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COUR EUROPÉENNE DES DROITS DE L'HOMME

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The cases related to the killing of the first five applicants' relatives by British Armed Forces in southern Iraq during a period when the UK was an "occupying force" there within the meaning of the Hague Regulations 1907. The sixth applicant's son was beaten to death while in the custody of British soldiers in southern Iraq. The applicants allege that the UK authorities failed to comply with their procedural obligations under Article 2 to investigate the circumstances of the killings. The cases were communicated in December 2008 under Articles 1, 2 and 3 of the Convention (see Information Note no. 114).

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The applicants are family members of young conscripts who allegedly committed suicide during their military service, using assault rifles. In six cases the conscripts were allegedly given firearms even though the military medical authorities knew them to be psychologically vulnerable. In all of the cases the military prosecutor issued an order finding that there was no case to answer because the victims had committed suicide and the military courts found no liability on the part of the military authorities. A full appeal on fact and law was lodged against the Ministry of Defence by family members in six cases, but the Supreme Administrative Court dismissed it on the grounds that there was no causal relationship between the suicides and any negligence attributable to the military authorities. Lastly, although criminal investigations were opened against certain of the victims' superiors in an attempt to establish their possible liability for "assault occasioning actual bodily harm" to the soldiers, there has been only one conviction to date.

Communicated under Articles 2, 3 and 6.

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Muskhadzhiyeva and Others v. Belgium - 41442/07
Judgment 19.1.2010 [Section II]

Facts – The applicants are a mother and her four children. Having fled Grozny in Chechnya, the applicants arrived in Belgium in October 2006 and lived temporarily in a special welfare home in Brussels. They applied for asylum in Belgium. The Polish authorities agreed to take charge of them, by virtue of the Dublin Regulation[1]. The Belgian authorities issued a decision refusing the applicants permission to stay in Belgium and ordering them to be held in a particular place with a view to their being handed over to the Polish authorities. The applicants were placed in closed transit centre 127 *bis*. They made an application to a court of first instance for release, but the court ruled that their detention was lawful. The applicants appealed, but the court of appeal upheld the order. In January 2007 the applicants were put on board a plane to Warsaw. An appeal to the Court of Cassation was held to have become devoid of purpose as the applicants had already been removed from the country.

Law – Article 3: a) *The children* – Although the children had not been separated from their mother, that alone was not sufficient to exempt the Belgian authorities from their obligation to protect the children and take the necessary measures in keeping with their positive obligations under Article 3. The children had been respectively aged seven months, three and a half years, five and seven years at the material time. At least two of them had been old enough to realise what sort of surroundings they were in. They had all been held for over a month in closed transit centre 127 *bis*, a facility ill-equipped to receive children. In addition, independent doctors had found the children's state of health to be a cause for concern. The doctors had carried out a psychological examination of the applicants and found that the children in particular were showing serious psychological and psychosomatic symptoms and that their mental state was deteriorating. The Court referred to the United Nations Convention of 20 November 1989 on the Rights of the Child, and in particular Article 22, which calls on the States Parties to take appropriate measures to ensure that a child who is seeking refugee status, whether unaccompanied or accompanied by his or her parents, receives appropriate protection and humanitarian assistance. In view of the young age of the children, the duration of their detention and their state of health as attested by medical certificates during their detention, the Court found that the conditions in which the children had been held in transit centre 127 *bis* had attained the minimum level of severity required to constitute a violation of Article 3.

Conclusion: violation (unanimously).

b) *The first applicant (the mother)* – The mother had not been separated from her children. Their constant presence must have somewhat appeased the distress and frustration she must have felt at being unable to protect them against the conditions of their detention, so that it did not reach the level of severity required to constitute inhuman treatment.

Conclusion: no violation (unanimously).

Article 5 § 1: The Court referred to its observations in the judgment of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (no. 13178/03, 12 October 2006, Information Note no. 90) and saw no reason to reach a different conclusion concerning the four child applicants in the present case, even though they were accompanied by their mother. As to the mother, she had been held with a view to her expulsion from Belgium. Article 5 § 1 f) does not require the detention of a person against whom expulsion proceedings are in progress to be considered reasonably necessary.

Conclusion: violation in respect of the four child applicants (unanimously); no violation in respect of the mother (unanimously).

Article 5 § 4: The court of first instance had dismissed the applicants' appeal and that decision had been upheld on appeal. The Court of Cassation had found the applicants' subsequent appeal devoid of purpose as the applicants had in the meantime been removed to Poland. The applicants had thus complained about their detention to a court which had issued a decision only six days later. They had been able to appeal against the first-instance decision while they were still in Belgium. Since an appeal to the Court of Cassation was an extraordinary appeal, it could not, in any event, have operated to suspend the expulsion procedure.

Conclusion: no violation in respect of all the applicants (unanimously).

Article 41: EUR 17,000 jointly to the four child applicants in respect of non-pecuniary damage.

1. European Council Regulation no. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

Degrading treatment

Requirement for detainee to wear a balaclava when not in his cell: *violation*

Petyo Petkov v. Bulgaria - 32130/03
Judgment 7.1.2010 [Section V]

Facts – After being arrested by the police on suspicion of being the perpetrator of a sulphuric acid attack, the applicant was charged and detained pending trial. From May 2002, by order of the district prosecutor, he was required to wear a balaclava with eye-holes whenever he left his cell, for example when moving around or outside the prison premises, at hearings or when receiving visits. He complained but to no avail. In 2003 he applied to the district court for the measure to be discontinued. In view of the length of time the measure had been applied, the court ordered its discontinuation after the end of a hearing in May 2003. Nevertheless, the police officers continued to compel the applicant to wear the balaclava outside the courtroom. In June 2003 the applicant was acquitted.

Law – Article 3: *Obligation to wear a balaclava* – The applicant had been forced to conceal his face with a balaclava whenever he had left his cell over a period of one year and one month. That measure, which had impinged on the applicant's physical identity and had been applied for such a lengthy period, had inevitably had a profound psychological impact on him. No provision of domestic law expressly permitted the measure. The applicant had been aware of that fact, having raised it before the district court, and had thus felt that he was being treated arbitrarily by the authorities. As to whether the measure had been necessary, in the context of the widespread media coverage of the applicant's trial and in view of the nature and seriousness of the offence with which he had been charged and the existence of a separate criminal investigation into a similar offence, the concern to ensure the applicant's own safety and to avoid jeopardising the two criminal investigations concerning him did not appear unfounded. In particular, the need to preserve the applicant's anonymity could have justified the use of a balaclava during his appearances in public while he was being escorted to the courtroom. However, the application of that measure had not been justified during his movements within the detention facility itself to the area where he had met his relatives and lawyers. Similarly, the applicant's anonymity during the consideration of his case by the courts could have been preserved by holding hearings in private or restricting the presence of television cameras or photographic equipment at hearings. However, despite the applicant's repeated complaints, the State authorities had apparently not considered whether it might be appropriate to make such arrangements to alleviate his situation, and this had surely aggravated his feelings of frustration and helplessness. Lastly, the police officers' arbitrary conduct in continuing to conceal the applicant's face outside the courtroom despite the district court's decision might have been perceived by him as a form of punishment. This punitive element had aroused in him feelings of anxiety, powerlessness and inferiority that were liable to debase him or lower his self-esteem. Accordingly, having regard to the duration and nature of its application, its lack of a legal basis, its arbitrariness and punitive character, the psychological effects of the measure in question had gone beyond the threshold of severity required for Article 3 to apply and the applicant had been subjected to degrading treatment.

Conclusion: violation (six votes to one).

Article 41: EUR 6,000 in respect of non-pecuniary damage.

The Court also held unanimously that there had been a violation of Article 5 §§ 1 and 3, Article 6 § 2 and Article 13 of the Convention and Article 1 of Protocol No. 1, and no violation of Article 3 as regards the applicant's isolation from the other detainees' activities.

Conditions of detention: *communicated*

Segheti v. Moldova - 39584/07
[Section IV]

The applicant has been detained since October 2006 in a 60 square-metre cell along with twenty-six other prisoners. He complains that he has been given no bed linen, clothes or toiletries and insufficient food and water.

Communicated under Articles 3 and 13, with a question about the suitability of using the "pilot-judgment" procedure.

ARTICLE 4

Applicability

Trafficking in human beings: *Article 4 applicable*

Rantsev v. Cyprus and Russia - 25965/04
Judgment 7.1.2010 [Section I]

(See below)

Positive obligations

Failure by Cyprus to establish suitable framework to combat trafficking in human beings or to take operational measures to protect victims: *violation*

Failure by Russia to conduct effective investigation into recruitment of a young woman on its territory by traffickers: *violation*

Rantsev v. Cyprus and Russia - 25965/04
Judgment 7.1.2010 [Section I]

Facts – The applicant's daughter Ms Rantseva, a Russian national, died in unexplained circumstances after falling from a window of a private property in Cyprus in March 2001. She had arrived in Cyprus a few days earlier on a "cabaret-artiste" visa, but had abandoned her work and lodging shortly after starting and had left a note to say she wanted to return to Russia. After locating her in a discotheque some days later, the manager of the cabaret had taken her to the central police station at around 4 a.m. and asked them to detain her as an illegal immigrant. The police had contacted the immigration authorities, who gave instructions that Ms Rantseva was not to be detained and that her employer, who was responsible for her, was to pick her up and bring her to the immigration office at 7 a.m. The manager had collected Ms Rantseva at around 5.20 a.m. and taken her to private premises, where he had also remained. Her body had been found in the street below the apartment at about 6.30 a.m. A bedspread had been looped through the railing of the balcony.

An inquest held in Cyprus concluded that Ms Rantseva had died in circumstances resembling an accident while attempting to escape from an apartment in which she was a guest, but that there was no evidence of foul play. Although the Russian authorities considered, in the light of a further autopsy that was carried out following the repatriation of the body to Russia, that the verdict of the inquest was unsatisfactory, the Cypriot authorities stated that it was final and refused to carry out any additional investigations unless the Russian authorities had evidence of criminal activity. No steps were taken by either the Russian or Cypriot authorities to interview two young women living in Russia whom the applicant said had worked with his daughter at the cabaret and could testify to sexual exploitation taking place there.

In April 2009 the Cypriot authorities made a unilateral declaration acknowledging violations of Articles 2, 3, 4, 5 and 6 of the Convention, offering to pay compensation to the applicant and advising that independent experts had been appointed to investigate the circumstances of Ms Rantseva's death, employment and stay in Cyprus.

The Cypriot Ombudsman, the Council of Europe Commissioner for Human Rights and the United States State Department have published reports which refer to the prevalence of trafficking in human beings for commercial sexual exploitation in Cyprus and the role of the cabaret industry and "artiste" visas in facilitating trafficking in Cyprus.

Law – Article 37 § 1: The Court refused the Cypriot Government's request for the application to be struck out. It found that, despite the unilateral declaration acknowledging violations of the Convention, respect for human rights in general required it to continue its examination of the case in view of the serious nature of the allegations, the acute nature of the problem of trafficking and sexual exploitation in Cyprus and the paucity of case-law on the question of the interpretation and application of Article 4 of the Convention to trafficking in human beings.

Conclusion: case not struck out (unanimously).

Article 1: *Jurisdiction* ratione loci – The Court did not accept the Russian Government's submission that they had no jurisdiction over, and hence no responsibility for, the events to which the application pertained. Since the alleged trafficking had commenced in Russia, the Court was competent to examine the extent to which Russia could have taken steps within the limits of its own territorial sovereignty to protect the applicant's daughter from trafficking and to investigate both the allegations of trafficking and the circumstances that had led to her death, in particular, by interviewing witnesses resident in Russia.

Conclusion: preliminary objection dismissed (unanimously).

Article 2: (a) *Cyprus* – (i) *Substantive aspect*: Although it was undisputed that victims of trafficking and exploitation were often forced to live and work in cruel conditions and may suffer violence and ill-treatment at the hands of their employers, a general risk of ill-treatment and violence could not constitute a real and immediate risk to life. In the instant case, even if the police ought to have been aware that Ms Rantseva might

have been a victim of trafficking, there had been no indications while she was at the police station that her life was at real and immediate risk and the particular chain of events that had led to her death could not have been foreseeable to the police when they released her into the cabaret manager's custody. Accordingly, no obligation to take operational measures to prevent a risk to life had arisen.

Conclusion: no violation (unanimously).

(ii) *Procedural aspect*: The Cypriot authorities' investigation into the death had been unsatisfactory in a number of ways: inconsistencies in the evidence had been left unresolved; relevant witnesses had not been questioned; little had been done to investigate events at the police station and, in particular, possible corruption on the part of the police; the applicant had not been able to participate effectively in the proceedings; and the Cypriot authorities had refused a Russian offer of assistance that would have enabled them to obtain the testimony of two important witnesses. On this last point, the Court made it clear that member States were required to take necessary and available steps to secure relevant evidence, whether or not it was located on their territory, particularly in a case such as the instant one, in which both States were parties to a convention providing for mutual assistance in criminal matters.

Conclusion: violation (unanimously).

(b) *Russia – Procedural aspect*: Article 2 did not require the criminal law of member States to provide for universal jurisdiction in cases involving the death of one of their nationals outside their territory. The Russian authorities had, therefore, not been under a free-standing obligation to investigate Ms Rantseva's death in Cyprus. As to Russia's duty as a State where evidence was located to render legal assistance to the investigating State (Cyprus), there had been no obligation on the Russian authorities to take action of their own motion to secure the evidence of the two Russian witnesses in the absence of any request from the Cypriot authorities. Lastly, as regards the applicant's complaint that the Russian authorities had failed to request the initiation of criminal proceedings, the Court observed that they had made extensive and repeated use of the opportunities presented by the relevant legal-assistance agreements to press for action by the Cypriot authorities.

Conclusion: no violation (unanimously).

Article 4: (a) *Applicability* – In response to the Russian Government's submission that the complaint under Article 4 was inadmissible *ratione materiae* in the absence of any slavery, servitude or forced or compulsory labour, the Court noted that trafficking in human beings as a global phenomenon had increased significantly in recent years. The conclusion of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("the Palermo Protocol") in 2000 and the Council of Europe Convention on Action against Trafficking in Human Beings in 2005 demonstrated the increasing recognition at international level of the prevalence of trafficking and the need for measures to combat it. It was thus appropriate to examine the extent to which trafficking itself could be considered to run counter to the spirit and purpose of Article 4. By its very nature and aim, trafficking in human beings was based on the exercise of powers attaching to the right of ownership. It treated human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implied close surveillance of the activities of victims, whose movements were often circumscribed and involved the use of violence and threats against people who lived and worked under poor conditions. There could be no doubt that trafficking threatened the human dignity and fundamental freedoms of its victims and could not be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considered it unnecessary to identify whether the treatment about which the applicant complained constituted "slavery", "servitude" or "forced and compulsory labour". Instead, trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, fell within the scope of Article 4 of the European Convention.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits – Positive obligations*: It was clear from the provisions of the Palermo Protocol and the Anti-Trafficking Convention that the Contracting States had formed the view that only a combination of measures could be effective in the fight against trafficking. This gave rise to positive obligations to take measures to prevent trafficking, to protect victims and potential victims and to prosecute and punish those responsible for trafficking. As regards the latter point, it was a feature of trafficking that in many cases it was not confined to the domestic arena. Victims were often trafficked from one State

to another. Relevant evidence and witnesses could be located in more than one State. For this reason, in addition to the obligation to conduct a domestic investigation into events occurring on their own territories, member States were also subject to a duty in cross-border trafficking cases to cooperate effectively with the other States concerned in the investigation, in order to ensure a comprehensive international approach to trafficking in the countries of origin, transit and destination.

(i) *Compliance by Cyprus*: Cyprus had failed to comply with its positive obligations under Article 4 on two counts: firstly, it had failed to put in place an appropriate legal and administrative framework to combat trafficking and, secondly, the police had failed to take suitable operational measures to protect Ms Rantseva from trafficking. (The issue whether the Cypriot authorities had discharged their procedural obligation to investigate the trafficking had been subsumed by the general obligations under Article 2 and did not need to be examined separately.)

As to the first point, although the domestic legislation on trafficking did not in itself appear to give rise to any concern, both the Council of Europe Commissioner for Human Rights and the Cypriot Ombudsman had criticised the "cabaret-artiste" visa regime, which they considered to have been responsible for encouraging large numbers of young foreign women to come to Cyprus, where they were at risk of trafficking. Further, while it was legitimate for immigration-control purposes to require employers to notify the authorities when an artiste left her employment, the responsibility for ensuring compliance with immigration obligations had to remain with the authorities themselves. Measures which encouraged cabaret owners and managers to track down or take personal responsibility for the conduct of artistes were unacceptable and the practice of requiring owners and managers to lodge a bank guarantee to cover potential future costs associated with artistes they had employed was particularly troubling. These factors had been at play in Ms Rantseva's case. The regime of artiste visas had thus failed to afford Ms Rantseva practical and effective protection against trafficking and exploitation.

As to the second point, the State had been under a positive obligation to take measures to protect Ms Rantseva as there had been sufficient indicators available to the police to give rise to a credible suspicion that she was at real and immediate risk of trafficking or exploitation. There had been multiple failings on the part of the police, who had failed to make immediate further inquiries to establish whether she had been trafficked, had confided her into the custody of the cabaret manager instead of releasing her and had not complied with their statutory duty to protect her.

Conclusion: violations (unanimously).

(ii) *Compliance by Russia*: The Court found no violations of Article 4 as regards the positive obligations to put in place an appropriate legislative and administrative framework and to take protective measures. As to the need for an effective investigation in Russia, the Russian authorities had been best placed to conduct an effective investigation into Ms Rantseva's recruitment, which had occurred on Russian territory. No investigation had taken place, however, a failing that was all the more serious in the light of Ms Rantseva's subsequent death and the mystery surrounding the circumstances of her departure from Russia.

Conclusion: violation (unanimously).

Article 5: Ms Rantseva's detention at the police station and her subsequent confinement in the apartment amounted to a deprivation of liberty. Although it could be inferred that she was initially detained to enable her immigration status to be checked, there had been no basis in domestic law for the police's decision, once they had established that her papers were in order, to continue to hold her or to consign her to the cabaret manager's custody. Cyprus's responsibility was also engaged for Ms Rantseva's detention in the apartment because, even though she had been held by a private individual, it was clear that this would not have been possible without the active cooperation of the police. Her detention in the apartment had been both arbitrary and unlawful.

Conclusion: violation by Cyprus (unanimously).

Article 41: Awards in respect of non-pecuniary damage of EUR 40,000 against Cyprus and EUR 2,000 against Russia.

ARTICLE 5

Article 5 § 1

Lawful arrest or detention

Continued preventive detention of Iraqi national by British Armed Forces in Iraq on basis of UN

Security Council Resolution: *relinquishment in favour of the Grand Chamber*

Al-Jedda v. the United Kingdom - 27021/08
[Section IV]

(See Article 1 above, page 7)

ARTICLE 6

Article 6 § 1 (civil)

Access to court

Restriction on a Church's access to court in a dispute with another Church: *violation*

Sâmbata Bihor Greek Catholic Parish v. Romania - 48107/99
Judgment 12.1.2010 [Section III]

Facts – The applicant is an Eastern-rite Catholic church (Greek Catholic or Uniate) of the Sâmbata parish. In 1948, following the dissolution of the Uniate Church, the church building in which the Sâmbata Uniate priest officiated was transferred to the Orthodox Church. In 1990, after the fall of the communist regime, the Uniate Church was officially recognised again by Legislative Decree no. 126/1990, which provided that joint committees of Uniate and Orthodox representatives were to settle the status of any disputed property, such as the church building in Sâmbata. An attempt to set up a joint committee in Sâmbata failed and the Orthodox representatives opposed a proposal for the two denominations to hold alternate religious services in the church in question. They asserted that the religious building had been their property for years and that the Greek Catholic Church could build a church if it needed to. In 1996 the applicant parish applied to a court for an order requiring the Sâmbata Orthodox parish to allow it to hold services in the parish church. The court held that in the absence of a place of worship for Uniate adherents, the Orthodox parish's refusal was unreasonable and ordered it to arrange alternate services in an equitable manner. In 1998 the Court of Appeal declared the applicant parish's application inadmissible.

Law – Article 6 § 1: The applicant parish's action fell within the scope of Article 6 § 1 in its civil aspect in that it had sought to obtain recognition of its right to use a building – a pecuniary right. In its 1998 final judgment, on the basis of Legislative Decree no. 126/1990, the court of appeal had dismissed the applicant parish's action on the ground that disputes concerning the ownership or use of religious buildings fell outside the courts' jurisdiction and came within the exclusive jurisdiction of the joint committees. However, it was unquestionable that the joint committee provided for by the Legislative Decree, made up of representatives of the two denominations, could not be regarded as a "tribunal" within the meaning of Article 6 § 1 of the Convention. The Court could accept that the restriction in question had pursued the legitimate aim of preserving social harmony. As to whether it had been proportionate, it was necessary first of all to examine the effect of the requirement to use the preliminary procedure on the applicant parish's right to a court, and subsequently the effect of the scope of the court's review. In the present case the applicant parish had followed the procedure prescribed by Legislative Decree no. 126/1990. Thus, at the only meeting between representatives of the two denominations it had asked to share the use, for religious services, of the church building it had owned before 1948 but its request had been refused by the Orthodox majority. However, the law in force at the material time had not laid down any rules on either the procedure for convening the joint committee or its decision-making process. There had been no statutory binding provision requiring the parties to arrange or take part in meetings of such committees. Moreover, no time-limits were set for a joint committee to give a decision. Those legislative shortcomings had helped to create a drawn-out preliminary procedure which, in view of its compulsory nature, was capable of indefinitely blocking the applicant parish's access to court.

Furthermore, the judicial scrutiny to which any decision by the committee could be subjected had been limited to ensuring that the criteria established by law were satisfied, the main one being the need to reflect the majority view. Accordingly, that scrutiny had not been sufficient for the purposes of Article 6 § 1. In addition, although the applicant parish's action had been declared inadmissible by the court of appeal after a limited review, other courts during the same period had carried out a full judicial review of disputes brought before them. The restriction imposed by law on the right of access to court for disputes of this kind had therefore not appeared necessary to certain domestic courts. Accordingly, a general exclusion of disputes such as the one in the present case from the jurisdiction of the courts in itself infringed the

right to a court under Article 6. Furthermore, the Court considered that the system of prior dispute resolution instituted by Legislative Decree no. 126/1990 had not been sufficiently regulated and that the judicial supervision of the joint committee's decision had not been adequate. The applicant parish had therefore not enjoyed effective access to a court.

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 6 § 1: The difference in treatment affecting the applicant parish's enjoyment of its right of access to court had been based on its adherence to the Greek Catholic Church. Although the restitution of religious buildings and other property that had belonged to the Uniate Church prior to its dissolution had been a fairly widespread and socially sensitive issue, the national courts had nevertheless interpreted Legislative Decree no. 126/1990 in a contradictory manner, sometimes accepting and sometimes declining jurisdiction to deal with cases brought before them by Greek Catholic parishes, with the result that the applicant parish had been treated differently from other parishes involved in similar disputes. The difference in treatment to which the applicant parish had been subjected had therefore had no objective and reasonable justification.

Conclusion: violation (unanimously).

Article 41: EUR 15,000 to cover all heads of damage.

Article 6 § 1 (criminal)

Applicability

Allegation of a lack of impartiality by an investigating judge: *Article 6 applicable*

Vera Fernández-Huidobro v. Spain - 74181/01
Judgment 6.1.2010 [Section III]

Facts – At the material time the applicant held the post of State Secretary for Security at the Ministry of the Interior. Criminal proceedings were instituted in 1988 by a central investigating judge against a terrorist organisation known as the Anti-Terrorist Liberation Groups ("the GAL"). In 1993 the central investigating judge took leave of absence for personal reasons in order to stand in the general election. He went on to occupy various posts within the Government. Besides the issuing of a letter of request for judicial assistance, no significant investigative steps had been taken either before his leave of absence or during his replacement. The posts held by the judge during his leave of absence included that of State Secretary at the Ministry of the Interior. For several days in 1994 he held a post of equal rank to that of the applicant, who was State Secretary for Security at the Ministry of the Interior at the time (and resigned shortly afterwards). According to the applicant, there were manifest feelings of animosity between the two men, against a background of rivalry as to their political responsibilities, a situation that went so far as to prompt his resignation, although the judge denied this. A few days after his own resignation from the Government, the central investigating judge resumed his former duties and in that capacity took over the investigation of the GAL case. From then on the investigation was actively pursued. In January 1995 the central investigating judge placed the applicant under formal investigation on suspicion of misappropriation of public funds and false imprisonment; he was accused of having played a part – by financial and other means – in the organisation of the GAL. The applicant unsuccessfully challenged the judge for bias. He was held in pre-trial detention for several months in 1995, before being released on payment of bail. From August 1995 the investigation was taken over at Supreme Court level by a judge designated from that court's Criminal Division, for reasons of jurisdiction on account of the parliamentary immunity enjoyed by some of the accused. The newly assigned judge conducted a fresh investigation, during which most of the investigative steps were carried out anew. He re-examined witnesses who had already given evidence to the central investigating judge. Those giving evidence were cross-examined by the parties' lawyers and questions were put to them by the designated investigating judge. Directions were also given for additional evidence to be obtained (written evidence, witness statements and expert reports). At the end of the investigation, the applicant was charged with the further offence of membership of an armed organisation. The case was set down for hearing in the Supreme Court in May 1998. A preliminary objection by the applicant alleging bias on the part of the central investigating judge was dismissed, as the Criminal Division held that there was no proof of the animosity alleged by the applicant. The applicant was sentenced to ten years' imprisonment for misappropriation of public funds and false imprisonment. An *amparo* appeal by the applicant was dismissed by the Constitutional Court in 2001.

Law – Article 6 § 1: (a) *Applicability of Article 6* – In so far as the steps taken by the investigating judge directly and inevitably influenced the conduct, and hence the fairness, of the subsequent proceedings, including the actual trial, the Court considered that, although some of the procedural safeguards envisaged by Article 6 § 1 might not apply at the investigation stage, the requirements of the right to a fair trial in the broad sense necessarily implied that the investigating judge should be impartial. Furthermore, Spanish law required the investigating judge, who was responsible for gathering evidence both in favour of and against the accused, to satisfy criteria of impartiality. The Constitutional Court, for its part, had held that an investigating judge, like any other judge, had to be objectively and subjectively impartial. Article 6 was therefore applicable to the investigation procedure conducted in the present case by the central investigating judge.

(b) *Merits* – The investigation in the present case had been assigned to the central investigating judge in 1989. Besides the letter of request for judicial assistance, there had been no significant investigative steps before the judge had taken leave for personal reasons. Only after he had resumed his duties as a central investigating judge had the investigation of the case been actively pursued. The Court considered that, irrespective of the hostile personal relations or the allegedly manifest animosity between the applicant and the judge, the factor underlying the allegation of a lack of objective impartiality was that the judge had held public office and had been in contact with certain persons in that capacity before immediately resuming the judicial investigation pending, *inter alia*, against them. Having regard to the circumstances of the case, the Court considered that the central investigating judge's impartiality might have appeared open to doubt. The applicant's concerns on that account could therefore be regarded as having been objectively justified; the objective test therefore resulted in the conclusion that, once he had returned to his previous post as a judge and resumed the investigation of the present case after taking leave of absence to stand in the elections, the central investigating judge had not satisfied the Article 6 impartiality requirement.

The next point to consider was whether the Supreme Court – and, in particular, the investigating judge designated from its Criminal Division – had cured that defect. In the present case the applicant had been tried and convicted at a single level of jurisdiction by the Supreme Court, which had assigned a new judge to conduct a fresh investigation. The investigation carried out by the central investigating judge had therefore been examined and reviewed by a new investigating judge from a higher court. The parties disagreed as to the extent of the investigation conducted by the judge designated by the Supreme Court. The Court noted that that judge's activities had not simply entailed repeating the previous investigation, but on the contrary had amounted to a fresh investigation during which most of the investigative steps had been carried out anew. Moreover, although the applicant argued that the new investigation had simply been a repetition of the one conducted by the central investigating judge, he did not cast doubt on the personal impartiality of the investigating judge designated by the Supreme Court. While it was true that the designated investigating judge had already known the persons who were to be called to give evidence and had pursued and completed the line of inquiry initiated by the first investigating judge, the parties had nevertheless had the opportunity, both before the new judge and at the trial in the Supreme Court, to confirm or contradict their previous statements, being afforded all the appropriate safeguards. That being so, the Court concluded that the impartiality of the investigating judge designated by the Criminal Division of the Supreme Court could not be called into question and that that judge had therefore cured the defects of the initial investigation.

Conclusion: no violation (four votes to three).

Article 6 § 2: The Supreme Court had found the applicant guilty on the basis of the evidence produced against him during the investigation and at the trial. In particular, it had given a fully reasoned decision. The Court therefore found that there had been no infringement of the applicant's defence rights by the court concerned, which had afforded him the benefit of adversarial proceedings.

Conclusion: no violation (four votes to three).

Fair hearing
Impartial tribunal

Lack of impartiality during investigation remedied by new investigation by judge from different court: *no violation*

Vera Fernández-Huidobro v. Spain - 74181/01
Judgment 6.1.2010 [Section III]

(See above, page 14)

Fair hearing

Criticism by members of national legal service of draft legislation applicable to pending proceedings: *inadmissible*

Previti v. Italy - 45291/06
Decision 8.12.2009 [Section II]

Facts – The applicant was a lawyer and a prominent figure in national politics. In 1995, in the context of a widely-publicised case concerning the corporate control of a major chemicals group, IMI/SIR, the applicant was charged with judicial bribery. In November 1999 he and seven co-accused were committed to stand trial before the Criminal Court. In May 2006 the Court of Cassation sentenced him to six years' imprisonment.

Law – Article 6 § 1: At the time the accusations of judicial bribery were made against him the applicant, a former Minister, had been a Member of Parliament and a leading figure in a political party. In view of the seriousness of the offences of which he stood accused it had been inevitable, in a democratic society, that his trial would attract media and public attention. The problems encountered by the trial and, in particular, the enactment of laws such as the law concerning letters of request had also been bound to intensify interest in the IMI/SIR criminal proceedings among the media and the public. Furthermore, the press was entitled to comment, at times in harsh terms, on a sensitive case concerning a prominent public figure, and the applicant had been convicted following adversarial proceedings. The Court took note of the statements made to the press by a number of members of the national legal service and the articles published in a magazine, and also of the paper published by the National Association of Judges and Prosecutors. These documents criticised the political climate in which the trial had taken place, the legislative reforms proposed by the Government and the applicant's defence strategy, but did not make any pronouncements as to the applicant's guilt. The Association of Judges and Prosecutors, again without discussing whether or not the applicant had committed the offences in question, had also expressed opposition to the idea that an accused should have access to a list of members of the national legal service espousing particular views. The fact that, in accordance with the principles of democracy and pluralism, some individuals or groups within the national legal service, in their capacity as legal experts, expressed reservations or criticism concerning draft Government legislation was not capable of adversely affecting the fairness of the judicial proceedings to which that legislation might apply. Moreover, the courts hearing the applicant's case had been made up entirely of professional judges whose experience and training enabled them to rise above external influences. It had also been legitimate for judges not involved in hearing the case to comment on the defence strategy of a leading public figure which had been widely reported on and discussed in the media. Accordingly, the Court was unable to find that the comments made in the context of the IMI/SIR proceedings had reduced the applicant's chances of receiving a fair trial.

Conclusion: inadmissible (manifestly ill-founded).

The Court also declared inadmissible the applicant's other complaints under Articles 6 § 1, 7 and 8 of the Convention and Article 2 of Protocol No. 7.

Article 6 § 3 (e)

Free assistance of interpreter

Absence of an authorised interpreter at the applicant's initial questioning by a customs officer, who had a command of the foreign language concerned: *inadmissible*

Diallo v. Sweden - 13205/07
Decision 5.1.2010 [Section III]

Facts – In 2006 the applicant, a French national, was stopped when she entered Sweden from France with 988 grams of heroin wrapped in two parcels in her suitcase. She alleged that she had been unaware of the contents of the parcels, which she had been carrying on behalf of someone else. The first interview with the Swedish Customs was held in French by a customs officer, who subsequently gave evidence against the applicant. Subsequently, the applicant was convicted of drug-trafficking and sentenced to nine years' imprisonment. Leave to appeal was refused by the Supreme Court. The applicant complained before the European Court that the first interview with the Swedish Customs had been held without an authorised French interpreter.

Law – Article 6 § 3 (e): The investigation stage had crucial importance for the preparation of the criminal proceedings, as the evidence then obtained determined the framework in which the offence charged would be considered. Access to a lawyer should normally be provided from the moment of

the first interrogation of a suspect by the police. Following the same reasoning, the assistance of an interpreter should be provided during the investigation stage unless it was demonstrated in the light of the particular circumstances of the case that there were compelling reasons to restrict that right. In the present case, the applicant's complaint concerned the fact that she had not been provided with the assistance of an authorised interpreter. Under domestic law, an interpreter was to be used when needed, and in practice the assessment of such a need was made on a case-by-case basis having regard to relevant circumstances including the nature of the case, its level of importance to the individual and the customs officer's knowledge of the foreign language concerned. Accordingly, there were no elements indicating that access to an interpreter was restricted systematically. There was nothing in the case file to show that the customs officer's conduct of the interview in French had been inaccurate or otherwise inadequate and the applicant had not contested the officer's qualifications until, during the trial, she was confronted with her statement that "the packages contained a product to wash money". The applicant had insisted that the officer must have misunderstood her and that she had, in fact, intended to say that she needed to go to the toilet. The Court had difficulties, however, in believing that the officer would not have been able to detect such a concrete wish and found, moreover, that the appeal court had exercised a sufficient degree of control of the adequacy of the officer's interpretation skills. Furthermore, the applicant's disputed statement had been far from the only evidence in the criminal proceedings against her and there was nothing to indicate that it had been decisive to the outcome of the case. The applicant had therefore received sufficient linguistic assistance during the first interview with the Swedish Customs. Subsequently, an authorised interpreter had been involved each time the applicant had been heard, both during the pre-trial stage and at the trial. Accordingly, the Court was unable to discern any violation of the right to a fair trial.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 8

Private life

Power to stop and search individuals without reasonable suspicion of wrongdoing: *violation*

Gillan and Quinton v. the United Kingdom - 4158/05
Judgment 12.1.2010 [Section IV]

Facts – Under sections 44-47 of the Terrorism Act 2000 senior police officers may, if they consider it "expedient for the prevention of acts of terrorism", issue an authorisation permitting any uniformed police officer within a defined geographical area to stop and search pedestrians and vehicles and their occupants. The authorisation must be confirmed by the Secretary of State within forty-eight hours, failing which it will cease to have effect. Authorisation cannot be for longer than twenty-eight days, although that period can be renewed. The powers conferred by the authorisation may be exercised only for the purpose of searching for "articles of a kind which could be used in connection with terrorism", but the officer concerned is not required to have grounds for "suspecting the presence of articles of that kind". The officer may request the person being searched to remove headgear, footwear, outer clothing and gloves and, if reasonably necessary, may place his hand inside pockets, feel round the inside of collars, socks and shoes and search hair. Searches take place in public at or near the place where the person is stopped. Failure to submit to a search is an offence punishable by imprisonment or a fine or both. A report by an independent reviewer on the working of the Act is placed before Parliament at least once a year.

The power to stop and search has been in force throughout the Metropolitan Police District (Greater London) ever since the entry into force of the legislation in February 2001 under a "rolling programme" of successive authorisations and confirmations. Between 2004 and 2008 the number of annual searches recorded by the Ministry of Justice steadily increased from 33,177 to 117,278. The independent reviewer has been increasingly critical of the way the power has been used in his most recent reports, citing problems of "poor or unnecessary use" and questioning the need for continued authorisation covering the entire Metropolitan Police District, rather than authorisation confined to "significant locations".

The applicants in the instant case were stopped and searched by the police in separate incidents while on their way to a demonstration to protest against an arms fair being held nearby. Mr Gillan was riding a bicycle and carrying a rucksack. Ms Quinton, a journalist, was stopped and searched despite showing her press cards. Neither applicant was stopped for more than thirty minutes. The applicants

subsequently made an unsuccessful application for judicial review. Sitting as the final appellate court, the House of Lords considered it doubtful whether an ordinary superficial search of the person could be said to show a lack of respect for private life, so as to bring Article 8 of the European Convention into operation and even if it did apply, the stop and search power complied with the lawfulness requirement in the Convention as officers were not free to act arbitrarily. The applicants also brought an action in damages in the county court. Their claim was dismissed and they did not appeal.

Law

(a) *Admissibility* – The Government had submitted that the applicants had not fully exhausted domestic remedies, as they had not pursued an offer of a closed hearing before the High Court to determine whether the authorisation and its confirmation had been justified and had not appealed against the county court's judgment. The Court noted, however, that the applicants did not dispute that the stop and search measures used against them complied with the terms of the Terrorism Act. Instead, their complaints focused on the general compatibility of the stop and search powers with the Convention. Accordingly, the remedies identified by the Government would have been neither relevant nor effective in relation to the complaints before the Court.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – Article 8: The use of the coercive powers conferred by the anti-terrorism legislation to require an individual to submit to a detailed search of their person, clothing and personal belongings amounted to a clear interference with the right to respect for private life. The public nature of the search, with the discomfort of having personal information exposed to public view, might even in certain cases compound the seriousness of the interference because of an element of humiliation and embarrassment. The interference could not be compared to searches of travellers at airports or visitors to public buildings. Air travellers could be seen as consenting to a search by choosing to travel and were free to leave personal items behind or to walk away without being subjected to a search. The search powers under the Terrorism Act were qualitatively different, as individuals could be stopped anywhere and at any time, without notice and without any choice as to whether or not to submit to a search.

As to whether the measure was "in accordance with the law", it was not disputed that the stop and search powers used in the applicant's case had a basis in sections 44-47 of the Terrorism Act, combined with the relevant Code of Practice, which was a public document. The question was whether those provisions conferred an unduly wide discretion on the police, both in terms of the authorisation of the power to stop and search and its application in practice. In the Court's view, it had not been shown that the safeguards provided by domestic law offered adequate protection against arbitrary interference.

Firstly, as regards the authorisation and confirmation stage, the Court noted that senior police officers could authorise the use of stop and search powers if they considered it "expedient" (as opposed to "necessary") for the prevention of acts of terrorism, so that there was no requirement for the proportionality of the measure to be assessed. Further, while the authorisation was subject to confirmation by the Secretary of State within forty-eight hours, the Secretary of State could not alter the geographical coverage and in practice did not appear ever to have refused confirmation or reduced the duration of the authorisation. The statutory temporal and geographical restrictions on authorisations had failed to act as any real check, as was demonstrated by the fact that the authorisation for the Metropolitan Police District had been continuously renewed in a "rolling programme". Lastly, there was little prospect of challenging an authorisation: although judicial review was available, the width of the statutory powers was such that applicants faced formidable obstacles in showing that any authorisation and confirmation were *ultra vires* or an abuse of power, while the independent reviewer's powers were confined to reporting on the general operation of the statutory provisions and he had no right to cancel or alter authorisations.

As regards the individual police officer's powers, the breadth of the discretion conferred on him was of still further concern. Although the officer was obliged, in carrying out the search, to comply with the terms of the Code of Practice, the Code essentially governed the mode in which the stop and search was carried out, rather than providing any restriction on the officer's decision to stop and search. That decision was one based exclusively on the "hunch" or "professional intuition" of the officer concerned. Not only was it unnecessary for him to demonstrate the existence of any reasonable suspicion, he was not required even subjectively to suspect anything about the person stopped and

searched. The sole proviso was that the search had to be for the purpose of looking for articles which could be used in connection with terrorism, a very wide category which could cover many articles commonly carried by people in the streets. Provided the person concerned was stopped for the purpose of searching for such articles, the police officer did not even have to have grounds for suspecting their presence.

In this connection, the statistical and other evidence showing the extent to which police officers resorted to the stop and search powers was striking. Noting the large number of searches involved and the reports by the independent reviewer indicating that the powers were being used unnecessarily, the Court found that there was a clear risk of arbitrariness in granting such broad discretion to the police officer. The risk of the discriminatory use of the powers against ethnic minorities was a very real consideration and the statistics showed that black and Asian persons were disproportionately affected. There was also a risk that such a widely framed power could be misused against demonstrators and protestors. Similarly, as had been shown in the applicants' case, judicial review or an action in damages to challenge the exercise of the stop and search powers by a police officer in an individual case were unlikely to succeed as the absence of any obligation on the part of the officer to show reasonable suspicion made it almost impossible to prove that the powers had been improperly exercised.

In conclusion, neither the powers of authorisation and confirmation, nor the stop and search powers under sections 44 and 45 of the Terrorism Act, were sufficiently circumscribed or subject to adequate legal safeguards against abuse. Accordingly, they were not "in accordance with the law".

Conclusion: violation (unanimously).

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

Family life

Refusal to grant custody of child to father because he was member of a religious sect: *communicated*

Cosac v. Romania - 28129/05
[Section III]

The applicants are father and daughter. In 2003 a district court granted the first applicant and his wife a divorce. It awarded custody of the couple's daughter, then aged twelve, to her mother. The judgment became final, but the girl refused to live with her mother. In 2004 the first applicant, as his daughter's legal representative, made an urgent application for sole custody. He claimed that his daughter had been assaulted by her mother and the latter's partner and had left their home and moved in with him. The district court rejected the application as ill-founded. The first applicant lodged a fresh application for custody, referring to the threat posed to the child's development by living with her mother, and produced copies of several forensic medical certificates recording injuries she had allegedly sustained. In 2004 the district court rejected his application, observing that the mere fact that the child wished to live with her father was not sufficient reason to transfer custody.

In 2005 the second applicant herself applied to have custody awarded to her father, arguing that her mother's behaviour made it impossible to live with her and her partner. The district court awarded sole custody to the first applicant, but that decision was overturned on appeal on the grounds that it was not in the child's best interests to live under the influence of her father, who suffered from depression and belonged to a religious sect known as "The prophesies of Sundar Singh" which was not recognised by the Orthodox Church.

Communicated under Article 8 in conjunction with Article 14.

Home

Status of a laundry room belonging to the owners of a building in multiple occupation: *inadmissible*

Chelu v. Romania - 40274/04
Judgment 12.1.2010 [Section III]

Facts – The use of a laundry room belonging to the co-owners of a block of flats was granted to V.T. in exchange for an undertaking to pay certain communal charges. A disagreement subsequently arose between V.T. and the other owners, including the applicant, who requested him to vacate the laundry room and return it to its previous state. The courts issued the corresponding order and several unsuccessful attempts were made to enforce

it. The courts finally dismissed an objection by V.T. against enforcement of the order.

Law – Article 8: The applicant submitted that the authorities' failure to take action to put an end to the occupation of the laundry room of which he was co-owner had breached his right to respect for his home under Article 8. The Court noted that the laundry room at issue, which was not the applicant's exclusive property, was designed for occasional use and that the applicant did not live there. Accordingly, it was not a "home" within the meaning of the Convention.

Conclusion: inadmissible (incompatible *ratione materiae*).

ARTICLE 12

Right to marry

Refusal to allow a prisoner to marry in prison: *violation*

Frasik v. Poland - 22933/02
Judgment 5.1.2010 [Section IV]

Facts – In September 2000 the applicant was detained following a complaint by a woman who alleged that he had raped and battered her. They had been in a relationship that had lasted some four years but had terminated several months previously. From December 2000 onwards, they had made several unsuccessful requests to the prosecutor for the applicant to be released under police supervision as they had become reconciled and wanted to marry. At the opening of the trial the victim requested the court to absolve her from testifying against the applicant. In 2001 the trial court refused the applicant's request to be allowed to marry in prison as it wished to prevent the victim from exercising her marital right not to testify against him. The judge also considered that the remand centre was not an appropriate place for holding a marriage ceremony and that the sincerity of the couple's intentions was open to doubt given that they had not "officialised their life" before. The applicant was subsequently sentenced to a term in prison for rape and uttering threats. His conviction was upheld on appeal and by the Supreme Court. The latter held, *inter alia*, that the refusal to let the applicant marry in prison clearly violated Article 12 of the Convention.

Law – Article 12: The Court saw no reason for the trial court to have questioned whether the quality of the parties' relationship was of such a nature as to justify their decision to get married or whether the chosen time and venue were suitable. The choice of a partner and the decision to marry, at liberty and in detention alike, was a strictly private and personal matter. Under Article 12 the authorities' role was to ensure that the right to marry was exercised "in accordance with the national laws" (which had themselves to be compatible with the Convention) but they were not allowed to interfere with a detainee's decision to establish a marital relationship with a person of his or her choice. What needed to be solved was not the question of whether or not it was reasonable for a detainee to marry in prison but the practical aspects. Apart from this, the authorities could not restrict the right to marry, unless there were important considerations such as prison security or the prevention of crime and disorder. In the present case it was the trial court's conviction that the marriage would adversely affect the process of taking evidence against the applicant which had justified the imposition of a ban on his right to marry during the trial. The ban, however, had no legal basis since under Polish law the fact that one of the future spouses was an accused in criminal proceedings and the other a victim was not a legal or factual impediment to contracting a marriage. If the applicant had not been held in detention, there would have been no means of preventing him from marrying in the civil-status office at any time during the trial. Nor would the genuineness of his feelings have been debated by the civil-status authorities before the solemnisation of the relationship. In consequence, the Court could not but fully endorse the Supreme Court's assessment that the interference with the applicant's right to marry had been disproportionate and arbitrary. The Court did not accept the Government's argument that the applicant had retained the possibility of marrying the victim in the future and that this could alleviate the consequences of the ban. A delay imposed before entering into a marriage in respect of persons of full age and otherwise fulfilling the conditions for marriage under the national law could not be considered justified under Article 12. Polish law left to the relevant authorities complete discretion when deciding a detainee's request for leave to marry. No specific provision of the national law dealt with marriage in detention but, in the Court's view, Article 12 did not require the State to introduce separate laws or specific rules on the marriage of prisoners as detention was not a legal obstacle to marriage. Nor was there any difference in legal status in respect of the eligibility of persons at

liberty and persons detained to marry. In the applicant's case, the Convention breach had been caused not by the absence of detailed rules on marriage in detention, but by the lack of restraint displayed by the national judge in exercising her discretion and by her failure to strike a fair balance between the various public and individual interests at stake in a manner compatible with the Convention. Even if the trial court had acted as it had in order to ensure the orderly conduct of the trial – which was the legitimate interest – it had lost sight of the need to weigh in the balance respect for the applicant's fundamental Convention right. As a result, the measure applied had impaired the very essence of the applicant's right to marry.

Conclusion: violation (unanimously).

Article 13: The Government had acknowledged that there had been no procedure whereby the applicant could appeal against or otherwise challenge the decision denying him his right to marry in detention.

Conclusion: violation (unanimously).

The Court also found a violation of Article 5 § 4.

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

Refusal to allow a prisoner to marry in prison: *violation*

Jaremowicz v. Poland - 24023/03
Judgment 5.1.2010 [Section IV]

Facts – In June 2003 the applicant, who was serving a prison sentence, asked the prison administration to be allowed visits by a female prisoner who had been detained in the same prison but had since been moved to another prison. Both he and the woman asked the regional court for permission to marry in prison, but this was refused on the grounds that they had become "acquainted illegally in prison" and their relationship had been "very superficial" as they had mostly communicated by sending messages, often without visual contact. In November 2003 the prison governor issued a certificate to the civil-status office confirming that the applicant had obtained leave to marry in prison.

Law – Article 12: A requirement for detainees to obtain prior leave in order to marry could not by itself be regarded as contrary to Article 12 – limitations on marital, private and family life were inherent in deprivation of liberty. The authorities had a margin of discretion and had to have regard not only to the personal interest pursued by the prisoner, but equally to the maintenance of good order, safety and security in prison. In the present case, however, the authorities' refusal was in no way linked to prison security or prevention of disorder but to an assessment of the nature and quality of the applicant's relationship with his fiancée. Such arguments bore no relation whatsoever to the domestic-law provisions enumerating the grounds on which an authority could refuse an adult permission to marry. Under Polish law it was solely for the civil-status authorities to determine whether there were any legal obstacles to marriage. Detention facilities were not typical places for bringing together future partners but the fact that a bond had developed between a man and a woman during detention did not automatically render their relationship "illegal", "superficial", of no rehabilitative value or not deserving of respect. The essence of the right to marry was the formation of a legal union of a man and a woman. It was for them to decide whether they wished to enter into such a relationship in circumstances in which there were objective obstacles to their living together. The choice of a partner and the decision to marry was a strictly private and personal matter. Under Article 12 the authorities' role was to ensure that the right to marry was exercised "in accordance with the national laws" (which had themselves to be compatible with the Convention) but they were not allowed to interfere with a detainee's decision to establish a marital relationship with a person of his or her choice. Having regard to the scope of the State's discretion, the impugned measure could not be justified by any conceivable legitimate aim. The Court did not accept the Government's argument that the fact that the applicant had obtained leave to marry some five months after his request and, in any event, had retained the possibility of marrying in the future had alleviated the consequences of the initial ban. A delay imposed on persons of full age and otherwise fulfilling the conditions for marriage under the national law could not be considered justified under Article 12. The domestic law left to the relevant authorities complete discretion when deciding a detainee's request for leave to marry. Although no specific provision of the national law dealt with marriage in detention, in the Court's view, Article 12 did not require the State to introduce separate laws or specific rules on the marriage of prisoners as detention was not a legal obstacle to marriage. Nor was there any difference in legal status in respect of the eligibility to marry of persons at liberty and persons detained. In the applicant's case the Convention breach had been

caused not by the absence of detailed rules on marriage in detention, but by the authorities' failure to strike a fair balance between the various public and individual interests at stake in a manner compatible with the Convention. As a result, the measure applied had impaired the very essence of the applicant's right to marry.

Conclusion: violation (unanimously).

Article 13: The applicant had been able to challenge the initial refusal before the penitentiary court. However, the procedure had lasted nearly five months and no ruling on his appeal had been given by the time the prison authorities eventually changed their original decision. In consequence, the procedure could not be said to have offered the applicant the requisite relief, that is to say, a prompt decision on the substance of his Convention claim under Article 12. Nor could the belated grant of permission to marry constitute the redress required by this Article.

Conclusion: violation (unanimously).

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

ARTICLE 14

Discrimination (Article 4 § 3 (a) and Article 1 of Protocol No. 1)

Refusal to take work performed in prison into account in calculation of pension rights: *relinquishment in favour of the Grand Chamber*

Stummer v. Austria - 37452/02
[Section I]

The applicant has spent much of his life in prison. In 1999 he made an application for an early retirement pension. His application was turned down on the grounds that he had failed to make the requisite number of monthly contributions. The applicant challenged that decision arguing that a total of twenty-eight years he had spent working in prison should have been taken into account when calculating his pension entitlement. His appeals were dismissed.

Under Austrian law, any prisoner who is fit is required to perform the work assigned to him. However, working prisoners are not considered to be employees and so are not affiliated to the general social-insurance system, which covers such matters as health and accident insurance and old-age pensions. In a leading decision on the subject, the Supreme Court upheld the legislature's decision not to affiliate prisoners to the scheme on the grounds that their work was performed on the basis of a legal obligation, not under a contract of employment.

This case, which the Court declared admissible on 11 October 2007 (see Information Note no. 101), raises issues under Article 14 read in conjunction with Article 4 § 3 (a) of the Convention and with Article 1 of Protocol No. 1.

Discrimination (Article 6 § 1)

Restriction on a Greek Catholic Church's access to court in a dispute with the Orthodox Church: *violation*

Sâmbata Bihor Greek Catholic Parish v. Romania - 48107/99
Judgment 12.1.2010 [Section III]

(See Article 6 § 1 (civil) above, page 13)

Discrimination (Article 1 of Protocol No. 1)

Alleged discrimination in amount of pension payable to married persons: *inadmissible*

Zubczewski v. Sweden - 16149/08
Decision 12.1.2010 [Section III]

Facts – Following the applicant's marriage, his supplementary pension was reduced by approximately EUR 50 in accordance with the domestic law. He appealed against that decision, claiming that since his wife did not have any income he had to support two people. His appeal was, however, dismissed.

Law – Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: The Court reiterated that States enjoyed a wide margin of appreciation in implementing general measures of economic or social strategy. The Swedish legislature had established different pension levels for different categories of persons based on the broad principle that the cost of living for two people sharing a home was generally lower that for one person living alone. Despite the applicant's contention that his situation was exceptional since his wife had no income, the Court considered that the legislation and the decisions based thereon fell within the State's margin of appreciation.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 22

Election of judges

Withdrawal of list of candidates after expiration of deadline for submitting list to Parliamentary Assembly: *withdrawal not possible*

Advisory Opinion (no. 2) on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights – 22.1.2010 [GC]

(See Article 47 below)

ARTICLE 35

Article 35 § 3

Abuse of the right of petition

Length of proceedings complaint concerning a token sum of money: *inadmissible*

Bock v. Germany - 22051/07
Decision 19.1.2010 [Section V]

Facts – In 2002 the applicant, a civil servant, brought administrative proceedings for the reimbursement of EUR 7.99 he had spent on magnesium tablets he had been prescribed by a doctor. The proceedings lasted until December 2007.

Law – Article 35 § 3: The applicant complained about the length of the domestic proceedings and the lack of an effective remedy in that respect. The Court noted that it already had a heavy overload of pending cases, including a large number of cases that raised serious human-rights issues, and that the type of alleged violations in the applicant's case had already been dealt with in numerous previous cases. It attached particular importance to the petty nature of the subject-matter of the dispute, the applicant's comfortable financial situation and his extensive use of court proceedings. In the Court's view, it was precisely cases like this that contributed to the congestion of courts at the domestic level and led to delays in proceedings.

Conclusion: inadmissible (abuse of the right of petition).

ARTICLE 47

Advisory opinions

Withdrawal of list of candidates for election as judges to the Court after expiration of deadline for submitting list to Parliamentary Assembly: *withdrawal not possible*

Advisory Opinion (no. 2) on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights – 22.1.2010 [GC]

The Court was asked by the Committee of Ministers of the Council of Europe for an advisory opinion on certain legal questions concerning the States' ability to withdraw lists of candidates submitted with a view to the election of judges to the Court.

Background and questions – Judges to the Court are elected in respect of each member State by the Parliamentary Assembly of the Council of Europe on the basis of lists of three candidates put forward by the country concerned. The procedure for electing judges is set out in the Appendix to Parliamentary Assembly Resolution 1432 (2005), paragraph 1 of which provides that, in principle, lists of candidates should not be modified after being submitted to the Parliamentary Assembly and that modifications will only be accepted exceptionally.

In 2007 the Ukrainian authorities submitted a list of three candidates for the post of judge at the Court. The three candidates were invited by the Parliamentary Assembly for interview, but before the interviews had taken place the Council of Europe was notified by the Ukrainian President that the list of candidates had been withdrawn on grounds of "significant procedural violations". One of the candidates on the original list subsequently stated that he was withdrawing for personal reasons. The Parliamentary Assembly found that there were no "exceptional circumstances" justifying the withdrawal of the list and requested Ukraine to submit a replacement candidate, not an entirely new list. The Ukrainian authorities did not accept that conclusion and submitted a new list. Against that background, the Committee of Ministers asked the Court to give its opinion on the following questions:

1(a) Can a list of three candidates, nominated by a State for election as a judge to the European Court of Human Rights in respect of that State

and submitted to the Parliamentary Assembly, be withdrawn and replaced with a new list of three candidates? If yes, is there any time limit?

1(b) Can candidates on a withdrawn list be considered as nominated by a State within the meaning of Article 22 of the Convention?

1(c) Is the Parliamentary Assembly obliged to consider a new list of candidates submitted by a State in replacement of its withdrawn list?

2(a) If one or more candidates on a list submitted to the Parliamentary Assembly by a State withdraws before the Assembly has voted on the list, is that State obliged under the Convention to submit an additional candidate or candidates to complete the list or is it entitled to submit a new list?

2(b) Are the conditions in paragraphs 1 and 2 of the Appendix to Resolution 1432 (2005) of the Parliamentary Assembly of the Council of Europe in breach of the Assembly's responsibilities under Article 22 of the Convention to consider a list, or a name on such a list, on the basis of the criteria listed in Article 21 of the Convention

Opinion

(a) *Jurisdiction* – Questions 1(a), (b) and (c) and 2(a) indisputably concerned the rights and obligations of the Parliamentary Assembly in the procedure for electing judges, as derived from Article 22 in particular and the Convention in general. They also related to the division of powers between the Contracting States and the Parliamentary Assembly in the context of that procedure. They were of a legal character and as such fell within the scope of its jurisdiction under Article 47. Question 2(b), however, concerned the compatibility with the Convention of certain provisions of a Parliamentary Assembly resolution. While the Court did not exclude the possibility that it might, in certain circumstances, be called upon to interpret the provisions of such instruments in order to clarify its answers to questions on which an advisory opinion had been sought, it could not express a view on the compatibility with the Convention of such provisions themselves.

Conclusion: jurisdiction to answer questions 1(a), (b) and (c) and 2(a), but not 2(b) (unanimously).

(b) *Merits* – In giving its opinion, the Court would be guided by three general principles: Firstly, securing the effective protection of human rights entailed interpreting the Convention in such a way as to ensure its effectiveness. In the context of Articles 21 and 22, this meant ensuring the prompt filling of all vacancies in the composition of the Court. Secondly, it was necessary to ensure the authority and proper functioning of the Court, which in turn meant interpreting Articles 21 and 22 in a way that best preserved the independence and impartiality of the Court and its judges. Thirdly, Article 22 provided for a balance and division of powers between the States and the Parliamentary Assembly with each State being required to nominate candidates satisfying the relevant criteria and the Assembly required to elect a judge from among these candidates. The system thus sought to ensure that the individual State and the Assembly enjoyed a certain autonomy, within the limits of their respective powers, allowing them to determine how the procedural rules laid down in Article 22 were to be applied.

The Court considered that States could, in exercising their sovereign power, decide – for reasons of their own – to withdraw lists of candidates for the post of judge at the Court. It was nevertheless appropriate, in the interests of legal certainty and the transparency and efficacy of the election procedure, for a time-limit to be set for doing so. It would be scarcely compatible with the normal conduct of the election procedure to allow States to withdraw a list, without any restrictions or conditions, once it had been submitted to the Parliamentary Assembly, particularly bearing in mind that the lists were submitted to the Assembly following a national selection procedure which it was assumed would have been organised in such a way as to allow suitably qualified candidates to be chosen. Any later possibility of withdrawal could hinder the normal course and timing of the procedure for election by the Parliamentary Assembly. In the Court's opinion, it was thus reasonable for the time-limit for withdrawal of a list to coincide with the deadline set for the member States to submit the lists to the Parliamentary Assembly.

In conclusion, member States could withdraw and replace a list of candidates for the post of judge at the Court, but only on condition that they did so before the deadline set for submission of the list to the Parliamentary Assembly. After that date, the member States would no longer be entitled to withdraw their lists (question 1(a)). By the same logic, where a member State withdrew a list of candidates before the expiry of the time-limit, the persons on that list could no longer be regarded as candidates (question 1(b)), while the persons on the new list had to be considered by the Parliamentary Assembly (question 1(c)).

Question 2(a) concerned the withdrawal of one or more candidates on a list submitted to the Assembly before the Assembly had conducted a final vote on that list. Such a situation had to be due to exceptional circumstances outside the control of the State that submitted the list. Applying the reasoning set out above, the Court considered that if the withdrawal occurred before the expiry of the time-limit, the State could either replace any absent candidates or submit a new list of three candidates. If, however, the withdrawal occurred after that date, the State had to be restricted to replacing only absent candidates.

Conclusion: withdrawal of list not permissible after deadline for submission to Parliamentary Assembly (unanimously).

ARTICLE 1 OF PROTOCOL No. 1

Deprivation of property

Unlawful distribution of assets of private bank by liquidator: *violation*

Kotov v. Russia - 54522/00
Judgment 14.1.2010 [Section I]

Facts – The applicant had a savings account with a private bank which went into liquidation. As a deposit-holder he was regarded under domestic law as a priority creditor and therefore entitled to be paid a share of the assets proportionate to the amount owed to him, together with the other priority creditors and ahead of the next-ranking category. However, in line with a decision of the creditors' committee, the liquidator gave priority to certain categories of persons not mentioned in the legislation (disabled persons, war veterans, the needy and persons who had participated actively in the winding-up operation). As a result, the applicant received only a tiny proportion of the amount owed to him, while 700 persons belonging to these other categories obtained full reimbursement. The courts subsequently found a breach of the law and directed the liquidator to remedy the situation. The decision remained unenforced, however, as the bank had no remaining assets. In a new round of proceedings, the applicant applied unsuccessfully for an order requiring the liquidator to pay the sum due to him out of his own funds.

Law – Article 1 of Protocol No. 1: The Court accepted that the State could not be held liable for the obligations of a private institution which was unable to honour its debts following its collapse. However, it had to ascertain whether and to what extent the State's responsibility could be engaged on account of the acts or omissions of the liquidator. On the first point the Court took the view that the liquidator could be considered as a representative of the State, particularly in view of his legal status. Liquidators were appointed by the courts to conduct insolvency proceedings under the latter's supervision. They exercised public authority and were tasked with striking a "fair balance" between the demands of the general interest and protection of the individual's fundamental rights. Their actions were therefore capable of engaging the responsibility of the State.

On the second point the Court observed that the bank's assets would have been sufficient to meet a substantial proportion of the applicant's claim had the liquidator treated him as a priority creditor in accordance with the law. The applicant's permanent inability to obtain effective repayment of the sum owed to him had stemmed directly from the abuse of authority committed by the liquidator in distributing the bank's assets unlawfully. Not only had there been a breach of the applicant's rights as a priority creditor but, in addition, there had been no legal basis in domestic law for the categories of creditors who had received repayment in full. Hence, since the applicant had been unable to secure payment of the amount owed to him in accordance with the legal principle of proportionality, as ordered by the domestic courts, while creditors in categories not even provided for by the law had been paid in full, the Court took the view that he had been deprived of his property unlawfully, in a manner incompatible with his right to the peaceful enjoyment of his possessions.

Conclusion: violation (unanimously).

Article 41: No award.

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

Al-Jedda v. the United Kingdom - 27021/08 [Section IV]

(See Article 1 above, page 7)

Al-Skeini and Others v. the United Kingdom - 55721/07 [Section IV]

(See Article 1 above, page 7)