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COUR EUROPÉENNE DES DROITS DE L'HOMME

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ARTICLE 2

Positive obligations
Life

Fatal attack on girl by stray dogs: *no violation*

Berü v. Turkey - 47304/07
Judgment 11.1.2011 [Section II]

Facts – The applicants are all members of the same family. In March 2001, when she was nine years old, their daughter or sister was fatally attacked by dogs on the loose near their village. An investigation was opened immediately. According to various concurring statements, the dogs had previously injured a number of villagers and had killed cattle. Some of the villagers claimed that the dogs belonged to the gendarmerie near the village, but the gendarmes stated that they were stray dogs that came to scavenge in their dustbins. The gendarme on duty that day said that he had seen the dogs attack the child but had not opened fire for fear of hitting her too. He had, however, raised the alarm, upon which his colleagues had come quickly to chase the dogs away and help the child. Proceedings against the gendarmerie commander, the gendarmes and the Ministry of the Interior were discontinued.

Law – Article 2: The allegations that the dogs belonged to the gendarmes and that they had failed to prevent the attack had not been based on any reliable evidence. The domestic courts had established the facts of the case, finding that the dogs in question had been strays, and it was on their assessment that the Court based its analysis. It noted that there had already been a series of incidents before the fatal attack. However, this fact was not sufficient for the Court to find that the authorities had had a positive obligation to take preventive measures. There was nothing in the file to show that the authorities knew, or should have known, that the child was exposed to an imminent risk of death because of some stray dogs outside the village. The incident, whilst tragic, had in fact occurred by chance and the State's responsibility could not therefore be engaged without being extended unduly.

Conclusion: no violation (six votes to one).

The Court also found a violation of Article 6 § 1.

ARTICLE 3

Inhuman treatment

Repeated transfers of high-security prisoner to avoid escape attempts: *no violation*

Payet v. France - 19606/08
Judgment 20.1.2011 [Section V]

Facts – The applicant is currently serving a prison sentence. After having escaped in 2001 he was classified as a "high-risk prisoner", placed in solitary confinement and made subject to a preventive rotation scheme consisting of frequent moves between prisons aimed at hindering would-be escapees and their accomplices in the preparation and execution of their plans. Between 2003 and 2008 the applicant was moved twenty-six times. He appealed unsuccessfully to the courts against the decision subjecting him to the rotation scheme. In 2007, after escaping again, he was placed in the prison punishment wing for forty-five days. According to the applicant, the premises were dilapidated and unfit for the detention of human beings. His application for a stay of execution of the disciplinary measure was declared inadmissible by the judge for failure to lodge an internal appeal. His subsequent internal appeal against the disciplinary measure was dismissed.

Law – Article 3

(a) *The rotation scheme* – Continual transfers from one institution to another could have harmful effects on a prisoner's well-being. However, in view of the fact that the applicant had escaped twice, that an attempt to help him escape had failed at the last minute and that he had organised the escape of some of his accomplices, the prison authorities had struck a fair balance between the imperatives of security and the need to provide the applicant with humane conditions of detention. In the present case, those conditions had not attained the minimum threshold of severity required to constitute inhuman treatment within the meaning of Article 3.

Conclusion: no violation (unanimously).

(b) *Conditions of detention in the punishment cell* – The applicant had not been held in decent conditions which respected his dignity.

Conclusion: violation (unanimously).

Article 13

(a) *Alleged absence of a remedy in respect of the rotation scheme* – Both the administrative court and the *Conseil d'Etat* had ruled on the merits of the applicant's complaint.

Conclusion: inadmissible (manifestly ill-founded).

(b) *Alleged absence of a remedy against enforcement of the disciplinary measure* – The remedy provided

for by the Code of Criminal Procedure did not have suspensive effect, although the decision to place a prisoner in a punishment cell was usually enforced immediately. Furthermore, before any other remedy could be tried an appeal had to be lodged with the inter-regional director of the prison service, who had one month in which to give a decision. Only following such an appeal could an application be made to the administrative court. Accordingly, by the time a judge came to rule on his application the applicant had no longer been detained in the punishment cell. A remedy which did not bear fruit in good time was neither adequate nor effective. In view of the serious repercussions of detention in a punishment cell, it was essential for the prisoner concerned to have access to an effective remedy by which to appeal against the form and substance of the measure before a judicial body. In the instant case the applicant had had no effective remedy available to him by which to complain of his conditions of detention.

Conclusion: violation (unanimously).

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

(See *Khider v. France*, no. 39364/05, 9 July 2009, Information Note no. 121)

Degrading treatment
Expulsion

Conditions of detention and subsistence of asylum-seeker expelled under the Dublin Regulation: *violation*

M.S.S. v. Belgium and Greece - 30696/09
Judgment 21.1.2011 [GC]

Facts – The applicant, an Afghan national, entered the European Union via Greece. In February 2009 he arrived in Belgium, where he applied for asylum. In accordance with the Dublin Regulation, the Aliens Office asked the Greek authorities to take responsibility for the asylum application. Late in May 2009 the Aliens Office ordered the applicant to leave the country for Greece. The applicant lodged an application under the extremely urgent procedure to have the execution of that order stayed, but his application was rejected. On 4 June 2009 the Greek authorities sent a standard document confirming that it was their responsibility to examine the asylum application and stating that the applicant would be able to apply for asylum on arrival in the country. He was sent back to Greece on 15 June 2009. On his arrival there he was immediately placed in detention for four days in a building next to the airport, where the conditions of detention were allegedly appalling. On 18 June 2009 he was released and issued with an asylum-seeker's card and notice to report to the police headquarters to register the address where he could be reached with news about his asylum application. The applicant did not report to the police headquarters. Having no means of subsistence, he lived in the street. Later, as he was attempting to leave Greece, he was arrested and placed in detention for a week in the building next to the airport, where he was allegedly beaten by the police. After his release, he continued to live in the street. When his asylum-seeker's card was renewed in December 2009, steps were taken to find him accommodation, but apparently to no avail.

Law – Article 3

(a) *Conditions of detention in Greece* – The difficulties caused by the increasing numbers of migrants and asylum-seekers from States around the external borders of the European Union did not absolve the States of their obligations in respect of Article 3. According to their agreement of 4 June 2009 to take charge of the applicant, the Greek authorities had been aware of the applicant's identity and his status as a potential asylum-seeker. In spite of that, he had immediately been placed in detention without explanation, a widespread practice according to various reports produced by international and non-governmental organisations. He had suffered poor conditions of detention, and brutality and insults at the hands of the police officers in the detention centre, even though such conditions had already been found to amount to degrading treatment because the victims were asylum-seekers. Brief as they were, the periods the applicant had spent in detention could not be considered insignificant. Taken together, the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it, as well as the profound effect such conditions of detention indubitably had on a person's dignity, constituted degrading treatment. In addition, the applicant's distress had been accentuated by the vulnerability inherent in his situation as an asylum-seeker.

Conclusion: violation (unanimously).

(b) *Living conditions in Greece* – In spite of the obligations incumbent on the Greek authorities under their own legislation and the European Union's Reception Directive, the applicant had lived for months in the most abject poverty, with no food and nowhere to live or to wash. He also

lived in constant fear of being attacked and robbed, with no prospect of his situation improving. This explained why he had attempted to leave Greece on more than one occasion. His account of his living conditions was corroborated by the reports of various international organisations and bodies. At no time had the applicant been duly informed of the possibilities of accommodation that were available to him. The authorities could not have been unaware that the applicant was homeless and should not have expected him to take the initiative of reporting to police headquarters to provide for his basic needs. That situation had lasted since his transfer in June 2009, although the authorities could have considerably abbreviated his suffering by promptly examining his asylum application. They had thus failed to take due account of the applicant's vulnerability as an asylum-seeker and must be held responsible – because of their inaction and their failure to process his asylum application – for the conditions he had had to endure for many months. The applicant's living conditions, combined with the prolonged uncertainty he lived in and the total lack of any prospect of his situation improving, had attained the minimum level of severity required by Article 3 of the Convention.

Conclusion: violation (sixteen votes to one).

(c) *The applicant's transfer from Belgium to Greece* – Considering that, while the applicant's asylum request was still pending, reports produced by international organisations and bodies all gave similar accounts of the practical difficulties raised by the application of the Dublin system in Greece, and the United Nations High Commissioner for Refugees had warned the Belgian Government about the situation there, the Belgian authorities must have been aware of the deficiencies in the asylum procedure in Greece when the expulsion order against him had been issued, and he should not have been expected to bear the entire burden of proof as regards the risks he faced by being exposed to that procedure. Belgium had initially ordered the expulsion solely on the basis of a tacit agreement by the Greek authorities, and had proceeded to enforce the measure without the Greek authorities having given any individual guarantee whatsoever, when they could easily have refused the transfer. The Belgian authorities should not simply have assumed that the applicant would be treated in conformity with the Convention standards; they should have verified how the Greek authorities applied their asylum legislation in practice; but they had not done so.

Conclusion: violation (sixteen votes to one).

(d) *The decision of the Belgian authorities to expose the applicant to the conditions of detention and the living conditions that prevailed in Greece* – The Court had already found the applicant's conditions of detention and living conditions in Greece to be degrading. The conditions concerned had been well documented and easily verifiable in numerous sources prior to the applicant's transfer. That being so, by removing the applicant to Greece, the Belgian authorities had knowingly exposed him to detention and living conditions that amounted to degrading treatment.

Conclusion: violation (fifteen votes to two).

Article 13 taken together with Article 3

(a) *In respect of Greece* – The situation in Afghanistan posed a widespread problem of insecurity, and the applicant was particularly exposed to reprisals by anti-government forces because he had worked as an interpreter for the international air force personnel stationed there.

The three-day deadline the applicant had been given to report to the police headquarters had been too short considering how difficult it was to gain access to the building. Also, like many other asylum-seekers, the applicant had believed that the only purpose of that formality was to declare his address in Greece, which he could not have done as he was homeless. Nor was it mentioned anywhere in the notification document that he could declare that he had no fixed abode, so that news could be sent to him by other means. It had been the responsibility of the Greek Government to find a reliable means of communicating with the applicant so that he could effectively follow the procedure.

Furthermore, the authorities had still not examined the applicant's asylum request. Nor had they taken any steps to communicate with him, or any decision about him. This had deprived him of any real and adequate opportunity to state his case. It was also a matter of some concern that there was a real risk that the applicant would be sent back to Afghanistan without any decision having been taken on the merits of his case, considering that he had already narrowly escaped expulsion twice.

As regards the possibility of the applicant applying to the Greek Supreme Administrative Court for judicial review of a potential rejection of his asylum request, the authorities had failed to take any steps to communicate with him. That, combined with the poor functioning of the notification procedure in respect of persons with no known address made it very uncertain whether he would learn the outcome of his asylum application in time to react

within the prescribed time-limit. In addition, although the applicant clearly could not afford a lawyer, he had received no information on access to advice through the legal-aid scheme, which was itself rendered ineffective in practice by the shortage of lawyers on the list. Lastly, appeals to the Supreme Administrative Court generally took so long that they were no remedy for the lack of guarantees that asylum applications would be examined on their merits

There had therefore been a violation of Article 13 taken in conjunction with Article 3 because of the deficiencies in the Greek authorities' examination of the applicant's asylum application and the risk he faced of being removed directly or indirectly back to his country of origin without any serious examination of the merits of his application and without having had access to an effective remedy.

Conclusion: violation (unanimously).

(b) *In respect of Belgium* – The Court found that the extremely urgent procedure did not meet the requirements of the Court's case-law whereby any complaint that expulsion to another country would expose an individual to treatment prohibited by Article 3 must be closely and rigorously scrutinised, and the competent body must be able to examine the substance of the complaint and afford proper redress. As the Aliens Appeals Board's examination of cases was mostly limited to verifying whether the persons concerned had produced concrete proof of the irreparable damage that might result from the alleged potential violation of Article 3, the applicant's appeal would have had no chance of success.

Conclusion: violation (unanimously).

Article 46: Without prejudice to the general measures required to prevent other similar violations in the future, Greece was to proceed, without delay, with an examination of the merits of the applicant's asylum request in keeping with the requirements of the Convention and, pending the outcome of that examination, to refrain from deporting the applicant.

Article 41: Greece and Belgium were to pay the applicant, respectively, EUR 1,000 and EUR 24,900 in respect of non-pecuniary damage.

Degrading treatment

Repeated, video-taped, full body searches by masked security-force personnel: *violation*

El Shennawy v. France - 51246/08
Judgment 20.1.2011 [Section V]

Facts – The applicant was sentenced to several terms of imprisonment, including one imposed following an Assize Court trial held from 9 to 18 April 2008. In view of his dangerousness, exceptionally tight security arrangements were put in place concerning, for instance, the conditions of his temporary removal from prison and his supervision during the hearings. The applicant was placed under the supervision of officers of the regional security and intervention force (ERIS) throughout the trial. He claimed that officers wearing masks at all times had subjected him to a series of particularly thorough strip-searches, including visual examinations of the anus during which they used force if he refused to bend over and cough. The searches were video-recorded and usually took place in the presence of an officer from the national police intervention force (GIPN). The applicant lodged several appeals against the measures, without success.

Law – Article 3: According to the *Conseil d'Etat*, the applicant had undergone a full body search between four and eight times a day. The searches had gone beyond the normal routine applicable at the relevant time. Full body searches were carried out mainly on high-risk prisoners like the applicant, who had belonged to that category since 1977. The applicant's history and criminal background had justified substantial security measures when he was being taken from prison to the Assize Court. He had undergone a series of searches by the various law-enforcement officials supervising him – prison officers and police officers – although the Ministry of Justice recommended avoiding successive searches of this kind, which it considered to be unwarranted particularly where a prisoner was being handed over by the ERIS to the GIPN. Between 9 and 11 April 2008, when the applicant had returned to the prison for lunch, the searches had been extremely frequent. As to the searches conducted by masked men, the Court saw no reason to depart in the instant case from its recent finding expressing concern at this intimidating practice which, while not intended to humiliate, was liable to cause feelings of anxiety. Furthermore, the full body searches had been recorded on video, at least during the opening days of the trial, although the rules governing the video-recording of searches had not been clearly defined and a 2009 memorandum stated that searches should not be video-recorded, as this could be construed as a violation of human dignity. The searches in ques-

tion had not been based on any pressing need to ensure security or prevent disorder or crime. Although they had taken place over a short period, they had been liable to arouse in the applicant feelings of arbitrariness, inferiority and anxiety characteristic of a degree of humiliation going beyond the level which the strip-searching of prisoners inevitably entailed. The Court took note in that regard of the 2009 Prison Act, which provided a legislative framework for the searching of prisoners and imposed tight restrictions on full body searches, permitting them only where rub-down searches or electronic detection methods were insufficient.

Conclusion: violation (unanimously).

The Court also held that there had been a violation of Article 13.

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

Systematic handcuffing of life prisoner whenever he left his cell: *violation*

Kashavelov v. Bulgaria - 891/05
Judgment 20.1.2011 [Section V]

Facts – The applicant was sentenced to life imprisonment without commutation on various charges, including aggravated murder, and ordered to serve his sentence under the so-called "special regime". Consequently, he was kept in his cell at all times except for an hour-long daily walk, during which he was not allowed to communicate with other prisoners. The applicant also alleged that he was handcuffed whenever he was taken out of his cell.

Law – Article 3: *Handcuffing* – The Court had no objections to the material conditions of the applicant's imprisonment or to the detention regime he had been held in. It also accepted that, in view of the length of the applicant's sentence, his criminal record and his violent antecedents, the use of handcuffs could be warranted on specific occasions, such as transfers outside the prison. However, it observed that the applicant was systematically handcuffed each time he was taken out of his cell, even when taking his daily walk. This practice had been applied to him for some thirteen years, despite the fact that there never appeared to have been an incident in which the applicant had tried to escape, or to hurt himself or anyone else. Concurring with the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which had found such practice to be unjustified, the Court concluded that the applicant's systematic handcuffing had constituted degrading treatment.

Conclusion: violation (unanimously).

The Court found no violation of Article 3 on account of the special detention regime.

It found violations of Article 6 § 1 and Article 13 of the Convention on account of the length of the proceedings against the applicant and the lack of an effective remedy in that respect.

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

Inhuman or degrading punishment
Positive obligations

Detainee suffering from lung disease subjected to passive smoking in prison and on court premises: *violation*

Elefteriadis v. Romania - 38427/05
Judgment 25.1.2011 [Section III]

Facts – The applicant, who suffers from chronic pulmonary disease, is currently serving a sentence of life imprisonment. Between February and November 2005 he was placed in a cell with two prisoners who smoked. In the waiting rooms of the courts where he was summoned to appear on several occasions between 2005 and 2007, he was also held together with prisoners who smoked. The applicant further claimed to have been subjected to second-hand tobacco smoke when being transported between the prison and the courts. He complained unsuccessfully to the prison authorities.

Law – Article 3: The State was required to take measures to protect a prisoner from the harmful effects of passive smoking where, as in the applicant's case, medical examinations and the advice of doctors indicated that this was necessary for health reasons. In the instant case the authorities had therefore been obliged to take steps to safeguard the applicant's health, in particular by separating him from prisoners who smoked, as he had requested on numerous occasions. That appeared to have been not only desirable but also possible, given that there was a cell in the prison in which none of the prisoners smoked. The fact that the prison in question had been overcrowded at the relevant time in no way dispensed the authorities from their obligation to safeguard the applicant's

health. While it was true that the applicant appeared to have had daily exercise in the prison yard, sports activities three times a week and a relatively large cell which had natural light and ventilation and was not overcrowded, these circumstances, however positive, had not been sufficient to offset the harmful effects of the second-hand smoke to which he had been subjected. In particular, following the period during which he had been detained in a cell with smokers, the medical certificates issued by several doctors recorded a deterioration in the applicant's respiratory condition and the emergence of a further illness, namely chronic obstructive bronchitis. As to the fact that the applicant had been held in court waiting rooms with prisoners who smoked – even assuming that it had been for short periods – this had been against the recommendations of doctors, who had advised the applicant to avoid smoking or exposure to tobacco smoke. The fact that the applicant had eventually been placed in a cell with a non-smoker appeared to have been due to the existence of sufficient capacity in the prison in which he was detained at that particular time rather than to any objective criteria in the domestic legislation ensuring that smokers and non-smokers were detained separately. Thus, there was nothing to indicate that the applicant would continue to be held in such favourable conditions if the prison where he was currently detained were to be overcrowded in the future. With regard to the reasons given by the courts for dismissing his claims for compensation, the mere fact that the situation complained of by the applicant had ceased to exist in the meantime because of his transfer to a more favourable setting did not dispense the domestic courts from the obligation to examine whether that situation had had harmful effects, and to award compensation if necessary. The Court did not consider it reasonable, in the circumstances of the present case, to place the onus on the applicant to prove the truth of his allegations by providing evidence of the suffering resulting from his detention in conditions contrary to Article 3 of the Convention. Adopting such a formalistic approach would rule out the possibility of compensation in numerous cases in which detention was not accompanied by an objectively measurable deterioration in the prisoner's physical or mental health.

Conclusion: violation (unanimously).

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

(See also *Florea v. Romania*, no. 37186/03, 14 September 2010, Information Note no. 133)

ARTICLE 5

Article 5 § 1

Deprivation of liberty
Lawful arrest or detention

Indefinite preventive detention following completion of prison term: *violation*

Haidn v. Germany - 6587/04
Judgment 13.1.2011 [Section V]

Facts – In 1999 the applicant was given a three-and-a-half-year prison sentence following a conviction for rape. In April 2002, three days before he completed his sentence, the court responsible for the execution of sentences ordered his preventive detention in prison for an indefinite duration under the recently introduced Bavarian (Dangerous Offenders') Placement Act after finding, on the basis of psychiatric reports, that he posed a serious risk to others. That decision was upheld on appeal. The applicant was held in preventive detention until December 2003 and from March to September 2004. He was subsequently admitted to a psychiatric unit.

Law – Article 5 § 1: The applicant's preventive detention from April 2002 to December 2003 and from March to September 2004 did not constitute detention "after conviction" for the purposes of Article 5 § 1 (a) of the Convention in the absence of a sufficient causal link between the conviction and the detention. The trial court had not made, and had not had the power to make, any such order. The order made by the court responsible for the execution of sentences had not involved any finding of guilt and could not be regarded as having ensued "by virtue of" the criminal conviction simply because it referred to the conviction and was made while the sentence was still being served. Nor was the preventive detention covered by Article 5 § 1 (c) as being "reasonably considered necessary to prevent [the applicant's] committing an offence": Article 5 § 1 was to be interpreted narrowly and the potential further offences were not sufficiently concrete and specific as regards the place and time of commission or the victims. Lastly, the detention did not come within Article 5 § 1 (e). Although there was objective medical evidence to show that the applicant suffered from a personality disorder, a distinction was made in the German legal system between the placement of dangerous offenders in prison for preventive purposes and the

placement of mentally ill persons in a psychiatric hospital. The applicant had been detained under the legislation on dangerous offenders, which required only an assessment of the risk he posed to the public, not of his mental health, and initially at least he had been held in an ordinary prison, rather than in a hospital, clinic or other appropriate institution. In sum, the applicant's preventive detention was not covered by any of the subparagraphs of Article 5 § 1.

Conclusion: violation (unanimously).

Article 3: The Court was not persuaded that the combination of the applicant's advancing years and declining (but not critical) health was such as to bring him within the scope of Article 3. Further, while the circumstances in which the applicant had been detained after completing his prison sentence must have generated feelings of humiliation and uncertainty going beyond the inevitable element of suffering connected with imprisonment, there was no indication of any intent to debase him by ordering his continued detention three days before his scheduled release. Lastly, although the order for his detention was of indefinite duration, the applicant had been entitled to a two-yearly review by the domestic courts. Accordingly, the minimum level of severity required for inhuman or degrading treatment or punishment had not been attained.

Conclusion: no violation (unanimously).

Article 41: Claim made out of time.

(See also, with reference to preventive detention ordered by the trial court itself but extending beyond the maximum ten-year period allowed under domestic law, *M. v. Germany*, no. 19359/04, 17 December 2009, Information Note no. 125; and three judgments of 13 January 2011: *Kallweit v. Germany*, no. 17792/07; *Mautes v. Germany*, no. 20008/07; and *Schummer v. Germany*, nos. 27360/04 and 42225/07)

ARTICLE 6

Article 6 § 1 (civil)

Public hearing
Independent and impartial tribunal

Absence of public hearing before Stock Exchange Regulatory Authority or indication of identity of members of hearing panel: *violations*

Vernes v. France - 30183/06
Judgment 20.1.2011 [Section V]

Facts – The applicant, who was the chairman of a financial company, was permanently banned by the Stock Exchange Regulatory Authority (*Commission des opérations de bourse* – "COB") from engaging in any management activity for third parties. He complained before the European Court of Human Rights that hearings before the COB were not public, that the identity of the members examining his case was not disclosed and that it was therefore impossible to verify whether he had been given an impartial hearing.

Law – Article 6 § 1

(a) *Public hearings* – The Court had already found a violation of Article 6 § 1 in cases concerning the lack of a hearing before the Disciplinary Offences (Budget and Finance) Court (*Guisset v. France*, no. 33933/96, 26 September 2000, Information Note no. 22) and the Court of Audit (*Martinie v. France* [GC], no. 58675/00, 12 April 2006, Information Note no. 85). Of the grounds set forth in Article 6 § 1 that could be used to justify the absence of a public hearing, the Government had relied only on the possible reluctance of professionals working in the financial sector to have their management scrutinised by the public. Having regard to the COB's powers to impose penalties and to the consequences of the penalty imposed in the present case, the Court found it comprehensible that public scrutiny could be seen as a necessary condition for transparency and the safeguard of respect for one's rights, notwithstanding the technical nature of the proceedings. Regard being had to the importance of being able to request that hearings before the COB be public, the mere fact that there had subsequently been a review by the *Conseil d'Etat* had been insufficient in the present case.

Conclusion: violation (unanimously).

(b) *Lack of impartiality of the COB* – The provisions of domestic law in force at the material time had prevented the applicant from knowing the composition of the body that had imposed the penalty and thus from satisfying himself that there had been no prejudice on its part or any link between one of its members with the party in question that might invalidate the proceedings. In those circumstances, and for the sake of appearances, the failure to disclose the identity of all the members of the COB that had heard the case was capable of casting doubt on its impartiality.

Conclusion: violation (unanimously).

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

Article 6 § 1 (criminal)

Fair hearing

Alleged denial of fair trial for suspected terrorist, notably on account of adverse media publicity: *inadmissible*

Mustafa (Abu Hamza) v. the United Kingdom - 31411/07
Decision 18.1.2011 [Section IV]

Facts – Between 1996 and 2000 the applicant, an imam at a London mosque, delivered a series of sermons and speeches which brought him to the attention of the United Kingdom Security Service. He had a number of meetings with officials from the Service in 1997 and 1998. He also had meetings with the police during this period and in 1999 was arrested and interviewed by the police as part of an inquiry into a hostage taking in Yemen before being released without charge. Between 2002 and 2004 he attracted widespread media attention after successively being designated a global terrorist by the President of the United States, informed that he was to lose his British citizenship because of his activities and made the subject of an extradition request by the United States in connection with the Yemeni kidnapping. In October 2004 he was charged in the United Kingdom with various counts of soliciting to murder and stirring up racial hatred between 1997 and 2000. He sought to have the prosecution stayed as an abuse of process on the grounds that, as a result of his dealings with the Security Service and police, he had either been given assurances that he would not be prosecuted or left with the legitimate expectation that he would not be. He also argued that the publicity surrounding him had grown to such an extent that it would be impossible for him to receive a fair trial and that the delay had made it impossible for him to defend himself. That application was, however, refused and he was convicted of a number of the offences charged. His conviction was upheld on appeal.

Law – Article 6 § 1

(a) *Alleged assurances of non-prosecution* – The Court would not exclude the possibility that if prosecuting authorities reneged on an assurance to a defendant that he would not be prosecuted for certain offences the subsequent criminal proceedings would be unfair. However, nothing in the applicant's case could be treated as an assurance that the applicant would not be prosecuted. While the notes of his meetings with the Security Service officials raised certain questions, it must have been clear to the applicant that they were not qualified to advise him on whether his conduct amounted to incitement or to provide assurances as to whether or not he would be prosecuted. The applicant had not alleged that the notes of his meetings with the police would demonstrate that he had been given an unequivocal assurance by the police that he would not be prosecuted. Nor could the Secretary of State's decisions to deprive the applicant of his citizenship and to accede to his extradition have been seen as an assurance of non-prosecution. In any event, even if the trial judge had found that such an assurance had been given, the domestic case-law made it clear that it would have been open to him to grant a stay of proceedings. That case-law was entirely compatible with Article 6.

(b) *Delay and adverse publicity* – The applicant had not complained that the delay in itself had made his trial unfair but rather that the delay meant that the intervening attack on the World Trade Center on 11 September 2001 had made it impossible for him to explain the context of his speeches. It was therefore appropriate to consider the issues of delay and adverse publicity together. There was no allegation that the subjective impartiality of the jury had been affected. As regards objective impartiality, the Court accepted that a virulent media campaign could in certain circumstances undermine the fairness of a trial by influencing public opinion and thus the jury which is called upon to decide on the culpability of the accused. However, in the majority of cases the nature of the trial process and, in particular, the role of the trial judge in directing the jury would ensure that the proceedings were fair. Domestic courts were better placed than the Court to decide whether exceptional circumstances existed, especially where, as here, they enjoyed wide powers to prevent adverse media reporting during trial and to stay proceedings on grounds of an abuse of process. In the applicant's case, the trial judge had given a full and unequivocal direction to the jury to ignore the adverse publicity and to concentrate instead on the evidence before them. A further, careful and skilful, direction had been given after the jury had begun their deliberations. These directions, when taken with the repeated warnings given by the trial judge to the media in the course of the trial, had provided sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the jury. There was, therefore, no appearance of a violation of Article 6.

Conclusion: inadmissible (manifestly ill-founded).

Article 6 § 2: There was no direct link between the Secretary of State's announcement of his intention to deprive the applicant of his citizenship and the later decision by the prosecuting authority to bring criminal proceedings. Although the grounds for the Secretary of State's decision had included the allegation that the applicant had promoted anti-Western sentiment and violence through his preaching, that allegation had been made in general terms without any specific reference to the particular speeches for which the applicant would later be prosecuted. In any event, an allegation that conduct made a person's presence in a country undesirable did not mean that the maker of the allegation considered the same conduct to be a criminal offence. The Secretary of State's decision and the allegations made in support of it therefore fell some way short of the clear declarations as to the applicant's guilt that had led to a finding of a violation in *Allenet de Ribemont v. France* (no. 15175/89, 10 February 1995). The same considerations applied to the applicant's designation as a terrorist by the President of the United States, which concerned quite separate allegations.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 8

Private life

Disclosure of police decision stating that the applicant had committed an offence, even though no criminal proceedings were ever brought: *violation*

Mikolajová v. Slovakia - 4479/03
Judgment 18.1.2011 [Section IV]

Facts – In 2000 the applicant's husband filed a criminal complaint with the police alleging that the applicant had beaten and wounded him. Several days later, the police dropped the case because the applicant's husband did not agree to criminal proceedings being brought against her. In their decision, which was never served on the applicant, the police stated that their investigation had established that the applicant had committed the criminal offence of inflicting bodily injury. A year and a half later, relying on the police decision, an insurance company wrote to the applicant requesting her to reimburse the costs of her husband's medical treatment. The applicant protested to the police about their decision and filed a constitutional complaint alleging the violation of her rights, but to no avail.

Law – Article 8: Given the gravity of the conclusion contained in the police decision, namely that the applicant was guilty of a violent criminal offence, coupled with its disclosure to the insurance company, the Court considered that there had been an interference with the applicant's rights protected by Article 8. The police decision had been formulated as a statement of fact thus indicating that the police considered the applicant guilty of the alleged offence. Even though she had never been charged with a criminal offence, the applicant was nonetheless placed on record as a criminal offender possibly for an indefinite period, which must have caused damage to her reputation. Moreover, the Court could not but note the lack of any procedural safeguards in that the applicant had no available recourse to obtain a subsequent retraction or clarification of the impugned police decision. The domestic authorities had thus failed to strike a fair balance between the applicant's Article 8 rights and any interests relied on by the Government to justify the terms of the police decision and its disclosure to a third party.

Conclusion: violation (unanimously).

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

Private life
Positive obligations

Refusal to make medication available to assist suicide of a mental patient: *no violation*

Haas v. Switzerland - 31322/07
Judgment 20.1.2011 [Section I]

Facts – The applicant has been suffering from a serious bipolar affective disorder for about twenty years. Considering that his illness made it impossible for him to live in dignity, he asked a Swiss private-law association that offered services including assistance in suicide to help him end his life. The applicant asked several psychiatrists to prescribe him a lethal prescription drug (sodium pentobarbital), but to no avail. He then sought permission from various federal and cantonal authorities to obtain the drug from a pharmacy without a prescription through the association, again without success. The applicant appealed to the administrative courts and ultimately the Federal Court. In a judgment of November 2006 the Federal Court dismissed his appeals, finding that a distinction had to be made between the right to decide on one's own death – which was not at issue – and the right to assistance in suicide from the

State or a third party, which could not be inferred from the Convention. Before the European Court, the applicant argued that his right to end his life in a safe and dignified manner had not been respected in Switzerland, on account of the conditions that had to be met in order to be able to obtain the lethal substance, namely a medical prescription issued on the basis of a thorough psychiatric assessment.

Law – Article 8: The right of an individual to decide how and when his life should end, provided that he was in a position to form his own free will in that respect and to act accordingly, was one aspect of the right to respect for private life. However, the dispute in the present case concerned another matter: whether the State had a "positive obligation" under Article 8 to ensure that the applicant could obtain, without a prescription, a substance enabling him to die without pain or risk of failure. The Court noted in that connection that the member States of the Council of Europe were far from having reached a consensus as regards the right of an individual to choose how and when to end his life. Although assistance in suicide had been decriminalised (at least partly) in certain member States, the vast majority of them appeared to attach more weight to the protection of the individual's life than to his right to end it. The Court concluded that States had a wide margin of appreciation in such matters.

Although the Court accepted that the applicant might have wished to commit suicide in a safe and dignified manner and without unnecessary pain, it nevertheless considered that the requirement under Swiss law for a medical prescription in order to obtain sodium pentobarbital had a legitimate aim, namely to protect people from taking hasty decisions and to prevent abuse, the risks of which should not be underestimated in a system that facilitated access to assisted suicide. The Court shared the view of the Federal Court that the right to life obliged States to put in place a procedure capable of ensuring that a person's decision to end his life did in fact reflect his free will. The requirement of a prescription, issued on the basis of a thorough psychiatric assessment, was a means of satisfying that obligation. It remained to be determined whether the applicant had had effective access to a medical assessment that might have allowed him to obtain sodium pentobarbital (if not, his right to choose when and how he died would have been theoretical and illusory). However, the Court was not persuaded that it had been impossible for him to find a specialist willing to assist him as he had claimed.

Having regard to all the above considerations and to the margin of appreciation enjoyed by the national authorities in this sphere, the Court considered that, even assuming that States had a positive obligation to take measures to facilitate suicide in dignity, the Swiss authorities had not breached that obligation in the applicant's case.

Conclusion: no violation (unanimously).

Correspondence

Refusal of prison authorities to send prisoners' letters to members of their family drafted in the Kurdish language: *violation*

Mehmet Nuri Özen and Others v. Turkey - 15672/08 et al.
Judgment 11.1.2011 [Section II]

Facts – The applicants, who were serving prison sentences in high-security prisons, were denied permission by the authorities to send letters they had written to their families on the grounds that, being in Kurdish, the letters could not be checked to ascertain whether or not they contravened the rules. Appeals by the applicants against those decisions were dismissed by the judge responsible for the execution of sentences, who found that there was no procedural defect or error of law, taking the view, among others, that no statutory provision required the prison authorities to bear the cost of translating letters. He explained that the reason for the refusal to send the letters was not that they were written in Kurdish but that their content was incomprehensible and thus impossible to scrutinise, having regard in particular to the imperatives of order and security.

Law – Article 8: The refusal to send the applicants' letters had constituted interference with their freedom of correspondence, since their private communication had been prevented. As to whether that interference had been in accordance with the law, the Court noted that under domestic law the prison authorities' power to scrutiny and censor correspondence related only to the content of that correspondence, whereas their decision in the applicants' case had been based on separate criteria. There was no statutory provision concerning the use of a language other than Turkish in prisoners' letters or indicating any restrictions or prohibitions that might be imposed in that connection. The Court thus concluded that the interference with the applicants' freedom of correspondence had not been "in accordance with the law". Moreover, the Court noted that at the material time, in the absence

of any legal framework clarifying the procedure for handling correspondence written in a language other than Turkish, the prison authorities had developed a practice of requiring a prior translation at the prisoner's own expense. That practice, as implemented, was incompatible with Article 8 because it automatically excluded from that provision's scope of protection an entire category of correspondence in which prisoners might wish to engage.

Conclusion: violation (unanimously).

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

ARTICLE 10

Freedom of expression

Ban on displaying advertising poster in public owing to immoral conduct of publishers and reference in poster to banned Internet site: *no violation*

Mouvement raëlien suisse v. Switzerland - 16354/06
Judgment 13.1.2011 [Section I]

Facts – The applicant is a non-profit association constituting the national branch of the Raelian Movement, with the stated aim of making initial contact and developing good relations with extra-terrestrials. In 2001 it sought permission from the police to put up posters which featured pictures of extraterrestrials' faces and a flying saucer and displayed the Movement's Internet address and telephone number. Permission to put up the posters was refused, and subsequent appeals by the association were all dismissed.

Law – Article 10: The applicant association had suffered interference with its freedom of expression by not having been allowed to impart its ideas through the poster campaign. The interference had been prescribed by law and had pursued the legitimate aims of preventing crime, protecting health and morals and protecting the rights of others. It was undisputed that the poster in itself did not contain anything unlawful or shocking to the public, either in its wording or in the illustrations. However, it featured, in bold type, the association's website address, which linked to the Clonaid site, where specific cloning services prohibited by law were on offer to the public. Since the websites in question were *per se* accessible to everyone, including children, the public impact of the posters would have been amplified and the State's interest in prohibiting the poster campaign was all the greater. Accordingly, the authorities had had sufficient grounds for finding it necessary to refuse the permission sought by the applicant association, having regard to the link to the Clonaid site, the Raelian Movement's possibly sexually deviant attitudes towards under-age children and its promotion of "geniocracy", a theory that power should be given to individuals with a high intellectual coefficient. Lastly, the ban in question was strictly limited to the display of posters in public places. Accordingly, the national authorities had not overstepped the wide margin of appreciation afforded to them with regard to extended use of public space. They had also given relevant and sufficient reasons in support of their position. The prohibition of the poster campaign had therefore been proportionate to the legitimate aim pursued and the very essence of the applicant association's freedom of expression had not been impaired.

Conclusion: no violation (five votes to two).

Damages award for breach of confidence after newspaper disclosed details of a celebrity's therapy for drug addiction: *no violation*

Order requiring newspaper to pay success-fees of opposing party's lawyers: *violation*

MGN Limited v. the United Kingdom - 39401/04
Judgment 18.1.2011 [Section IV]

Facts – The applicant was the publisher of a national daily newspaper which published an article divulging details about a well-known fashion model's drug addiction therapy. The article was accompanied by photographs, including one taken secretly near a Narcotics Anonymous (NA) centre she was attending. When the model's lawyer wrote to the applicant complaining of a breach of his client's privacy, the applicant published a further two articles, accompanied by a similar picture, in which it criticised the model's lifestyle and claim to privacy. The model sued for breach of confidence. Her claim was ultimately upheld by a majority in the House of Lords who found that, although there was a public interest in knowing that she was misleading the public when she said that she did not take drugs, the publication of details of her treatment at NA and of covertly taken photographs had nevertheless been an unjustifiable invasion of her privacy. She was awarded damages of 3,500 pounds sterling (GBP) and legal costs. The costs

of the proceedings in the House of Lords included a "success-fee" element under a Conditional Fee Agreement[1] between the model and her lawyers that almost doubled the base costs. The applicant contested payment of the success fees on the grounds that they were so disproportionate as to infringe its right to freedom of expression. However, it eventually agreed on a settlement (which included the success-fee element) after the House of Lords had ruled that the success-fee regime was compatible with the Convention. The total agreed costs for the two sets of proceedings in the House of Lords alone came to GBP 500,000.

Law – Article 10

(a) *Breach of confidence*: The finding of a breach of confidence amounted to interference with the applicant's right to freedom of expression that was prescribed by law and pursued the legitimate aim of protecting the rights of others. As to whether the interference had been necessary in a democratic society, the Court noted that the sole issue between the domestic judges, who had all agreed on the relevant Convention principles, had concerned the application of those principles to the question whether the interference with the editorial decision to publish the additional materials (concerning the claimant's attendance at NA meetings) was justified. The domestic courts had examined that question at length and given detailed reasons for their decisions. Against that background and having regard to the margin of appreciation accorded to decisions of national courts in this context, the Court would require strong reasons to substitute its view for that of the final decision of the majority of the House of Lords. In point of fact, it considered the reasons that had been given by the majority convincing. The majority had underlined the intimate and private nature of the additional information about the claimant's physical and mental health and treatment and concluded that its publication was harmful and risked causing a significant setback to her recovery. They had further noted that the photographs, which were clearly distressing, had been taken covertly with a view to inclusion in the article and were accompanied with captions which made it clear she was coming from her NA meeting and allowed the location to be identified. Lastly, the publication of the additional material had not been necessary to ensure the credibility of the story, as the applicant already had sufficient information, while the public interest had been satisfied by the publication of the core facts of the claimant's addiction and treatment. The Court therefore considered that the relevancy and sufficiency of these reasons were such that there was no reason, let alone a strong one, for it to substitute its own view for that of the final decision of the House of Lords.

Conclusion: no violation (six votes to one).

(b) *Success fees*: The order requiring the applicant to pay the success fees constituted interference with the applicant's right to freedom of expression. That interference was prescribed by law and had the legitimate aim of ensuring the widest possible public access to legal services for civil litigation funded by the private sector and thus the protection of the rights of others.

The Court examined whether the recoverability of substantial success fees against unsuccessful defendants in civil actions was reasonable, proportionate and necessary to achieve that aim. It paid particular attention to the fact that the scheme had been the subject of detailed and lengthy domestic public consultations initiated by the Ministry of Justice since 2003. While there had been no legislative follow-up to those consultations, a review (the Jackson Review) published in 2010 had highlighted four fundamental flaws, especially in cases such as the applicant's: the lack of any qualifying requirements for claimants to enter into a success-fee arrangement; the lack of any incentive on the part of claimants to control the costs they incurred; the "chilling" effect of the system which often drove opposing parties to settle early, despite good prospects of a successful defence; and, finally, the opportunity for lawyers to "cherry-pick" cases likely to succeed while avoiding claims with smaller chances of success (thus defeating the intended objective of extending access to justice to the broadest range of persons). Such pressure on defendants to settle defendable cases represented a risk to media reporting and thus to freedom of expression. The Ministry of Justice had acknowledged that recoverable success fees rendered the costs' burden in civil litigation excessive and that the balance had swung too far in favour of claimants and against the interests of defendants, particularly in defamation and privacy cases. The flaws identified in the consultation process were reflected in the applicant's case: the claimant was wealthy and thus not at risk of being excluded from access to justice for financial reasons, her lawyers had few success-fee clients and

1. A Conditional Fee Agreement (CFA) is an agreement between a client and a legal representative which provides for all or part of the legal representative's fees to be payable only in specific circumstances (for example if the claim or, as in this case, the appeal) is successful. A court order for costs against a losing party may include an uplift in respect of success fees of up to 100% of the base costs.

so were unlikely to act for impecunious claimants and, as the divided opinions of the domestic courts had shown, the applicant's case had not been without merit. While the precise amount the applicant paid in respect of success fees could not be quantified with precision, the figure was substantial. Accordingly, the requirement that the applicant pay success fees to the claimant was disproportionate having regard to the legitimate aims sought to be achieved and exceeded even the broad margin of appreciation accorded to the States in such matters.

Conclusion: violation (unanimously).

Article 41: Reserved.

Conviction of supporter of a banned organisation for contravening the ban: *no violation*

Aydin v. Germany - 16637/07
Judgment 27.1.2011 [Section V]

Facts – In 1993 the German authorities imposed a ban on the activities of the Workers' Party of Kurdistan (PKK). In 2001 the PKK launched a large-scale campaign urging its supporters to demand that the ban be lifted. Approximately 100,000 declarations were submitted to the authorities in this context. The applicant organised the collection of signatures in Berlin. She also signed a declaration herself. The declaration contained the following statement: "I further declare that I do not acknowledge this ban and assume all responsibility arising therefrom." She was subsequently convicted of contravening the ban imposed on the association's activity and sentenced to 150 daily fines of EUR 8 each. The domestic courts interpreted her statement as implying that she had expressed her commitment not to abide by the ban in the future and to provide the PKK with security for planning future unlawful activities. They further held that the declaration was not covered by the applicant's right to freedom of expression, since she had not confined herself to claiming freedom and self-determination for the Kurdish people and demanding that the ban be lifted. They also considered that the campaign had been organised by the PKK in order to hamper the prosecution of breaches of the ban by overburdening the public-prosecution service with a large number of criminal proceedings. This was demonstrated by the fact that the applicant and the other campaigners had not addressed themselves to the Federal Interior Ministry, which would have been competent to lift the ban, but had submitted a huge number of signed declarations to the public prosecutor's office. The applicant's constitutional complaint was rejected as unsubstantiated.

Law – Article 10: The applicant's conviction for lending support to an illegal organisation had constituted an interference with her right to freedom of expression. The interference was based on the Law on Associations and had pursued the legitimate aims of protecting order and safety. The penalty imposed on the applicant had been intended to ensure that the ban on the PKK's activities was respected. A ban imposed on an organisation would be ineffective if its followers were free to pursue the banned organisation's activities in practice. The domestic courts had expressly acknowledged the applicant's right to call for the ban to be lifted and to publicly apply to a competent authority to that end. She could therefore have avoided criminal prosecution. The courts had thoroughly examined the content of the declaration at issue in the context of the PKK's campaign and taken into account the fact that the applicant had contravened the ban in a separate way by making a donation to a sub-organisation of the PKK which had also been subject to a ban. The sanction imposed on her did not appear disproportionate. The courts had therefore sufficiently taken into consideration the applicant's right to freedom of expression in the course of the criminal proceedings against her.

Conclusion: no violation (six votes to one).

Prohibition on prisoner wearing potentially inflammatory emblems outside his cell: *inadmissible*

Donaldson v. the United Kingdom - 56975/09
Decision 25.1.2011 [Section IV]

Facts – The applicant was serving a prison sentence in a segregated wing for republican prisoners in Northern Ireland. Pursuant to the regulations in force, prisoners were not permitted to wear emblems outside of their cells, an exception having been made in respect of wearing a shamrock on St. Patrick's Day and a poppy on Remembrance Day. On Easter Sunday 2008 the applicant affixed an Easter lily to his outer clothing in commemoration of Irish republican combatants who had died during the 1916 uprising. After he refused to remove the emblem as ordered by a prison officer, the applicant was found guilty of disobeying a lawful order and punished with three days of cellular confinement. His proceedings for judicial review were unsuccessful.

Law – Article 10: The prison policy interfering with the applicant's right to freedom of expression clearly pursued the legitimate aims of preventing disorder and crime and of protecting the rights of others. As to the proportionality of the measure, the States enjoyed a wide margin of appreciation in assessing which emblems could potentially inflame existing tensions, since cultural and political emblems had many levels of meaning which could only be fully understood by those knowing the historical background. The Easter lily was considered a symbol inextricably linked to the community conflict as it was worn in the memory of the killed republicans. It was therefore one of the many emblems deemed inappropriate in the workplace and in the communal areas of Northern Ireland's prisons. Even though the level of offence caused by a particular emblem could not alone set the limits of freedom of expression, in times of conflict prisons were characterised by an acute risk of disorder and emblems more likely to be considered offensive were therefore more likely to spark violence and disorder if worn publicly. In the applicant's case, the interference complained of was relatively narrow since it applied only to serving prisoners when they were outside their cells and in the circumstances was proportionate to the legitimate aim of preventing disorder. Since it was Easter holidays and there were an increased number of visits during those days, it was more likely that segregated prisoners might come into contact with other prisoners. Moreover, throughout the conflicts in Northern Ireland, prison officers had routinely been targeted by paramilitaries. The Court therefore accepted that the prohibition of wearing emblems for paramilitary prisoners was also necessary to ensure a safe working environment for the prison staff.

Conclusion: inadmissible (manifestly ill-founded).

The Court also declared inadmissible the applicant's complaints under Article 14 in conjunction with Article 10 and under Article 6 § 1.

ARTICLE 12

Right to marry

Inability of legally incapacitated applicant to marry: *admissible*

Lashin v. Russia - 33117/02
Decision 6.1.2011 [Section I]

The applicant suffers from schizophrenia and has been legally incapacitated since 2000. In 2002 he and his fiancée applied to the competent authority in order to register their marriage. However, they were unable to do so as Article 14 of the Russian Family Code prohibits persons legally incapacitated due to a mental disorder from getting married.

Conclusion: admissible under Article 12 in conjunction with Article 13 (unanimously).

The Court also declared admissible the applicant's complaints under Article 5 §§ 1 and 4 and under Article 8 in conjunction with Article 13.

ARTICLE 13

Effective remedy

Deficiencies in the asylum procedure in Greece and risk of expulsion without any serious examination of merits of asylum application or access to effective remedy: *violation*

M.S.S. v. Belgium and Greece - 30696/09
Judgment 21.1.2011 [GC]

(See Article 3 above, page 8)

Lack of effective remedy to challenge conditions of detention in a punishment cell: *violation*

Payet v. France - 19606/08
Judgment 20.1.2011 [Section V]

(See Article 3 above, page 7)

ARTICLE 35

Article 35 § 1

Effective domestic remedy – United Kingdom Six-month period

Application to Criminal Cases Review Commission: *not effective remedy/inadmissible*

Tucka v. the United Kingdom - 34586/10
Decision 18.1.2011 [Section IV]

Facts – The applicant's appeal against a conviction for rape was dismissed in 2008. He applied to the Criminal Cases Review Commission (CCRC) for his case to be referred back to the Court of Appeal,

but was notified in 2010 that the CCRC had rejected that application. He subsequently lodged an application with the European Court in which he alleged a breach of his right to a fair trial. As a preliminary point, the Court considered whether he had complied with the six-month time-limit for lodging his application.

Law – Article 35 § 1: The Court reiterated that the pursuit of remedies which are not considered effective for the purposes of Article 35 § 1 will not be taken into account when determining the date of the "final decision" or calculating the starting point for the running of the six-month rule. The 2010 request to the CCRC had effectively sought to reopen the concluded criminal proceedings against the applicant. It was clear from the terms of the relevant legislation that any decision to refer a case to the Court of Appeal was within the discretion of the CCRC and that an application to that body could be made "at any time". It could thus be seen that no time-limit applied to an application to the CCRC, nor to the number of CCRC applications an individual could make. Thus if an application to the CCRC were to be considered an effective remedy, the uncertainty thereby created would render nugatory the six-month rule in so far as it concerned criminal convictions in the United Kingdom. Accordingly, the request to the CCRC for a referral did not constitute an effective remedy for the purposes of Article 35 § 1 and the application to the European Court had been lodged more than six months after the decision of the Court of Appeal.

Conclusion: inadmissible (out of time).

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions
Control of the use of property

Obligation of landowner opposed to hunting on ethical grounds to tolerate hunting on his land and to join a hunting association: *no violation*

Herrmann v. Germany - 9300/07
Judgment 20.1.2011 [Section V]

Facts – The applicant is the owner of landholdings in Germany. As such he is automatically a member of the hunting association under the Federal Hunting Law and thus has to tolerate hunting on his land. Being opposed to hunting on ethical grounds, he filed a request with the hunting authority to terminate his membership of the association, but this was rejected. A like request was subsequently rejected by the administrative courts. In December 2006 the Federal Constitutional Court declined to consider the applicant's constitutional complaint, holding in particular that the legislation pursued legitimate aims and did not impose an excessive burden on landowners. The statutory provisions were, it said, aimed at preserving game in a manner adapted to rural conditions and to ensure a healthy and varied wildlife, and compulsory membership of the hunting association was an appropriate and necessary means of achieving those aims and did not violate the applicant's property rights or his rights to freedom of conscience or of association. His right to equal treatment had not been violated either, as the law was binding on all landowners.

Law – Article 1 of Protocol No.1: The applicant's obligation to tolerate hunting on his land interfered with his right to the peaceful enjoyment of his property. The aim of that interference, namely maintaining varied and healthy game populations and avoiding game damage, served the general interest. As to the necessity of the measures at issue, the Court noted that Germany's situation as one of the most densely populated areas in Central Europe made it necessary to allow area-wide hunting on all suitable premises. It observed that the law in question applied across Germany, which distinguished the situation from that in the French case of *Chassagnou and Others*[1] where only 29 of the 93 *départements* concerned had been made subject to the regime of compulsory membership of hunting associations. While there were statutory exceptions to the system of area-wide hunting, these essentially concerned areas where there was a risk to the general public, nature reserves and land in a specific setting (for example, an enclave surrounded by a private hunting district). Furthermore, the German legal regime did not exempt any public or private owners of property which was suitable for hunting from the obligation to tolerate hunting on their land[2] and the applicant had a statutory right to a share of the profit of the lease corresponding to the size of his property. Even though the sum he could have claimed did not appear to be substantial, the relevant provisions prevented other individuals from drawing a

1. *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, 29 April 1999, Information Note no. 5.

2. Contrast with the position in *Schneider v. Luxembourg* (no. 2113/04, 10 July 2007) where Crown property was excluded from the obligation.

financial profit from the use of the applicant's land. He further had a right to compensation for any damage which might be caused by the hunt. In conclusion and having regard to the wide margin of appreciation afforded to the States in this sphere, the Court considered that the Government had struck a fair balance between the protection of the right of property and the requirements of the general interest.

Conclusion: no violation (four votes to three).

Article 1 of Protocol No. 1 in conjunction with Article 14 of the Convention: The Court considered that under the provisions of the impugned law there existed a difference in treatment between the owners of smaller plots (such as the applicant) and the owners of larger plots in that the latter remained free to choose how to fulfil their obligation under the hunting legislation (either by carrying out the hunt themselves or leasing the hunting rights), whereas the former merely retained the right to participate in the hunting association's decisions. However, it accepted that this difference in treatment was justified, in particular by the need to pool smaller plots in order to allow for area-wide hunting and the effective management of the game stock. Similarly, the difference in treatment between the applicant and owners of landholdings which were not subject to the hunt was, as noted under Article 1 of Protocol No. 1, justified by the specific circumstances of the individual plots subject to statutory exceptions.

Conclusion: no violation (four votes to three).

Article 11 alone and in conjunction with Article 14: The present hunting associations were established in the form of public-law associations, subject to the control of the hunting authority, and their internal statutes were subject to the approval of that authority. They were allowed to issue cost orders by administrative acts, which were executed by the public exchequer. They were thus subject to State supervision which clearly went beyond the supervision normally exercised over private associations and were sufficiently integrated into State structures to qualify as public-law institutions. Moreover, they pursued the aims of managing the exercise of hunting rights and of ensuring the management and protection of the game stock, which were in the general interest. Accordingly, a hunting association did not qualify as an "association" for the purposes of Article 11, which was therefore not applicable.

Conclusion: inadmissible (incompatible *ratione materiae*).

Article 9: The Court did not find it necessary to determine whether the applicant's complaint that his right to freedom of thought and conscience had been violated fell to be examined under Article 9 as, in any event, any interference with his rights had been justified under paragraph 2 of that provision as being necessary in a democratic society, in the interests of public safety, and for the protection of public health and the rights of others.

Conclusion: no violation (six votes to one).

ARTICLE 2 OF PROTOCOL No. 1

Right to education

Exclusion of pupil from secondary school for long period, on account of criminal investigation into an incident at school: *no violation*

Ali v. the United Kingdom - 40385/06
Judgment 11.1.2011 [Section IV]

Facts – In March 2001 a criminal investigation was initiated into a fire that had been started deliberately in the applicant's school. The applicant, who was one of the suspects, was excluded from the school until the police investigation was completed. During the period of exclusion, the school sent him revision-based, self-assessing work in mathematics, English and science until May 2001, when he was permitted to attend school in order to sit examinations. In June 2001 the prosecution against the applicant was discontinued for lack of evidence. As the applicant's parents did not attend a meeting in July 2001 proposed with a view to facilitating his re-integration, the head teacher advised them that she was removing the applicant from the school roll. In September 2001 he did not return to the school. His name remained on the roll until the middle of October 2001 although he was not provided with any education by the school during this period. In November 2001, when the applicant's father finally requested his reinstatement, he was informed that his place had been allocated to a student on the waiting list. In January 2002 the applicant was admitted to a new school. He unsuccessfully complained before the domestic courts that his right to education had been violated.

Law – Article 2 of Protocol No. 1: A measure resulting in the suspension of a pupil for a temporary period for reasons unrelated to the school's internal rules – such as a criminal investigation

into an incident at the school – could be considered justified. The applicant's exclusion had been both lawful and foreseeable, even though there had been some procedural irregularities. In particular, the school had failed to set a time-limit for the initial period of exclusion and to notify the applicant and his parents of their right of appeal to the governors; the governors had failed to hold a hearing; and the period of exclusion had been extended beyond the 45-day maximum. However, due consideration had to be given to the extremely difficult position in which the school had found itself on account of the continuing police investigation. After the expiry of the 45-day period, the legislation required it either to re-integrate the applicant or exclude him permanently. In practice, it could do neither. The applicant could not be re-integrated while the criminal investigation was ongoing, given that other pupils, and members of staff, were potential witnesses. But it would have been equally inappropriate for the school to have excluded him permanently when it had not been established that he had committed any offence. As to the proportionality of the measure, the Court had regard to factors such as the procedural safeguards in place to challenge the exclusion and to avoid arbitrariness; the duration of the exclusion; the extent of the cooperation shown by the pupil or his parents with respect to attempts to re-integrate him; the efforts of the school authorities to minimise the effects of exclusion and, in particular, the adequacy of alternative education provided by the school during the period of exclusion; and the extent to which the rights of any third parties had been engaged. The applicant had only been excluded until the termination of the criminal investigation. The fact that he had not been re-integrated into the school following the cessation of the criminal investigation was his fault or that of his parents, who had not attended the meeting proposed by the head teacher with a view to facilitating his re-integration. Moreover, the applicant had been offered alternative education during the period of exclusion, although he had not chosen to avail himself of this offer. While the alternative education did not cover the full national curriculum, it was adequate in view of the fact that the period of exclusion had at all times been considered temporary pending the outcome of the criminal investigation. Article 2 of Protocol No. 1 did not require schools to offer alternative education covering the full national curriculum to all pupils who had been temporarily excluded from school. However, the situation might well be different if a pupil of compulsory school age were to be permanently excluded from one school and were not able to subsequently secure full-time education in line with the national curriculum at another school. The applicant's exclusion had therefore not amounted to a denial of the right to education and had not been disproportionate to the legitimate aim pursued.

Conclusion: no violation (unanimously).

ARTICLE 3 OF PROTOCOL No. 1

Vote

Ban on prisoner voting imposed automatically as a result of sentence: *violation*

Scoppola v. Italy (no. 3) - 126/05
Judgment 18.1.2011 [Section II]

Facts – In 2002 an assize court sentenced the applicant to life imprisonment for murder, attempted murder, ill-treatment of members of his family and unauthorised possession of a firearm. Under Italian law, his life sentence resulted in a lifetime ban from public office, entailing permanent forfeiture of his right to vote. Appeals by the applicant against the ban were unsuccessful. The Court of Cassation found against him in 2006, pointing out that permanent forfeiture of the right to vote resulted only from prison sentences of at least five years or life sentences (voting rights being forfeited for only five years in the case of sentences of less than five years).

Law – Article 3 of Protocol No. 1: The Court reiterated that a blanket ban on the right of prisoners to vote during their detention constituted a general, automatic and indiscriminate restriction incompatible with Article 3 of Protocol No. 1.[1] Furthermore, a decision on disenfranchisement should be taken by a court and should be duly reasoned.[2]

In the present case, while it was not disputed that the permanent voting ban imposed on the applicant had a legal basis in Italian law, the application of that measure had been automatic since it derived as a matter of course from the main penalty imposed on him (life imprisonment) and had not been mentioned in the court decisions convicting him. Moreover, that general measure had been applied indiscriminately, since it had been taken on account

1. See *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, 6 October 2005, Information Note no. 79.
2. See *Frodl v. Austria*, no. 20201/04, 8 April 2010, Information Note no. 129.

of the length of the prison sentence, irrespective of the offence committed and beyond any consideration by the trial court of the nature and seriousness of the offence. The assessment carried out by the sentencing judge and the possibility that the applicant might one day be rehabilitated by a court decision did not in any way alter that finding.

Conclusion: violation (unanimously).

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

Stand for election

Permanent ineligibility of impeached President to stand for election to parliamentary office: *violation*

Paksas v. Lithuania - 34932/04
Judgment 6.1.2011 [GC]

Facts – The applicant is a former President of Lithuania who was removed from office by Parliament following impeachment proceedings for committing a gross violation of the Constitution. The Constitutional Court found that, while in office as President, the applicant had, unlawfully and for his own personal ends, granted Lithuanian citizenship to a Russian businessman, disclosed a State secret to the latter and exploited his own status to exert undue influence on a private company for the benefit of close acquaintances. In April 2004 the Central Electoral Committee found that there was nothing to prevent the applicant from standing in the presidential election called as a result of his removal from office. However, on 4 May 2004 Parliament amended the Presidential Elections Act by inserting a provision to the effect that a person who had been removed from office in impeachment proceedings could not be elected President until a period of five years had expired. As a result, the Central Electoral Committee ultimately refused to register the applicant as a candidate. The Constitutional Court subsequently ruled on 25 May 2004 that the disqualification resulting from the statutory amendment was compatible with the Constitution, but that subjecting it to a time-limit was unconstitutional. On 15 July 2004 Parliament passed an amendment to the Parliamentary Elections Act, to the effect that anyone who had been removed from office following impeachment proceedings was disqualified from being a member of parliament.

Law – Article 3 of Protocol No. 1

(a) *Admissibility* – Article 3 of Protocol No. 1, which secured the right to free elections, applied only to the election of the "legislature". Accordingly, in so far as the applicant's complaint related to his removal from office or disqualification from standing for the presidency, it was incompatible *ratione materiae* with the provisions of the Convention and hence inadmissible. However, it was admissible *ratione materiae* in so far as it related to his inability to stand for election to Parliament.

(b) *Merits* – The applicant had suffered interference with the exercise of his right to stand for election, having been deprived of any possibility of running as a parliamentary candidate. The interference had been in accordance with the law and had pursued the aim of preserving the democratic order. Without underplaying the seriousness of the applicant's alleged conduct in relation to his constitutional obligations or questioning the principle of his removal from office as President, the interference had had significant consequences as he had been barred not only from being a member of parliament but also from holding any other office for which it was necessary to take an oath in accordance with the Constitution. Lithuania's position in this area constituted an exception in Europe since, in the majority of the Council of Europe's member States, impeachment had no direct effects on the electoral rights of the person concerned, or there were no direct consequences for the exercise of the right to stand in parliamentary elections, or the permissible restrictions required a specific judicial decision and were subject to a time-limit. In assessing the proportionality of such a measure, decisive weight should be attached to the existence of a time-limit and the possibility of reviewing the measure in question. The need to provide for a review was, moreover, linked to the fact that consideration should be given to the historical and political context in the State concerned. Since that context would undoubtedly evolve, not least in terms of the perceptions which voters might have of the circumstances that had led to the introduction of such a general restriction, the initial justification for the restriction could subside with the passing of time. In the present case, however, not only was the restriction unlimited in time, but the rule on which it was based was set in constitutional stone. The applicant's disqualification from standing from election accordingly carried a connotation of immutability that was hard to reconcile with Article 3 of Protocol No. 1. Moreover, the fact that the legislative process whereby the measure was introduced had been strongly influenced by the

specific circumstances was an additional indication of the disproportionate nature of the restriction. All these factors, especially the permanent and irreversible nature of the applicant's disqualification from holding parliamentary office, led the Court to conclude that the restriction was disproportionate.

Conclusion: violation (fourteen votes to three).

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

RECENT COURT PUBLICATIONS

1. Annual Report 2010 of the European Court of Human Rights

On 27 January 2011 the Court issued its Annual Report for 2010 at the press conference preceding the opening of its judicial year. This report contains a wealth of statistical and substantive information such as the Jurisconsult's short survey of the main judgments and decisions delivered by the Court in 2010 as well as a selection in list form of the most significant judgments, decisions and communicated cases. It is available free on the Court's internet site: www.echr.coe.int (Reports – Annual Reports).

Link to the Annual Report 2010

2. The Conscience of Europe: 50 Years of the European Court of Human Rights

The Court launched its anniversary book at the opening of its judicial year on 28 January 2011, thus concluding the celebrations marking the Court's 50th anniversary in 2009 and the 60th anniversary of the European Convention on Human Rights in 2010.

This richly-illustrated book groups a variety of individual contributions around photographs and text retracing the main events over the last half-century. Beyond the institutional and legal dimensions, the Court's history is also told through the personal recollections of those who were part of it for a time. Through these, the reader will learn some of the lore that has built up in an international tribunal that has reached the half-century mark as well as the many diverse personalities associated with its success. The book also looks ahead to what the future may hold for the Court. Some of the proposals for reform of the Court made at various points in the past ten years are.

Sample pages of the book are available on the Court's internet site: www.echr.coe.int (Publications – Court's Anniversary Book). The book in English or French may be purchased online from the publisher at <www.tmiltd.com>.