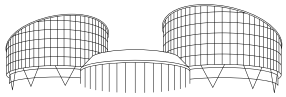

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law

No. 132 July 2010

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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Life

Criminal conviction for destroying fields of genetically modified crops: *inadmissible*

Hubert Caron and Others v. France - 48629/08
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ARTICLE 3

Inhuman treatment

Domestic compensation considerably lower than minimum awarded by Court in cases concerning inhuman treatment: *violation*

Ciorap v. Moldova (no. 2) - 7481/06
Judgment 20.7.2010 [Section IV]

(See Article 34 below – page 19)

Inhuman or degrading punishment
Extradition

Extradition orders entailing risk of effective detention for life and virtual solitary confinement for lengthy periods in US "supermax" facilities: *admissible*

Babar Ahmad and Others v. the United Kingdom
- 24027/07, 11949/08 and 36742/08
Decision 6.7.2010 [Section IV]

Facts – The four applicants are due to be extradited from the United Kingdom to stand trial on terrorism charges in the United States after their appeals to the domestic courts against the Secretary of State's orders for their extradition were dismissed. Evidence has been produced to the European Court which indicates that, if extradited, the first, third and fourth applicants will risk a term of life imprisonment with no possibility of parole, while the second applicant (who is thirty-five years old) faces a fifty-year sentence. Although the applicants accept that the Court's judgment in the case of *Kafkaris v. Cyprus* ([GC], no. 21906/04, 12 February 2008, Information Note no. 105) is authority for the proposition that the imposition of a life sentence would not in itself violate Article 3 provided it was reducible, they argue that none of the ways a sentence can be reduced in the United States meet that test in practice. They also allege that, if convicted, all but the fourth applicant (who suffers from a medical condition) would be liable to serve their sentences (and possibly the rest of their lives) in a "supermax" high-security facility (ADX Florence). They say that conditions in such facilities are stringent, with detainees facing a regime of virtual solitary confinement and significant periods confined to their cells. In support of their claims, they have produced a report by a psychiatrist which states that, while a "supermax" prison regime does not amount to sensory deprivation, there is an almost total lack of meaningful human communication; this tends to induce a range of psychological symptoms ranging from panic to psychosis and emotional breakdown within sixty days. They are concerned also that their situation may be compounded by the imposition of special administrative measures, involving almost complete solitary confinement and restrictions on their communications and visiting rights.

Admissible under Article 3 – detention in a "supermax" prison (first, second and third applicants) and in respect of the possibility of life imprisonment without parole (first, third and fourth applicants) or of a lengthy fixed-term sentence (second applicant). Remaining complaints inadmissible (manifestly ill-founded).

Expulsion

Risk of ill-treatment in case of deportation to Afghanistan of a woman separated from her husband: *deportation would constitute violation*

N. v. Sweden - 23505/09
Judgment 20.7.2010 [Section III]

Facts – The applicant and her husband are Afghan nationals who arrived in Sweden in 2004. Their requests for asylum were refused several times. In 2005 the applicant separated from her husband. In 2008 her request for a divorce was refused by the Swedish courts as they had no authority to dissolve the marriage as long as the applicant did not reside legally in the country. Her husband informed the court that he opposed a divorce. In the meantime, the applicant unsuccessfully requested the Migration Board to re-evaluate her case and stop her deportation, claiming that she risked the death penalty in Afghanistan as she had committed adultery by starting a relationship with a Swedish man and that her family had rejected her.

Law – Article 3: The Court had to establish whether the applicant's personal situation was such that her return to Afghanistan would contravene Article 3. Women were at particular risk of ill-treatment in Afghanistan if perceived as not conforming to the gender roles ascribed to them by society, tradition and even the legal system. The United Nations High Commissioner for Refugees had observed that Afghan women, who had adopted a less conservative lifestyle, such as those returning from exile in Iran or Europe, continued to be perceived as transgressing entrenched social and religious norms and might, as a result, be subjected to domestic violence and other forms of punishment ranging from isolation and stigmatisation to honour crimes for those accused of bringing shame on their families, communities or tribes. As the applicant had resided in Sweden since 2004, she might be perceived as not conforming to the gender roles ascribed to her by Afghan society. Moreover, she had attempted to divorce her husband and had demonstrated a real and genuine intention of not living with him. However, if the spouses were deported to Afghanistan, separately or together, the applicant's husband might decide to resume their married life together against her wish. The new Shiite Personal Status Law required, *inter alia*, women to comply with their husbands' sexual requests and to obtain permission to leave the home, except in emergencies. According to various human-rights reports on Afghanistan, up to 80% of Afghan women were affected by domestic violence, the authorities did not prosecute in such cases and the vast majority of women would not even seek help. To approach the police or a court, a woman had to overcome the public opprobrium affecting women who left their houses without a male guardian. The Court could not ignore the general risk indicated by statistics and international reports. As regards the applicant's extramarital relationship, she had failed to submit any relevant and detailed information to the Swedish authorities. Nevertheless, should her husband perceive the applicant's filing for divorce or other actions as an indication of an extramarital relationship, adultery was a crime under the Afghan Penal Code. Should the applicant succeed in living separated from her husband in Afghanistan, women without male support and protection faced limitations on conducting a normal social life, including the limitations on their freedom of movement, and lacked the means of survival, which prompted many to return to abusive family situations. The results of such "reconciliation" were generally not monitored and abuse or honour crimes upon return were often committed with impunity. There were no strong reasons to question the veracity of the applicant's statement that she had had no contact with her family for almost five years and therefore no longer had a social network or adequate protection in Afghanistan. In the special circumstances of the present case, there were substantial grounds for believing that if deported to Afghanistan, the applicant would face various cumulative risks of reprisals from her husband, his family, her own family and from the Afghan society which fell under Article 3.

Conclusion: deportation would constitute a violation (unanimously).

ARTICLE 5

Article 5 § 1 (b)

Non-compliance with a court order
Secure fulfilment of obligation prescribed by law

Disproportionate detention for failure to pay amount due for breach of bail conditions: *violation*

Gatt v. Malta - 28221/08
Judgment 27.7.2010 [Section IV]

Facts – The applicant, who had been charged with drug-trafficking, was granted bail subject to his providing a personal guarantee of approximately EUR 23,000 and with restrictions on his leaving his place of residence. Following a complaint that he had breached his curfew, the criminal court revoked his bail, and ordered his arrest and the payment of the guarantee. As he was unable to pay, proceedings were brought under Articles 585 and 586 of the Criminal Code and the guaranteed sum was converted into detention at the rate of one day per EUR 11.50. In total, this amounted to two thousand days' (more than five years and six months') imprisonment. The applicant brought a constitutional complaint which was ultimately dismissed.

Law – Article 5 § 1 (b): In so far as the Government had claimed that the detention in the applicant's case fell under the first limb of Article 5 § 1 (b), the Court held that in such circumstances issues such as the purpose of the court order, the feasibility of complying with it and the duration of the detention were matters to be taken into consideration. Moreover, proportionality assumed particu-

lar significance in the overall scheme of things. The Court considered that the applicant, who had been under strict bail conditions for nearly five years – presumably without being able to earn a living – could not realistically have been expected to comply with the court order to secure payment in the amount due. Bearing in mind the relatively shorter periods of detention in other similar cases it had examined previously, the Court found that the duration of the detention imposed for a single breach of curfew could not be considered to have struck a fair balance between the importance of securing compliance with a lawful court order and the importance of the applicant's right to liberty. In so far as the Government claimed that the detention fell within the second limb of Article 5 § 1 (b) of the Convention, the Court found that Maltese law and its application in the applicant's case had been deficient in two aspects. Firstly, the law had made no distinction between a breach of bail conditions related to the primary purpose of bail (namely, appearance at the trial) and other considerations of a less serious nature, such as a curfew. Secondly, it had not applied a ceiling on the duration of the detention, or made any assessment of proportionality. In sum, the domestic law as applied in the applicant's case had failed to strike a balance between the importance in a democratic society of securing the fulfilment of the obligation in question and the importance of the right to liberty.

Conclusion: violation (unanimously).

Article 41: Reserved. Given the nature of the violation, the respondent State should give consideration to securing the applicant's immediate release from detention in so far as it is based on the criminal court's decision applying Articles 585 and 586 of the Criminal Code.

ARTICLE 6

Article 6 § 1 (civil)

Applicability

Proceedings challenging the recording of the applicant's name in a secret police file and the withdrawal of firearms licence: *Article 6 applicable*

Užukauskas v. Lithuania - 16965/04
Judgment 6.7.2010 [Section II]

Facts – The applicant held a firearms licence which was revoked by the Lithuanian authorities on the ground that he was listed in the operational records file compiled by law-enforcement officers which contained information about his alleged risk to society. He was required to hand in his arms to the police in return for payment. He challenged the entry of his name in the operational records file in the domestic courts, which, however, dismissed his action on the basis of classified material submitted by the police, without disclosing it to the applicant.

Law – Article 6 § 1

(a) *Applicability* – There could be little doubt that the information contained in the operational records file had had an impact on the applicant's reputation, which merited protection under domestic law and fell within the scope of Article 8 of the Convention. Likewise, when information about a person's life, including, *inter alia*, his criminal record, was systematically collected and stored in a file held by State agents, that information fell within the scope of "private life" for the purposes of Article 8. The Court could not rule out the possibility, albeit theoretical, that the listing of the applicant's name in the operational records file could have resulted in restrictions on him entering certain private-sector professions or otherwise earning a living, thereby again affecting his private life. Indeed, under domestic law, certain professions, such as that of security officers, were not accessible to persons who had been listed in an operational records file. Lastly, as the applicant had been required to hand in the guns, albeit in return for payment, there could be little doubt that this had involved an interference with the right to the protection of property. Article 6 § 1 was therefore applicable to the impugned proceedings under its civil head.

(b) *Merits* – In order to determine whether or not the applicant had been involved in a criminal activity, it had been necessary for the judges to examine a number of factors, including the reason for the police operational activities and the nature and extent of the applicant's suspected participation in the alleged crime. Had the defence been able to persuade the judges that the police had acted without good reason, the applicant's name would have been removed from the operational records file. The data in that file was, therefore, of decisive importance to the applicant's case. More importantly, as the domestic courts' decisions showed, the operational records file had been the only evidence of the applicant's alleged danger to society. However, Lithuanian law and judicial practice provided

that information containing State secrets could not be used as evidence in court against a person unless it had been declassified, and that it could not be the only evidence on which a court based its decision. As the applicant had not been apprised of the evidence against him or had the opportunity to respond to it (unlike the police who had effectively exercised such rights), the decision-making procedure had not complied with the requirements of adversarial proceedings or equality of arms and had not incorporated adequate safeguards to protect the interests of the applicant.

Conclusion: violation (unanimously).

Article 41: EUR 3,500 in respect of non-pecuniary damage.

Article 6 § 1 (criminal)

Applicability

Assize court refusal to hold new trial following re-examination of case-file pursuant to judgment of European Court: *inadmissible*

Öcalan v. Turkey - 5980/07
Decision 6.7.2010 [Section II]

(See Article 46 below – page 22)

Article 6 § 2

Presumption of innocence

Refusal to award compensation for pre-trial detention because applicant acquitted for lack of evidence: *violation*

Tendam v. Spain - 25720/05
Judgment 13.7.2010 [Section III]

Facts – Two sets of criminal proceedings were brought against the applicant. In the first set, he was detained pending trial for 135 days, and was subsequently convicted at first instance and acquitted on appeal. In the second set of proceedings he was likewise acquitted and sought the recovery of possessions seized from him during the investigation. Although some of the items were returned to him, he noticed that they were damaged and that others had disappeared. He applied to the Ministry of Justice and the Interior for compensation, both for the damage resulting from his pre-trial detention and for the malfunctioning of the justice system that had led to the failure to return the seized items or to their loss in value. His application was dismissed under both heads. The applicant applied to the *Audiencia Nacional* for judicial review of that decision but without success. He subsequently lodged an appeal on points of law with the Supreme Court and an *amparo* appeal with the Constitutional Court, to no avail.

Law – Article 6 § 2: In dismissing the applicant's claim for compensation for his pre-trial detention, the Ministry had relied on the fact that he had been acquitted on appeal for lack of sufficient evidence. Such reasoning, without qualification or reservation, cast doubt on the applicant's innocence. In making a distinction between an acquittal for lack of evidence and an acquittal based on the finding that the alleged offence had not been committed, it had disregarded the applicant's previous acquittal, which had to be taken into account by any judicial authority regardless of the reasons given for the criminal court's decision. The national courts, for their part, had simply endorsed the Ministry's reasoning without remedying the issue arising.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 1: The seizure complained of by the applicant had not been designed to deprive him of his possessions but to prevent him temporarily from using them. There was no indication that it had lacked any basis in law. Furthermore, it had pursued the aim of guaranteeing the satisfaction of any claims brought by potential civil parties. After his acquittal, the applicant had brought an action against the State on account of the damage to or disappearance of the seized items. In the record of the return of the items, drawn up several months previously, he had mentioned the problem and the clerk to the investigating judge had noted that several items were in a poor condition. It also appeared from the case file that certain seized items had been deposited with third parties during the criminal investigation and had not subsequently been returned. Yet the national authorities, and in the final instance the Supreme Court, had dismissed the applicant's claim on the ground that he had not proved that the seized items had disappeared or been damaged. In those circumstances, the Court considered that the burden of proof regarding the missing or damaged items had rested with the judicial authorities, which had been responsible for looking after them throughout the duration of the seizure, and not with the applicant, who had been acquitted more than seven years after the items had been seized. Since, following the applicant's acquittal,

the judicial authorities had not provided any justification for the disappearance of and damage to the seized items, they were liable for any losses resulting from the seizure. The domestic courts that had examined the claim had not taken into account the liability incurred by the judicial authorities or afforded the applicant an opportunity to obtain redress for the damage sustained. By refusing his claim for compensation, they had caused him to bear a disproportionate and excessive burden.

Conclusion: violation (unanimously).

Article 41: EUR 15,600 in respect of non-pecuniary damage; the Court reserved the question of pecuniary damage.

ARTICLE 7

Article 7 § 1

Nullum crimen sine lege

Conviction for supplying Iraqi authorities with chemical substance used to produce poisonous gas: *inadmissible*

Van Anraat v. the Netherlands - 65389/09
Decision 6.7.2010 [Section III]

Facts – Between 1984 and 1988 the applicant supplied the Iraqi Government with a chemical substance used to produce the highly poisonous "mustard gas" which was then used in the Iran-Iraq war as well as in Iraqi attacks on the Kurdish population in northern Iraq. In 2005 the applicant was convicted in the Netherlands under section 8 of the War Crimes Act for aiding and abetting violations of laws and customs of war committed by Saddam Hussein and his collaborators in gas attacks on both locations.

Law – Article 6 § 1: The applicant firstly complained about the Supreme Court's failure to reply to all the arguments he had raised before it, in particular an argument concerning his protection by the foreign sovereign immunity enjoyed by the perpetrators of the crimes he had allegedly aided and abetted. However, the Court noted that the applicant had raised this issue only in his reply to the Prosecutor General's advisory opinion, that is, at the final stage of the proceedings before the Supreme Court. While Article 6 guaranteed the right of defendants in criminal proceedings to reply to the Prosecutor General's opinion, it did not allow defendants to submit fresh arguments that had no bearing on any point contained in that opinion itself. The Supreme Court had a long-standing jurisprudence concerning the universal jurisdiction of the Netherlands criminal courts over crimes set out in section 8 of the War Crimes Act and, had the applicant wished to request it to change that approach, there had been nothing to prevent him from submitting his arguments at an earlier stage of the proceedings. In conclusion, Article 6 did not compel the Supreme Court to provide a reasoned response on this point.

Conclusion: inadmissible (manifestly ill-founded).

Article 7: The applicant further complained that section 8 of the War Crimes Act lacked foreseeability in so far as it relied for its substantive application on standards of general international law. However, given the general purpose of laws, it was logical that the wording of statutes could not always be precise; one of the standard techniques of regulation by rules was using general categorisations as opposed to exhaustive lists and, since the choice of legislative technique was reserved for the domestic legislature, in principle it escaped the Court's scrutiny. Further, as to the applicant's argument concerning the lack of precision of the applicable rules of international law, the Court concluded that during the period in which the applicant had supplied the Iraqi Government with the chemical substance in question, a norm of customary international law was in existence that prohibited the use of mustard gas as a weapon of war in international conflict, not least because of the 1925 Geneva Gas Protocol[1] and the repeated condemnations throughout the Iran-Iraq war by the UN General Assembly of the use of chemical weapons. In so far as the applicant sought to challenge the domestic courts' findings of fact, the Court recalled that domestic courts were better placed to assess the credibility and relevance of evidence. In conclusion, it could not be maintained that, at the time when the applicant was committing the acts which led to his conviction, there was anything unclear about the criminal nature of the use of mustard gas either in an international conflict or against a civilian population. The applicant could therefore reasonably have been expected to be aware of the state of the law and to take appropriate legal advice (if necessary).

Conclusion: inadmissible (manifestly ill-founded).

1. The League of Nations Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare was signed at Geneva on 17 June 1925 and entered into force on 8 February 1928.

ARTICLE 8

Private and family life

Failure to regulate residence of persons who had been "erased" from the permanent residents register following Slovenian independence: *violation*

Kurić and Others v. Slovenia - 26828/06
Judgment 13.7.2010 [Section III]

Facts – The applicants had previously been citizens of the former Yugoslavia and one of its constituent Republics other than Slovenia. They had acquired permanent residence in Slovenia, but, following its independence, had either not requested or not been granted Slovenian citizenship. On 26 February 1992, pursuant to the newly enacted Aliens Act, the applicants' names were deleted from the Register of Permanent Residents and they became aliens without a residence permit. Approximately another 18,000 people were in the same situation. According to the applicants, none of them were ever notified of that decision and they only discovered what had been done later, when they sought to renew their personal documents. The erasure of their names from the register had serious and enduring negative consequences: some applicants became stateless, while others were evicted from their apartments, could not work or travel, lost all their personal possessions and lived for years in shelters and parks. Still others were detained and expelled from Slovenia. In 1999 the Constitutional Court declared certain provisions of the Aliens Act, as well as the automatic "erasure" from the register, unconstitutional, after finding that under the impugned legislation, the citizens of the former Yugoslavia had been in a less favourable legal position than other aliens who had lived in Slovenia since before its independence, in that there was no act regulating the transition of their legal status towards the status of aliens living in Slovenia. Following the Constitutional Court's decision, a new law was adopted to regulate the situation of the so-called "erased". In a subsequent decision of 2003, the Constitutional Court declared certain provisions of the new law unconstitutional, in particular since they failed to grant the "erased" retroactive permanent residence permits or to regulate the situation of those who had been deported.

Law – Article 8: Before 26 February 1992, when their names were erased from the relevant register of permanent residents, the applicants had been lawfully residing in Slovenia for a number of years; some had even been born there. They had developed a network of personal, social, cultural and economic relations that made up the private life of every human being, and most of them had also developed a family life in Slovenia. They had therefore had a private and/or family life in Slovenia and the prolonged refusal of the authorities to regulate their situation in line with the Constitutional Court's decisions, and in particular to issue them permanent residence permits, had constituted an interference with their rights guaranteed under Article 8. As to the justification for such interference, the Court found no reason to depart from the findings of the Constitutional Court in 1999 and 2003 that the "erasure" of the applicants had been unlawful since the relevant legislation had not regulated their legal status. Such unlawfulness had persisted for over fifteen years because, despite certain efforts on their part, the legislative and administrative authorities had failed to comply with the judicial decisions.

Conclusion: violation (unanimously).

Article 13: In spite of legislative and administrative efforts to comply, the Constitutional Court's leading decisions of 1999 and 2003 had never been fully implemented.

Conclusion: violation (unanimously).

Article 41: Reserved.

Article 46: The facts of the case disclosed the existence, within the Slovenian legal order, of a shortcoming as a consequence of which the remaining group of the "erased" had been denied their rights to a private and/or family life in Slovenia and to effective remedies in that respect. Although it was in principle not for the Court to determine which remedial measures would be appropriate to satisfy Slovenia's obligations under Article 46 of the Convention, the failure of the respondent State's authorities to comply with the Constitutional Court's decisions indicated by its very nature the appropriate general and individual measure to be adopted: the enactment of appropriate legislation and the regulation of the situation of the individual applicants by issuing them retroactive residence permits.

Prolonged failure to register marriage concluded abroad: *violation*

Dadouch v. Malta - 38816/07
Judgment 20.07.2010 [Section IV]

Facts – In 2003 the applicant, who had acquired Maltese citizenship through a previous marriage, married a Russian national in Moscow. Several days later, he applied to the public registry office to have his marriage registered in Malta. The registry officials requested that, in addition to his Maltese identity card and passport, he also provide a letter from the competent authority proving his Maltese nationality, which that authority refused to issue. At a later stage, the Maltese authorities also challenged the authenticity of his Russian certificate of marriage. The applicant then brought court proceedings, which were ultimately dismissed, the domestic courts having found no violation of his Convention rights. The applicant's marriage was finally registered in November 2006, on the basis of the same documents he had originally submitted to the registry office.

Law – Article 8: Even though Article 8 could not be interpreted as imposing on a State a general obligation to respect the choice of residence of married couples, a refusal to register a marriage might have consequences going beyond immigration and affect the private or family life of both nationals and foreigners. The parties in the applicant's case disagreed as to the effects of marriage registration. Whereas the domestic law clearly stated that the absence of registration was irrelevant to the existence of a marriage, the practical repercussions such an act might have could not be ignored. The absence of a document from the public registry made certain requests, such as applications for social or tax benefits, lengthier and more complex, if at all possible. The State's acknowledgment of a person's marital status inevitably formed a part of an individual's personal and social identity, and the registration of a marriage – being a form of recognition of such status – thus inevitably concerned one's private and family life. The substantive delay in the registration of the applicant's marriage amounting to over twenty-eight months constituted an interference with his rights guaranteed under Article 8. The reason for the delay, as acknowledged by the Constitutional Court, was interdepartmental lethargy. Any further verification of the marriage act itself with the relevant embassy could have been done in a timelier manner. Further delays had been caused by the authorities' insistence on the applicant providing them with a letter of citizenship, despite the fact that he had already offered them his passport, which in the Court's view provided a rebuttable presumption that he indeed was a Maltese citizen. In conclusion, the Court found that the denial of registration of the applicant's marriage for a prolonged period of time had been a disproportionate interference with his Article 8 rights.

Conclusion: violation (unanimously).

Article 41: EUR 3,000 in respect of non-pecuniary damage.

Criminal conviction for destroying fields of genetically modified crops: *inadmissible*

Hubert Caron and Others v. France - 48629/08
Decision 29.6.2010 [Section V]

Facts – The applicants removed the male and female flowers from genetically modified corn crops in a field in order to prevent them from spreading. This was part of a campaign by a movement opposed to the cultivation of genetically modified organisms (GMOs) in open fields on grounds of the damage to the environment and public health allegedly caused by crop trials of this nature. The applicants were given a suspended sentence of three months' imprisonment, at final instance, and fined EUR 1,000 each for destroying, damaging or harming another's property, while acting as a group.

Law – Articles 2 and 8

(a) *Interference with the applicants' health and environment* – The applicants clearly stated that the primary purpose of their campaign had been the protection of the collective interest. They confined themselves to complaining in the abstract about the effect of GMOs on the environment and public health and declaring that they were exposed to a health risk on the grounds that non-GM crops were being contaminated by GMOs. They failed to explain, however, how they had been personally affected, in terms of their health and private life, by the GMOs being grown on the plots that they had neutralised. Moreover, the GM crops neutralised by the applicants were not in the vicinity of their homes, farms or vineyards. Lastly, they had not alleged that their choice of crop plantations had been based on the need to put an end to the direct or indirect effects that these might have on their health or their private and family life. In the circumstances, this part of the complaint was an *actio popularis* and the applicants could not be regarded as victims, within the meaning of Article 34, of the violations alleged.

Conclusion: inadmissible (incompatible *ratione personae*).

(b) *The applicants' criminal conviction* – Neither Article 2 nor Article 8 could have the effect of relieving the applicants of their criminal responsibility for criminal offences. Indeed, that responsibility had been recognised by the domestic courts and in particular by the court of appeal, which had held, giving detailed reasons devoid of any arbitrariness, that the action was not justified by the precautionary principle and that the applicants could not rely on a defence of necessity either.

Conclusion: inadmissible (manifestly ill-founded).

Article 1 of Protocol No. 1: Having regard to the conclusion regarding the first limb of the complaint under Articles 2 and 8, the applicants could not claim to be victims of a violation on the basis of Article 1 of Protocol No. 1 either.

Conclusion: inadmissible (incompatible *ratione personae*).

Family life

Order for return of child with mother to father's country of residence from which it had been wrongly removed: *forced return would constitute violation*

Neulinger and Shuruk v. Switzerland - 41615/07
Judgment 6.7.2010 [GC]

Facts – The first applicant, a Swiss national, settled in Israel, where she got married and the couple had a son. When she feared that the child (the second applicant) would be taken by his father to an ultra-orthodox community abroad, known for its zealous proselytising, the Family Court imposed a ban on the child's removal from Israel until he attained his majority. The first applicant was awarded temporary custody, and parental authority was to be exercised by both parents jointly. The father's access rights were subsequently restricted on account of his threatening behaviour. The parents divorced and the first applicant secretly left Israel for Switzerland with her son. At last instance, the Swiss Federal Court ordered the first applicant to return the child to Israel.

In a Chamber judgment of 8 January 2009, the European Court held, by four votes to three, that there had been no violation of Article 8 of the Convention (see Information Note no. 120).

Law – Article 8: In the opinion of the national courts and experts, the child's return to Israel could be envisaged only if he was accompanied by his mother. The measure in question remained within the margin of appreciation afforded to national authorities in such matters. Nevertheless, in order to assess compliance with Article 8, it was also necessary to take into account any developments since the Federal Court's judgment ordering the child's return. The Court took the view that it could be guided on this point, *mutatis mutandis*, by its case-law on the expulsion of aliens and the criteria on which to assess the proportionality of an expulsion order against a minor who had settled in the host State. In the present case, the child was a Swiss national and had settled very well in the country where he had been living continuously for about four years. Even though he was at an age (seven years old) where he still had a significant capacity for adaptation, the fact of being uprooted again would probably have serious consequences for him and had to be weighed against any benefit that he was likely to gain from it. In this connection, it was noteworthy that restrictions had been imposed on the father's right of access before the child's abduction. Moreover, the father had remarried twice since then and was now a father again but had failed to pay maintenance for his daughter. The Court doubted that such circumstances would be conducive to the child's well-being and development. As to the mother, her return to Israel could expose her to a risk of criminal sanctions, such as a prison sentence. It was clear that such a situation would not be in the child's best interests, his mother probably being the only person to whom he related. The mother's refusal to return to Israel was not therefore totally unjustified. Even supposing that she agreed to return to Israel, the father's capacity to take care of the child in the event of criminal proceedings against her and of her subsequent imprisonment could be called into question, in view of his past conduct and limited means. Moreover, the father had never lived alone with the child and had not seen him since the child's departure at the age of two. The Court was thus not convinced that it would be in the child's best interests for him to return to Israel. As to the mother, she would sustain a disproportionate interference with her right to respect for her family life. Consequently, there would be a violation of Article 8 in respect of both applicants if the decision ordering the second applicant's return to Israel were to be enforced.

Conclusion: violation (sixteen votes to one).

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

Authorities' refusal, for five years, to assign asylum-seekers to the same canton as their spouses, so they could live together: *violation*

Mengesha Kimfe v. Switzerland - 24404/05
Agraw v. Switzerland - 3295/06
Judgments 29.7.2010 [Section I]

Facts – Like the two men who were later to become their husbands, the applicants in both cases, who are Ethiopian nationals, entered Switzerland illegally and sought asylum there. The Federal Office for Refugees assigned the applicants to different cantons from the two men. After the asylum applications lodged by the four individuals concerned had all been rejected, they were ordered to be deported from Switzerland. They stayed in Switzerland, however, because the Ethiopian authorities prevented their return. After they had got married in 2003 and 2002 respectively, the applicants unsuccessfully sought to be assigned to the same canton as their husbands so that they could live together. In 2008 they were both eventually granted residence permits for the canton in question.

Law – Article 8

(a) *Loss of victim status* – The decisions authorising the applicants, on grounds of family reunion, to move to the canton to which their husbands had been assigned had not deprived them of their victim status regarding the restrictions which they had allegedly suffered as a result of the rejection of their requests to be assigned to a different canton; those restrictions had lasted approximately five years, which was a considerable length of time. In that connection the domestic authorities, including the Government, had never acknowledged, even implicitly, any violation of the applicants' rights under the Convention. Furthermore, the applicants' enforced separation from their husbands had not been compensated within the meaning of the Court's case-law.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Applicability* – For the purposes of Article 1 of the Convention, the applicants – whose extended stay in Switzerland had been due to the failure to enforce the order for their deportation to Ethiopia – had come within the "jurisdiction" of Switzerland, which, accordingly, had been obliged to assume its responsibility under the Convention. The applicants, who had not in any way complained of the decision ordering their deportation from Switzerland, had been prevented from cohabiting with their husbands for approximately four years. In the light of the principle that the ability to lead a life as a couple constituted, for married couples, one of the essential elements of the right to respect for family life, the applicants could, following their marriage, rely on the guarantees under Article 8.

Conclusion: Article 8 applicable.

(c) *Merits* – The authorities' refusal to assign the applicants to the canton where their husbands had been living had amounted to an interference with their right to respect for their family life. The measure in question was prescribed by law and was designed to assign asylum seekers equitably between the cantons, which was a legitimate aim that could be regarded as falling within the concept of the economic well-being of the country. The applicants had been formally prevented from leading a life as a couple for approximately five years. Regarding the first case, the applicant had been able to maintain contact with her future husband and, since her marriage, to live with him. However, when she had gone to the police station one day she had been forcibly returned to her own canton, thus exposing her to a possible criminal penalty for illegal residence. Moreover, her decision not to stay in her own canton had had significant practical consequences in terms of her welfare benefits, health insurance and postal correspondence. Regarding the second case, even if the one-and-a-half-hour train journey that separated the applicant from her future husband had allowed them to have regular contact, as evidenced by their marriage and the birth of their child, the applicant had suffered a serious interference with her family life on account of the prolonged separation. The Court accepted that the Swiss authorities did, to an extent, have an interest in not changing the status of unsuccessful asylum seekers. However, the applicants and their husbands had been unable to return to their country of origin – and thus to build a family life outside Swiss territory – on account of the inability to enforce the deportation order against them because of the Ethiopian authorities' opposition to the repatriation of their citizens. Assigning the applicants to their husbands' canton earlier would not have had a significant effect on the number of aliens assigned to that canton and would not have adversely affected the equitable assignment of asylum seekers or have run counter to public policy. In any event, the advantages of that system for the respondent State had carried much less weight than the private interests of the applicants, even considering the administrative burden and the costs incurred in transferring them to a different canton. Having regard to the exceptional nature of the cir-

cumstances surrounding these cases and to the considerable number of years during which the applicants had been formally separated from their husbands, the measure in question had not been necessary in a democratic society.

Conclusion: violation (unanimously).

Article 41: EUR 2,330 to the applicant in the first case in respect of pecuniary damage and EUR 846 to the applicant in the second case; EUR 5,000 to each of the applicants in respect of non-pecuniary damage.

ARTICLE 10

Freedom of expression

Conviction for defamation following publication of a book in which a former defendant described his own trial: *violation*

Roland Dumas v. France - 34875/07
Judgment 15.7.2010 [Section V]

Facts – The applicant is a lawyer and politician who was formerly a government minister and President of the Constitutional Council. Between 1997 and 2003 he was implicated in a case which uncovered a web of corruption involving politicians and business leaders. In 2003 he was acquitted of aiding and abetting the misappropriation of company assets and handling misappropriated company assets. Shortly afterwards, he published a book containing an account of the court case, including one incident at a hearing in January 2001 when he had said that during the war the public prosecutor could have sat in the Special Sections (special tribunals set up during the German occupation). In 2006, in the context of an action for defamation prompted by the book's publication, the court of appeal, overturning the first-instance judgment, ordered the applicant and his publisher to pay fines and damages for having defamed a member of the legal service. In 2007 the Court of Cassation dismissed an appeal on points of law by the applicant.

Law – Article 10: The applicant's conviction had amounted to interference with his right to freedom of expression. It had been prescribed by law and had pursued the legitimate aim of protecting the reputation and rights of others, namely the public prosecutor. Seeing that the relevant passages of the book concerned an affair of State that had attracted widespread media coverage, that the applicant had been writing as a former politician and that the book amounted to a form of political expression, Article 10 called for a high degree of protection of the right to freedom of expression. Accordingly, the authorities had a particularly limited margin of appreciation in assessing whether the measure in question had been necessary. Because the court of appeal had chosen to examine the contentious passages of the book as a whole, the only factors it had taken into account as constituent elements of defamation had been the allegations that the principle of procedural fairness had been breached and that the public prosecutor had behaved like a judge of the Special Sections. The court of appeal had disregarded part of the alleged offence and had thus based its finding on a single statement without putting it in context, and in concluding that the applicant had not acted in good faith it had relied on allegations for which he had not been prosecuted. There was cause to fear that such a method of analysis might not make it possible to identify with any certainty the motives behind the allegation that had given rise to the criminal penalty, or at the very least to understand why they had formed a basis for a finding of defamation. Furthermore, the comments made in the book and held to be defamatory were the same as those made by the applicant during the trial in January 2001. At that time, however, no proceedings had been instituted against the applicant, a fact which the court of appeal should have taken into account. Indeed, in the book the applicant had simply made use of his freedom to recount his own trial as a former defendant. Although, unlike defence counsel, he did not enjoy a wide discretion to criticise a public prosecutor by virtue of the principle of equality of arms, that was not a sufficient reason to tolerate the *ex post facto* review of statements made by him in court. Treating the impugned comment not as a criticism of the public prosecutor's alleged frame of mind but as a precise fact capable of being examined in adversarial proceedings, and requiring the truth of that allegation to be proved even though the applicant's book had provided an explanation of his anger and of the intellectual process that had prompted his excessive conduct, did not appear to constitute a reasonable approach to the facts. Regard being had to those factors and to the national courts' confusion of the incident during the hearing in January 2001 with the account of it in a book published at a later stage, the reasons given for the applicant's conviction did not persuade the Court that the interference with his freedom of expression had been necessary in a democratic society.

Conclusion: violation (five votes to two).

Article 41: EUR 8,000 in respect of pecuniary damage; finding of a violation sufficient in itself as regards non-pecuniary damage.

Freedom to impart information

Virtually automatic conviction of media professionals for publishing written material of banned organisations: *violation*

Gözel and Özer v. Turkey - 43453/04 and 31098/05
Judgment 6.7.2010 [Section II]

Facts – The applicants, who were respectively the owner and editor, and publisher and editor, of two periodicals, were fined, with the first magazine being suspended for a week and the second closed for a fortnight, on the ground that they had published three articles that the domestic courts characterised as statements by a terrorist organisation.

Law – Article 10: The impugned convictions constituted interference with the applicants' right to impart information or ideas freely. The measures were prescribed by law. That interference further pursued the legitimate aims of maintaining public safety and the prevention of disorder and crime. However, the grounds given by the Turkish courts for the conviction of the applicants, who were media professionals, whilst pertinent, were not sufficient to justify the interference in question. This lack of reasoning simply stemmed from the very wording of section 6(2) of Law no. 3713, which provided for conviction of "anyone who print[ed] or publishe[d] statements or leaflets by terrorist organisations" and contained no obligation for the domestic courts to carry out a textual or contextual examination of the writings, applying the criteria established and implemented by the Court under Article 10 of the Convention. The Court had previously found a violation of that Article in numerous cases against Turkey in which media professionals had repeatedly been convicted for publishing statements by prohibited organisations. Such a practice could have the effect of partly censoring the work of media professionals and reducing their ability to put forward in public views – provided of course that they did not directly or indirectly advocate the commission of terrorist offences – which had their place in a public debate, especially where, as in the present case, the terms "statements" and "leaflets of terrorist organisations" had been interpreted very vaguely. In particular, such automatic repression, without taking into account the objectives of media professionals or the right of the public to be informed of another view of a conflictory situation, could not be reconciled with the freedom to receive or impart information or ideas. In the light of those considerations and an examination of the legislation in question, the Court found that the interference could not be regarded as necessary in a democratic society and had not been required for the fulfilment of the legitimate aims pursued.

Conclusion: violation (unanimously).

Article 46: The violation in the present case of Article 10 of the Convention stemmed from a problem relating to the wording and application of section 6(2) of Law no. 3713. In this connection, to bring the relevant domestic law into compliance with Article 10 would constitute an appropriate form of redress by which to put an end to the violation in question.

Article 41: EUR 170 to the first applicant in respect of pecuniary damage; EUR 2,000 to the first applicant and EUR 3,000 to the second applicant in respect of non-pecuniary damage.

ARTICLE 14

Discrimination (Article 5)

Differences in procedural requirements for early release depending on length of sentence: *violation*

Clift v. the United Kingdom - 7205/07
Judgment 13.7.2010 [Section IV]

Facts – The applicant was sentenced to eighteen years' imprisonment in April 1994 for serious crimes including attempted murder. In March 2002 he became eligible for release on parole and the Parole Board recommended his release. Under the legislation applicable at the time, prisoners serving fixed-term sentences of imprisonment of fifteen years or more were required to secure, in addition to a positive recommendation from the Parole Board, the approval of the Secretary of State for early release, whereas no such approval was required in the case of prisoners serving fixed-term sentences of less than fifteen years or life sentences. The Secretary of State rejected the Parole Board's recommendation in the applicant's case on the grounds that his release would pose an unacceptable risk to the public. The applicant sought judicial review, but the divisional court dismissed his claim in a decision that was upheld by the Court of Appeal. His further appeal to the House of Lords

was dismissed on the grounds that the difference in treatment was not the result of the applicant's "status" and so did not fall within the prohibition on discrimination in Article 14. The applicant had by then been released on licence.

Law – Article 14 in conjunction with Article 5

(a) *"Other status"* – The first issue was whether the applicant enjoyed some "other status" that would bring him within the protection of Article 14. Those words had generally been given a wide meaning in the Court's case-law and were not limited to different treatment based on characteristics which were personal in the sense of being innate or inherently linked to the identity or personality of the individual. Although the Court had held in *Gerger v. Turkey* ([GC], no. 24919/94, 8 July 1999) that differences in treatment between prisoners in relation to parole did not confer on them "other status" as the distinction was made not between different groups of people, but between different types of offence, according to their gravity, the applicant in the instant case alleged a difference of treatment based not on the gravity of the offence, but on his position as a prisoner serving a determinate sentence of more than fifteen years. While sentence length bore some relationship to the perceived gravity of the offence, a number of other factors could also be relevant, including the sentencing judge's assessment of the risk the prisoner posed to the public. Where an early-release scheme applied differently to prisoners depending on the length of their sentences, there was a risk that, unless objectively justified, it would run counter to the need to ensure protection from arbitrary detention under Article 5. Accordingly, the applicant enjoyed "other status" for the purposes of Article 14.

(b) *Analogous position* – As to whether the applicant was in an analogous position to other prisoners who had been treated more favourably, the Court noted that a decision not to approve the early release of a prisoner was not intended to constitute further punishment but to reflect the assessment that the prisoner posed an unacceptable risk upon release. The methods of assessing risk were in principle the same for all categories of prisoners and no distinction could be drawn between long-term prisoners serving less than fifteen years, long-term prisoners serving fifteen years or more and life prisoners. The applicant could therefore claim to be in an analogous position to long-term prisoners serving less than fifteen years and life prisoners.

(c) *Objective and reasonable justification* – Differences in treatment between groups of prisoners might be justified in principle if they pursued the legitimate aim of protecting the public, provided that it could be demonstrated that those to whom more stringent early release regimes applied posed a higher risk upon release. Given the apparently greater risk posed by life prisoners, a system which imposed on them less stringent conditions for early release than prisoners serving fixed-term sentences of fifteen years or more appeared to lack any objective justification. As regards the difference in treatment between those serving more and those serving less than fifteen years, while such a distinction did not of itself suggest unlawful discrimination, it nevertheless would only be justified where it achieved the legitimate aim pursued. In that connection, the Government had failed to demonstrate how the approval of the Secretary of State required for certain groups of prisoners addressed concerns regarding the perceived higher risk posed by certain prisoners on release. Indeed, as Lord Bingham, sitting in the House of Lords, had observed, that system had become an indefensible anomaly. The early-release scheme to which the applicant had been subject had thus lacked objective justification.

Conclusion: violation (unanimously).

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

Discrimination (Article 8)

Publications allegedly insulting to the Roma community: *no violation*

Aksu v. Turkey - 4149/04 and 41029/04
Judgment 20.7.2010 [Section II]

Facts – In 2000 the Ministry of Culture published a book entitled *The Gypsies of Turkey*, written by an associate professor. The applicant protested to the Ministry, claiming that the book contained expressions that humiliated and debased Gypsies. Subsequently, he brought proceedings in damages against the Ministry and the author of the book. The first-instance court dismissed the applicant's claim finding that the book was the result of academic research, based on scientific data and examined social structures of Gypsies in Turkey. The expressions at issue did not, therefore, insult the applicant. This judgment was upheld on appeal.

Meanwhile, in 1998 a non-governmental association, financed by the Ministry of Culture, published a dictionary entitled *Turkish Dictionary for Pupils*. The applicant brought civil proceedings against the publisher claiming that certain entries in the dictionary were insulting to and discrimin-

atory against Gypsies. The domestic courts dismissed the applicant's claim finding that the definitions and expressions in the dictionary were based on historical and sociological reality and that there had been no intention to humiliate or debase an ethnic group. Moreover, there were other similar expressions in Turkish concerning other ethnic groups, which existed in dictionaries and encyclopaedias.

Law – Article 14 in conjunction with Article 8: Although the applicant had not been targeted directly by the authors of the book or the dictionary, under domestic law he had been able to initiate compensation proceedings before the domestic courts. The Court therefore concluded that he could claim to be a victim for the purposes of Article 34 of the Convention. As to the merits of his complaints, the applicant had been able to argue his cases thoroughly before the domestic courts, which were in a better position to evaluate the facts of his case. As concerns the book, although the passages and remarks cited by the applicant might seem discriminatory or insulting, when read as a whole it was not possible to conclude that the author had acted in bad faith or with any intention to insult the Roma community. It had been made clear in the conclusion to the book that it contained an academic study which conducted a comparative analysis and focused on the history and socio-economic living conditions of the Roma people in Turkey. Moreover, the passages referred to by the applicant were not the author's own comments, but examples of the perception of Roma people in Turkey, which the author himself had sought to correct making clear that the Roma people should be respected. As for the dictionary, the definitions provided therein were prefaced with the comment that the terms were of a metaphorical nature. Consequently, the Court found no reason to depart from the domestic courts' findings that the applicant's integrity had not been harmed and that he had not been discriminated against.

Conclusion: no violation (four votes to three).

ARTICLE 34

Victim

Domestic compensation considerably lower than minimum awarded by Court in cases concerning inhuman treatment: *victim status upheld*

Ciorap v. Moldova (no. 2) - 7481/06
Judgment 20.7.2010 [Section IV]

Facts – In 2000 the applicant was arrested and placed in detention. Subsequently, he brought a court claim for compensation for his ill-treatment upon his arrest, a failure to give him medical treatment while in detention and the inhuman conditions in which he says he was detained. In 2007 the Supreme Court held that the denial of medical treatment combined with the conditions of detention, which had aggravated the applicant's medical condition, had amounted to inhuman treatment in breach of Article 3 of the Convention and awarded the applicant the equivalent of EUR 600 in respect of non-pecuniary damage and EUR 12.60 in respect of pecuniary damage.

Law – Article 3: The Court had to consider first whether the applicant could still claim to be a victim of a violation of Article 3 within the meaning of Article 34 of the Convention. On the basis of the material before it, it did not find the applicant's allegations of torture to be substantiated. There was, however, evidence that the conditions at the police station where the applicant had been detained for two weeks had been very poor. In particular, he had had to sleep on a concrete floor with no bedding, despite suffering from problems with a surgical wound. In addition, he had been denied hospital treatment for eight days contrary to medical advice. These facts had been established by the domestic courts which had, moreover, determined that they amounted to inhuman treatment in breach of Article 3. The Court accepted that conclusion. In the light of the principle of subsidiarity, the Supreme Court's decision to apply the Convention directly, in the absence of a provision of domestic legislation giving the applicant a right to compensation, was to be commended. The only issue which remained to be determined was the amount of compensation. Even taking into account the relatively short period of the detention in inhuman conditions, the amount in question was considerably below the minimum generally awarded by the Court in cases in which it had found a violation of Article 3 (see, for a recent example, *Gavrilovici v. Moldova* (no. 25464/05, 15 December 2009) where the Court had awarded the applicant EUR 6,000 in respect of five days' detention in inhuman conditions; and see also *Istratii and Others v. Moldova* (nos. 8721/05, 8705/05 and 8742/05, 27 July 2007, Information Note no. 95) where the Court had awarded EUR 6,000 to Mr Istratii, who had been held for approximately two months in inhuman conditions

of detention and had suffered a delay of three hours in the provision of emergency medical treatment). The applicant could therefore still claim to be a victim of a violation of Article 3.

Conclusion: violation (unanimously).

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

(See also *Kopylov v. Russia*, no. 3933/04, 29 July 2010)

Hinder the exercise of the right of petition

Inability of an asylum-seeker in a detention centre to hold meetings with a lawyer despite the indication of an interim measure by the European Court: *violation*

D.B. v. Turkey - 33526/08
Judgment 13.7.2010 [Section II]

Facts – In 2008 the applicant, an Iranian national, arrived illegally in Turkey and was subsequently arrested and placed in a Foreigners' Admission and Accommodation Centre ("the Centre"). On 17 July 2008 the Court indicated to the Government of Turkey, under Rule 39 of the Rules of Court, that the applicant should not be deported to Iran before 29 August 2008. On the same day the applicant's representative was requested to submit a power of attorney authorising him to lodge an application with the Court on behalf of the applicant. On 21 July 2008 a lawyer instructed by the applicant's representative was prevented from visiting the applicant by the Centre administration. On 26 August 2008 the Court prolonged the interim measure and requested the Turkish Government, under Rule 39, to allow, before 3 October 2008, the applicant's representative (or another advocate) to have access to the applicant in the Centre with a view to obtaining a power of attorney and information concerning the alleged risks that the applicant would face in Iran. On 5 September 2008 another lawyer attempted but was not allowed to see the applicant. On 8 October 2008 the Court decided to extend until further notice the interim measure indicated under Rule 39 and to communicate the application to the Government. On 21 October 2008 a lawyer was allowed to meet the applicant, who signed an authority form empowering his representative to represent him in the proceedings before the Court. The applicant left Turkey in 2010 and was granted refugee status in Sweden.

Law – Article 34: The Court had decided to raise of its own motion the question of Turkey's compliance with its obligation under Article 34. It was not until thirteen days after the deadline given by the Court that the competent authorities had been instructed to authorise the applicant to meet a lawyer and not until eighteen days after the deadline had the applicant been able to meet a lawyer and sign an authority form. The Government had therefore failed to comply with necessary diligence with the interim measure indicated under Rule 39. The Court could not accept the Government's argument that the applicant could not meet a lawyer in order to provide a power of attorney for the Court because the lawyer did not have an authority to meet the applicant in the first place. Because of this initial administrative obtuseness, the application had been put in jeopardy, since he had not been able to sign a power of attorney and provide more detailed information concerning the alleged risks he would face in Iran. The effective representation of the applicant before the Court had been seriously hampered. The fact that the applicant had subsequently been able to meet a lawyer, sign the authority form and provide the information regarding his situation in Iran did not alter the conclusion that the lack of timely action on the part of the authorities had been incompatible with the respondent Government's obligations under Article 34.

Conclusion: violation (unanimously).

The Court also found a violation of Article 5 §§ 1 and 4 (unanimously).

Article 41: EUR 11,000 in respect of non-pecuniary damage.

Intimidation and pressurising of applicant by authorities in connection with case before the European Court: *violation*

Lopata v. Russia - 72250/01
Judgment 13.7.2010 [Section III]

Facts – In 2001 the applicant was convicted of murder and sentenced to nine years' imprisonment. He applied to the European Court, submitting that he had been subjected to torture and convicted on the basis of a forced confession. In October 2003 the Court communicated his application to the respondent Government. On 6 January 2004 the applicant was visited in prison by a captain from the Federal Service for Execution of Sentences who allegedly tried to pressure him to retract his com-

plaint to the Court and threatened him with reprisals when he refused. On 3 March 2004 the applicant had two further visits from State officials who also questioned him about his application to the Court. The Government provided the Court with the applicant's written statement dated 3 March 2004 that he had no complaints about officers of the prison administration and the penitentiary system and that he had not been subjected to physical or psychological pressure by penitentiary officers. In 2005 an additional inquiry into the applicant's allegations of ill-treatment was carried out.

Law – Article 34: The Court, of its own motion, had raised the issue whether the applicant had been subjected to intimidation which had amounted to a hindrance to the effective exercise of his right of individual petition in respect of the events of 6 January 2004. Shortly after the conversation with the captain, the applicant had brought that fact to the Court's attention through his brother and had subsequently provided the Court with full details. His description was complemented and confirmed by a written statement by a lawyer, who had visited the applicant in the colony. In sum, the applicant had not only informed the Court about the conversation promptly, but also adduced several elements to support his submissions, remaining consistent in his account of the events. The Government had denied that any pressure had been put on the applicant during the conversation with the captain, whose purpose had been to obtain information on his complaints with a view to preparing the Government's position before the Court. However, they had not furnished any documents, such as a transcript of the conversation, which could have refuted the applicant's submissions or cast doubt on his description of the course of the conversation. In so far as they had argued that the conversation had been intended to "verify the circumstances prompting the applicant to submit his application", the Court found it peculiar that there had been a one-year break between the captain's visit and the investigative steps taken in 2005. In any event, nothing in the related documents allowed the Court to link the domestic inquiry to the applicant's questioning by the captain. In sum, the Court was not persuaded by the Government's arguments and was inclined to accept that the impugned conversation had proceeded as described by the applicant. The Government had not commented on the applicant's submissions concerning the two further visits by State officials or contested their truthfulness. However, they had enclosed the applicant's written statement of 3 March 2004, which appeared to confirm that on that day the applicant had again been questioned about the alleged ill-treatment. In this respect the Court could not but regard with suspicion a situation where, after the complaint about pressure was communicated to the Government, they had submitted a statement by the same applicant to the effect that he had no complaints. The Court concluded that the applicant could reasonably be considered to have felt intimidated following his conversation with the captain, as well as by his ensuing repeated questioning by State officials, and could have experienced a legitimate fear of reprisals in connection with his application to the Court. Accordingly, he had been subjected to illicit pressure, which had amounted to an undue interference with his right of individual petition.

Conclusion: violation (unanimously).

The Court also found violations of Article 3 under its procedural aspect and Article 6 § 3 (c) taken in conjunction with Article 6 § 1 (unanimously). It found no violation of Article 3 under its substantive aspect (unanimously).

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

ARTICLE 35

Article 35 § 3

No significant disadvantage

Complaint concerning inability to recover a judgment debt worth less than one euro: *inadmissible*

Korolev v. Russia - 25551/05
Decision 1.7.2010 [Section I]

Facts – In his application to the European Court, the applicant complained of a failure by a State authority to pay a judgment debt in his favour worth 22.50 Russian roubles (less than one euro) and of the domestic courts' refusal to consider an application he had lodged complaining of the court bailiffs' failure to collect the sum. He also alleged various breaches of the domestic procedural requirements by the domestic courts.

Law – Article 35 § 3 (b): The new "no significant disadvantage" criterion hinged on the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international

court. The assessment of this minimum level was, in the nature of things, relative and depended on all the circumstances of the case. The severity of the violation had to be assessed, taking into account both the applicant's subjective perceptions and what was objectively at stake in the case. In the instant case, the Court was struck by the almost negligible size of the pecuniary loss, which was equivalent to less than one euro. Although even modest pecuniary damage could be significant in the light of an individual's specific circumstances and the economic climate in which he or she lived, it was beyond any doubt in the present case that the amount at stake was of minimal significance to the applicant. Although it was relevant that the matter may have been an important question of principle for the applicant, that did not suffice for the Court to conclude that he had suffered a significant disadvantage. An applicant's subjective feeling about the impact of alleged violations had to be justifiable on objective grounds. The Court did not perceive any such justification in the present case.

Further, respect for human rights did not require an examination of the application on the merits in the absence of any compelling reason of public order (*ordre public*) warranting such an examination. The Court had on numerous occasions determined analogous issues to that arising in the instant case and ascertained in great detail the States' Convention obligations in that respect. Both the Court and the Committee of Ministers had addressed the systemic problem of non-enforcement of domestic judgments in the Russian Federation and the need for adoption of general measures to prevent new violations on that account.

The Court also found that the requirement for the case to have been duly considered by a domestic tribunal was satisfied. The initial grievances against the State authorities had been considered at two levels of jurisdiction and the applicant's claims granted. His subsequent complaint about the bailiffs' failure to recover the judgment debt was rejected for non-compliance with the domestic procedural requirements. That did not constitute a denial of justice imputable to the authorities. Lastly, the fact that domestic law did not grant the applicant a right to judicial review of alleged breaches of procedural requirements once his case had been decided at final instance did not constitute an obstacle for the application of the new admissibility criterion as otherwise the Court would be prevented from rejecting any claim, however insignificant, relating to alleged violations imputable to a final national instance. Such an approach would be neither appropriate nor consistent with the object and purpose of the new provision.

Conclusion: inadmissible (no significant disadvantage).

ARTICLE 46

Execution of a judgment

Assize court refusal to hold new trial following re-examination of case-file pursuant to judgment of European Court: *inadmissible*

Öcalan v. Turkey - 5980/07
Decision 6.7.2010 [Section II]

Facts – In 1999 the applicant, the former leader of the PKK (Workers' Party of Kurdistan), was convicted of carrying on activities with a view to bringing about the secession of part of the national territory and of having formed and led an armed organisation to that end. He was sentenced to death by the National Security Court. In 2002 his sentence was commuted to life imprisonment. On 12 May 2005, by a final judgment of the Grand Chamber (*Öcalan v. Turkey* [GC], no. 46221/99, Information Note no. 75), the European Court held that there had been a violation of Article 6 of the Convention on account of the lack of fairness of the proceedings before the National Security Court and the lack of independence and impartiality of that court. The Court also found that a retrial or a reopening of the case, if requested by the applicant, represented the most appropriate way of redressing the violation. In 2006 the Assize Court dismissed a request by the applicant for a retrial. In 2007 the Committee of Ministers of the Council of Europe concluded that the respondent State had fulfilled its obligations under Article 46 of the Convention and decided to close its examination of the execution of the Court's judgment.

Law – Article 46: *Complaint regarding the execution by the national authorities of the Court's judgment of 12 May 2005* – The Committee of Ministers, by adopting Resolution CM/ResDH(2007)1 of 14 February 2007, had terminated its supervision of the execution of the judgment after having regard to all the materials in the file including the decision of the Assize Court of July 2006 to undertake a full review of the case but to refuse the applicant a new trial on the ground that he had unequivocally been found guilty. The Committee of Ministers had concluded that the review carried out by the Assize

Court had fulfilled the State's obligations under Article 46 of the Convention with regard to the requisite individual measures. No new factual or legal elements had been submitted to the national authorities or the Committee of Ministers – apart from the documents relating to execution of the Court's judgment by those bodies – that had not been examined and determined by the judgment in question. Nor had the execution procedure in question given rise to any new fact. It followed that the Court could not examine the present complaint without encroaching on the powers of the Committee of Ministers under Article 46.

Conclusion: inadmissible (incompatible *ratione materiae*).

Article 6: *Complaint regarding the domestic proceedings for the execution of the judgment* – The proceedings for review of the case, which consisted in examining the applicant's request for a retrial following a finding of a violation by the Court, were similar – or at least comparable – to proceedings for the reopening of criminal proceedings or for a retrial under the domestic law. They were brought by a person whose conviction had become final and did not involve the determination of a "criminal charge", but rather the question whether the conditions for reopening criminal proceedings had been met. Accordingly, Article 6 did not apply to the proceedings in question.

Conclusion: inadmissible (incompatible *ratione materiae*).

Execution of a judgment – Measures of a general character

Respondent State required to take general measures to remedy depreciation of compensation for expropriation

Yetiş and Others v. Turkey - 40349/05
Judgment 6.7.2010 [Section II]

(See Article 1 of Protocol No. 1 below – page 24)

Respondent State required to enact appropriate legislation regulating residence of persons who had been "erased" from the permanent residents register following Slovenian independence

Kurić and Others v. Slovenia - 26828/06
Judgment 13.7.2010 [Section III]

(See Article 8 above – page 12)

Execution of a judgment – Individual measures

Respondent State required to issue applicants retroactive residence permits

Kurić and Others v. Slovenia - 26828/06
Judgment 13.7.2010 [Section III]

(See Article 8 above – page 12)

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Refusal to award compensation for loss or deterioration of property seized in criminal proceedings: *violation*

Tendam v. Spain - 25720/05
Judgment 13.7.2010 [Section III]

(See Article 6 § 2 above – page 10)

Deprivation of property

Unlawful distribution of assets of private bank by liquidator: *case referred to the Grand Chamber*

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

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 preferential creditor and therefore entitled to be paid a share of the assets proportionate to the amount owed to him, on a par with the other creditors of the same class and ahead of the next-ranking class. 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 operations). As a result, the applicant received only a tiny proportion of the amount owed to him, while 700 persons belonging to those 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.

In a judgment of 14 January 2010 a Chamber of the Court held unanimously that there had been a violation of Article 1 of Protocol No. 1, finding that the liquidator's acts had engaged the responsibility of the State and that the applicant had been unlawfully deprived of his property (see Information Note no. 126 for further details).

On 28 June 2010 the case was referred to the Grand Chamber at the Government's request.

Disproportionate burden on applicants resulting from depreciation of compensation for expropriation between date of assessment and date of settlement, with no default interest: *violation*

Yetiş and Others v. Turkey - 40349/05
Judgment 6.7.2010 [Section II]

Facts – In 2000 the administrative authorities declared that it was in the public interest to expropriate farmland belonging to the applicants with a view to building a motorway. In 2002 the authorities asked a district court to assess the amount of compensation for the expropriation. The court determined the value of the land as of the date on which the authorities had applied to it and, in a judgment assessing the amount of the award, directed that that sum was to be paid to the applicants and that the authorities were to be entered in the land register as owners of the land. In 2003 the Court of Cassation quashed that judgment, holding that the amount of compensation was insufficient. In 2004 the district court found that the value of the land on the date of the original application had been more than twice as high as the previous assessment and ordered the difference to be paid, but rejected the applicants' request under the Constitution for interest to be payable on the additional sum at the maximum rate applicable under domestic law. In 2005 the Court of Cassation dismissed an appeal on points of law by the applicants. At the material time there was a very high rate of inflation in Turkey.

Law – Article 1 of Protocol No. 1: The applicants had been deprived of their property in accordance with the law and in pursuance of a legitimate aim in the public interest. It remained to be determined whether they had had to bear a disproportionate and excessive burden as a result of the alleged depreciation in the value of the compensation between the date of its assessment and the date of its payment.

As to the non-application of the Constitution, the maximum rate of default interest applicable under domestic law was payable only if a final award of compensation for expropriation remained unpaid; that had not been the case in this instance. As to the loss in value of the compensation awarded, seeing that the applicants had been paid the compensation in two separate sets of proceedings, the 2002 and 2004 judgments had to be considered separately. No default interest had been payable on the compensation awarded in 2002, despite the fact that during the period between the date of the application to the court and the judgment the average annual rate of inflation had been 31.5%, with the result that the sum awarded had decreased in value by 14.68%. The fact that the court had taken six months to determine the compensation was not unreasonable. Furthermore, even if the applicants had been able to continue using the land during the proceedings – which had not been the case – that would not have been sufficient to offset such a loss. Nor could the applicants have claimed default interest at the statutory rate, since the legislation on expropriation did not provide for that possibility. Lastly, no legitimate public-interest consideration could have justified payment of an amount lower than the market value of the land. Accordingly, the difference between the value of the compensation for the expropriation on the date of the application to the court and its value at the time of the actual payment was due to the lack of default interest. That difference had caused the applicants to bear a disproportionate and excessive burden which had upset the requisite fair balance between the protection of the right of property and the demands of the general interest. As to the additional compensation awarded in 2004, no default interest had been payable on that amount either, although the average annual rate of inflation had been 15% between the date of the application to the court and the second judgment, during which period the sum in question had decreased in value by approximately 43%. The applicants had thus had to bear a disproportionate and excessive burden that could not be justified by a legitimate general interest on the part of the authorities.

Conclusion: violation (unanimously).

Article 46: The violation found by the Court had originated in a systemic problem connected with the absence in domestic law of a mechanism whereby the national courts could take account of the potential depreciation in the value of compensation awarded for expropriation, as a result of the combined effect of the length of proceedings and inflation. More than 200 similar cases possibly giving

rise to a finding of a violation were currently pending before the Court, and the deficiencies in domestic law identified in the present case could lead to a large number of subsequent applications. General measures at national level would undoubtedly have to be adopted in order to execute the judgment in this case. Without prejudice to any other measures that the respondent State might envisage, the most appropriate form of redress would be to incorporate into the Turkish legal system a mechanism for taking account of potential depreciation in the value of compensation for expropriation as a result of the combination of factors referred to above. This aim could be achieved, for example, by charging default interest to offset such depreciation or, failing that, by awarding appropriate redress for losses sustained by those concerned.

Article 41: EUR 16,000 in respect of pecuniary damage.

ARTICLE 3 OF PROTOCOL No. 1

Vote

Failure for more than thirty years to introduce legislation giving practical effect to expatriates' constitutional right to vote in parliamentary elections from overseas: *violation*

Sitaropoulos and Giakoumopoulos v. Greece - 42202/07
Judgment 8.7.2010 [Section I]

Facts – In a fax of September 2007 to the Greek Ambassador in France, the applicants, who were permanent residents in France, expressed the wish to exercise their voting rights in France for the Greek parliamentary elections. The Ambassador replied that their request could not be granted "for objective reasons", namely the absence of the legislative regulation that was required to provide for "special measures ... for the setting up of polling stations in Embassies and Consulates". As a result, the applicants were unable to exercise their voting rights in the elections.

Law – Article 3 of Protocol No. 1: An Article of the Constitution authorised the legislature to lay down the conditions for the exercise of voting rights by expatriate voters. But the Constitution did not directly oblige the domestic authorities to give effect to such voting rights. Article 3 of Protocol No. 1 was not to be interpreted as generally imposing a positive obligation on national authorities to secure voting rights in parliamentary elections for voters living abroad. However, the possibility afforded by the Constitution could not remain inapplicable indefinitely, otherwise its content and the intention of its drafters would be deprived of any normative value. Thirty-five years after it was adopted, the legislature had still not rendered that provision of the Constitution effective. The lack of legislative implementation had shown *de facto* that the national authorities were unwilling to secure expatriates the possibility to exercise their voting rights at their place of residence. Expatriates could find it impossible in practice, for economic, professional or family reasons, to return to their country of origin in order to vote in national elections. As a result, the absence of any regulation for such a long period was likely to constitute unfair treatment of Greek citizens living abroad in comparison to those living in Greece. Moreover, the respondent State clearly fell short of the common denominator between contracting member States, which had been urged by the Council of Europe to enable their non-resident citizens to participate to the fullest extent possible in national elections. In addition, the margin of appreciation afforded to the respondent State was limited, as when the Court assessed restrictions on voting rights – the "active" aspect of the rights secured by Article 3 of Protocol No. 1 – it was more demanding than when dealing with the right to stand for election – the "passive" aspect. Whilst taking into account the national autonomy as regards the conditions of exercise of voting rights, the fact that for over three decades there had been no legislative implementation of the relevant Article of the Constitution, combined with the evolution of the Contracting States' law in such matters, showed that the respondent State's responsibility was engaged. The failure by the State to take effective measures had breached the right to free elections.

Conclusion: violation (five votes to two).

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

OTHER MATTERS

European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights

Request for waiver in domestic proceedings of Government Agent's immunity under the European Agreement: *request rejected*

Albertsson v. Sweden - 41102/07
Decision 6.7.2010 [Section III]

Facts – A witness who had submitted affidavit evidence on behalf of the first applicant in the present case brought a private prosecution for slander in the domestic courts against the Agent for the Government, Mr Ehrenkrona, after the latter had submitted observations to the European Court alleging that the witness had criminal convictions for offences involving dishonesty. Mr Ehrenkrona claimed immunity under domestic legislation giving effect to the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights signed in Strasbourg on 5 March 1996 (ETS no. 161). The witness made a request to the Court under Article 5 § 2 (a) of the European Agreement for a waiver of Mr Ehrenkrona's immunity on the grounds that such immunity would impede the course of justice and that its waiver would not prejudice the purpose for which the immunity was intended.

Law – The Court stressed the need to ensure free and open communication in its proceedings and to protect those who pleaded before it from being sued or prosecuted for their statements. In view of the importance of this objective for the proper conduct of its proceedings, the Court would waive such immunity only in exceptional circumstances, for example where statements were made which were manifestly excessive or plainly irrelevant. Mr Ehrenkrona's statement had been made in his capacity as Agent of the Government in the proceedings before the Court and raised the question of the credibility of the author of an affidavit that had been submitted in support of the first applicant's case. It was justifiable to question the credibility of evidence invoked in a case and the terms of Mr Ehrenkrona's statement could not be said to have exceeded the limits of what was permissible to that end. It followed that a waiver of his immunity would prejudice the purpose of that immunity within the meaning of Article 5 § 2 (a) of the European Agreement.

Conclusion: request for waiver of immunity rejected (unanimously).

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

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

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

(See Article 1 of Protocol No. 1 above – page 23)