress and anguish as a result of the disappearance of his son and his inability to find out what had happened. This went beyond the level of emotional distress that was inevitably caused to relatives of victims of serious human-rights violations. He had witnessed his son being taken away by two men claiming to be police officers more than 11 years previously and had not heard from him since. Despite his attempts to report the abduction and share the information he had, the authorities had taken no action other than to tell him that his son's name was not mentioned in the custody records. The manner in which his complaints had been dealt with had to be considered inhuman treatment.
Conclusion: violation in respect of the applicant (unanimously).

Article 41 – EUR 60,000 in respect of pecuniary damage; EUR 30,000 in respect of non-pecuniary damage, of which two-thirds was to be held for the partner and heirs of the applicant's son and the remaining third for the applicant.

ARTICLE 3

TORTURE
INHUMAN OR DEGRADING TREATMENT
Ill-treatment of persons held for questioning and failure to follow correct procedures when prosecuting those responsible: *violations*.

MASLOVA and NALBANDOV - Russia (N° 839/02)
Judgment 24.1.2008 [Section I]

Facts: The first applicant complained of serious assault – including beatings, rape, suffocation and electric shocks – at the hands of police and prosecution interrogators after she was called to a police station for questioning as a witness in a murder case in November 1999. She denied all involvement in the murder but says that she was forced to make a written confession. She was eventually released after almost 24 hours in custody. Her mother and the second applicant were likewise detained for questioning and the second applicant alleged that prosecution officials punched, kicked and tried to suffocate him before evicting him from the building. The following day the first applicant filed a complaint with the prosecutor's office alleging rape and torture. An investigation was immediately opened. Witnesses were interviewed, the police station searched and evidence was sent for forensic examination. In April 2000 four police officers and members of the prosecution service were formally charged. However, the trial court ruled all the prosecution evidence inadmissible owing to a failure to follow a special procedure that applied to proceedings against prosecution officers. The case was remitted for fresh investigation but later discontinued for want of evidence of an offence.
During the course of the proceedings before the Court, the Court requested the Government to submit a copy of the investigation file into the events at the police station. However, without any explanation, the Government refused to produce any documents other than copies of procedural decisions.

Law: Article 3 – (a) *Substantive limb*:
(i) First applicant: There was an impressive and unambiguous body of evidence in support of the first applicant's version of events. Indeed, by bringing charges, referring the case for trial and then resuming and discontinuing the proceedings on numerous occasions, the authorities had conceded that her allegations were credible. That evidence had been dismissed solely because of procedural defects. The Government had not provided any satisfactory or convincing explanation to disprove her allegations. The Court therefore accepted the first applicant's claims as to what had happened. The rape of a detainee by a State official had to be considered an especially grave and abhorrent form of ill-treatment given the ease with which the offender could exploit the vulnerability and weakened resistance of his victim. Consequently, the physical violence, especially the cruel acts of repeated rape, to which the first applicant had been subjected, amounted to torture.
Conclusion: violation (unanimously).

(ii) Second applicant: Throughout the domestic proceedings the second applicant had presented a coherent and convincing account of the events which was further corroborated by the evidence in the investigation file. Inferences could also be drawn from the Government's failure to comply with the Court's request for a copy of the entire investigation file, which was seen as crucial to establishing the facts in the case. The Government had only produced copies of procedural decisions and had refused to submit any other documents. The Court therefore accepted the second applicant's version of events and concluded that the duration of his ill-treatment and its physical and mental effects, taken as a whole, amounted to inhuman and degrading treatment.
Conclusion: violation (unanimously).

(b) *Procedural limb*: The authorities appeared to have reacted diligently and promptly in order to identify and punish those responsible for the first applicant's ill-treatment. However, procedural errors had led to a

stalemate in the criminal proceedings. In the absence of any plausible explanation, the only possible explanation was the prosecution authorities' obvious incompetence in conducting the investigation during the relevant period. Accordingly, there had been no effective investigation into the first applicant's allegations of ill-treatment. That reasoning also held true in the second applicant's case.
Conclusion: violations (unanimously).

Article 38 § 1 (a) – Referring to the importance of a government's cooperation in Convention proceedings and mindful of the difficulties associated with the establishment of the facts in cases such as the present one, the Court found that, by failing to submit the requested documents, the Government had failed to meet their obligations under Article 38 § 1 (a).
Conclusion: failure to comply (unanimously).

Article 41 – EUR 70,000 to the first applicant and EUR 10,000 to the second applicant in respect of non-pecuniary damage.

INHUMAN OR DEGRADING TREATMENT
Detention of illegal aliens in the transit zone of an airport for more than ten days without providing for their basic needs: *violation*.

<u>RIAD and IDIAB - Belgium</u> (Nos 29787/03 and 29810/03)
Judgment 24.1.2008 [Section I]

Facts: The applicants are Palestinian nationals. They both arrived at Brussels-National Airport in Belgium on separate flights from Sierra Leone in late December 2002. They stated that they had left Lebanon, where their lives were in danger. As neither applicant possessed a visa, they were refused entry into Belgium and immediately placed in a transit zone inside the airport. They submitted applications for asylum, which were refused. Towards the end of January 2003 the applicants were transferred to a closed detention centre for illegal aliens. In the meantime the applicants' lawyer had lodged an application for their release, which the court allowed. On the same day, however, the applicants were transferred to the transit zone of Brussels-National Airport pending their removal from Belgium. The applicants complained of the conditions in which they were detained in the transit zone, alleging that there were no bedrooms or beds and that they were housed in the mosque located there; that they went several days without being given anything to eat or drink and received food only from the cleaning staff or the company which ran the airport; that they were not able to wash themselves or launder their clothes; that they were repeatedly subjected to security checks by the airport police; and that on a number of occasions they were taken to cells and left there for several hours without being given anything to eat or drink – in an attempt to persuade them to leave the country of their own free will – before being taken back to the transit zone. On an application by the applicants, on 14 February 2003 the court ordered the Belgian State to permit the applicants to leave the transit zone freely and without restriction, subject to a coercive fine of EUR 1,000 per hour of default. On the following day the applicants left the transit zone but, following an identity check, they were served with an order to leave Belgian territory and immediately taken to another centre for illegal aliens. Early in March 2003 the applicants were repatriated under police escort on flights to Beirut.

Law: Article 5 – The applicants had been confined to the transit zone not immediately upon their arrival but a month later, after final decisions had clearly ordered their release. The time they were to spend in the transit zone had not been specified, but they had in fact been held for fifteen days and eleven days respectively. That amounted to *de facto* deprivation of liberty. The mere fact that the applicants could have left the country of their own free will did not erase the interference with their freedom. The domestic court had ruled the situation illegal and incompatible with the rule of law. According to the Court's case-law, there had to be some relationship between, on the one hand, the ground of permitted deprivation of liberty relied on and, on the other, the place and conditions of detention. Here, however, the applicants had been left to their own devices in the transit zone, which was not an appropriate place of residence, without any form of humanitarian or social assistance. In that respect, it was also relevant that the

detention measures in question applied to foreign nationals who, in the applicants' case, had committed no offences other than those related to their residence status. The Government had failed to explain the legal basis on which the applicants had been transferred to and detained in the transit zone. "Detaining" a person in the transit zone for an unspecified, unforeseeable length of time, without the detention being based on any actual legal provision or valid judicial decision and with limited possibility of judicial control in view of the difficulties of maintaining sufficient contact for proper judicial supervision, was in itself contrary to the principle of legal certainty.
As to the subsequent placement in a centre for illegal aliens, this had been ordered with total disregard for the court orders of 14 February 2003, against which no appeal had been lodged and which clearly indicated that, pending their removal from Belgium, the applicants were to be allowed freedom of movement in Belgium. Instead, while the State had clearly refused to enforce the repatriation decisions in the hope that the applicants would leave of their own free will, they had been kept in detention and no use had been made of the legal possibility of requiring them to reside in a particular place. In conclusion, the applicants' detention had not been lawful.
Conclusion: violation (unanimously).

Article 3 – The applicants had been taken to the transit zone without the Aliens Office, which was responsible for the transfer, or any of the other authorities involved, bothering to consider whether they would be properly taken care of there. The Court found this surprising as the Aliens Office ran a centre where the applicants would have received more appropriate treatment on a short-term basis. However, having taken the decision to deprive the applicants of their liberty, the State should have made sure that their detention conditions were compatible with respect for human dignity. It was not enough simply to wait for the applicants to contact the centre of their own accord to provide for their basic needs. By its very nature the transit zone was designed to be used for short periods by people in transit. Its characteristics could arouse a sense of solitude in a detainee: with no outdoor area for fresh air or physical exercise, no internal catering facilities, no radio or television for contact with the outside world, the transit zone was quite unsuitable for a stay of more than ten days. The fact that staff working there had catered for some of the applicants' needs did not make the situation the applicants had clearly had to bear any less unacceptable. Even assuming that it actually existed and that the applicants had been informed of it, the mere possibility of having three meals a day delivered would not change that conclusion. The conditions of detention the applicants had been obliged to endure for more than ten days had undeniably placed them under great psychological strain, wounded their dignity and made them feel demeaned and humiliated. Furthermore, their humiliation had been accentuated by the fact that, having secured an order for their release, the applicants had been deprived of their liberty in other premises and obliged to live in a public place, without assistance. The Court took note of the reports and observations of the United Nations Human Rights Committee, the federal mediators and the CPT, which indicated that these were not isolated cases and lent credit to the applicants' allegation that the aim of the Aliens Office in abandoning them in the transit zone had been to oblige them to leave the country of their own accord. That being so, the applicants' detention in the transit zone for more than ten days amounted to inhuman and degrading treatment.
Conclusion: violation (unanimously).

Article 41 – EUR 15,000 to each applicant in respect of non-pecuniary damage.

INHUMAN OR DEGRADING TREATMENT
Lack of medical assistance to a HIV-positive detainee and State's failure to comply with Rule 39 measures in connection therewith: *communicated*.

ALEKSANYAN - Russia (N° 46468/06)
Partial decision 24.1.2008 [Section I]

The applicant provided legal services to the oil company Yukos and its senior executives Mr Khodorkovskiy and Mr Lebedev. He was subsequently appointed vice-president of Yukos. Shortly afterwards, he was allegedly questioned by an investigator from the General Prosecutor's Office who warned him to "stay far away" from the company's affairs unless he was volunteering "to go to prison". In April 2006 criminal proceedings were initiated against the applicant, his premises were searched and he was taken into custody. While ordering his detention on remand, the court declared itself incompetent to examine the strength of the prosecution evidence. On several occasions the applicant applied for release, citing poor health, but his requests were refused. In September 2006 he was found to be HIV-positive. By September 2007 he was suffering from a swingeing fever, had lost over 10% of his body weight and had become anaemic. He developed a number of other diseases: *inter alia*, stomatitis, neurological problems, encephalopathy, optic atrophy and liver lesions. A medical examination had revealed a dramatic worsening of his condition. It was recommended that he should undergo in-patient examination and treatment in the Moscow Aids Centre. The investigator in charge of the case lodged a request with a court stating that the applicant's diseases could not be treated in a detention centre and seeking his release on bail. The court decided that it was not competent to deal with the matter and noted that the investigator did not need a court order to replace detention on remand with a milder measure of restraint such as bail. However, after receiving that decision, the investigator refused to allow release on bail, concluding that he was incompetent to decide whether the applicant should be transferred to a specialised medical institution. On 27 November 2007 the Court indicated an interim measure under Rule 39 of the Rules of Court, inviting the Government to secure immediately the applicant's in-patient treatment in a hospital specialised in the treatment of Aids and concomitant diseases and to submit a copy of his medical file. On 4 December 2007 the Government informed the Court that the interim measure had not been yet implemented since "it required additional time". On 21 December 2007 the Court indicated to the Government an additional interim measure while confirming the validity of the previous one (the applicant's transfer to a specialised institution): the Government were invited *inter alia* to form a medical commission to be composed on a parity basis to diagnose the applicant's health problems and suggest treatment. On 27 December 2007 the Government replied that the applicant could have received adequate medical treatment in the medical facility at the detention centre and that his examination by a mixed medical commission was against Russian law.
Communicated under Articles 3, 5, 8, 13, in conjunction with Article 18 of the Convention. *Remainder inadmissible*.

(See also *Khodorkovskiy v. Russia* (N° 5829/04) in Information Note no. 85 and *Paladi v. Moldova* (N° 39806/05) in Information Note no. 99; the latter has been referred to the Grand Chamber – see Article 34 below).

INHUMAN TREATMENT
Silence of authorities in face of real concerns about the fate of Greek-Cypriots who had gone missing during the Turkish military operations in northern Cyprus in 1974: *violation*.

VARNAVA and Others - Turkey (N° 16064/90 and 8 Other cases)
Judgment 10.1.2008 [Section III]

(see Article 2 above).

ARTICLE 5

Article 5 § 1

DEPRIVATION OF LIBERTY
Failure to conduct effective investigation into arguable claim that missing Greek-Cypriots may have been detained during Turkish military operations in northern Cyprus in 1974: *violation*.

VARNAVA and Others - Turkey (N° 16064/90 and 8 Other cases)
Judgment 10.1.2008 [Section III]

(see Article 2 above).

LAWFUL ARREST OR DETENTION
Continued detention of illegal aliens in the transit zone of an airport and in an immigration centre in breach of order for their release: *violation*.

RIAD and IDIAB - Belgium (N° 29787/03 and 29810/03)
Judgment 24.1.2008 [Section I]

(see Article 3 above).

Article 5 § 1 (f)

PREVENT UNAUTHORISED ENTRY INTO COUNTRY
Seven-day detention in reception centre for asylum-seeker who had been granted "temporary admission": *no violation*.

SAADI - United Kingdom (N° 13229/03)
Judgment 29.1.2008 [GC]

Facts: The applicant, an Iraqi Kurd, fled his country of origin and arrived at London Heathrow Airport on 30 December 2000. He immediately claimed asylum and was granted "temporary admission". On reporting to the immigration authorities on 2 January 2001, he was detained and transferred to Oakington Reception Centre, which was used for asylum seekers considered unlikely to abscond and whose applications could be dealt with by a "fast-track" procedure. He was handed a standard form that purported to explain the reasons for his detention and his rights, but did not explain that he was being detained for fast-track processing. On 5 January 2001 the applicant's representative was informed on the telephone by an immigration officer that the reason for the detention was that the applicant was an Iraqi who met the criteria for detention at the reception centre. The applicant's asylum claim was initially refused on 8 January 2001 and he was formally refused leave to enter the UK. He was released the next day and subsequently granted asylum after successfully appealing against the refusal of leave to enter. He sought judicial review of the decision to detain him. This was ultimately rejected by the House of Lords, which found that detention under the Oakington procedure was proportionate and reasonable. In a judgment of 11 July 2006, a Chamber of the European Court held that there had been no violation of Article 5 § 1 of the Convention, but a violation of the Article 5 § 2 requirement to give reasons promptly (see Information Note no. 88).

Law: Article 5 § 1 (f) – (a) *Meaning of the phrase "to prevent his effecting an unauthorised entry"*: It was a necessary adjunct to the State's right to control the entry and residence of aliens that it should be permitted to detain would-be immigrants who had applied for permission to enter, whether by way of asylum or otherwise. Until "authorised", any entry was "unauthorised" and the detention of a person who wished to enter a country and who needed but did not yet have authorisation to do so, could, without any distortion of language, be to "prevent his effecting an unauthorised entry". The Court did not accept that as soon as an asylum seeker surrendered to the immigration authorities he was seeking to effect an "authorised" entry. Article 5 § 1 (f) did not permit detention only of a person shown to be trying to evade entry restrictions. Such an interpretation would be too narrow and was also inconsistent with United Nations and Council of Europe guidelines and recommendations.

(b) *Arbitrariness*: The principle that detention should not be arbitrary applied to detention under the first limb of Article 5 § 1 (f) (unauthorised entry) in the same manner as it applied to detention under the second limb (deportation or extradition). Thus, there was no requirement that detention should reasonably be considered necessary and the principle of proportionality required only that the detention should not continue for an unreasonable length of time. Accordingly, detention under the first limb of Article 5 § 1 (f) would not be arbitrary if it satisfied four conditions: it was carried out in good faith; it was closely connected to the purpose of preventing unauthorised entry to the country; the place and conditions of detention were appropriate bearing in mind that the detainee might well have fled his home country in mortal fear; and the length of the detention did not exceed that reasonably required for the purpose pursued.
It was accepted that the purpose of the Oakington detention regime had been to ensure the speedy resolution of some 13,000 of the approximately 84,000 asylum applications being made annually in the United Kingdom at the time. Achieving that objective had entailed scheduling up to 150 interviews a day and even small delays could disrupt the entire programme. The applicant had been selected for detention on the basis that his case was suited for fast-track processing. The national authorities had thus acted in good faith in detaining the applicant. Indeed the policy behind the creation of the Oakington regime was generally to benefit asylum seekers by dealing with their claims expeditiously. The detention was also closely connected to the purpose of preventing unauthorised entry since it was intended to enable the authorities to determine the applicant's asylum claim quickly and efficiently. As regards the place and conditions of detention, the centre was specifically adapted to hold asylum seekers and offered various facilities for recreation, religious observance, medical care and, importantly, legal assistance. The applicant had not complained about the conditions. Finally, his detention for seven days before his release the day after his claim to asylum was refused at first instance could not be said to have exceeded the period reasonably required to enable his claim to asylum to be processed speedily. The Court also noted that the provision of a more efficient system for determining large numbers of asylum claims had rendered unnecessary recourse to a broader and more extensive use of detention powers.
Conclusion: no violation (eleven votes to six).

Article 5 § 2 – The Grand Chamber agreed with the Chamber that general statements – such as parliamentary announcements – could not replace the need for the individual to be informed of the reasons for his arrest or detention. The first the applicant learnt of the real reason for his detention was through his representative on 5 January 2001, by which point he had already been detained for 76 hours. Assuming that the giving of oral reasons to a representative met the requirements of Article 5 § 2, a delay of that length was not compatible with the requirement for reasons to be given promptly.
Conclusion: violation (unanimously).

Article 41 – Finding of a violation constituted sufficient just satisfaction.

Article 5 § 2

INFORMATION ON REASONS FOR ARREST
76-hour delay in informing "temporarily admitted" asylum-seeker of the grounds for his later detention in a reception centre: *violation*.

SAADI - United Kingdom (N° 13229/03)
Judgment 11.7.2006 [Section IV]

(see Article 5(1)(f) above).

ARTICLE 6

Article 6 § 1 [civil]

PUBLIC JUDGMENT
Failure to state reasons for civil judgment in public: *violation*.

RYAKIB BIRYUKOV - Russia (N° 14810/02)
Judgment 17.1.2008 [Section I]

Facts: The applicant brought a civil action against a hospital for alleged medical negligence. His case was examined on the merits by a district court, acting as a first-instance court, at a public hearing. At the close of the hearing the court read out the operative provisions of the judgment, in which it stated that it was dismissing the applicant's claims on the basis of Article 1064 of the Civil Code. The reasoned judgment was served on the applicant later. In dismissing the applicant's appeal against that judgment, the regional court likewise read out only the operative provisions of its judgment in open court.

Law: The issue before the Court was whether, in civil proceedings, the requirement to pronounce judgments publicly was satisfied by the reading out in open court solely of the operative provisions of the judgment. This in turn entailed examining whether the public had access to the reasoned judgment and to the arrangements made to ensure its availability for public scrutiny. Under domestic law, only the parties and other participants in the proceedings and their representatives were served with a copy of the reasoned judgment or could gain access to it at the court registry. It followed that the reasons on which the district court had based its judgment on the merits were, apart from the reference made in the operative provisions to Article 1064 of the Civil Code, inaccessible to the public. Article 1064 merely established general grounds giving rise to liability for the infliction of harm and the operative provision contained no indication as to the underlying principle that had been applied and so was not informative to the layman. Accordingly, the reasons which would have made it possible to understand why the applicant's claims had been rejected were inaccessible to the public.
Conclusion: violation (unanimously).

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

IMPARTIAL TRIBUNAL
Statutory impossibility to challenge a judge on the basis of his/her family ties with a party's advocate: *violation*.

MICALLEF - Malta (N° 17056/06)
Judgment 15.1.2008 [Section IV]

(see Article 34 below).

Article 6 § 2

PRESUMPTION OF INNOCENCE
Collection of personal identification data for police records following the discontinuance of criminal investigation: *communicated*.

MANKA - Germany (N° 23210/04)
[Section V]

In September 2003 the authorities discontinued a criminal investigation against the applicant (for burglary) for lack of evidence. Nonetheless, in October 2003 the police ordered the collection of personal identification data on the applicant (photographs, fingerprints and measurements) for their records. Since there was still some evidence that the applicant had aided and abetted the burglary, the authorities justified the collection of the data as being relevant to future investigations and necessary in order to prevent crime. The applicant objected to the order and subsequently brought a court action to have it quashed. His action was dismissed by the competent courts, which stated that it was lawful to collect personal identification data in respect of a person who had not been convicted, but against whom suspicion of the offence in question still remained.
Communicated under Article 6 § 2 and Article 8 of the Convention.

Article 6 § 3 (c)

DEFENCE THROUGH LEGAL ASSISTANCE
Refusal of legal aid to contest tax surcharge: *inadmissible*.

BARSOM and VARLI - Sweden (N°s 40766/06 and 40831/06)
Decision 4.12.2007 [Section III]

Facts: The applicants owned a restaurant. Their tax returns for 2002 and 2003 were revised on the basis of an audit carried out in respect of the restaurant. Consequently, tax surcharges were also imposed on them directly. The applicants appealed against that decision to the County Administrative Court and applied for legal aid on account of their poor financial situation and incomplete knowledge of the Swedish language and legal system. Since tax surcharges were considered to fall within the criminal sphere of Article 6, the applicants argued that they were entitled to free legal assistance.

Inadmissible: Article 6 § 3 (c) guaranteed the right to free legal assistance to persons charged with a criminal offence under two conditions: that the person concerned lacked sufficient means to pay for legal assistance and that the "interests of justice" so required. The second condition was to be judged by taking into account the seriousness of the offence, the severity of the possible sentence, the complexity of the case and the personal situation of the accused. The applicants' case concerned the assessment of their relatively straightforward tax surcharges and they had never faced a risk of being deprived of their liberty. Both applicants had lived in Sweden for almost 30 years and were businessmen who owned and ran a

restaurant. It was therefore highly unlikely that they would not be able to present their case and arguments adequately, without legal assistance, before the national courts. Moreover, under the domestic law the Swedish administrative courts had an obligation to direct the parties on how to supplement their case-file and to ensure that the circumstances of each case were clarified to the extent that its character demanded. In the light of the above, legal aid was not indispensable for the applicants' effective access to court or for the effective presentation of their case.

ARTICLE 8

PRIVATE LIFE
Decision not to implement a needle-exchange programme for drug users in prisons to help prevent the spread of viruses: *inadmissible*.

SHELLEY - United Kingdom (N° 23800/06)
Decision 4.1.2008 [Section IV]

Although drugs use is prohibited in prisons in the United Kingdom, official surveys indicate that a significant percentage of prisoners inject drugs while in prison. The sharing of needles and syringes carries a risk of infection from serious viruses such as Hepatitis B and C and HIV. Among the methods available for reducing the risk are needle-exchange programmes, whereby used equipment is exchanged for sterile needles and syringes, and disinfecting agents. A number of studies suggest that needle-exchange programmes are more effective than disinfection at preventing transmission and almost all health authorities in the United Kingdom make such programmes available to the general public. However, with the exception of a pilot scheme in a Scottish prison, needle-exchange programmes are not available to the prison population. A scheme for the provision of disinfecting tablets to prisons has been in operation since 2004.
The applicant, a prisoner who did not specify whether or not he took drugs, sought permission to seek judicial review of the decision to provide disinfecting tablets instead of needle-exchange programmes as he was concerned that it failed sufficiently to address the risks – which were not confined to drug users – caused by the sharing of infected needles. His application was refused. In refusing a renewed application for permission, the Court of Appeal noted that there was no satisfactory evidence as to the difference in the decreased risk to life inherent in a needle-exchange programme as opposed to a disinfectant scheme and that there remained a legitimate concern that a needle-exchange programme might increase drugs use and the number of syringes in prison. The matter was to be kept under review.

(a) *Inadmissible* under Articles 2, 3 and 8 – (i) *Victim status*: Since the applicant had not specified that he personally was at any real or immediate risk of infection his complaint had to be regarded as concerning the general situation within the prison system. The Court was not satisfied that the general unspecified risk, or fear, of infection as a prisoner was sufficiently severe as to raise issues under Articles 2 or 3 of the Convention. It had, however, given consideration to the extent to which Article 8 required the authorities to take particular preventive measures to counter infection rates in prisons. In this context it was prepared to accept for the purposes of the case that, as a person detained in prison where there was a significantly higher risk of infection of HIV and HCV, the applicant could claim to be affected by the health policy implemented in that regard by the prison authorities and so had victim status.

(ii) *Compliance*: There was no authority in the case-law that placed any obligation under Article 8 on a Contracting State to pursue any particular preventive health policy. While it was not excluded that a positive obligation might arise to eradicate or prevent the spread of a particular disease or infection, the Court was not persuaded that any potential threat to health that fell short of the standards of Articles 2 or 3 would necessarily impose a duty on the State to take specific preventive steps. Matters of health care policy, in particular as regards general preventive measures, were in principle within the margin of appreciation of the domestic authorities. The applicant could not point to any directly negative effect on his private life. Nor was he being denied any information or assistance concerning a threat to his health

for which the authorities were directly or indirectly responsible. Giving due leeway to decisions about resources and priorities and to a legitimate policy to try to reduce drug use in prisons, and noting that some preventive steps had been taken (the provision of disinfecting tablets) and that the authorities were monitoring developments elsewhere, the Court concluded that the respondent Government had not failed to respect the applicant's private life: *manifestly ill-founded*.

(b) *Inadmissible* under Article 14 (in conjunction with Article 8) – (i) *Scope*: Convicted prisoners could be regarded as having been placed in a distinct legal situation which was inextricably bound up with their personal circumstances and existence. Their complaints did not therefore fall outside the scope of Article 14 on this ground.

(ii) *Analogous positions*: Prisoners did not forfeit their Convention rights in prison, although the manner and extent to which they could enjoy them would inevitably be influenced by the context. Accordingly, the question whether or not a prisoner could, for the purposes of Article 14, claim to be in an analogous position to people in the community depended on the subject-matter of the complaint. The applicant's complaint was that different standards of health care were applied in prison. Since the European Prison Rules, the Committee for the Prevention of Torture (CPT) and the domestic prison regulations themselves provided that health care in prisons should be the same as in the community, the Court was prepared to assume for the purposes of the application that prisoners could claim to be on the same footing as the community as regards the provision of health care.

(iii) *Justification*: The Court found that the difference in preventive policy applied in prisons and in the community (with needle-exchange programmes only being available in the latter) fell within the State's margin of appreciation and could, as matters stood, be regarded as proportionate and supported by objective and reasonable justification. Among the factors noted by the Court in reaching that conclusion were the States' particularly wide margin of appreciation with regard to preventive measures; the absence of any specific guidance on the issue of needle-exchange programmes from the CPT; the fact that the risk of infection flowed primarily from the prisoners' own conduct; and the various policy considerations that had led the authorities to deal with the risk of infection through the provision of disinfectants and to approach the question of needle-exchange programmes with caution while monitoring their progress elsewhere: *manifestly ill-founded*.

FAMILY LIFE

Two-month time-limit for requesting return of child placed in the care of the State by the mother: *no violation*.

KEARNS - France (N° 35991/04)
Judgment 10.1.2008 [Section III]

Facts: The Irish applicant went to a hospital with her mother and a lawyer to submit a request to give birth anonymously (*accouchement sous X*). The following week she gave birth to a baby girl, K. Requesting that the birth be kept secret, the applicant signed a record of the child's placement in State care and gave her consent to its adoption. The conditions and effects of anonymous registration of a birth were explained to her during two interviews with the social services, particularly as regards the two-month period within which, after handing a child over to the authorities, the mother could request the child's return. The applicant was assisted at the interviews by her mother and by a nurse and a doctor who spoke English and acted as interpreters. On the same day, with the authorisation of the family council, the president of the council for the *département* placed the child with a couple with a view to her full adoption. In the meantime the child's biological father had applied to the Irish Family Court for recognition of his rights over the child. That court barred the continuation of the adoption procedure in France and ordered the name and photograph of the child to be sent to the father and its decisions to be notified to the council for the *département* and the French social services. The applicant went to the hospital's maternity ward and subsequently to the French social services, requesting the return of the child, as the biological father had learnt of its birth and taken legal action in Ireland and the applicant had persuaded her husband to

recognise the child. Her request was refused, however, because the two-month time-limit for withdrawing consent to adoption had expired. The applicant applied to the *tribunal de grande instance* to cancel the abandonment order and have the child returned to her, arguing that the consent she had given had been invalid on account of the family pressure exerted on her and because she had not been fully aware of the consequences of registering the birth anonymously, as no interpreter had been present when they were explained to her. She considered that French law was incompatible with Articles 13 and 14 of the Convention. The child's biological father intervened in the proceedings. The court dismissed their applications. However, the Court of Appeal, considering that the applicant, an Irish national who was a native English speaker and did not speak French, had not been in a position to realise the consequences in French law of anonymous registration of a birth, set aside that judgment. The applicant's lawyer asked the Prefect to enforce the Appeal Court's judgment and return the child to her mother, but to no avail. The Prefect lodged an appeal on points of law, arguing that as the applicant had not recognised the child to which she had given birth anonymously, her consent to have the child placed in the care of the State had not been necessary. The Court of Cassation quashed and annulled the Appeal Court decision. An order was made for the child's full adoption by the foster family.

Law: The authorities' refusal to accede to the request to return the child had had a basis in law and pursued a legitimate aim, namely to protect the rights and freedoms of others, in this case the child.

(a) *The time-limit for withdrawal of consent*: There was no consensus among the Council of Europe's member States in the field of adoption. The interests at issue – those of the biological mother, those of the child, those of the foster family and the public interest – were difficult to reconcile. In seeking a balance between these different interests, the best interests of the child had to be paramount. The Court accepted the arguments put forward by the Government on the basis of studies by child-welfare professionals, which had stressed that it was in the child's interest to enjoy stable emotional relations within a new family as quickly as possible. It further observed that the *tribunal de grande instance* had held that psychological and legal stability and certainty had to be sought for the child, even if that meant imposing short time-limits on withdrawal of consent by the interested parties. Furthermore, although two months might seem fairly short, it nevertheless appeared to be long enough to allow the biological mother to reflect and to reconsider her decision to give the child up. The Court was aware of the psychological distress the applicant must have experienced, but noted that she had been 36 years old at the time, had been accompanied by her mother and had had two long interviews with the social services after the birth. Having regard to the latitude States should enjoy in view of the diversity of legal systems and traditions and practices, the reflection period provided for under French law sought to strike a balance and ensure the right proportionality between the conflicting interests.
Conclusion: no violation (unanimously).

(b) *The information given to the applicant*: The applicant, an Irish national who lived in Dublin, had decided to give birth in France in order to take advantage of the possibility of registering the birth anonymously, which did not exist in Irish law. She had visited the maternity hospital during the week before the birth, accompanied by a lawyer and her mother. The presence of the lawyer suggested that the applicant had been given legal advice even before the birth. On the two days following the birth, the applicant, together with her mother, had had two long interviews with the social services, in the presence first of a nurse, and then of a doctor, who both spoke English and were provided by the hospital to serve as interpreters. In that connection, Article 8 could not be interpreted as requiring the authorities to provide a qualified interpreter in such situations. As to the information the applicant had received concerning the reflection period, the form she had signed consenting to the adoption had explicitly mentioned the two-month time-limit. That being so, there could have been no ambiguity in her mind as to the time-limit for retrieving her child. Lastly, the documents she had been given included a notice stating the time-limits and conditions for the child's return, plus a standard letter of withdrawal of consent. Thus the French authorities had provided the applicant with sufficient and detailed information, affording her linguistic assistance not required by law and ensuring that she was informed as thoroughly as possible of the consequences of her choice. Accordingly, the State had not failed in its positive obligations towards the applicant under Article 8 of the Convention.
Conclusion: no violation (unanimously).

ARTICLE 10

FREEDOM OF EXPRESSION
Conviction of newspaper for using official documents in support of claims made in articles without making additional enquiries: *violation*.

SAYGILI and Others - Turkey (N° 19353/03)
Judgment 8.1.2008 [Section II]

Facts: The applicant was the owner of a company which published a daily newspaper in which two articles by Mrs Kurtay appeared, concerning the case of *İrfan Bilgin v. Turkey* (no. 25659/94, ECHR 2001-VIII), in which the Court found a violation of Articles 2, 5 and 13 of the Convention because of a disappearance during police custody. The first Article, "Admission of disappearance during police custody", reported on the statements made by the public prosecutor at the material time, when interviewed as a witness before a delegation from the European Commission of Human Rights, and those made by the missing prisoner's lawyer; the second article, "Prosecutor falsifies report", comments on the statement made by the Principal Public Prosecutor's assistant before the Commission delegation. The Principal Public Prosecutor's assistant instituted proceedings against the applicant company, its editor Mr Bilgiç and Mrs Kurtay, seeking compensation for the non-pecuniary damage sustained as a result of the publication of the articles, alleging that they were misleading and defamatory. The applicants denied the accusations and relied on freedom of expression. They submitted that they had told nothing but the facts, the unadorned truth, in all impartiality. The articles had been written in the light of the judgment delivered by the Court in the case of *İrfan Bilgin v. Turkey*. They were based on the findings of the Court and should be taken as a whole, not as odd sentences taken out of context. The Criminal Court found Mr Bilgiç and Mrs Kurtay guilty of infringement of the claimant's personality rights and sentenced them to pay compensation. The court considered that there was no evidence in the case-file or the Court's deliberations or judgment that the claimant's report had been falsified, that he had intentionally falsified his report or that he had not acted in a manner befitting his office. The applicants appealed on points of law. They maintained that they had by no means sought in the impugned articles to harm the claimant's reputation, but to reveal how investigations into the deaths of prisoners in police custody were conducted. They reiterated that the information they had published was true, topical and of interest to the public. Lastly, they submitted that their conviction had violated their right to freedom of expression under Article 10 of the Convention. The Court of Cassation upheld the first-instance court's decision.

Law: The impugned measure amounted to interference with freedom of expression. This was prescribed by law and pursued a legitimate aim, namely the protection of the reputation or the rights of others. As to whether it was necessary in a democratic society, the impugned articles concerned topical matters of general interest as they related to cases of disappearances and the Court's examination thereof. The articles directly criticised the Principal Public Prosecutor's assistant because of the post he had held at the time of the prisoner's disappearance. Now, while it could often prove necessary to protect public officials against destructive attacks that were essentially unfounded, it was also true that their conduct could be of legitimate interest to the press and contribute to the debate on the functioning of the justice system and the integrity of those responsible for it. So the personal and institutional responsibility of the Principal Public Prosecutor's assistant was central to the general-interest debate concerned in so far as, in his capacity as a public prosecutor, he had taken part in the investigation into the prisoner's disappearance, prepared a report on detention conditions at the police headquarters where he was being held, and made findings of fact but also deductions as to the credit-worthiness of the statements made by persons who claimed to have seen the prisoner at the police headquarters. It was true that public confidence was particularly important for the proper accomplishment of a mission like that of the prosecuting authorities. But those in charge of that mission had a duty to help justify that confidence, for example by showing due diligence in conducting criminal proceedings as the secular arm of the State, to prevent and punish crime and protect the people. Moreover, the relevant law made no provision for exceptions on the grounds of truthfulness and public interest. However, as the impugned comments comprised not only value judgments but also statements of fact, the applicants should have been given that dual possibility. Denying them the

possibility of relying on *exceptio veritatis*, that is, proving the truth of their allegations in order to absolve themselves, was an excessive means of protecting a person's reputation and rights. The impugned articles had criticised the public prosecutor's conduct and suggested that the information contained in a report he had prepared was untrue. Yet those allegations had been based on an analysis of the Court's judgment in the case concerned, on the material evidence it had taken into account, on the statements made by the public prosecutor and the witnesses interviewed by the European Commission of Human Rights, and on the statements made by the applicant's lawyer in the case in question – all of which the applicants had been perfectly entitled to use, not only in their articles but also to prove their good faith and the truthfulness of their affirmations in the proceedings before the domestic courts. When the press contributed to the public debate on questions of legitimate concern, it should, in principle, be able to rely on official reports without having to conduct its own independent research. That was undeniably so in the case of the factual and legal findings in the judgments delivered by the Court. So there was no reason to doubt that the applicants had acted in good faith on that score, in pointing out, interpreting and qualifying the contradictions between the findings of the national authorities' investigation into the disappearance and those reached by the Court.
Conclusion: violation (unanimously).

Article 41 – EUR 2,500 for pecuniary damage and EUR 1,500 EUR for non-pecuniary damage.

FREEDOM OF EXPRESSION
Disciplinary sanction of a judge for following PKK-related media: *violation*.

ALBAYRAK - Turkey (N° 38406/97)
Judgment 31.1.2008 [Section III]

Facts: The applicant was working as a judge when in 1995 the authorities brought disciplinary proceedings against him for, among other things, reading PKK legal publications and watching a PKK-controlled television channel. The applicant denied all accusations, arguing that he believed in the fundamental principles of the State and served it faithfully. He admitted to reading certain biased publications, but solely for the purpose of keeping himself informed about incidents reported in the region. The Supreme Council found the allegations against the applicant well-founded and, as a sanction, transferred him to another jurisdiction. The Supreme Council subsequently repeatedly refused to promote the applicant, given his previous disciplinary sanction. The applicant eventually unwillingly resigned from his post in 2001 and is now practising as a lawyer.

Law: The disciplinary sanction imposed on the applicant had undisputedly interfered with his right to freedom of expression. It was based on domestic law and pursued the legitimate aim of maintaining the authority and impartiality of the judiciary. However, as to the proportionality of the interference, the Court found no reference to any known incident to suggest that the applicant's impugned conduct, including looking at PKK-related media, had had a bearing on his performance as a judge. Nor was there any evidence to demonstrate that he had associated himself with the PKK or behaved in a way which could call into question his capacity to deal impartially with related cases coming before him. Consequently, the Court concluded that, in deciding to discipline the applicant, the authorities had attached decisive weight to the fact that he looked at PKK-related media. Their decision in this respect was therefore not based on sufficient reasons that showed that the interference complained of was "necessary in a democratic society".
Conclusion: violation (unanimously).

Article 41 – EUR 5,000 in respect of pecuniary damage and EUR 1,000 in respect of non-pecuniary damage.

FREEDOM OF EXPRESSION
Imposition of a fine on a lawyer for issuing a press statement criticising "the abusive methods used by special police units on the pretext of fighting terrorism": *inadmissible*.

COUTANT - France (N° 17155/03)
Decision 24.1.2008 [Section III]

The trial known as the "Chalabi" trial, after one of the accused, whom the applicant, a lawyer, represented, triggered strong protests, *inter alia* from the Bar Council, that the organisation of a mass trial was incompatible with respect for the rights of the defence. On behalf of her client, the applicant published a press release, part of which was included in an Agence France-presse (AFP) dispatch, in which she objected to "the abusive methods used by special police units on the pretext of fighting terrorism". The Minister of the Interior lodged a complaint with the public prosecutor for public defamation of a public authority, based on the Freedom of the Press Act ("the 1881 Act"). The applicant alleged that as she, the accused, was a lawyer, and in view of the exceptional circumstances of the trial in question, the courts should be broad in their interpretation of the immunity provided for in the 1881 Act and give her the benefit of it. She further argued that, as a lawyer, it was her duty to decry practices at variance with the Convention, and that her press release had therefore contributed to the type of political debate and discussion of ideas accepted in the case-law of the Court. The Criminal Court decided that the statements were not covered by such immunity, emphasising their defamatory nature towards the national police. It found her guilty as charged and fined her 30,000 French francs (FRF) (about 4,575 euros (EUR)), and ordered her to pay one symbolic franc to the Ministry of the Interior. The court also ordered the publication, in three newspapers of the civil party's choice, of a statement announcing her conviction. The applicant appealed, relying, *inter alia*, on the legitimacy of the debate on the means used in the fight against terrorism, her duty as a lawyer to speak out and the principle of freedom of expression enshrined in Article 10 of the Convention. The Court of Appeal upheld the judgment concerning the statement of guilt but reduced the fine to FRF 10,000 (about EUR 1,525). The applicant appealed to the Court of Cassation, relying on Article 10 of the Convention and alleging in particular that the impugned conviction had interfered with her freedom of expression. The Court of Cassation dismissed the appeal. Concerning immunity, it considered that as the impugned press release could not be regarded as a document produced before a court, the Court of Appeal had correctly applied the law. It also found that the lawyer had deliberately expressed herself in a partial and vindictive manner, without caution or moderation, casting aspersions on the whole police force.

Inadmissible: The applicant's sentencing by the criminal courts to a fine for public defamation of a public authority had constituted an interference by the public authorities with the right protected by Article 10 of the Convention. That interference had been prescribed by law and pursued a legitimate aim, namely the protection of the reputation of others – in this case the police authorities responsible for combating terrorism. As to whether it had been necessary in a democratic society, the Court agreed that the "Chalabi" trial had been unusual in terms of its magnitude and the material conditions in which it had been held. Fifty-odd defence lawyers had refused to attend the hearings, and criticisms had been voiced by, *inter alia*, human rights organisations and members of the judiciary. However, the applicant had chosen, one week after the start of the trial, to express herself through a press release, part of which had been included in an AFP dispatch, deploring the objectionable conditions of her client's arrest and the fact that it was impossible to defend him in the course of a fair trial. There was no evidence, however, that under the circumstances this mode of expression had been the only means open to the applicant of making her case for the defence. On the contrary, the applicant had first of all presented no ground of nullity during the investigation and, secondly, in the impugned press release she had overstepped the bounds of her client's defence in the criminal proceedings in order to make general accusations against the methods used by the police and the judiciary in the fight against terrorism. The Court accordingly saw no contradiction with its case-law in the findings of the domestic courts that the impugned comments, voiced outside court premises, did not constitute a defence in the procedural sense, presented before a court, and the applicant could therefore not claim the benefit of the immunity provided for in the 1881 Act. Furthermore, the domestic courts, and in particular the Court of Appeal, had found that certain passages in the press release had sullied the honour and the reputation of the national police, particularly those

accusing them of using "terrorist methods", of carrying out "raids using methods worthy of the Gestapo and the militia", or of "brutality and torture during four days of police custody, under the supervision of judges from the special section". The examination of the press release by the courts of first and second instance had made it possible to evaluate clearly the tenor of the published statements, in the light, for example, of the criticisms of the same trial voiced publicly by the Bar Council and other public figures. Certain expressions the applicant had used had overstepped the limits required for the simple discussion of ideas. The excessive nature of the offensive wording and the lack of factual evidence to support the accusations were aggravated by the fact that they were the work of a lawyer. The applicant had not displayed the moderation and the dignity expected of representatives of her profession. Her words had been aimed specifically at State authorities responsible for combating terrorism. The authorities of a democratic State were required to tolerate criticism, even if it might be regarded as provocative or insulting, and the limits of acceptable criticism could, in certain cases, be wider for civil servants acting in an official capacity than for private individuals. However, it remained open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks or to defamatory accusations devoid of foundation or formulated in bad faith. Considering the insulting nature of the applicant's statements vis-à-vis the national police and the fact that they had been disseminated to the public via the press, the imposition of a criminal penalty on her had been legitimate, especially as the fine imposed, although not negligible, could not be considered excessive. The modest penalty, which moreover had had no repercussion on the applicant's professional activity, had not been a disproportionate response to the applicant's remarks. Accordingly, having regard to the tenor of the offending press release, the applicant's profession as a lawyer and the moderate fine imposed, the Court found the impugned interference proportionate to the aim pursued and considered that the domestic courts had given relevant and sufficient reasons to justify it: *manifestly ill-founded*.

ARTICLE 14

DISCRIMINATION (Article 8)
Refusal to grant approval for the purposes of adoption, on the ground of the applicant's life-style as a lesbian living with another woman: *violation*.

E.B. - France (N° 43546/02)
Judgment 22.1.2008 [GC]

Facts: In 1998 the president of the council for the *département* gave a decision refusing the applicant's request for authorisation to adopt a child. During the procedure the applicant had mentioned her homosexuality and her stable relationship with another woman. The administrative courts dismissed the applicant's appeals "having regard to her lifestyle", among other reasons.

Law: *Admissibility* – The present case concerned the procedure for obtaining authorisation to adopt rather than adoption itself. Accordingly, the Court was not required to rule whether the right to adopt did or did not fall within the ambit of Article 8 of the Convention taken alone. Given that French legislation expressly granted single persons the right to apply for authorisation to adopt and established a procedure to that end, the facts of this case undoubtedly fell within the ambit of Article 8 of the Convention. Consequently, the State, which had gone beyond its obligations under Article 8 in creating such a right, could not take discriminatory measures when applying it. Article 14 of the Convention, taken in conjunction with Article 8, was therefore applicable in the present case.

Merits: After drawing a parallel with the case of *Fretté v. France* (no. 36515/97, § 32, ECHR 2002-I), the Court noted that the domestic administrative authorities, and then the courts that heard the applicant's appeal, had based their decision to reject her application for authorisation to adopt on two main grounds: the lack of a paternal referent in the applicant's household and the attitude of her long-standing and declared partner. The latter did not feel committed by her partner's application to adopt. Her attitude was

not without interest or relevance in assessing the application. It was legitimate for the authorities to ensure that all safeguards were in place before a child was taken into a family particularly where they found that not one but two adults were members of the household. In the Court's view, that ground had nothing to do with any consideration relating to the applicant's sexual orientation. The ground relating to the lack of a paternal referent did not necessarily raise a problem in itself, but in the Court's view such a ground, which ran the risk of rendering ineffective the right of single persons to apply for authorisation, might have led to an arbitrary refusal and have served as a pretext for rejecting the applicant's application on grounds of her homosexuality. The Government had been unable to prove that use of that ground at domestic level had not resulted in discrimination. The fact that it was legitimate for this factor to be taken into account should not lead the Court to overlook the excessive reference to it in the circumstances of the present case. The fact that the applicant's homosexuality had featured to such an extent in the reasoning of the domestic authorities was significant even if the courts had found that this had not been the basis for the decision in question and had not been considered from a hostile position of principle. Besides their considerations regarding the applicant's "lifestyle", they had above all confirmed the decision of the president of the council for the *département* which had been based on certain opinions in which the applicant's homosexuality, or sometimes her status as a single person, had been a determining factor. The Court considered that the reference to the applicant's homosexuality had been, if not explicit, at least implicit, and that the influence of the applicant's avowed homosexuality on the assessment of her application had been established and, having regard to the foregoing, had been a decisive factor in the decision to refuse her authorisation to adopt. Accordingly, the domestic authorities had made a distinction based on considerations regarding her sexual orientation, a distinction that was unacceptable under the Convention. French law allowed single persons to adopt a child, thereby opening up the possibility of adoption by a single homosexual. Moreover, the Civil Code was silent as to the necessity of a referent of the other sex and, further, the applicant presented, in the terms of the judgment of the *Conseil d'Etat*, "undoubted personal qualities and an aptitude for bringing up children". The reasons put forward by the Government could not therefore be regarded as particularly convincing and weighty such as to justify the difference in treatment of the applicant. The Court observed that the authorities had undertaken an overall assessment of the applicant's situation. This had not been based on a single ground, but on "all" the factors involved. Accordingly, the two main grounds used had to be assessed concurrently. Thus the illegitimacy of one of the grounds (lack of paternal referent) had the effect of contaminating the entire decision. It followed that the decision refusing the applicant authorisation was incompatible with the Convention.
Conclusion: violation (ten votes to seven).

Article 41 – EUR 10,000 for non-pecuniary damage.

DISCRIMINATION (Article 1 of Protocol No. 1)
Legislation implementing measures in favour of Jewish and Roma victims of the Second World War subject to condition that they had held Belgian nationality from a specified date: *inadmissible*.

EPSTEIN and Others - Belgium (N° 9717/05)
Decision 8.1.2008 [Section II]

A Law was passed introducing new measures in favour of war victims, including giving deportees who had not had Belgian nationality on 10 May 1940 the same advantages as those that had previously been granted to persons having political prisoner status, in respect of pensions and a war pension. A life annuity equivalent to that awarded to those who had refused compulsory labour was introduced for the benefit of orphans whose mothers and fathers had died in deportation, and also for people of Jewish or Gypsy origin who had been forced to live in hiding. The Law specified that only people who had Belgian nationality on 1 January 2003 and had resided in Belgium during the German occupation were entitled to these benefits. The applicants applied for life annuities, but their applications were rejected, one of the reasons being that they had not, or had no longer, been Belgian citizens on 1 January 2003. The notice accompanying the decisions specified that an appeal to have them set aside could be lodged with the *Conseil d'Etat* within sixty days. One applicant lodged an appeal. She argued that by limiting entitlement to the annuity it instituted to people who were Belgian nationals on 1 January 2003, the law had

introduced a difference of treatment incompatible with the Constitution (principle of equality and non-discrimination). She also asked the *Conseil d'Etat* to submit a preliminary point of law to the Administrative Jurisdiction and Procedure Court. Other applicants lodged an appeal with the Administrative Jurisdiction and Procedure Court to have the Law annulled. They argued, *inter alia*, that the Llaw was contrary to the principles of equality and non-discrimination guaranteed by the Constitution, particularly the requirements to have been a Belgian national on 1 January 2003, to have lost both parents and to have been forced to live in hiding, and the non-retroactivity of the compensatory measures. The Administrative Jurisdiction and Procedure Court and the *Conseil d'Etat* dismissed the appeals.

Inadmissible under Article 14 taken together with Article 1 of Protocol No. 1 (following dismissal of the preliminary objection of the six-month time-limit and the exhaustion of domestic remedies). – If a State decided to make amends for damage for which it bore no responsibility, it had a wide margin of appreciation, particularly when it came to determining the forms and beneficiaries of the reparation. In this case the State had decided to award compensation to war victims for damage for which it was not responsible. The impugned Law, which had relaxed the citizenship requirements introduced by the previous legislation, had been discussed at length prior to its enactment, in Parliament and in talks with the community concerned. It contained significant advances in favour of deportees and objectors, as well as measures aimed specifically at Jewish and Gypsy war victims. In such a context the State should be free to define its own criteria for the compensation of civilians who had suffered as a result of acts of war by another State, and applicants should meet the requirements specified in the legislation in order to qualify for the financial advantages proposed. In that respect this case differed from those in which the Court had found violations of Article 1 of Protocol No. 1 taken together with Article 14 of the Convention, which all concerned the allocation of welfare benefits, whether contributory or non-contributory: *incompatible* ratione materiae.

ARTICLE 34

VICTIM

Application introduced on behalf of the applicant's sister who died while her constitutional claim concerning the alleged breach of her right to a fair trial was pending: *victim status upheld*.

MICALLEF - Malta (N° 17056/06)
Judgment 15.1.2008 [Section IV]

Facts: The applicant's sister was an unsuccessful party to civil litigation. In 1993 she instituted constitutional proceedings, alleging that the president of the court of appeal lacked objective impartiality by reason of his family ties with the other party's lawyers. In 2002, after his sister's death, the applicant intervened in the proceedings. In 2005 the constitutional claim was dismissed. In 2006 the applicant lodged an application with the Court.

Law: *The applicant's victim status* – The direct victim had died while the constitutional proceedings were pending. In the Maltese legal system, the institution of constitutional proceedings was the only way to seek redress in such cases and was a required step in order to exhaust remedies before bringing proceedings before the Court. The Court was therefore persuaded that the applicant's sister had wished to complain about the alleged breach of her right to a fair trial. Upon her death, the constitutional jurisdictions had not rejected the applicant's request to intervene in the proceedings before them in his capacity as the plaintiff's brother. The alleged defect in the relevant law which had made it impossible to challenge a judge on the basis of his or her relationship with a party's advocate was a matter of sufficient general interest. The applicant therefore had standing to introduce the present application.

Merits: Maltese law as it stood at the material time was deficient on two levels. Firstly, there was no automatic obligation on a judge to withdraw in cases where impartiality could be an issue, a matter which remains unchanged in the law in force at present. Secondly, the law did not recognise as a ground for

challenge a sibling relationship between judge and advocate, let alone that arising from relationships of a lesser degree such as those of uncles or aunts in respect of nephews or nieces. Thus, the law in itself did not give adequate guarantees of subjective and objective impartiality. The applicant's sister had faced a panel of three judges, one of whom was the brother and at a later stage the uncle of the opposing party's advocate. The Court could not overlook the fact that Malta was a small country and that entire families practising law were a common phenomenon. Furthermore, the relationship at issue did not involve any professional or financial dependence. There was insufficient evidence that the judge in question had displayed personal bias. However, the close family ties between the opposing party's advocate and the judge had sufficed to justify objectively the applicant's sister's fears that the presiding judge had lacked impartiality and nothing had been done to dispel her concerns.
Conclusion: violation (four votes to three, the minority finding that Article 6 was inapplicable).

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

HINDER THE EXERCISE OF THE RIGHT OF PETITION
Lack of appropriate regulations and deficiencies in the organisation of the Government Agent's activity resulting in the State's failure to comply promptly with a Rule 39 measure: *case referred to the Grand Chamber*.

PALADI - Moldova (N° 39806/05)
Judgment 10.7.2007 [Section IV]

In 2004 the applicant was taken into custody on suspicion of abuse of position and power. He suffered from a number of serious illnesses and in March 2005 he was transferred to a prison hospital. In May that year a neurologist recommended his transfer to an institution where he could receive specific therapy. He did not however start to receive such therapy until September 2005. It produced positive results and was prescribed until the end of November 2005. On 10 November 2005 a district court ordered the applicant's transfer back to the prison hospital. That same evening, the Court indicated by facsimile an interim measure to the Government under Rule 39 of the Rules of Court, stating that the applicant should not be transferred back to the prison hospital until the Court had had an opportunity to examine the case. The next day a Deputy Registrar of the Court unsuccessfully tried several times to contact the Government Agent's Office in Moldova by telephone. On the basis of the Court's fax to the Government, the applicant requested the district court to stay the execution of its decision. This was refused and he was transferred to the prison hospital the same day. Following requests by the applicant's lawyer and the Agent of the Government, the district court on 14 November 2005 ordered the applicant's transfer back to the medical institution to undergo further therapy. For further details, see Information Note no. 99 and Press Release no. 493 (2007).
In its Chamber judgment the Court held, by six votes to one, that there had been a violation of Article 34 in that there had been serious deficiencies in the State's compliance with the Court's interim measures: firstly, the apparent lack of clear provisions in the domestic law and practice requiring a domestic court to deal urgently with an interim measure; and, secondly, the shortcomings in organising the activity of the Government Agent's Office, starting with the unavailability of officials to answer urgent calls from the Registry and resulting in its failure to react promptly to the interim measure and to ensure that the hospital authorities had had at their disposal all the medical documents necessary for the applicant's immediate admission. In the light of the very serious risk to which he had been exposed as a result of the delay in complying with the interim measure and notwithstanding the relatively short period of such delay and the absence of adverse consequences for his life or health, the attitude of the domestic authorities had in itself jeopardised his ability to pursue his application before the Court.
The Court also held, unanimously, that there had been violations of Article 3 and Article 5 § 1.
The case was accepted for referral to the Grand Chamber at the respondent Government's request.

HINDER THE EXERCISE OF THE RIGHT OF PETITION
Government representative orders inquiry into the financial arrangements between the applicant and his representative before the Court: *violation*.

RYABOV - Russia (N° 3896/04)
Judgment 31.1.2008 [Section I]

Facts: In 2003 the applicant was convicted of the rape of a seven-year-old girl and sentenced to 12 years and six months' imprisonment. At no stage of the proceedings was he given the opportunity to examine a witness who had made a written statement about the rape or the expert who had drawn up the medical report. In 2006 the Supreme Court acknowledged a violation of the applicant's right to examine witnesses, as guaranteed by Article 6 § 3 (d) of the Convention, and ordered a re-trial.
Meanwhile, in 2004 the applicant brought his case before the European Court and his complaint under Article 6 § 3 (d) was communicated to the respondent Government. In November 2005, following the submission of the Government's comments on the applicant's claims for just satisfaction in the Court proceedings, the Representative of the Russian Government asked the competent domestic authorities to verify the lawfulness of the legal-assistance agreement between the applicant and his representative before the Court, asserting that she had imposed a financial obligation on the applicant without his knowledge. Pursuant to that request, the authorities required the applicant's lawyers to produce documents concerning their legal relationship with the applicant. They also visited the applicant in prison and attempted to compel him to give a written statement about his contacts with his lawyer. They later decided that the legal-assistance agreement between the applicant and his lawyer was contrary to domestic legislation and requested the Bar Association to take appropriate measures against the lawyer(s).

Law: Article 6 § 3 (d) – Having regard to the Supreme Court's decision indicating that a new trial should be held in the applicant's case, the Court concluded that the national authorities had both acknowledged, and then afforded redress for, the alleged breach of the Convention: *no longer a victim*.

Article 34 – As a matter of principle it was inappropriate for the authorities of a respondent State to enter into direct contact with an applicant before the European Court on the pretext that "forged documents had been submitted in other cases". It was furthermore unacceptable for the domestic authorities to ask for privileged information from the applicant's lawyer's office, bearing in mind that the specific body carrying out the enquiry was not even competent to do so, nor had there been any criminal investigation which would have justified such actions. On the contrary, the applicant had consistently maintained that he was satisfied with the work of his representative and fully aware of the legal-assistance agreement and the amounts indicated therein. The allegation of the Russian authorities that the agreements had been signed without the applicant's knowledge were therefore mere personal conjecture without any basis in fact. In conclusion, the steps taken by the Russian Government to enquire about the financial arrangements between the applicant and his lawyer lacked any basis in law or fact and had specifically targeted the applicant's representative in order to prevent her from participating in the Strasbourg proceedings.
Conclusion: violation (unanimously).

(see also *Fedotova v. Russia*, no. 73225/01, 13 April 2006, and *Tanrıkulu v. Turkey* [GC], no. 23763/94, ECHR 1999-IV)

ARTICLE 35

Article 35 § 1

SIX-MONTH PERIOD
Application in disappearance case lodged more than six months after the respondent State's ratification of the right of individual petition but within days of its recognition of the jurisdiction of the old Court: *preliminary objection dismissed*.

VARNAVA and Others - Turkey (N° 16064/90 and 8 Other cases)
Judgment 10.1.2008 [Section III]

(see Article 2 above).

Article 35 § 3

COMPETENCE *RATIONE TEMPORIS*
Court's temporal jurisdiction in respect of disappearances that had occurred some thirteen years before the respondent State recognised the right of individual petition: *preliminary objection dismissed*.

VARNAVA and Others - Turkey (N° 16064/90 and 8 Other cases)
Judgment 10.1.2008 [Section III]

(see Article 2 above).

ARTICLE 38

FURNISH ALL NECESSARY FACILITIES
Government's refusal to disclose documents from investigation into allegations of ill treatment by State agents: *failure to comply with Article 38*.

MASLOVA and NALBANDOV - Russia (N° 839/02)
Judgment 24.1.2008 [Section I]

(see Article 3 above).

(see also, for previous failures to comply with Article 38: *Shamayev and Others v. Georgia and Russia* (no. 36378/02 – reported in Information Note no. 74); *Imakayeva v. Russia* (no. 7615/02 – Information Note no. 91); *Baysayeva v. Russia* (no. 74237/01 – Information Note no. 96); *Akhmadova and Sadulayeva v. Russia* (no. 40464/02 – Information Note no. 97); *Bitiyeva and X v. Russia* (nos. 57953/00 and 37392/03 – Information Note no. 98) and *Kukayev* and *Khamila Isayeva* (nos. 29361/02 and 6846/02 – Information Note no. 102)).

ARTICLE 1 OF PROTOCOL No. 1

POSSESSIONS
Inability to recover deposits from the Chechen Savings Bank, a part of the Savings Bank of Russia, following its liquidation, despite judicial recognition of entitlement: *admissible*.

MERZHOYEV - Russia (N° 68444/01)
Decision 17.1.2008 [Section I]

Prior to 1992 the applicant deposited his savings with the Chechen Savings Bank, then an integral part of the USSR Savings Banks. After the beginning of hostilities in Chechnya in 1994, the applicant left Chechnya and settled in Moscow. Thereafter he applied to transfer his savings to a Moscow branch of the Savings Bank of Russia, the successor to the USSR Savings Bank. In 2000, following the bank's refusal to transfer the money, he brought a court action. The courts confirmed his entitlement to the deposits in question, acknowledging "the existence of obligations under the bank deposit agreements between the applicant and the Savings Bank". However, his action was dismissed on the grounds that the Chechen Savings Bank had been wound up in 1996 and that there existed no legal framework which would enable the transfer and reimbursement of his deposits. In 2003, in accordance with a governmental decree, the Savings Bank of Russia commenced payment of compensation to the former depositors of the Chechen Savings Bank. It was unclear whether the applicant had applied for a payment.
Admissible.

POSSESSIONS
Inability to recover deposits from the Chechen Savings Bank, a part of the Savings Bank of Russia, following its liquidation: *inadmissible*.

PUPKOV - Russia (N° 42453/02)
Decision 17.1.2008 [Section I]

Prior to 1992 the applicant deposited his savings with the Chechen Savings Bank, then an integral part of the USSR Savings Bank. After the beginning of hostilities in Chechnya in 1994, he left Chechnya and settled in another region of Russia. In 2001 he applied to transfer his savings to the local branch of the Savings Bank of Russia, the successor to the USSR Savings Bank, but his request was refused on the ground that in 1996 the Chechen Savings Bank had been wound up. The courts dismissed his claim by reference to the political events in Chechnya and his failure to submit, in addition to his savings books, a document proving that his deposits had actually been transferred from Chechnya to another branch of the Savings Bank of Russia. In 2003, in accordance with a governmental decree, the Savings Bank of Russia commenced payment of compensation to the former depositors of the Chechen Savings Bank. The applicant did not apply for compensation.

Inadmissible: The decision of the Savings Bank of Russia to wind up the Chechen Savings Bank had served as the basis for the refusal to return the applicant's deposits and had therefore constituted an interference with his property rights. That decision had pre-dated the ratification of the Convention by Russia on 5 May 1998. There was nothing to suggest the existence of a continuing situation, given that during the period between 1996 and 2003 the State had not adopted any legal acts confirming the applicant's entitlement to his deposits. The governmental decree of February 2003 had not, as such, restored his entitlement to his savings but had merely acknowledged his right to compensation for his deposits. The alleged interference with the applicant's property rights had amounted to the *de facto* deprivation of property and had been of an instantaneous nature, and therefore the Court had no jurisdiction *ratione temporis* to examine the applicant's complaint in so far as it related to the events that had taken place prior to 5 May 1998. As regards the post-ratification period, given that the domestic

courts had rejected his claims as unsubstantiated, the applicant had no "possessions" within the meaning of Article 1 of Protocol No. 1: *manifestly ill-founded*.

PEACEFUL ENJOYMENT OF POSSESSIONS
Prolonged inability to enjoy proceeds from customs auction: *violation*.

JUCYS - Lithuania (N° 5457/03)
Judgment 8.1.2008 [Section III]

Facts: The applicant was arrested on suspicion of smuggling mink furs, but was ultimately acquitted in 1997. However, the goods were forfeited and auctioned, being of a perishable nature. The applicant brought civil proceedings in order to obtain compensation for the forfeited goods. The proceedings lasted over eight years and six months and the applicant was eventually awarded compensation in the amount of the auction proceeds, from which the auction expenses (15% of the total sum) were deducted. The applicant also brought a second civil action, claiming that the furs had been sold at a price of about 33% less than their market value. However, these proceedings were stayed and, apparently, have never been resumed.

Law: The forfeiture and the sale of furs were customs measures for the control of imports and so concerned the control of the use of property within the meaning of Article 1 of Protocol No. 1. The Court recalled that any seizure or confiscation entailed damage which, however, should not be more extensive than that which was the inevitable. Likewise, an "innocent" owner of smuggled goods should in principle be entitled to recover the forfeited items. Following his acquittal, the applicant was able to claim the actual proceeds of the auction. However, it had taken more than eight and a half years for the courts to resolve the matter, even though it presented no complexities, as the facts had already been determined in the criminal proceedings against him. Consequently, after going through the strain of an ill-founded criminal prosecution, and losing his possessions which had hurriedly been auctioned off as perishable goods, the applicant had been precluded from enjoying the auctioned fruits of those possessions for many years.
Conclusion: violation (unanimously).

Article 41 – EUR 25,000 in respect of pecuniary and non-pecuniary damage.

PEACEFUL ENJOYMENT OF POSSESSIONS
Refusal to allow Greeks to inherit property located in Turkey, on the ground that the criterion of reciprocity between Greece and Turkey had not been met: *violation*.

NACARYAN and DERYAN - Turkey (N°s 19558/02 and 27904/02)
Judgment 8.1.2008 [Section IV]

Facts: In 2000 a Turkish national died unmarried and without any direct descendants. In 2001 the District Court found that the applicants were related to the deceased and recognised them as the heirs to his movable property. As to his immovable property, the District Court found that as the applicants were Greek nationals they had no claim to the estate, on the ground that the condition of reciprocity between Greece and Turkey had not been met.

Law: According to the Turkish Land Act in force at the material time, the inheritance of real estate by non-nationals was subject to a condition of reciprocity. Ownership of the immovable part of the deceased's estate was never transferred to the applicants, in conformity with Turkish law. It followed that the applicants had no "existing possessions". It remained to be determined whether an asset existed by virtue of which the applicants could claim to have a legitimate expectation of being recognised as the heirs to the immovable property and, consequently, to have a right of ownership over that property. That meant ascertaining whether the applicants could be considered to have met the reciprocity requirement

contained in the Land Act. The Court considered it unnecessary to examine *in abstracto* whether the application of the principle of reciprocity in Turkish law was compatible with the Convention, but set out to determine whether the way it had affected the applicants constituted a violation of the Convention. In the instant case the District Court had based its finding that the reciprocity requirement had not been met on the conclusions of a report of the Ministry of Justice. However, the report expressly mentioned that there were no restrictions in Greece on the inheritance of immovable property. Although the report mentioned information according to which there were various obstacles to this form of acquisition, it admitted that the information concerned was not based on concrete proof. On the other hand, according to documents produced by the Greek Government, Turkish nationals had been able to inherit immovable property located in Greece. That being so, the applicants, whose family ties with the deceased had been established with certainty, could hardly have foreseen that the District Court would consider that the reciprocity requirement had not been met. Accordingly, the applicants had had a "legitimate expectation", within the meaning of the Court's case-law, that their rights to inherit the deceased's immovable property and, consequently, their title to it, would be acknowledged. The refusal of the domestic courts to acknowledge that title had amounted to an interference with their right to the peaceful enjoyment of their property. Given that the application of the impugned provision of the Land Act could not be considered to have been sufficiently foreseeable for the applicants, the impugned interference was incompatible with the requirement of lawfulness and was therefore not in conformity with Article 1 of Protocol No. 1.
Conclusion: violation (five votes to two).

PEACEFUL ENJOYMENT OF POSSESSIONS
Method of calculation of wealth tax combined with application of a ceiling such that liability did not exceed disposable income: *inadmissible*.

IMBERT DE TREMIOLLES - France (Nos 25834/05 and 27815/05)
Decision 4.1.2008 [Section III]

In 1997 the applicants' assets were subject to the wealth tax provided for in the General Tax Code. However, in a prior declaration presented to the director of the Inland Revenue Service, they challenged the lawfulness of the methods that made them subject to the wealth tax. They argued that the wealth tax plus all the other charges they had to pay amounted to more than their earnings from their assets. They submitted that although the wealth tax had been limited to 85% of their income, that ceiling was confiscatory and seriously undermined their financial situation, especially as the ceiling did not apply to their property taxes, which amounted to 30% of their total taxation, so that 85% was a completely unrealistic ceiling. Lastly, in the alternative, they maintained that those assets which had not produced any income should be exempted from the wealth tax. The Inland Revenue Service rejected their complaint and the applicants took the matter before the *tribunal de grande instance*, which found against them. The Court of Appeal dismissed their subsequent appeal and upheld the first-instance judgment. It held that the method of taxation, and in particular the ceiling applied, were not at variance with the reasoning behind the decisions of the Constitutional Council and were not confiscatory for the purposes of Article 1 of Protocol No. 1. The wealth tax was part of the taxation system as long as its modus operandi and the calculation method used were detailed in a Law that was not contrary to constitutional principles, its purpose was the evident one of being in the public interest to which all taxes contributed, and the proportionality between the means employed and the aim pursued could not be seriously contested in law, in particular the principle of the ceiling, striking a fair balance between the demands of the general interest and the protection of human rights. The applicants appealed to the Court of Casssation, which upheld the Court of Appeal's judgment.
The applicants were again obliged, a few years later, to pay the wealth tax. They once again challenged the lawfulness of the way in which they had been subjected to this tax. The Inland Revenue Service rejected their complaint. The applicants took the matter before the *tribunal de grande instance*, which found against them. They did not appeal as the court had delivered its judgment in terms almost identical to those used by Court of Cassation in its decision concerning the payment of the wealth tax for 1997, so they considered that an appeal was unlikely to succeed.

Inadmissible under Article 1 of Protocol No. 1: Concerning the lawfulness of the interference with the right protected by the first paragraph of that Article, the wealth tax, which had been introduced by a Finance Act, was payable by individuals whose net taxable assets exceeded a certain value. It had been introduced as a solidarity tax, to serve the public interest by financing part of the minimum welfare benefit. As to the requirement that the interference with the applicant's right be proportionate to the general-interest aims pursued, the manner in which the legislation concerned was applied and, in particular, the tax ceiling and the assets taken into account to calculate it, lay within the margin of appreciation the States enjoyed in that area, in particular in implementing tax policy. First of all, the General Tax Code provided for a ceiling intended to ensure that persons subject to the wealth tax were not required to pay more than they earned. In the domestic courts the applicants had raised questions regarding the payment of taxes in excess of the ceiling of 85% of their income provided for in the General Tax Code and the notion of the reference income taken into account for tax purposes. The tax authorities who had calculated the taxes the applicants had to pay and the domestic courts which had examined their case, basing their decisions on the precise wording of the relevant Article of the General Tax Code, had considered that the reference income mentioned in the Article concerned was financial income (and not income in kind, such as usufruct, as the applicants had claimed), excluding housing tax and property tax, which were not income-based. Secondly, the courts to which the applicants had appealed had examined their situation *in concreto*. The Court of Appeal had found that the method of calculating the wealth tax, with its ceiling for one of the years concerned, had not generated wealth tax and income tax in excess of their income. The Court of First Instance had found that the applicants could not really claim that the wealth tax had actually caused their assets to diminish, as their own declarations showed that they had increased substantially from one year to the next. Accordingly, in view of the margin of appreciation which the States were afforded in this sphere, the payment of the tax in question had not affected the applicants' financial situation seriously enough for the measure to be considered disproportionate or an abuse of a State's right, acknowledged in Article 1 of Protocol No. 1, to secure the payment of taxes and other contributions: *manifestly ill-founded*.

RULE 39 OF THE RULES OF COURT

INTERIM MEASURES
Lack of appropriate regulations and deficiencies in the organisation of the Government Agent's activity resulting in the State's failure to comply promptly with a Rule 39 measure: *case referred to the Grand Chamber*.

PALADI - Moldova (N° 39806/05)
Judgment 10.7.2007 [Section IV]

(see Article 34 above).

INTERIM MEASURES
Application of Rule 39 of the Rules of Court to enable an HIV-positive detainee to be admitted to a specialised medical institution and to be examined by a medical commission to be composed on a parity basis.

ALEKSANYAN - Russia (N° 46468/06)
Decision 24.1.2008 [Section I]

(see Article 3 above).

Referral to the Grand Chamber

Article 43 § 2

The following case has been referred to the Grand Chamber in accordance with Article 43 § 2 of the Convention:

PALADI - Moldova (N° 39806/05)
Judgment 10.7.2007 [Section IV]

(see Article 34 above).

Judgments having become final under Article 44 § 2 (c)[1]

Article 44 § 2 (c)

On 30 January 2008 the Panel of the Grand Chamber rejected requests for referral of the following judgments, which have consequently become final:

ALIKHADZHIYEVA – Russia (N° 68007/01)
ASSOCIATION for EUROPEAN INTEGRATION and HUMAN RIGHTS and EKIMDZHIEV – Bulgaria (N° 62540/00)
BITIYEVA and X – Russia (N°s 57953/00 and 37392/03)
CRUZ DE CARVALHO – Portugal (N° 18223/04)
FC MRETEBI – Georgia (N° 38736/04)
GARABAYEV – Russia (N° 38411/02)
IGOR IVANOV – Russia (N° 34000/02)
KANALA – Slovakia (N° 57239/00)
KANTYREV – Russia (N° 37213/02)
KONDRASHINA – Russia (N° 69533/01)
KOZEYEV – Russia (N° 934/03)
KUMKIN and Others – Russia (N° 73294/01)
MELNIKOVA – Russia (N° 24552/02)
PAROLOV – Russia (N° 44543/04)
SATILMIŞ and Others – Turkey (N°s 74611/01, 26876/02 and 27628/02)
TESTA – Croatia (N° 20877/04)
TIMISHEV – Russia (no. 3) (N° 18465/05)

[1] The list of judgments having become final pursuant to Article 44(2)(b) of the Convention has been discontinued. Please refer to the Court’s database HUDOC which will indicate when a given judgment has become final.

Cases selected for publication[1]

The Publications Committee has selected the following remaining cases from 2007 for publication in *Reports of Judgments and Decisions* (where applicable, the three-digit number after each case-title indicates the issue of the Case-Law Information Note where the case was summarised):

Grand Chamber judgments
LINDON and OTCHAKOVSKY-LAURENS and JULY – France (N[os] 21279/02 and 36448/02) (101)
D.H. and Others – Czech Republic (N° 57325/00) (102)
DICKSON – United Kingdom (N° 44362/04) (103)
STOLL – Switzerland (N° 69698/01) (103)

Chamber judgments
VEREIN GEGEN TIERFABRIKEN SCHWEIZ – Switzerland (N° 32772/02) (101)
SAOUD – France (extracts) (N° 9375/02) (101)
HASAN and EYLEM ZENGIN – Turkey (N° 1448/04) (101)
GLAS NADEZHDA EOOD and ANATOLIY ELENKOV – Bulgaria (extracts) (N° 14134/02) (101)
WIESER and BISOC BETEILINGUNGEN GmbH – Austria (N° 74336/01) (101)
DRIZA – Albania (extracts) (N° 33771/02) (102)
KHAMIDOV – Russia (extracts) (N° 72118/01) (102)
PFEIFER – Austria (N° 12556/03) (102)
HAMER – Belgium (extracts) (N° 21861/03) (102)
TILLACK – Belgium (N° 20477/05) (102)
LUCZAK – Poland (N° 77782/01) (102)
URBARSKA OBEC TRENCIANSKE BISKUPICE – Slovakia (extracts) (N° 74258/01) (102)
MAUMOUSSEAU and WASHINGTON – France (N° 39388/05) (103)
BEIAN – Romania (extracts) N° 30658/05) (103)
EMONET and Others – Switzerland (N° 39051/03) (103)
ISLAMIC REPUBLIC OF IRAN SHIPPING LINES – Turkey (N° 40998/98) (103)
MARINI – Albania (extracts) (N° 3738/02) (103)
PHINIKARIDOU – Cyprus (extracts) (N° 23890/02) (103)

Decisions
SUKÜT – Turkey (extracts) (N° 59773/00) (100)
PHOCAS – France (N° 15638/06) (100)
MOULLET – France (N° 27521/04) (100)
MERIE – Netherlands (N° 664/05)
BERIC and Others – Bosnia and Herzegovina (N° 36357/04 etc.) (101)
OMWENYEKE and Others – Germany (N° 44294/04) (102)
WOLKENBERG and Others – Poland (extracts) (N° 50003/99) (103)

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[1] For a list of the previously selected cases from 2007 please see the survey of the Court's activities at: http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+surveys+of+activity/

Statistical information

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