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COUR EUROPÉENNE DES DROITS DE L'HOMME

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TABLE OF CONTENTS

ARTICLE 2

Life

Non-fatal shooting of journalist by special operations police unit which had not been informed that his presence had been authorised by local chief of police: *violation; no violation*

Trévalec v. Belgium - 30812/07
Judgment 14.6.2011 [Section II]

Facts – The applicant, a reporter, was engaged by a production company which had obtained police authorisation for him and a journalist colleague to film the operations of a special unit, the anti-gang squad. At around 1 a.m. on 12 January 2003, in response to a call from a person living nearby, the police radio operator directed police officers, including M.S. and Y.M., to an area of warehouses. The purpose of the operation was to apprehend two individuals who had been acting suspiciously and seemed to be armed. Shortly after the interception and immobilisation of the suspects by other police officers, the applicant appeared a few metres behind M.S. and Y.M. In a reflex action in self-defence in the heat of the moment, mistaking the reporter's camera in the dark for a weapon and feeling threatened, the two officers fired at the applicant, seriously injuring him in the legs.

The persons in charge of the operation were immediately contacted and informed of the accident, and the public prosecutor was notified about ten minutes later. The investigating judge immediately took various measures to establish the facts and preserve the evidence.

Law – Article 2

(a) *Substantive aspect* – M.S. and Y.M. had believed in good faith that their lives were at risk and had used their weapon in self-defence, believing they were acting within the law. Given the subject of his report, it was evident that the applicant was likely to find himself in situations where he risked injury or even death. In that context he depended for his safety on the police, which had accepted that responsibility when authorising his presence. Without any written regulations, decisions in that kind of situation were taken on a case-by-case basis. The police authorities had made sure that the applicant had countersigned the authorisation to film that had been issued by the police chief on the condition that he complied with the safety instructions given by the inspectors. In addition, bullet-proof jackets had been provided to the applicant and his colleague, who had been invited to a preparatory meeting and had been given appropriate instructions. However, the transcription of the communications emitted on the night of the incident from the police "radio-operations centre" showed that the officers on the ground had not been specifically informed of the presence of the applicant and his colleague with the anti-gang squad. The officers who had fired the shots and their colleagues from "Unit 101" and the dog-handling unit, had confirmed that, whilst they had not been unaware that a television crew was filming a documentary at the time, they had not been informed of the arrangements for the filming or of the applicant's presence that night during the operation. The authorisation to film issued by the police chief had been displayed in the office of the squad's head of station and in the "radio-operations centre" of the police headquarters, with a note stating "for information – filming from 9 to 13 January", but the document had not mentioned the exact times when the journalists would be accompanying the police. In addition, and most importantly, the heads of station and inspectors on duty in "Unit 101" the day before and at the time of the incident and those in charge of the dog-handling unit had not received any note or memorandum giving that information and had not been otherwise informed.

The question whether M.S. and Y.M. had been aware that the police intervention was being followed by a reporter was a decisive point in relation to Article 2, as it could not be excluded that they might have acted differently and the tragic events might have been avoided if they had known about the situation. As shown above, the reason for their being unaware of this could be put down to shortcomings in the flow of information that were attributable to the authorities. Even though the applicant, who could not have been unaware of the risks involved, had probably not acted with all the requisite caution, he had not received any safety instructions on the day of the accident or any order to remain on the sidelines after his arrival at the scene.

Having regard to the failure to properly supervise the applicant that was attributable to the authorities, and to the shortcomings in the flow of information, it could not be asserted that the applicant's imprudent conduct had been the decisive cause of the accident of which he had been victim. In conclusion, the authorities, who had been responsible for his safety in a context where his life was potentially in danger, had not shown all the vigilance that could reasonably be expected of them. This lack of vigilance had

been the essential cause of the use, by mistake, of potentially lethal force which had exposed the applicant to a serious risk to life and limb and had resulted in his sustaining serious injury. Accordingly, the use of force had not been absolutely necessary "in defence of any person from unlawful violence", within the meaning of Article 2 § 2 (a).

Conclusion: violation (unanimously).

(b) *Procedural aspect* – The authorities had reacted to the events promptly and seriously. Numerous measures had been taken to establish the facts and responsibilities and the investigations had taken place under the supervision of an investigating judge, whose impartiality and independence had not been called into question. The applicant had been kept up to date with the progress of the investigation. In addition, the investigating judge had granted his request for a second reconstruction of the incident, and it was on his own initiative that it had ultimately not taken place. The investigation had thus been carried out in conditions apt to make it possible to determine whether the use of force had been justified or not and to identify who was responsible. There were admittedly a number of periods of inactivity, and it would probably have been desirable for the investigation to be completed more quickly, but in view of the circumstances and the measures taken in this case, that was not sufficient for its effectiveness to be called into question.

Conclusion: no violation (unanimously).

Article 41: Question reserved.

ARTICLE 3

Inhuman and degrading treatment

Protracted solitary confinement in inadequate prison conditions: *violation*

Csüllög v. Hungary - 30042/08
Judgment 7.6.2011 [Section II]

Facts – In 2006 the applicant was convicted of conspiracy to murder and sentenced to five years' imprisonment. He was detained in a special security cell as the authorities suspected he was planning an escape. As a result, he had almost no human contact for a period of nearly two years and was never informed why he was being kept separately from the other inmates. The applicant submitted that there was only artificial light in his cell, the ventilation was insufficient, the toilet had neither a seat nor a cover and he had had to endure body cavity searches on a daily basis. In addition, he was always handcuffed when outside his cell, was not permitted to keep items such as a watch, pen, comb, plastic cutlery, teabags or stationery and was only allowed a limited number of books or newspapers. The applicant complained about the conditions of his detention to the Public Prosecutor's Office, which replied that they were not entitled to intervene and that all the measures taken by the prison authorities had had a proper legal basis. The applicant was released in February 2009 after serving his sentence.

Law – Article 3: Even though the applicant's isolation was partial and relative, given the likely negative effects on an inmate's personality, it could only be considered appropriate if applied exceptionally and temporarily. Furthermore, several of the restrictive measures applied to the applicant – such as for example the prohibition on possessing a watch or teabags or the restriction on the number of books kept in the cell – could not have reasonably been related to the purported objective of the isolation, namely to frustrate any attempt to escape. Moreover, there were no security reasons for constantly handcuffing the applicant every time he was outside his cell: nothing indicated that he would incite disorder in the prison and there was no evidence that the measure was applied on the grounds that he represented a security risk to other prisoners, the prison staff or himself. Finally, the authorities had failed to give any substantive reasons for imposing or extending the solitary confinement in the applicant's case. The impugned restriction must therefore have been perceived as arbitrary and instilled in the applicant feelings of subordination, powerlessness and humiliation. The authorities did not apply any measures to counter the negative effects of protracted solitary confinement on his physical and mental condition. Open-air stays or sport opportunities of limited availability could not in the circumstances be considered capable of remedying those negative effects, especially since all the applicant's movements entailed him being handcuffed in an otherwise secure environment. In sum, the cumulative effects of the stringent custodial regime to which the applicant was subjected for an extended period of time and the material conditions in which he was detained must have caused him suffering which exceeded the unavoidable level inherent in detention.

Conclusion: violation (unanimously).

Article 13: Without proper information about the reasons for applying a strict security regime to the applicant, or any other prisoner for that matter, the prosecution authorities could not review or challenge the decisions of the prison authorities to impose it. Thus, although independent, the prosecutor lacked the power to overturn prison authority decisions relating to special security measures for prisoners.

Conclusion: violation (unanimously).

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

Expulsion

Orders for deportation to Somalia: *deportation would constitute violation*

Sufi and Elmi v. the United Kingdom - 8319/07 and 11449/07
Judgment 28.6.2011 [Section IV]

Facts – Both applicants were Somali nationals. Mr Sufi (the first applicant) arrived in the United Kingdom in 2003 and claimed asylum on the ground that he was a member of a minority clan which was persecuted by militia who had killed his father and sister and seriously injured him. His application was refused and his appeal dismissed on the grounds that his account was not credible. In 2008 he was diagnosed as suffering from post traumatic stress disorder. Mr Elmi (the second applicant) is a member of the majority Isaaq clan. He arrived in the United Kingdom in 1988 and was granted leave to remain as a refugee. Following convictions for a number of serious criminal offences both applicants were issued with deportation orders. They appealed unsuccessfully.

Somalia is comprised of three autonomous areas: the self-declared Republic of Somaliland in the north west, the state of Puntland in the north east, and the remaining southern and central regions. Somali society has traditionally been characterised by membership of clan families. The country has been without a functioning central government since 1991 and is beset by lawlessness, civil conflict and clan warfare. Although the Transitional Federal Government was established in October 2004 and is recognised by the United Nations, it currently controls only a small section of Mogadishu and is dependent on African Union troops for its survival. A group known as al-Shabaab, which began as part of the armed wing of the Union of Islamic Courts, has emerged as the most powerful and effective armed faction on the ground, especially in southern Somalia and has steadily been moving forces up towards the capital, Mogadishu.

In their applications to the European Court, the applicants complained that they would be at risk of ill-treatment if they were deported to Somalia.

Law – Article 3: The sole question in an expulsion case was whether, in all the circumstances of the case, substantial grounds had been shown for believing that the applicant would, if returned, face a real risk of treatment contrary to Article 3.[1] If the existence of such a risk was established, the applicant's removal would necessarily breach Article 3, regardless of whether the risk emanated from a general situation of violence, a personal characteristic of the applicant, or a combination of the two. However, not every situation of general violence would give rise to such a risk. On the contrary, a general situation of violence would only be of sufficient intensity to create such a risk "in the most extreme cases". The following criteria[2] were relevant (but not exhaustive) for the purposes of identifying a conflict's level of intensity: whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; whether the use of such methods and/or tactics was widespread among the parties to the conflict; whether the fighting was localised or widespread; and finally, the number of civilians killed, injured and displaced as a result of the fighting.

Turning to the situation in Somalia, Mogadishu, the proposed point of return, was subjected to indiscriminate bombardments and military offensives, and unpredictable and widespread violence. It had substantial numbers of civilian casualties and displaced persons. While a well-connected individual might be able to obtain protection there, only connections at the highest level would be able to assure such protection and anyone who had not been in Somalia for some time was unlikely to have such connections. In conclusion, the violence was of such a level of intensity that anyone in the city, except possibly those who were exceptionally well-connected to "powerful actors", would be at real risk of proscribed treatment.

1. See *NA. v. the United Kingdom*, no. 25904/07, 17 July 2008, Information Note no. 110.
2. Criteria identified by the United Kingdom Asylum and Immigration Tribunal in the case of *AM and AM (armed conflict: risk categories) Somalia CG* [2008] UKAIT 00091.

As to the possibility of relocating to a safer region, Article 3 did not preclude the Contracting States from placing reliance on the internal flight alternative provided that the returnee could travel to, gain admittance to and settle in the area in question without being exposed to a real risk of ill-treatment. The Court was prepared to accept that it might be possible for returnees to travel from Mogadishu International Airport to another part of southern and central Somalia. However, returnees with no recent experience of living in Somalia would be at real risk of ill-treatment if their home area was in – or if they was required to travel through – an area controlled by al-Shabaab, as they would not be familiar with the strict Islamic codes imposed there and could therefore be subjected to punishments such as stoning, amputation, flogging and corporal punishment.

It was reasonably likely that returnees who either had no close family connections or could not safely travel to an area where they had such connections would have to seek refuge in an Internally Displaced Persons (IDP) or refugee camp. The Court therefore had to consider the conditions in these camps, which had been described as dire. In that connection, it indicated that where a crisis was predominantly due to the direct and indirect actions of parties to a conflict – as opposed to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought – the preferred approach for assessing whether dire humanitarian conditions had reached the Article 3 threshold was that adopted in *M.S.S. v. Belgium and Greece*,[1] which required the Court to have regard to an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time frame. Conditions in the main centres – the Afgooye Corridor in Somalia and the Dadaab camps in Kenya – were sufficiently dire to amount to treatment reaching the Article 3 threshold. IDPs in the Afgooye Corridor had very limited access to food and water, and shelter appeared to be an emerging problem as landlords sought to exploit their predicament for profit. Although humanitarian assistance was available in the Dadaab camps, due to extreme overcrowding, access to shelter, water and sanitation facilities was extremely limited. The inhabitants of both camps were vulnerable to violent crime, exploitation, abuse and forcible recruitment and had very little prospect of their situation improving within a reasonable time frame. Moreover, the refugees living in – or, indeed, trying to get to – the Dadaab camps were also at real risk of *refoulement* by the Kenyan authorities.

As regards the applicants' personal circumstances, the first applicant would be at real risk of ill-treatment if he were to remain in Mogadishu. Since his only close family connections were in a town under the control of al-Shabaab and as he had arrived in the United Kingdom in 2003, when he was only sixteen years old, there was also a real risk of ill-treatment by al-Shabaab if he attempted to relocate there. Consequently, it was likely that he would find himself in an IDP or refugee camp where conditions were sufficiently dire to reach the Article 3 threshold and the first applicant would be particularly vulnerable on account of his psychiatric illness.

The second applicant would be at real risk of ill-treatment if he were to remain in Mogadishu. Although it was accepted that he was a member of the majority Isaaq clan, the Court did not consider this to be evidence of connections powerful enough to protect him. There was no evidence that he had any close family connections in southern and central Somalia and, in any case, he had arrived in the United Kingdom in 1988, when he was nineteen years old, and had had no experience of living under al-Shabaab's repressive regime. He would therefore be at real risk if he were to seek refuge in an area under al-Shabaab's control. Likewise, if he were to seek refuge in the IDP or refugee camps. Lastly, the fact that he had been issued with removal directions to Mogadishu rather than to Hargeisa appeared to contradict the Government's assertion that he would be admitted to Somaliland.

Conclusion: deportation would constitute a violation (unanimously).

Article 41: No claim made in respect of damage.

ARTICLE 5

Article 5 § 1

Deprivation of liberty
Lawful arrest or detention

Indefinite preventive detention ordered by sentencing court: *no violation*

1. *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21 January 2011, Information Note no. 137.

Schmitz v. Germany - 30493/04
Mork v. Germany - 31047/04 and 43386/08
Judgments 9.6.2011 [Section V]

Facts – Both applicants were convicted of serious offences for which they received prison sentences. In view of their records and the risk of their reoffending, the sentencing courts also made orders for them to be held in indefinite preventive detention once they had served their sentences, in accordance with Article 66 § 1 of the German Criminal Code as worded prior to amendments that entered into force on 27 December 2003. In their application to the European Court, the applicants complained that their preventive detention had infringed their right to liberty.

Law – Article 5 § 1: The Court saw no reason to depart from its findings in the case of *M. v. Germany*[1] that preventive detention ordered by the sentencing court was covered by sub-paragraph (a) of Article 5 § 1 if it was not extended beyond the statutory ten-year maximum period permitted at the time of the offence and conviction. Neither applicant had been in preventive detention beyond that maximum period. There was a sufficient causal connection between the applicants' conviction and their deprivation of liberty, with both the orders for their preventive detention and the decisions not to release them being based on the same grounds, namely to prevent further serious re-offending.

Further, their preventive detention was lawful in that it was based on a foreseeable application of the Criminal Code. In that connection, the Court took note of the Federal Constitutional Court's leading judgment of 4 May 2011 in which it held that all provisions of the Criminal Code on the retrospective extension of preventive detention and on the retrospective ordering of such detention were incompatible with the Basic Law. The Court welcomed the Constitutional Court's approach of interpreting the provisions of the Basic Law also in the light of the Convention and the Court's case-law, so demonstrating a continuing commitment to the protection of fundamental rights not only at national but also at European level.

The Court further noted the Constitutional Court's finding in that judgment that the current provisions on the imposition and duration of preventive detention were incompatible with the fundamental right to liberty to the extent that they did not satisfy the constitutional requirement of establishing a difference between preventive detention and a prison sentence. However, the Constitutional Court's judgment had not declared void the relevant provisions with retrospective effect, and the applicants' preventive detention had in any event been ordered and executed on the basis of a previous version of the Criminal Code. The Court understood that, when reviewed in the future, the applicants' preventive detention would be prolonged only subject to the strict test of proportionality set out in the Federal Constitutional Court's judgment. For all these reasons, the lawfulness of their preventive detention was not called into question.

Conclusion: no violation (unanimously).

1. *M. v. Germany*, no. 19359/04, 17 December 2009, Information Note no. 125.

Deprivation of liberty

Forty-five minute arrest of human rights activist with a view to preventing him committing unspecified administrative and criminal offences: *violation*

Shimovolos v. Russia - 30194/09
Judgment 21.6.2011 [Section I]

Facts – In May 2007 a European Union-Russia Summit was scheduled to take place in Samara (Russia). At about the same time the applicant's name was registered as a human-rights activist in the so-called "surveillance database". The local authorities were informed that protests were planned during the summit and that it was necessary to stop all members of organisations planning such protests in order to prevent unlawful and extremist acts. They were also informed that the applicant was coming to Samara by train several days before the summit and that he might be carrying extremist literature. When the applicant arrived in Samara, he was stopped by the police and escorted to the police station at around 12.15 p.m. under the threat of force. At the police station the officers drew up an attendance report using a standard template entitled "Attendance report in respect of a person who has committed an administrative offence". However, they crossed out the phrase "who has committed an administrative offence". The applicant was released some 45 minutes later. The police officer who had escorted the applicant to the police station later stated that he had done so in order to prevent him from committing administrative and criminal offences.

Law – Article 5 § 1: Given the element of coercion in bringing the applicant to the police station and notwithstanding the short duration of his arrest,

the Court concluded that the applicant had been deprived of his liberty. The applicant was not suspected of having committed any offence, but instead, as submitted by the Government, had been arrested for the purpose of preventing him from committing "offences of an extremist nature". However, no concrete offences which the applicant had to be prevented from committing were ever mentioned and the vague reference to "offences of an extremist nature" was not specific enough to satisfy the requirements of Article 5. The only concrete suspicion against the applicant was that he might be carrying extremist literature, but even that was dispelled when the applicant was found not to have any luggage upon his arrival in Samara. The applicant was arrested solely because his name had appeared in the "surveillance database" and the only reason for that registration was the fact that he was a human-rights activist. The Court stressed that membership of human-rights organisations could not in any case form sufficient basis for suspicion justifying an individual's arrest. In conclusion, the applicant's arrest could not reasonably be considered to have been necessary to prevent his committing an offence within the meaning of Article 5 § 1 (c).

Conclusion: violation (unanimously).

Article 8: The applicant's name was registered in the "surveillance database", which collected information about his movements, by train or air, within Russia and therefore amounted to an interference with his private life. The creation and maintenance of the database and the procedure for its operation were governed by a ministerial order which had never been published or otherwise made accessible to the public. Consequently, the Court found that the domestic law did not indicate with sufficient clarity the scope and manner of exercise of the discretion conferred on the domestic authorities to collect and store information on individuals' private lives in the database. In particular, it did not set out in a form accessible to the public any indication of the minimum safeguards against abuse.

Conclusion: violation (unanimously).

Article 41: Claim made out of time.

Article 5 § 1 (f)

Expulsion

Detention of applicant in respect of whom interim measure by Court preventing his deportation was in force: *inadmissible*

S.P. v. Belgium - 12572/08
Decision 14.6.2011 [Section II]

Facts – The applicant, a Sri Lankan national, arrived in Belgium in October 2003. All his requests for asylum, his request to regularise his stay on exceptional grounds and his request under the extremely urgent procedure for a stay of execution of the order for him to leave the country were rejected, and his subsequent appeals were unsuccessful. On 12 February 2008 the applicant was placed in a detention centre. On 13 March 2008 the Court, under Rule 39 of the Rules of Court, requested the suspension of the procedure for the applicant's deportation to Sri Lanka. The measure requested was initially applied from that date until 27 March 2008, when it was extended "until further notice". The applicant was released on 8 April 2008 and was ordered to leave Belgian territory by 13 April 2008.

Law – Article 5 § 1 (f): The Aliens Act entitled the Aliens Office to hold the applicant in a detention centre for two-month periods and he had been released before the expiry of the initial statutory time-limit for detention. The fact that the application of an interim measure had temporarily suspended the procedure for the applicant's deportation did not render his detention unlawful, seeing that the Belgian authorities had still envisaged deporting him and that, notwithstanding the suspension, action was still "being taken" with a view to his deportation (see in this connection *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, 26 April 2007, Information Note no. 96). Although an unreasonable extension of the detention might have had a bearing on its "lawfulness" for the purposes of Article 5, the applicant had been released eleven days after the interim measure had been extended until further notice, a period which had not exceeded that reasonably required for the purpose pursued.

Conclusion: inadmissible (manifestly ill-founded).

In addition, the applicant's complaints under Articles 3 and 13 were declared inadmissible as being manifestly ill-founded.

Extradition

Detention pending extradition to the United States of a former Russian minister who, while visiting Switzerland for private reasons, was summoned as a witness in a criminal case: *no violation*

Adamov v. Switzerland - 3052/06
Judgment 21.6.2011 [Section II]

Facts – In 2004 criminal proceedings were opened against the applicant in the United States on a charge of misappropriating funds that had been provided to Russia by the USA when he was the Russian Minister for Nuclear Energy. On 11 February 2005 he obtained a four-month Swiss visa that he had applied for expressly in order to visit his daughter, who was living in Bern. On 21 February 2002 criminal proceedings were opened in Switzerland against his daughter for money laundering. The suspicions mainly concerned sums of money she had allegedly received from him. Through his daughter's lawyer the applicant had said that he was prepared to be questioned in Switzerland by the investigating judge and indicated the period in which he intended, in any event, to be in Switzerland. The investigating judge proposed two possible dates for the interview in that period. After arriving in Switzerland on 20 April 2005 the applicant expressed a preference for 2 May. The judge immediately issued a summons that was served at the applicant's daughter's private address. On 28 April 2005 the investigating judge contacted a public prosecutor in Pennsylvania to find out any information that might be useful in the proceedings against the applicant's daughter. During their conversation, the judge mentioned that he would be interviewing the applicant on 2 May. On 29 April 2005 the US Department of Justice sent the Swiss Federal Office of Justice a request for the applicant's provisional arrest in accordance with the extradition treaty of 14 November 1990 between Switzerland and the USA. On the same day the Federal Office of Justice issued an urgent order for the applicant's arrest that was sent to the investigating judge. On 2 May 2005, after the interview, the investigating judge notified him that he was under arrest and he was immediately taken by the police to Bern prison. On 3 May 2005 the Federal Office of Justice issued an order for the applicant's provisional detention with a view to extradition, and it was served on the applicant the next day. On 17 May 2005 Russia also applied for his extradition. On 9 June 2005 the Federal Criminal Court upheld an appeal by the applicant and lifted the extradition arrest order against him. On 14 July 2005 that decision was overturned by the Federal Court. Taking the view that the applicant had been visiting Switzerland for private purposes (to see his daughter) and for business, and not to give evidence as a witness in criminal proceedings, it held that it was not appropriate to apply the "safe conduct" clause and that he could thus be detained. In late June 2005 the US authorities lodged a formal extradition request with the Swiss authorities. The applicant was held in custody until 30 December 2005 and then finally extradited to Russia pursuant to an administrative decision of the Federal Court, which found that priority had to be given to the Russian extradition request, as the applicant was a Russian national and stood accused of committing criminal acts in that country. In 2007 the Federal Criminal Court dismissed a request for compensation for the alleged unlawfulness of the applicant's detention.

Law – Article 5 § 1 (f): The applicant had been taken into custody for extradition purposes, as permitted under this provision. The fact that he had been detained with a view to extradition to the United States but was finally extradited to Russia did not make any difference (this not being related to a finding as to whether the detention was lawful). The purpose of the safe-conduct clause relied upon in the present case was to ensure that a witness required to testify in another country could not be detained there without the substantive or procedural conditions of extradition being observed. The witness thus had immunity and could not be prosecuted or detained in respect of acts committed before his departure from the requested State.

As to the question whether the applicant could rely on this clause, he had not travelled to Switzerland specially to testify in the criminal proceedings against his daughter. On the contrary, he had clearly indicated in his statement of 2 May 2005 to the investigating judge that he had freely chosen to go to Switzerland for personal reasons (to visit his daughter) and for business. That version had been corroborated by an article that he had written for a Russian newspaper. In addition, no summons to appear before the Swiss authorities had been served on him in his State of residence, as required by the relevant national and international provisions for the safe-conduct clause to be engaged. The summons to appear on 2 May 2005 had been served on him by the investigating judge at the private home of his daughter, at a time when he was already in Switzerland.

As the present case had not involved any inter-State cooperation in accordance with agreements mutual legal assistance, there had been no reason to protect the applicant from arrest or prosecution in respect of acts previously committed and the safe-conduct clause was thus not applicable to his case. The

applicant, who frequently travelled outside Russia and had access to lawyers, must have been aware of the risks he was taking by going abroad, especially as criminal proceedings had been brought against him in the United States. It did not appear that, when he had agreed to give evidence to the investigating judge, he had himself raised the question of safe-conduct protection. By agreeing to go to Switzerland without relying on the safeguards provided for in the relevant international mutual-assistance instruments, he had knowingly renounced the benefit of the immunity that arose from the safe-conduct clause. As regards his argument that the Swiss authorities had resorted to trickery with the aim of depriving him of immunity, it was on the basis of the information that he was travelling to Switzerland for private and business reasons and that he was prepared to give evidence in the case concerning his daughter that the investigating judge had summoned him, leaving him a choice of date. The judge had not therefore tricked him into coming to Switzerland. In addition, by informing the US authorities – in connection with the proceedings concerning his daughter – that the applicant was in Switzerland, the Swiss authorities had not acted in bad faith against him: they had simply acted in compliance with the cooperation agreements between the two States to combat cross-border crime.

In conclusion, the applicant's detention, which had been based on a valid arrest order issued for the purposes of inter-State cooperation to combat cross-border crime, had not infringed the safe-conduct clause or contravened the principle of good faith.

Conclusion: no violation (four votes to three).

Article 5 § 4

Review of lawfulness of detention
Speediness of review

Inordinate delay by Supreme Court and refusal to entertain appeal against detention once period covered by detention order had expired: *violations*

S.T.S. v. the Netherlands - 277/05
Judgment 7.6.2011 [Section III]

Facts – In October 2002 a judge authorised the placement of the applicant, a minor with a history of offending and behavioural difficulties, in custody for treatment. The initial three-month period was extended several times until the judge made an order for a further year's extension effective from October 2003. In December 2003 a court of appeal reduced that period until 1 May 2004. The applicant appealed in mid-January 2004 to the Supreme Court, which in November 2004 declared his appeal inadmissible for lack of interest, as the period covered by the court of appeal's order had lapsed in the meantime.

Law – Article 5 § 4

(a) *Speediness* – Given the need for the court of appeal to gather information from a variety of sources and allow a variety of parties to participate effectively in the proceedings, the period of 63 days it had taken to reach its decision did not, in isolation, raise an issue of speediness. The same could not be said of the proceedings before the Supreme Court, which had given its decision 294 days after the applicant had lodged his appeal on points of law. Such a lapse of time appeared in itself inordinate. Whatever the reasons for the delay, the national judicial authorities had been under an obligation to make the necessary administrative arrangements to ensure that urgent matters were dealt with speedily, particularly when personal liberty was at stake.

Conclusion: violation (unanimously).

(b) *Effectiveness* – The applicant's appeal on points of law had been lodged with the Supreme Court just over three and a half months before the expiry of the court of appeal's six-month authorisation for the applicant's custodial placement. However, no grounds had been stated why the Supreme Court could not reasonably have been expected to give its decision within that time. Absent such grounds, the lack of a final decision, before the validity of the authorisation for the applicant's custodial placement had expired, was itself sufficient to deprive the applicant's appeal on points of law of its practical effectiveness as a preventive or even reparative remedy.

In addition, in declaring the applicant's appeal on points of law inadmissible as having become devoid of interest, the Supreme Court had deprived it of whatever further effect it might have had. A former detainee might well have a legal interest in the determination of the lawfulness of his detention even after his release, for example, in relation to his "enforceable right to compensation" guaranteed by Article 5 § 5, when it might be necessary to secure a judicial decision which would override any presumption under domestic law that a detention order given by a competent authority was *per se*

lawful. The proceedings for deciding the lawfulness of the applicant's detention were, therefore, not effective.

Conclusion: violation (unanimously).

Article 41: EUR 2,000 in respect of non-pecuniary damage.

ARTICLE 6

Article 6 § 1 (civil)

Applicability
Access to court

Immunity from jurisdiction preventing non-national employee of foreign embassy to challenge dismissal: *Article 6 applicable; violation*

Sabeh El Leil v. France - 34869/05
Judgment 29.6.2011 [GC]

Facts – The applicant is a French national. In August 1980 he was recruited as an accountant in the Kuwaiti Embassy in Paris for an indefinite duration. He was promoted to head accountant in 1985. In March 2000 the Embassy terminated his contract on economic grounds. The applicant appealed before the Paris Employment Tribunal, which found that the dismissal had been without genuine or serious cause and ordered the Kuwaiti Government to pay him various amounts in compensation and damages. Disagreeing with the amounts awarded, the applicant appealed. The Paris Court of Appeal set aside the first-instance judgment finding that, in view of his level of responsibility and the nature of his duties as a whole, the applicant participated in the exercise of the governmental-authority activity of the State of Kuwait, through its diplomatic representation in France. His claims against Kuwait were thus inadmissible because foreign States enjoyed jurisdictional immunity. The Court of Cassation rejected the applicant's appeal on points of law.

Law – Article 6 § 1

(a) *Admissibility – Exhaustion of domestic remedies*: In his appeal on points of law the applicant had challenged the Court of Appeal's findings as to the exact extent of his duties. He had denied that he had performed his duties autonomously in the interest of the public diplomatic service or had participated in the exercise of the governmental-authority activity of the State of Kuwait. He had also challenged the application of the jurisdictional immunity rule to his case. Under those conditions, the complaint submitted to the Court had thus been relied on in substance before the domestic courts.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Applicability* – The Court observed that, according to its judgment in *Vilho Eskelinen and Others*,[1] in order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant in excluding the protection embodied in Article 6, two conditions had to be fulfilled. First, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest. In the present case, however, the applicant's duties in the Embassy could not, as such, justify restrictions on his access to a court based on objective grounds in the State's interest. Moreover, the applicant's action before the French courts had concerned compensation for dismissal without genuine and serious cause. His dispute had thus concerned civil rights and Article 6 § 1 was applicable.

Conclusion: applicable (unanimously).

(c) *Merits* – Just as the right of access to a court was an inherent part of the fair trial guarantee in Article 6 § 1, so some restrictions on access had likewise to be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the rule of State immunity. However, in cases where the application of the rule of State immunity from jurisdiction restricted the exercise of the right of access to a court, the Court had to ascertain whether the circumstances of the case justified such restriction.

In the present case, the restrictions on the right of access to a court had pursued a legitimate aim, as set out in the *Cudak*[2] judgment. The Court thus proceeded to examine whether the impugned restriction of the applicant's right was proportionate to the aim pursued. In this connection, it was necessary to take into account the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property, which, in Article 11, laid down the principle that the immunity rule did not apply to contracts of

1. *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, 19 April 2007, Information Note no. 96.
2. *Cudak v. Lithuania* [GC], no. 15869/02, 23 March 2010, Information Note no. 128.

employment between a State and the staff of its diplomatic missions abroad, except in the situations exhaustively enumerated therein. The applicant, who was neither a diplomatic or consular agent of Kuwait, nor a national of that State, did not fall within any of the exceptions enumerated in Article 11 of that Convention. From his recruitment until his dismissal by the Kuwaiti Embassy, he had successively performed the duties of accountant and then of head accountant. An official note had listed his tasks as head of the Embassy's accounts department, without mentioning any other tasks inside or outside that department. Similarly, a certificate of employment dated January 2000 had only indicated his post as head of the accounts department. His only other activity had been that of staff representative on an unofficial basis. Neither the domestic courts nor the Government had shown how his duties could objectively have been linked to the sovereign interests of the State of Kuwait. The Court of Appeal had merely referred to the existence of "additional responsibilities", without justifying its decision by explaining on what basis – documents or facts brought to its attention – it had reached that conclusion. The Court of Cassation had not given any more extensive reasoning in its decision. It had confined itself to examining the case in the context of the preliminary admissibility procedure for appeals on points of law – a procedure that permitted a level of legal consideration, concerning the merit of the appeal, that was substantially limited. In addition, the Court of Appeal and the Court of Cassation had also failed to take into consideration the provisions of Article 11 of the 2004 Convention, in particular the exceptions enumerated therein that had to be strictly interpreted. In conclusion, by upholding in the present case an objection based on State immunity and dismissing the applicant's claim without giving relevant and sufficient reasons, and notwithstanding the applicable provisions of international law, the French courts had failed to preserve a reasonable relationship of proportionality. They had thus impaired the very essence of the applicant's right of access to a court.

Conclusion: violation (unanimously).

Article 41: EUR 60,000 in respect of pecuniary and non-pecuniary damage.

Denial of the right to appeal against a preliminary judgment: *Article 6 applicable; violation*

Mercieca and Others v. Malta - 21974/07
Judgment 14.6.2011 [Section IV]

Facts – The applicants were sued, personally and in their capacity as partners of an audit firm. During the proceedings, they raised a preliminary plea, which was dismissed by the court in a preliminary judgment on 1 December 2003. On 3 December the applicants sought leave to appeal, which was granted on 12 December. On 29 December the applicants lodged their appeal, but it was dismissed as being out of time. The Court of Appeal noted that while the legislator had clearly established that the time-limit for lodging an appeal against an interlocutory decree ran from the date of authorisation to appeal, in respect of an appeal against a "judgment" the legislator had made no distinction between a "judgment" and a "partial judgment". It followed that the twenty-day time-limit which ran from the date of delivery of a judgment applied also to appeals necessitating prior leave to appeal. That decision was overturned by the Civil Court, which held that a right to appeal could not arise before leave to appeal had been given, so that the applicants had effectively been denied access to a court, in breach of Article 6 of the Convention. However, on an appeal by the Attorney General, the Constitutional Court refused to uphold the first-instance judgment after finding that, although the interpretation given to the law by the Court of Appeal had been erroneous, that did not suffice to find a violation of the Convention as the applicants had had the opportunity to appeal after the final judgment.

Law – Article 6 § 1

(a) *Applicability* – According to the applicants, they had been denied an interlocutory appeal against a preliminary judgment. The latter could be equated to interim or provisional measures and proceedings. Thus, the same criteria were relevant to determine whether Article 6 was applicable. The main proceedings dealt with civil liability. Had the Civil Court upheld the applicants' pleas in its preliminary judgment, there would have been no scope for a further determination, since the applicants' liability would have been excluded at that stage. The interlocutory appeal would, therefore, have determined the same civil rights and obligations at issue in the main proceedings. Article 6 was, therefore, in principle applicable to the instant case.

(b) *Merits* – The applicants' time to appeal had been reduced from twenty days to nine days. While it was true that the applicants could have lodged

their appeal within those nine days, the Constitutional Court had specifically acknowledged that the law had been wrongly applied by the Court of Appeal, with the consequence that the applicants' appeal had been unfairly rejected. In these circumstances, the European Court found no reason to second guess that decision. Thus, the applicable rules had been construed in such a way as to prevent the applicants' appeal being examined on the merits, with the consequence that their right under domestic law of access to the Court of Appeal at that point in time had been impaired. The Constitutional Court had not found a violation of Article 6 of the Convention, since the applicants could avail themselves of an appeal at a later stage of the proceedings. However, it had not been disputed that the proceedings at issue would have ended at that stage had the applicants' appeal been heard on the merits and upheld. That eventuality would have avoided the applicants the expense and anxiety related to the continuation of burdensome court proceedings. In consequence, the European Court was of the view that an appeal at the end of the proceedings on the merits, even if that could be guaranteed under domestic law and practice, would not have sufficed to annul the consequences suffered by the applicants as a result of the wrongful dismissal of their appeal at an earlier stage. In sum, the domestic courts' restrictive interpretation of the relevant procedural rules had denied the applicants the right to lodge an appeal.

Conclusion: violation (unanimously).

Article 41: No award.

Access to court

Refusal of Russian courts to examine a claim against Russian authorities concerning the interpretation of Russian law: *violation*

Zylkov v. Russia - 5613/04
Judgment 21.6.2011 [Section I]

Facts – The applicant was a Russian national with permanent residence in Vilnius, Lithuania. In 2003 he applied for a child allowance payable by the Russian Federation to parents with minor children. He lodged his claim with the social-security division of the Russian Embassy in Vilnius, but it was refused on the grounds that he was ineligible for the allowance. The applicant sought to challenge that decision before a district court in Moscow, but that court declared his claim inadmissible, finding that he should have lodged his claim with a court in Lithuania.

Law – Article 6 § 1: The district court had refused to consider the claim lodged by the applicant, a Russian national, against a Russian State authority, incorporated under the laws of Russia, suggesting that the matter was subject to the jurisdiction of a court in Lithuania. The Government had supported that view. The Court, however, was not convinced by that line of reasoning, in particular since the Russian courts had failed to refer to any law binding on the Lithuanian courts that made them competent to resolve the matter or to explain how their view that the matter was to be considered by a foreign court complied with the principles of international law on State immunity. Moreover, the Russian authorities had advised the applicant to apply to a foreign court without even considering whether such an act would be feasible in view of the relevant provisions of the Vienna Convention on Diplomatic Relations or the existing agreement between Russia and Lithuania. The Court concluded that such a situation amounted to a denial of justice, which impaired the very essence of the applicant's right of access to a court.

Conclusion: violation (unanimously).

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

Independent and impartial tribunal

Alleged lack of impartiality where Constitutional Court President's judicial assistant had acted for one of the parties in prior civil proceedings in same case: *no violation*

Bellizzi v. Malta - 46575/09
Judgment 21.6.2011 [Section III]

Facts – The first applicant and his wife brought civil proceedings against a maritime authority for permission to use a mooring berth. After failing in that action they instituted constitutional-redress proceedings claiming various violations of his Convention rights. While at first instance their claims were upheld, the Constitutional Court reversed the judgment. In their application to the European Court, the applicants (the first applicant and his children, as heirs to the first applicant's wife) complained that the Constitutional Court had not been impartial because the judicial assistant assigned to the Office of the Chief Justice (the Chief Justice presided over the Constitutional Court) had been on the team of lawyers who had represented the maritime authority in the earlier civil proceedings.

Law – Article 6 § 1

(a) *Admissibility* – The Government had objected that the applicants had failed to exhaust domestic remedies as they had not lodged a fresh set of constitutional proceedings complaining of the fairness of the first set. While there was no reason for the Court to doubt that constitutional proceedings were accessible and capable of providing redress for human-rights violations, what was of concern was the length of another set of constitutional proceedings at a stage where the initial complaint had been conclusively decided after several years of litigation before various degrees of jurisdiction including seven years before courts of constitutional jurisdiction. Lodging a fresh constitutional complaint would have involved a cumbersome procedure and the length of the proceedings would have detracted from their effectiveness. Moreover, while the constitutional jurisdictions (the Civil Court in its constitutional jurisdiction and the Constitutional Court) would have been differently constituted, the former would most likely have had to rule on the conduct of the Chief Justice and other hierarchically superior judges and this could have raised issues in respect of the impartiality and independence requirements. Consequently, even though the domestic law provided a remedy against a final judgment of the Constitutional Court, in view of the specific situation of the Constitutional Court in the domestic legal order, it was not one requiring exhaustion in the circumstances of the instant case.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – The principles of impartiality established in the Court's case-law applied equally to jurors, professional and lay judges and other officials exercising judicial functions such as assessors and court officials such as "referendaries". The exercise of different functions within the judicial process by the same person or hierarchical or other links with another actor in the proceedings gave raise to objectively justified misgivings as to the impartiality of the tribunal. It therefore had to be ascertained in each individual case whether the connection was of such nature and degree as to indicate a lack of impartiality on the part of the tribunal concerned. The time-frame was relevant when assessing the significance of a judge's previous relationship to an opposing party.

In the present case the Court had to examine the impartiality of the Constitutional Court in the applicants' case in the light of the specificities of the judicial assistant's role within the domestic legal and judicial system. That role included assisting in the judicial process and, at the request of the court, participating in the proceedings, taking witness testimony and affidavits, receiving documentary evidence and holding sittings as directed. Judicial assistants were also entitled to draw up opinions in respect of the cases put to the court. Such tasks could be of important significance to the judicial process. In the present case the judicial assistant had actively represented the applicants' opponent at an earlier stage of the proceedings, but her involvement had been temporary and she had withdrawn from the case almost six years before the Constitutional Court's decision. As to her participation in the constitutional proceedings, it was noted that apart from pointing to her general role as judicial assistant to the Chief Justice the applicants had not provided any evidence to suggest she had been entrusted with the case. Indeed, under domestic law a judicial assistant could be involved in any named case only at the court's request and the Chief Justice had declared she had had no involvement. The applicants had not contested the veracity of that statement and had acknowledged that he had been unaware of the identity of the Chief Justice's judicial assistant, so confirming she had not taken any witness or documentary evidence, held sittings or issued procedural deadlines. Accordingly, since it had not been established that the judicial assistant had participated in the impugned proceedings, there were no ascertainable facts capable of raising legitimate doubts as to the impartiality of the Constitutional Court in the present case.

Conclusion: no violation (unanimously).

Article 6 § 1 (criminal)

Fair hearing

Inability to defend charge of malicious prosecution owing to presumption that accusation against a defendant acquitted for lack of evidence was false: *violation*

Klouvi v. France - 30754/03
Judgment 30.6.2011 [Section V]

Facts – In 1994 the applicant lodged a criminal complaint against her former line manager, P., alleging rape and sexual harassment. An investigation was opened in 1995 into the offence of sexual assault by a person abusing the authority conferred on him by his duties. The investigating

judge ruled in 1998 that there was no case to answer for lack of sufficient evidence. Alongside those proceedings, the accused brought criminal proceedings against the applicant for malicious prosecution. The criminal court gave Ms Klouvi a suspended prison sentence and ordered her to pay damages. The court of appeal upheld the judgment in its entirety and the Court of Cassation dismissed an appeal on points of law by the applicant.

Law – Article 6 §§ 1 and 2: The thorough investigation conducted into the applicant's complaint, including the gathering of physical evidence and interviews of numerous witnesses, had not produced conclusive results and had not established sufficient evidence against P. for his case to be sent for trial in the criminal court. That being so, the case had been discontinued. Subsequently, in the course of the proceedings for malicious prosecution, the criminal court had strictly applied Article 226-10 of the Criminal Code by holding that the ruling that there was no case to answer "necessarily" meant that the accusations were false. Furthermore, since the applicant had complained of repeated rape and sexual harassment, she must have known that her allegations were untrue, which meant that the intentional element had been made out. The court of appeal had upheld that judgment, finding that the application of the presumption had remained within reasonable limits, in accordance with the principle of a fair trial.

The applicant had thus been confronted with a dual presumption – a statutory presumption based on the above-mentioned provision of the Criminal Code and a factual presumption deriving from the domestic case-law concerning the intentional element – which had significantly curtailed her rights under Article 6. The court had been unable to weigh up the various items of evidence before it, an exercise which would have been viewed as questioning the investigating judge's conclusions in his ruling that there was no case to answer, and had to have automatic recourse to statutory presumptions. As a result, the applicant had had no opportunity to adduce evidence at an adversarial hearing, prior to the court's decision in her case, to show that the offences had actually occurred and that she was not guilty. In July 2010 a law amending the relevant provision of the Criminal Code had been passed, with the result that a person against whom a complaint had been lodged was now required to have been found not guilty of the offence in a final decision. Accordingly, the applicant had not had the benefit of a fair trial or the presumption of innocence because she had had no means of defending herself against the charge of malicious prosecution.

Conclusion: violation (unanimously).

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

Tribunal established by law

Applicant's case decided by Special Court established for trying corruption and organised crime: *no violation*

Fruni v. Slovakia - 8014/07
Judgment 21.6.2011 [Section III]

Facts – In June 2002 the applicant, who was the chairman of various financial institutions accepting money from the public, was arrested and charged with large-scale fraud and other offences. He was detained pending trial and his applications for release were refused on the grounds of the gravity of the charges, the risk of his absconding and the extensive amount of evidence that had to be obtained. In 2005 he was indicted to stand trial in a regional court exercising the powers of the Special Court, which had been established in 2003 to try certain public officials for crimes of corruption and organised crime. The applicant unsuccessfully challenged the jurisdiction of that court and in January 2007 was convicted of financial fraud and conspiracy. He appealed alleging, *inter alia*, that the Special Court was unconstitutional and that his trial had been unfair. The Special Division of the Supreme Court dismissed his appeal, and in April 2008 the Constitutional Court declared his complaint inadmissible since there was no constitutionally relevant arbitrariness in the impugned decisions. Subsequently, however, the Constitutional Court declared the statutory provisions establishing the Special Court unconstitutional but ruled that this would not give ground for reopening proceedings which had already ended before that court.

Law – Article 6 § 1: The term "established by law" was meant to ensure "that the judicial organisation in a democratic society [did] not depend on the discretion of the executive, but that it [was] regulated by law emanating from Parliament". The jurisdiction and competence of the Special Court and the Special Division of the Supreme Court were defined by legislation adopted in 2003 and proceedings before them were subject to the Code of Criminal Procedure. The reasons for the Constitutional Court's decision that the statutory

provisions establishing the Special Court were unconstitutional appeared to be linked to the conceptual role and institutional status of the Special Court in the constitutional and judicial system of Slovakia rather than its quality and independence as a judicial body. This explained why the Constitutional Court had stressed that final decisions rendered by the Special Court were in no way affected by the subsequent unconstitutionality of the underlying legal basis of that court. Consequently, there was nothing to suggest that the Special Court and the Special Division of the Supreme Court involved in the determination of the applicant's case were not "tribunals established by law".

Moreover, neither Article 6 nor any other Convention provision required the States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction. The question was always whether, in a given case, the requirements of the Convention were met. In this connection, the Court observed that the judges of the Special Court and of the Special Division of the Supreme Court were career judges whose terms of office were not limited in time, and who thus had equal status to that of any other judge in Slovakia. They could be recalled if they ceased to meet the security vetting criteria, but this appeared never to have occurred, and in any event, in such a case the judge involved could seek judicial review. The Special Court was subject to the supervisory jurisdiction of the Special Division of the Supreme Court on appeal and both jurisdictions were subject to supervision by the Constitutional Court in the event of a constitutional complaint. In sum, the Court found no grounds for the applicant to have had legitimate misgivings as to the "independence" of the Special Court, which had tried him, or of the Special Division of the Supreme Court, which had determined his appeal.

Conclusion: no violation (unanimously).

Article 5 § 3: The Constitutional Court had issued a decision concerning the reasonableness of the length of the applicant's detention in 2005, by which time his detention had lasted just over three years. In justifying the applicant's continued detention at that time, the Constitutional Court relied on the wide-ranging criminal activity of which the applicant stood accused, involving more than 150,000 aggrieved parties and vast financial damage. It also took note of the large amount of evidence which had to be obtained and assessed and, in view of his personal and financial situation, the serious risk of his absconding. The Court accepted these reasons as relevant and sufficient in the circumstances. There was no indication of procedural inactivity on the part of the authorities. Conversely, the defence strategy had been marked by attempts to obstruct the proceedings. In these circumstances, the Constitutional Court's assessment at the time was acceptable. Following that court's decision in 2005, the applicant's detention had lasted for another year, four months and eighteen days, but he had failed to exhaust domestic remedies in respect of that period. In that connection, the Court noted that a constitutional complaint challenging exclusively the lawfulness of the applicant's pre-trial detention but not its length was not sufficient.

Conclusion: inadmissible (non-exhaustion of domestic remedies).

Article 6 § 2

Presumption of innocence

Inability to defend charge of malicious prosecution owing to presumption that accusation against a defendant acquitted for lack of evidence was false: *violation*

Klouvi v. France - 30754/03
Judgment 30.6.2011 [Section V]

(See Article 6 § 1 (criminal) above, page 18)

ARTICLE 7

Article 7 § 1

Nullum crimen sine lege

Conviction for murder of a former prosecutor, who had been involved in the elimination of opponents through a political trial: *inadmissible*

Polednová v. the Czech Republic - 2615/10
Decision 21.6.2011 [Section V]

Facts – In 1950 the applicant participated, as a prosecutor, in the trial of Milada Horáková and other opponents of the communist regime, which was conducted under the direct control of the political authorities of the time and culminated in

the sentencing to death and execution of several persons. In 1990 the Prosecutor General ruled that there was no case to answer in respect of all those charged, finding that they had been wrongly convicted of actions which were in accordance with the principles of a democratic society and that the criminal proceedings had been designed, for political ends, to arbitrarily eliminate opponents of the totalitarian dictatorship under the communist regime.

In 2008 the applicant was convicted of having committed murder by participating in the trial on the basis of the 1852 Criminal Code, applicable at the time of the events. On the basis of numerous pieces of written evidence, the national courts found that the trial had been a mere formality designed to confer an appearance of legality on the physical elimination of the opponents of the communist regime, and that the course of the proceedings and their outcome had been decided in advance by the political organ of the Communist Party in cooperation with the State Security Service. They found that the fundamental principles of fairness of the proceedings and the immutable ethical requirements of judicial power had therefore been flouted during the trial; hence, the resulting judgment could not be considered an act of justice and the participants in the trial, of which the applicant was the only survivor, could not avoid this criminal liability by claiming to have merely been fulfilling their duties. They also considered that, through her active and deliberate participation in the trial, the applicant had significantly contributed to giving it an appearance of legality and to fulfilling its political aim. Seeing as the trial, culminating in the sentencing to death and execution of the convicted persons, had been the murder mechanism, they concluded that the applicant, as a prosecutor in the legal system, had committed this murder as a joint principal. Having regard to the extenuating circumstances such as the applicant's law-abiding life, her age and the state of her health, as well as the fact that she had committed the offence *de facto* by obeying orders, the applicant was given a six-year prison sentence, which was shorter than the normal minimum. In March 2009 the applicant began to serve her sentence. In December 2010 the President of the Czech Republic granted her a pardon in respect of the remainder of her sentence and she was released.

Law – Article 7 § 1: The Court's task was to examine whether, at the time it was committed, the applicant's act had constituted an offence defined with sufficient accessibility and foreseeability by the law of the former Czechoslovakia. The Court considered that the domestic courts' application and interpretation of the provisions of criminal law in force at the material time had not been arbitrary in any way. It further considered that the strict interpretation of the relevant Czechoslovakian legislation was compatible with Article 7 of the Convention and that the practice of eliminating opponents to a political regime through the death penalty, imposed at the end of trials which flagrantly infringed the right to a fair trial and above all the right to life, could not benefit from the protection of that Article. In the present case, this practice had emptied of their substance the Constitution and law of the time, on which it was supposedly based, and could not therefore be described as "law" within the meaning of Article 7.

The Court also could not accept the applicant's argument that she had simply been obeying the instructions of her more experienced superiors whom she had trusted completely. The applicant had not claimed that she had not had access to the texts of the Constitution and relevant laws; the maxim "ignorance of the law is no excuse" therefore applied to her. Having already held that even a private soldier should not show total, blind obedience to orders which flagrantly infringed not only the principles of national legislation but also internationally recognised human rights, in particular the right to life, the Court considered this observation to be wholly applicable to the case of the applicant, who had acted as a prosecutor after having completed preparatory law studies and acquired some practical experience of trials. Moreover, the national courts had found, relying on evidence, that the applicant must have been aware of the fact that the questions of guilt and sentencing had been determined by the political authorities well in advance of the trial and that the fundamental principles of justice had been completely flouted as a result. In these circumstances the applicant, who, in her role as a prosecutor, had helped to confer the appearance of legality on the political trial of Milada Horáková and the other opponents of the regime and had identified herself with that unacceptable practice, could not rely on the protection afforded by Article 7. To reason otherwise would run counter to the object and purpose of that provision, namely to ensure that no one was subjected to arbitrary prosecution, conviction or punishment.

Moreover, the fact that the applicant had been prosecuted and convicted by the Czech courts only after the restoration of the democratic regime did not in any way mean that her acts had not constituted an offence according to the Czechoslovak-

ian law in force at the material time. Although the applicant did not argue that the proceedings against her were time-barred, the Court found it relevant to note that proceedings had been initiated against her as late as 2005, fifty-five years after the trial in question, because section 5 of the 1993 Law on the Illegality of the Communist Regime provided for the suspension of the limitation period between 1948 and 1989 where offences had not resulted in a conviction or acquittal because of underlying political motives incompatible with the fundamental principles of a democratic legal system. Similar legislation had also been enacted in Poland and in reunified Germany. With the above-mentioned law, the Czech State had been trying to remedy a problem which it considered prejudicial to its democratic regime, and distance itself from an unacceptable practice of the totalitarian regime which allowed serious violations of its own legislation to go unpunished; thus, such an approach by the Czech legislature did not seem prima facie incompatible with the values protected by the Convention.

Having regard to all the above considerations, the Court considered that the applicant's act, at the time it was committed, had constituted an offence defined with sufficient accessibility and foreseeability by Czechoslovakian law. The principle enshrined in Article 7 § 1 whereby only law could define a crime and prescribe a penalty had thus been observed.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 8

Private life

Police listing and surveillance of applicant on account of his membership in a human rights organisation: *violation*

Shimovolos v. Russia - 30194/09
Judgment 21.6.2011 [Section I]

(See Article 5 § 1 above, page 11)

Private and family life
Expulsion

Refusal to renew residence permit of minor who had been sent abroad by her parents against her will: *violation*

Osman v. Denmark - 38058/09
Judgment 14.6.2011 [Section I]

Facts – At the age of fifteen the applicant, a Somali national who had been living with her parents and siblings in Denmark since the age of seven, was sent against her will to a refugee camp in Kenya by her father to take care of her paternal grandmother. Two years later, when still a minor, she applied to be reunited with her family in Denmark, but her application was turned down by Danish immigration on the grounds that her residence permit had lapsed as she had been absent from Denmark for more than twelve consecutive months. She was not entitled to a new residence permit as, following a change in the law that had been introduced to deter immigrant parents from sending their adolescent children to their countries of origin to receive a more traditional upbringing, only children below the age of fifteen could apply for family reunification. The immigration authority also considered that no special circumstances existed in her case as she had not seen her mother for four years, her mother had agreed to her being sent to Kenya and she could continue to live in Kenya with her grandmother or her grandmother's family.

Law – Article 8: The refusal to renew the applicant's residence permit had interfered with both her private life and her family life. She was still a minor when she applied to be reunited with her family in Denmark and, for young adults who had not yet founded a family of their own, their relationship with their parents and other close family members constituted "family life". In addition, all the social ties between settled migrants and the community in which they were living constituted "private life". The measure in question had a basis in domestic law and pursued the legitimate aim of immigration control.

As to whether the measure had been necessary in a democratic society, the Court noted that the applicant had spent her formative years in Denmark, spoke Danish and had received schooling in Denmark and that all her close family lived in Denmark. Accordingly, she could be considered a settled migrant who had lawfully spent all or the major part of her childhood and youth in the host country so that very serious reasons would be required to justify the refusal to renew her residence permit. Although the aim pursued by the law on which that refusal was based was legitimate – discouraging immigrant parents from sending their children to their countries of origin to be "re-educated" in a manner their parents considered

more consistent with their ethnic origins – the children's right to respect for private and family life could not be ignored.

The domestic authorities had, however, disregarded the applicant's submission that her father's decision to send her to Kenya for so long had been against her will and was not in her best interests as they considered that it had been taken by her parents, who had custody of her at the relevant time. While the Court agreed that the exercise of parental rights constituted a fundamental element of family life, and that the care and upbringing of children normally and necessarily required that the parents decide where the child should live, this did not entitle the authorities to ignore the child's interests, including the right to respect for his or her private and family life. Moreover, even though the applicant may have had very limited contact with her mother over a four-year period, this could be explained by various factors, including practical and financial constraints, and could hardly lead to the conclusion that they did not wish to maintain or intensify their family life together. Lastly, the legislative amendment that had reduced the age of entitlement to family reunification from eighteen to fifteen years had not been foreseeable when the decision to send the applicant to Kenya was taken or when her residence permit expired. In these circumstances, it could not be said that the applicant's interests had been sufficiently taken into account or balanced fairly against the State's interest in controlling immigration.

Conclusion: violation (unanimously).

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

Private and family life

Inability of father divested of his legal capacity to acknowledge paternity of his child: *violation*

Krušković v. Croatia - 46185/08
Judgment 21.6.2011 [Section I]

Facts – In 2003 the applicant was divested of his legal capacity due to a personality disorder resulting from long-term drug abuse. In 2007 a certain K.S. gave birth to a daughter and identified the applicant as the child's father. Subsequently, the applicant gave a statement at the local birth registry acknowledging his paternity and was registered as the father. However, once the competent social-welfare centre informed the birth registry that the applicant had been divested of his legal capacity, that entry was annulled. In 2010 the local welfare centre brought an action against the applicant, K.S. and the child seeking establishment of the applicant's paternity and those proceedings were still pending at the time the European Court gave its judgment.

Law – Article 8: Even though restrictions in the sphere of private and family life on the rights of persons divested of their legal capacity could not in principle be regarded as contradictory to Article 8, such restrictions should be subject to relevant procedural safeguards. In the applicant's case, he had been unable to recognise his paternity before the national authorities or to institute any proceedings to prove paternity. Only the competent social-welfare centre could have instituted such proceedings, but there was no legal obligation or time-limit under national law for the centre to do so. Consequently, the applicant had been left in a legal void until the proceedings for the establishment of his paternity were finally instituted, some two and a half years after he had urged the social-welfare centre to do so. By ignoring his claims that he was the biological father of the child, the State had failed to discharge its positive obligation to guarantee his right to respect for private and family life.

Conclusion: violation (unanimously).

Article 41: EUR 1,800 in respect of non-pecuniary damage.

Inability of healthy couple with high risk of transmitting hereditary illness to obtain genetic screening of embryo prior to implantation: *communicated*

Costa and Pavan v. Italy - 54270/10
[Section II]

In 2006, after their first child had been born with cystic fibrosis, the applicants learned that they were both healthy carriers of the disease. According to a document issued by the Italian Cystic Fibrosis Society, where both parents are healthy carriers of cystic fibrosis, there is a one in four chance that their child will be born with the disease, a one in four chance that the child will neither have the disease nor be a carrier and a one in two chance that the child will be a carrier. During her second pregnancy, the first applicant, anxious to ensure that the child would not be born with cystic fibrosis, underwent a prenatal test in February 2010, which revealed that the foetus likewise had

the disease. She was therefore obliged to have an abortion. The applicants wish to undergo pre-implantation genetic diagnosis as part of an *in vitro* fertilisation process. However, by law, screening of this kind is available only to infertile couples or where the male partner has a sexually transmitted viral disease.

Communicated under Article 8, taken separately and in conjunction with Article 14.

Family life
Expulsion
Positive obligations

Deportation and exclusion orders that would effectively result in a mother guilty of immigration-law breaches being separated from her young children for two years: *deportation would constitute violation*

Nunez v. Norway - 55597/09
Judgment 28.6.2011 [Section IV]

Facts – The applicant, a Dominican Republic national, was deported from Norway in 1996 with a two-year prohibition on re-entry following a criminal conviction. Four months later she re-entered the country under a false identity and married a Norwegian national. She continued to reside and work there unlawfully, using permits obtained by deception. She subsequently divorced and cohabited with a settled non-national, with whom she had two daughters, who were born in 2002 and 2003. In April 2005 the immigration authorities, who had been aware since 2001 that the applicant's stay in the country was unlawful, decided she should be expelled and prohibited from re-entering for two years. Her appeals to the domestic courts failed. In the interim and following her separation from the children's father in October 2005 the applicant assumed the daily care of the children until May 2007, when the father was given custody after the court considering the case found that there was little prospect of the applicant obtaining a reversal of the expulsion order. The applicant was granted contact.

Law – Article 8: In cases concerning both family life and immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there varied according to the particular circumstances of those involved and the general interest. Relevant in this context were the extent to which family life was effectively ruptured, the extent of the ties in the Contracting State, whether there were insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there were factors of immigration control or considerations of public order weighing in favour of exclusion. Where family life was created in the knowledge that the immigration status of one of the family members was precarious, the removal of that member would be incompatible with Article 8 only in exceptional circumstances.

In the applicant's case, the Court observed that the public interest in favour of her expulsion weighed heavily in the balance when assessing the issue of proportionality: there was an aggravated character to her breaches of the immigration law as she had disregarded the re-entry ban, intentionally given misleading information about her identity, previous stay in the country and earlier convictions, and had obtained residence, work and settlement permits to which she had not been entitled. She had lived and worked in the country unlawfully since her re-entry and therefore could not reasonably have entertained any expectations of remaining there lawfully. She also had strong links with her home country.

However, the Court also had to have particular regard to the best interests of the children. In that connection, it noted that it was the applicant who had primarily cared for the children since their birth until 2007 when, largely because of the decision to expel her, the father was granted custody and she was granted extended contact. The children would thus have remained in Norway, where they had lived all their lives, in order to live with their father, a settled immigrant. They had suffered stress as a result of these events and would have difficulty in understanding the reasons if they were separated from their mother. Such a separation would in all likelihood have lasted for practically two years, a very long period for young children, with no guarantee that the mother would be able to return once it was over. The Court also noted that, despite having been aware since 2001 of the unlawful character of the applicant's stay, the authorities had not ordered her expulsion until 2005, which could hardly be seen as swift and efficient immigration control.

In the light of these considerations, the Court was not convinced in the concrete and exceptional circumstances of the case that sufficient weight had been attached to the best interests of the children for the purposes of Article 8 and found that the authorities had not struck a fair balance between the public interest in ensuring effective immigration

control and the applicant's need to remain in the country in the best interests of the children.

Conclusion: deportation would constitute a violation (five votes to two).

ARTICLE 9

Freedom of religion

Unforeseeable taxation of donations to religious association: *violation*

Association Les témoins de Jéhovah v. France - 8916/05
Judgment 30.6.2011 [Section V]

Facts – The applicant association's main purpose is to support the maintenance and practice of its movement, which it describes as a Christian religion. The movement is financed by "donations". In 1995 a parliamentary report classified the Jehovah's Witnesses as a sect. In the same year a tax audit of the applicant association's finances was conducted. On the basis of the information gathered, it was given notice to declare the gifts that it had received in the period 1993 to 1996. The association refused, and asked that the tax exemption applicable to gifts and legacies to liturgical associations be applied to it; the authorities then decided to subject it to the automatic taxation procedure in the absence of a declaration. In May 1998 the association was notified of a supplementary tax assessment for the equivalent of about EUR 45,000,000. The tax claimed concerned donations by 250,000 persons over four years. All of the appeals lodged by the applicant association were unsuccessful.

Law – Article 9: The disputed supplementary tax assessment had concerned the totality of the manual gifts received by the applicant association, although they represented 90% of its income. Taxation of those gifts amounted to interference, which had had the effect of cutting off the association's operating resources; it had no longer been able to guarantee to its followers the free exercise of their religion in practice. The appeal court had considered that the amounts of money recorded by the applicant association as "donations" in its accounts amounted to manual gifts, whatever the total of those amounts. Those gifts were therefore taxed in application of Article 757 of the General Tax Code, since they had been "disclosed" by submission of the applicant association's accounts to the tax authorities during the tax audit that began in 1995.

As to the foreseeability of the measure, the Tax Code stated that manual gifts "disclosed" to the tax authorities were subject to gift tax. The legislature's initial intention had been to regulate the transmission of property within families and therefore concerned only natural persons. A ministerial reply dated March 2001 had stated that the provisions of the Tax Code were applicable to manual gifts received by associations; in the present case, however, the notification of the automatic taxation procedure and the supplementary tax assessment dated from 1998. In addition, the Government had not referred to the decisions by the Court of Cassation which, at the material time, had interpreted the Tax Code as applying to legal entities. The relevant article of the Tax Code had been amended in 2003 following the applicant association's court case, in order to take account of the financial consequences of this fiscal measure on associations and to exclude taxation of organisations that operated in the public interest.

As to the concept of "disclosure" of gifts, it was held in this case, for the first time, that the submission of accounts to the authorities during a tax audit was the equivalent of "disclosure". Such an interpretation of the disputed provision by the courts would have been difficult for the applicant association to foresee, in that manual gifts had until then been exempt from any declaration requirement and had not been systematically subjected to duty on transfers without consideration. This lack of clarity regarding the concept of "disclosure" in the Tax Code could not, as the law stood at the relevant time, have permitted the applicant association to envisage that the mere submission of its accounts would amount to disclosure. Ultimately, this concept as interpreted in the instant case had made taxation of manual gifts dependent on the conduct of a tax audit, which necessarily implied an element of chance and therefore a lack of foreseeability in the application of the tax law.

Thus, the applicant association had been unable reasonably to foresee the consequence which the receipt of donations and the submission of its accounts to the tax authorities might entail. Accordingly, the interference had not been prescribed by law within the meaning of Article 9 § 2. Having regard to the above conclusion, the Court did not consider it necessary to examine further whether the other requirements of the second paragraph of Article 9 had been met.

Conclusion: violation (unanimously).

Article 41: Question reserved.

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: *case referred to the Grand Chamber*

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

The applicant is a non-profit association constituting the national branch of the Raelian Movement, whose stated aim is to make initial contact and develop good relations with extraterrestrials. In 2001 it sought permission from the police to put up posters which featured, among other things, pictures of extraterrestrials' faces and a flying saucer and displayed the movement's website address and telephone number. Permission to put up the posters was refused, and subsequent appeals by the association were all dismissed.

In a judgment of 13 January 2011 (see Information Note no. 137), a Chamber of the Court held, unanimously, that there had been no violation of Article 10 on the ground that 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 (a company offering specific cloning services prohibited by law), the movement's possibly sexually deviant attitudes towards children and its promotion of "geniocracy" (a theory that power should be given to individuals with a high intellectual coefficient).

On 20 June 2011 the case was referred to the Grand Chamber at the request of the applicant association.

Damages award against newspaper which had made all reasonable attempts to verify accuracy of report on court proceedings: *violation*

Aquilina and Others v. Malta - 28040/08
Judgment 14.6.2011 [Section IV]

Facts – The first applicant was the editor, the second applicant a court reporter and the third applicant a printer working for a national newspaper. In 1995 the second applicant attended a court hearing to report on a bigamy case. At some point in the proceedings, the atmosphere in the court room became chaotic and the second applicant believed that the magistrate had found one of the lawyers in contempt of court. She tried to verify what she had heard through the records of the proceedings but was unable to do so as the magistrate and the court deputy registrar had already left their chambers. She checked however with another reporter, also present in the courtroom, who confirmed that he too had understood that the lawyer concerned had been found in contempt. This was reported the next day in the newspaper under the headline "Lawyer found in Contempt of Court". The lawyer concerned immediately contacted the second applicant to protest. She verified the minutes of the proceedings and, noting that no mention had been made of the lawyer having been found guilty of contempt, ensured that the newspaper issued an apology. The lawyer nonetheless brought civil proceedings for defamation and was awarded 300 Maltese liras (approximately EUR 720).

Law – Article 10: The domestic courts' judgments had amounted to an interference with the applicants' freedom of expression. That interference had been "prescribed by law", namely the Press Act, and had pursued the legitimate aim of protecting the reputation or rights of others.

As to whether the interference had been necessary in a democratic society, the Court reiterated that special grounds were required before the media could be dispensed from their ordinary obligation to verify factual statements that were defamatory of private individuals. Whether such grounds existed depended in particular on the nature and degree of the defamation in question and the extent to which the media could reasonably regard their sources as reliable with respect to the allegations. By giving readers the impression that the lawyer had been found guilty of contempt of court, the headline had contained a factual allegation, which, since it concerned a lawyer's behaviour in the exercise of his profession, was a matter of public interest. What was relevant was whether the second applicant had had the means to verify the facts and whether she had abided by her duty of responsible reporting.

On the first point, the Court observed that records of proceedings were usually brief minutes which, since they did not contain a detailed record of all that took place, could not be considered the sole source of truth for purposes such as court reporting. To limit court reporting to facts reproduced in the records of proceedings, and to bar reports based on what a journalist had heard and seen with his or her own eyes and ears, as corroborated by others,

would be an unacceptable restriction of freedom of expression and the free flow of information. While there may be a presumption that the official record of court proceedings is complete and accurate, such a presumption may be rebutted by other evidence of what occurred during the course of the proceedings. Indeed, all the evidence – apart from the minutes of the hearing – suggested that the lawyer had been found to be in contempt of court. Even the prosecutor's evidence, which was plainly relevant and came from an independent source, had corroborated what the second applicant had stated, yet little or no attention appeared to have been paid to it and no explanation had been given for disregarding it.

As to the second point, there was no reason to doubt that the second applicant had, in line with best journalistic practice, attempted to verify what had taken place in the court room and could not reasonably have been expected to do more, especially bearing in mind that news is a perishable commodity and delaying publication may well deprive it of all value and interest. Noting, too, that the second applicant had issued an apology the Court found that she had at all times acted in good faith and in accordance with her duty of responsible reporting.

It followed that the interference with the applicants' right to freedom of expression had not been necessary in a democratic society for the protection of the reputation of others.

Conclusion: violation (unanimously).

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

Criminal conviction for breaching planning regulations applicable to external murals: *inadmissible*

Ehrmann and SCI VHI v. France - 2777/10
Decision 7.6.2011 [Section V]

Facts – The first applicant is a visual artist who, as part of a collaborative project, has transformed a former seventeenth century estate into an artists' residence and an open-air museum exhibiting more than three thousand works of art, now entitled "La Demeure du Chaos". Since 2006 this estate, which has the status of a public-access building, has attracted about 120,000 visitors per year and been the subject of numerous press articles and featured in art publications, films and reports. It belongs to the second applicant, a property company in which the first applicant holds the majority of shares. The property is located within sight of a church and a manor house, both of which are classed as historical monuments. In 2008 the first applicant was convicted of four criminal offences for failure to comply with the urban-planning regulations. He was ordered to pay fines of EUR 30,000 for having carried out or commissioned work that did not require planning permission, without a preliminary declaration, on the surrounding wall and façade of the estate, for having carried out or commissioned work that changed the appearance of constructions that were directly visible from buildings classed as historical monuments without having sought preliminary authorisation as required by the Heritage Code, and for having carried out or commissioned work in contravention of the land-use plan. The domestic courts found that the changes made to the property's surrounding wall and the facade in question were in total disharmony with the neighbouring buildings, which were constructed in a very traditional style. The first applicant was given nine months to restore the areas in question to their previous condition, with daily fines of EUR 75 to be paid on expiry of that period. The second applicant was ordered in civil proceedings to pay, jointly and severally with the first applicant, the sum of one euro in damages to the municipality.

Before the Court, the applicants alleged, in particular, that the penalty imposed on them represented a disproportionate interference with their freedom of artistic expression.

Law – Article 10: The Court noted that the majority of cases regarding freedom of artistic expression examined by it had concerned criminal convictions for the purpose of protecting morals or preventing disorder. In the instant case, the dispute did not concern the protection of morals but rather the prevention of disorder, which referred to protection of the rights of others. The criminal and civil penalties imposed on the applicants amounted to interference by the public authorities in the exercise of their freedom of expression. However, this interference had been "prescribed by law", namely the relevant provisions of the Town Planning Code and the Heritage Code. Like the domestic courts, the Court considered that the urban-planning regulations pursued a legitimate aim and represented measures that were necessary in a democratic society for the prevention of disorder, which implied protection of the common heritage and compliance with the collective will as expressed in urban-planning choices. In those circumstances, the arguments put

forward by the domestic authorities were both relevant and sufficient.

In the instant case, the restriction on the applicants' freedom of expression was limited to the surrounding wall and the facade, which were directly visible from buildings that were classed as historical monuments, and by no means concerned the estate in its entirety. The public interest, determined in this instance by protection of the heritage, required that the applicants comply with certain urban-planning regulations. In reality, the latter were merely subject to the granting of preliminary authorisation before any work was carried out. In those circumstances, the restrictions on freedom of expression affected only one form of exercise of this right, in the general interest and in a very limited manner. Furthermore, the criminal and civil penalties and the order to restore the premises to their previous state could not be considered disproportionate, given that the restrictions in question concerned only the work which was visible to the public from the exterior of the property and did not concern the works of art which were displayed inside the estate. The imposition of a criminal penalty on the first applicant had been legitimate, especially since, while the amount of the fine was significant, it could not be considered excessive. The interference could therefore be considered "necessary in a democratic society".

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 14

Discrimination (Article 8)

Inability of healthy couple with high risk of transmitting hereditary illness to obtain genetic screening of embryo prior to implantation: *communicated*

Costa and Pavan v. Italy - 54270/10
[Section II]

(See Article 8 above, page 23)

Discrimination (Article 2 of Protocol No. 1)

Requirement on aliens without permanent residence to pay secondary-school fees: *violation*

Ponomaryovi v. Bulgaria - 5335/05
Judgment 21.6.2011 [Section IV]

Facts – Under the National Education Act 1991 only Bulgarian nationals and certain categories of aliens were entitled to primary and secondary education free of charge. The applicants were two Russian schoolchildren living with their mother in Bulgaria. At the material time, only the mother had a permanent residence permit although the applicants were entitled to live there as members of her family. In their application to the European Court the applicants complained of discrimination in that they had been required to pay fees (of EUR 800 and EUR 2,600 respectively) to pursue their secondary education in Bulgaria, unlike Bulgarian nationals and aliens with permanent residence permits.

Law – Article 14 of the Convention in conjunction with Article 2 of Protocol No. 1

(a) *Applicability* – Access to educational institutions existing at a given time was an inherent part of the right set out in the first sentence of Article 2 of Protocol No. 1. The applicants had enrolled in and attended secondary schools set up and run by the Bulgarian State, but had later been required, by reason of their nationality and immigration status, to pay school fees in order to pursue their secondary education. The complaint therefore fell within the scope of Article 2 of Protocol No. 1 and Article 14 of the Convention was applicable.

(b) *Merits* – Given that the applicants had been required to pay school fees exclusively because of their nationality and immigration status, they had clearly been treated less favourably than others in a relevantly similar situation on account of a personal characteristic. The Court therefore had to determine whether there had been objective and reasonable justification for that difference in treatment.

A State could have legitimate reasons for curtailing the use of resource-hungry public services (such as welfare programmes, public benefits and health care) by short-term and illegal immigrants, who, as a rule, did not contribute to their funding. Although similar arguments applied to a certain extent in the field of education, they could not be transposed there without qualification. While recognising that education was an activity that was complex to organise and expensive to run and that the State had to strike a balance between the educational needs of those under its jurisdiction and its limited capacity to accommodate them, the Court could not overlook the fact that, unlike some other public services, education was a right that enjoyed direct Convention protection. It was also a very particular type of public service, which not only directly benefited those using it but also

served broader societal functions and was indispensable to the furtherance of human rights.

The State's margin of appreciation in this domain increased with the level of education, in inverse proportion to the importance of that education for those concerned and for society at large. Thus, at the university level, which thus far had remained optional for many people, higher fees for aliens – and indeed fees in general – seemed to be commonplace and could, in the present circumstances, be considered fully justified. The opposite applied to primary schooling, which provided basic literacy and numeracy – as well as integration into and first experiences of society – and was compulsory in most countries. Secondary education, which was at issue in the applicants' case, fell between those two extremes. However, with more and more countries moving towards what had been described as a "knowledge based" society, secondary education played an ever increasing role in successful personal development and in the social and professional integration of the individuals concerned. Indeed, in a modern society, having no more than basic knowledge and skills constituted a barrier to successful personal and professional development and prevented those concerned from adjusting to their environment, with far reaching consequences for their social and economic well being. Those considerations militated in favour of the Court's applying stricter scrutiny to the assessment of the proportionality of the measure affecting the applicants.

The applicants had not been in the position of individuals arriving in the country unlawfully and then laying claim to the use of its public services, including free schooling. Even without permanent residence permits, the authorities had not had any substantive objection to their remaining in Bulgaria or any serious intention of deporting them. Thus, any considerations relating to the need to stem or reverse the flow of illegal immigration clearly did not apply to the applicants' case. However, the Bulgarian authorities had not taken any of these factors into account. Indeed, the legislation did not provide any possibility of requesting an exemption from the payment of school fees. In the specific circumstances of the case, therefore, the requirement for the applicants to pay fees for their secondary education on account of their nationality and immigration status was not justified.

Conclusion: violation (unanimously).

Article 41: EUR 2,000 each in respect of non-pecuniary damage.

ARTICLE 34

Victim

General complaint on religious grounds about constitutional provision prohibiting construction of minarets: *absence of victim status*

Ouardiri v. Switzerland - 65840/09
Ligue des musulmans de Suisse and Others v. Switzerland - 66274/09
Decisions 28.6.2011 [Section II]

Facts – In July 2008 a popular initiative "against the building of minarets", supported by the signatures of 113,540 Swiss citizens and seeking a partial amendment of the Swiss Constitution, was submitted to the Federal Chancellery. In August 2008 the Federal Council (Swiss Government) submitted a draft federal decree concerning the initiative to the Federal Assembly (Parliament). A message attached to the draft mentioned a risk of incompatibility with the provisions of Articles 9 and 14 of the Convention. In June 2009 the Federal Assembly passed a decree confirming the validity of the popular initiative and deciding to submit it to the vote of the people and the cantons, stipulating that it would entail the amendment of the Constitution and recommending that the people and the cantons reject it. A referendum was held in November 2009. The results, which are still provisional, indicate that 53.4% of those who voted supported the initiative and only four cantons rejected it.

In the *Ouardiri* case the applicant is a private individual of the Muslim faith who works for a foundation active in building relations between Islam and the rest of the world. In the case of the *Ligue des musulmans de Suisse and Others* the applicants are three associations and a foundation whose common focal point is the Muslim faith. They all alleged that the ban on building minarets was a violation of religious freedom that affected all Muslims and amounted to discrimination.

Law – Articles 9 and 14: All the applicants alleged mainly that the impugned constitutional provision interfered with their religious beliefs. They did not allege that it had begun to be implemented or that it had had any practical effect on them. They were therefore not direct victims of the alleged violation of the Convention. In the absence of any allegation as to the effects of the impugned constitutional amendment on his family members, the applicant

in the first case could not be considered as an indirect victim either. Nor could the applicants in the second case.

Regarding the applicants' status as potential victims, as no criminal penalty was associated with the ban on building minarets, it was not likely to influence the behaviour of the applicant in the first case, who remained free to practise the Muslim religion and publicly challenge the impugned constitutional provision. In the second case, the applicants did not suggest that the provision had begun to be implemented or that it had had any practical effect, such as the departure of their members or any loss of prestige in their eyes. That being so, none of the applicants had shown that the constitutional provision in question was likely to be applied to them. The mere possibility that that might happen at some unspecified time in the future was not sufficient.

As the applications were solely intended to challenge a constitutional provision applicable in a general manner in Switzerland, the Court considered that the applicants had not shown that there were any highly exceptional circumstances capable of conferring victim status on them. On the contrary, their applications resembled an *actio popularis* aimed at having the compatibility of the constitutional provision with the Convention reviewed *in abstracto*. Furthermore, it was clear from a Federal Court judgment of 21 January 2010, concerning the compatibility of a constitutional provision with the Convention, that the Swiss courts would be able to review the compatibility with the Convention of any future refusal to allow the construction of a minaret.

Conclusion: inadmissible (incompatible *ratione personae*).

ARTICLE 35

Article 35 § 3 (b)

No significant disadvantage

Domestic proceedings aimed at the recovery of goods worth EUR 350 allegedly stolen from the applicant's apartment: *preliminary objection dismissed*

Giuran v. Romania - 24360/04
Judgment 21.6.2010 [Section III]

Facts – In 2002, in a final judgment in ordinary criminal proceedings, the domestic courts found a third party guilty of the theft of a number of items belonging to the applicant and ordered her to pay the applicant compensation for their estimated value (about EUR 350). In 2003, following an extraordinary appeal, the High Court of Cassation and Justice quashed the conviction, acquitted the third party and relieved her of the obligation to pay the applicant compensation and costs.

Law – Article 35 § 3 (b): None of the parties had submitted information concerning the applicant's financial status. The applicant was, however, retired, and according to the Romanian Department of Pensions and Social Insurance the average pension level in Romania in 2003, when the applicant lost his entitlement to the EUR 350 awarded in 2002, was the equivalent of some EUR 50. The domestic proceedings, which were the subject of the complaint before the Court, had been aimed at the recovery of goods stolen from the applicant's own apartment. Therefore, in addition to the pecuniary interest in the actual goods and the sentimental value attached to them, it was necessary also to take into account the fact that the proceedings concerned a question of principle for the applicant, namely his right to respect for his possessions and for his home. Under these circumstances, the applicant could not be deemed not to have suffered a significant disadvantage.

Conclusion: preliminary objection dismissed (unanimously).

On the merits, the Court found that the quashing of the final judgment of 2002 had not amounted to a breach of Article 6 § 1 of the Convention or of Article 1 of Protocol No. 1.

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: *case referred to the Grand Chamber*

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

In his application to the Court the applicant, who opposes hunting on ethical grounds, complained that, as the owner of landholdings in Germany, he is required to be a member of the hunting associ-

ation and so has to tolerate hunting on his land. In declining to consider the applicant's constitutional complaint the Federal Constitutional Court held that the legislation was intended to preserve game in a manner adapted to rural conditions and to ensure a healthy and varied wildlife, and that compulsory membership of the hunting association was an appropriate and necessary means of achieving those aims.

In a judgment of 20 January 2011 (see Information Note no. 137) a Chamber of the Court held by four votes to three that there had been no violation of the applicant's rights under Article 1 of Protocol No. 1, either alone or in conjunction with Article 14 of the Convention. Under the former provision it noted that maintaining varied and healthy game populations and avoiding game damage served the general interest and that the regime of compulsory membership of hunting associations applied across the country and was not confined to certain areas. The applicant had a statutory right to a share of the profit of the lease corresponding to the size of his property and a right to compensation for any damage which might be caused. Accordingly, given the wide margin of appreciation the States enjoyed in this sphere, a fair balance had been struck between the conflicting interests. As to the Article 14 complaint, the difference in treatment between owners of smaller plots (such as the applicant) and the owners of larger plots (who were free to choose how to fulfil their obligation under the hunting legislation) was justified by the need to allow 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 justified by the specific circumstances of the individual plots concerned. The Court also declared the applicant's complaint under Article 11 (alone and in conjunction with Article 14) inadmissible *ratione materiae* and found, by six votes to one, that here had been no violation of Article 9.

On 20 June 2011 the case was referred to the Grand Chamber at the applicant's request.

ARTICLE 3 OF PROTOCOL No. 1

Vote

Ban on prisoner voting imposed automatically as a result of sentence: *case referred to the Grand Chamber*

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

Under Italian law a life sentence imposed on the applicant entailed a lifetime ban from public office, which in turn had the effect of permanently depriving him of the right to vote. The applicant's appeals against this last measure were unsuccessful. The Court of Cassation found against him in 2006, pointing out that only prison sentences of at least five years or life sentences entailed permanent loss of the right to vote (persons sentenced to less than five years forfeited their voting rights for five years only).

In a judgment of 18 January 2011 (see Information Note no. 137) a Chamber of the Court unanimously found that there had been a violation of Article 3 of Protocol No. 1 because the impugned measure had derived automatically from the main penalty imposed on the applicant (life imprisonment) and had not been mentioned in the court decisions convicting him. Furthermore, the measure had been applied indiscriminately, irrespective of the offence committed and beyond any consideration by the trial court of the nature and seriousness of that offence.

On 20 June 2011 the case was referred to the Grand Chamber at the Government's request.

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

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

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

(See Article 10 above, page 26)

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

(See Article 1 of Protocol No. 1 above, page 30)

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

(See Article 3 of Protocol No. 1 above)

RECENT COURT PUBLICATIONS

1. Practical Guide on Admissibility Criteria

Bulgarian and Greek translations of the Practical Guide on Admissibility Criteria can now be found on the Court's Internet set (www.echr.coe.int / Case-Law / Case-law analysis / Admissibility guide). These translations have been made available with the help of the Bulgarian Supreme Bar Council and the Greek Ministry of Foreign Affairs.

The Research Division of the Registry of the Court, which produced this guide, is currently working on an updated edition which should be available in English and in French in September.

2. Handbook on European Non-Discrimination Law

The Italian version of the handbook, edited and published jointly with the European Union Fundamental Rights Agency (FRA), has now been printed and is available, along with the English, French and German versions, on the Court's internet site (www.echr.coe.int / Case-Law / Case-law analysis / Handbook on non-discrimination).

Versions in Bulgarian, Czech, Greek, Hungarian, Polish, Romanian and Spanish will follow shortly along with a Turkish version produced in partnership with the Council of Europe's Directorate General of Human Rights and Legal Affairs.