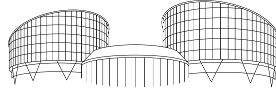

Information Note on the Court's case-law

No. 117

March 2009

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ARTICLE 2

LIFE
Obligation of the State to provide plausible explanation for death of corporal on military premises: *violation*.

<u>BEKER - Turkey</u> (N° 27866/03)
Judgment 24.3.2009 [Section II]

Facts: The applicants are close family members – mother, sister and brothers – of Mr Beker, an army corporal. On the morning of 8 March 2001 Mr Beker was found shot in the head in the dormitory of the military barracks where he was stationed. He was still alive when found, but died before reaching the hospital. The same day a military investigator carried out an inspection of the dormitory. A pistol, belonging to another officer, was found some distance away from where Mr Beker had fallen, but the exact distance was unspecified. It was established that the pistol had been cocked and had fired two rounds, but had failed to fire a third shot. A subsequent medical report established that the shooting had occurred at point-blank range and that the bullet entry hole had been about two centimetres above Mr Beker's left eyebrow. A forensic examination found gunpowder residue on the outside of his right hand. From the statements given by several officers present in the locker area where the impugned event took place, the investigator concluded that Mr Beker had taken the pistol from another officer's locker and shot himself. Only one of the officers present originally stated that he had seen Mr Beker shoot himself, but he later said that he had not actually seen the shooting because he had covered his face with his hands. The officers further confirmed that Mr Beker had been unhappy because his mother had allegedly disapproved of him marrying his girlfriend. Two days after the incident, the military investigator concluded his investigation by finding that Mr Beker had "committed suicide as a result of a sudden bout of depression". Several days later, one of the applicants asked the military prosecutor's office for copies of the documents from the investigation because the family had had "suspicions surrounding his death". Following several requests by the applicants and almost a year later, they received a copy of the post-mortem report. In November 2002 the military prosecutor closed the investigation, concluding that Mr Beker had shot himself in the right temple and at a close range. The applicants unsuccessfully objected to this decision, pointing out that the bullet entry hole had been on the left side of the deceased's head and that some of the witness statements had been contradictory. In March 2003 the applicants requested that the investigation be re-opened, but they never received a reply.

Law: At the outset the Court recalled that States bore the burden of providing plausible explanations for injuries and deaths occurring not only in custody, but also in areas within the exclusive control of the authorities. In the applicants' case, the impugned event had taken place in army barracks, the investigation had been conducted by military authorities and all the witnesses were members of the armed forces. The State had therefore been under the obligation to provide a plausible explanation for Mr Beker's death and the Court was thus called upon to examine the investigation that had been carried out and its conclusions. The Court noted serious misgivings about the investigation. First of all, the investigating authorities never appeared to have explained the fact that the gun had been fired twice and that a third attempt had been made to fire it. Even assuming that Mr Beker had missed with the first shot, he must have been successful with the second one and shot himself in the head. However, it was improbable that after that he could have pulled the trigger for the third time, when the pistol jammed. Another inexplicable aspect of the investigation was the military prosecutor's conclusion that Mr Beker had shot himself in the right side of the head, whereas it was evident from the post-mortem report – and the Government agreed – that he in fact had been shot in the left side of the head. According to the Government, this had merely been an error of fact on the part of the prosecutor. However, the Court was not convinced that this was the case, in particular because the court which had examined the applicants' objection against the decision to terminate the investigation had also not dealt with that "factual error". Moreover, neither the pistol which was found close to Mr Beker's body, nor the locker from which he had allegedly taken it had ever been forensically examined for fingerprints. The Court further found it unconvincing that four trained military

officers present in the same room where two shots were fired from a pistol did not see the incident or that they had covered their faces in shock. Finally, the Court attached importance to the fact that the authorities had not divulged any information, apart from the post-mortem report, to Mr Beker's family, and had not allowed them access to the investigation or replied to their request for the re-opening of the investigation. The authorities had thus not only deprived the applicants of the opportunity to safeguard their legitimate interests, but had also prevented any scrutiny of the investigation by the public. Concluding that the investigation carried out by the domestic authorities had clearly been inadequate as it defied logic and left many obvious questions unanswered, the Court considered that the Government had failed to account for Mr Beker's death and that consequently the State had to bear the responsibility for it.
Conclusion: violation (unanimously).

Article 41 – EUR 16,500 to the first applicant in respect of pecuniary damage and EUR 20,000 in respect of non-pecuniary damage; EUR 5,000 to the other applicants in respect of non-pecuniary damage.

LIFE
Death by asphyxia of a person immobilised with belts and left alone without medical supervision in a sobering-up centre; lack of effective investigation: *violation*.

MOJSIEJEW - Poland (N° 11818/02)
Judgment 24.3.2009 [Section IV]

Facts: In 1999 the applicant's son was taken to a sobering-up centre, where he was immobilised with belts and left alone. He was found dead by staff a few hours later. The prosecution launched an inquiry. An autopsy was carried out. Several medical opinions were prepared. Although they agreed that he had died from asphyxiation, they differed in respect of what had been its cause: some medical reports found that he had been inadequately immobilised with belts on the chest and had suffocated; others that he had died as a result of pressure being applied to his neck, most probably when a staff member had put him in a headlock. In the domestic court proceedings, several employees of the sobering-up centre were found guilty of having exposed the applicant's son to an immediate danger of loss of life and were sentenced to two years in prison, suspended for a probationary period of three years. The court established, *inter alia*, that the applicant's son had not been examined every 15 minutes as required under domestic law for patients immobilised by belts. Following an appeal both by the applicant and the convicted employees, the judgment was annulled and the case remitted for fresh examination. The case was still pending in May 2008.

Law: (a) *Procedural aspect*: Although the investigation had been concluded in little over a year, the trial had started more than two years after the charges were brought against the accused and had been affected by a number of lengthy delays. The first time the applicant was heard by the court was almost five years after her son's death. Moreover, his body had not been examined at the place where it had been found, which had made it impossible to establish the time of death and thus determine the personal responsibility of each of the accused. The Polish authorities had therefore failed to carry out a prompt and effective investigation into the death of the applicant's son.
Conclusion: violation (unanimously).

(b) *Substantive aspect*: The applicant's son had been taken to the sobering-up centre in good health and without pre-existing injuries or obvious illness. In the particularly grave circumstances of the case, in which the applicant's son had died under the exclusive control of the Polish authorities, the obligation on the Government to provide plausible explanations was particularly stringent. Moreover, the Government's explanations should have been provided within a reasonable time. Postponing them further until the resolution of the criminal case, even though over nine years had elapsed since the events in question, showed that the State was unable to provide them and to satisfy the burden of proof. The Government had also failed to provide a convincing explanation as to whether the centre's employees had carried out periodic checks on the applicant's son and had complied with domestic regulations aimed at protecting the lives of persons admitted to sobering-up centres, particularly those immobilised by belts. The Court's

examination of whether the circumstances of a case engaged the State's responsibility could be precluded by an ongoing investigation before the domestic authorities. However, in the light of its finding that the authorities had failed to carry out a prompt and effective investigation, the applicant was dispensed from awaiting the conclusion of the proceedings and her application could not therefore be considered premature. The Court emphasised that its decision was limited to the circumstances of the instant case. Having regard to the overall length of the period which had elapsed since the tragic event and to the Government's failure to provide a satisfactory and convincing explanation, the Court found that the applicant's son had been deprived of his life in circumstances engaging the responsibility of the respondent State.
Conclusion: violation (unanimously).

Article 41 – EUR 20,000 in respect of non-pecuniary damage.

LIFE
Death of a prisoner following lengthy hunger strike: *no violation*.

HOROZ - Turkey (N° 1639/03)
Judgment 31.3.2009 [Section II]

Facts: In 1999 the applicant's son was arrested and placed in pre-trial detention for attacking the constitutional order of the State and for various terrorist acts. In 2001, while in prison, he joined a hunger strike which subsequently became a "death fast", in which only sugared water and vitamins were accepted. He was hospitalised on several occasions, in particular after losing consciousness. In a report in 2001 the Institute of Forensic Medicine diagnosed a "terminal failure as a result of insufficient nutrition" and recommended that the applicant's son be released for six months as his state of health was incompatible with imprisonment. His lawyer filed an application for his release, which was dismissed by the National Security Court on the grounds that Article 399 of the Code of Criminal Procedure, which provided for conditional release on health grounds, applied to "convicted persons" and not to individuals in "pre-trial detention", and that treatment could be provided in the prison wing of a civilian hospital. A few days later the subject died in the prison wing of the civilian hospital. His lawyer requested disciplinary action and criminal proceedings to be brought against the prosecutor and judges involved in the case. The Ministry of Justice had an investigation opened, but the prosecuting authorities found that there was no case to answer.

Law: The death in this case was clearly the result of the hunger strike. It was true that the Institute of Forensic Medicine had recommended that the applicant's son be released for six months, which the judicial authorities had refused to do, and the subject had died a few days later. While it would have been desirable for the subject to be released following that report, there was no evidence permitting the Court to criticise the judicial authorities' assessment of the information contained in it. Nor was there any sign of arbitrariness or any element enabling it to challenge the conclusion that there was no case to answer in the investigation into the conduct of the prosecutor and judges involved. As to whether it had been advisable to maintain the applicant's son in detention, the Court could not substitute its own assessment for that of the domestic courts, particularly when, as here, the authorities had amply satisfied their obligation to protect the subject's physical integrity, specifically through the administration of appropriate medical treatment. Lastly, there was no evidence that he had been deprived in the prison environment of certain treatment he could have received had he been released. It was impossible to establish a causal link between the refusal to release him and his death. Accordingly, having examined all the relevant facts and bearing in mind the Government's assurances as to the administration of the necessary medical care in prisons, and the findings of the delegation from the Court that visited prison establishments as part of a mission conducted in connection with a first group of cases, the Court found that there were no substantial grounds for believing that the applicant's son's detention conditions had in themselves amounted to inhuman or degrading treatment within the meaning of Article 3 of the Convention. For the same reasons,

and for those mentioned above, it was unable to say that the refusal to release the applicant's son had amounted to a violation of Article 2 of the Convention.
Conclusion: no violation (five votes to two).

ARTICLE 3

POSITIVE OBLIGATIONS
Structural inadequacy of medical care in prisons: *violation*.

GHAVTADZE - Georgia (N° 23204/07)
Judgment 3.3.2009 [Section II]

Facts: The applicant was arrested and remanded in custody in October 2006, and subsequently sentenced to imprisonment. He alleged that he had been in good health prior to his arrest, even if he had been taking drugs intravenously. He had subsequently been hospitalised three times (from 22 January to 10 February 2007, from 20 February to 31 March 2007 and again from 23 April 2007), when he had successively presented symptoms of acute viral hepatitis C, scabies and tuberculous pleurisy. According to a medical opinion given by a specialist in infectious liver diseases in May 2007, the hepatitis C virus affecting the applicant was developing fast and the progress of the disease in difficult conditions had caused immunodeficiency. The scabies and tuberculosis had allegedly been contracted in prison. The specialist prescribed long-term treatment in a polyclinic where treatment for hepatitis compatible with the treatment for tuberculosis could be administered in such a way as to ensure that the tuberculosis treatment had no irreversible or life-threatening effects on the patient's liver. A medical opinion given in December 2007 by the president of the association of specialists in infectious and liver diseases concluded that the viral hepatitis C had moved into chronic phase because of the premature interruptions of the patient's hospitalisation and the administration of the treatment for tuberculosis.

Law: The lack of appropriate medical treatment and, more generally, the detention of a sick person in inadequate conditions could, in principle, constitute treatment contrary to Article 3. In this case the Georgian authorities had failed in their positive obligation to protect the applicant's health but also to administer sufficient appropriate medical treatment for his viral hepatitis C and tuberculous pleurisy.
Concerning the hepatitis, while it was not established that the applicant had contracted the disease in detention, the treatment administered by the authorities had clearly been inadequate: firstly, in spite of the appearance of the first signs of the disease upon the applicant's arrival in prison, they had waited three months, until his health deteriorated badly, before deciding to administer treatment; then, once the final diagnosis had been made, they had not examined the need for other analyses in order to prescribe an appropriate antiviral treatment; and thirdly, in spite of the specialist's recommendation of May 2007, they had never considered the possibility of coordinating a combined treatment for both illnesses at once, to make sure that the treatment for one illness did not make the other illness worse. As to the scabies, although adequate medical treatment had been administered, it showed the insalubrious conditions in which the applicant must have been detained to contract this contagious disease. The tuberculous pleurisy could easily have been contracted in prison, in particular because of the lack of hygiene and the fact that detainees suffering from the disease were not separated from those in good health. Although the treatment administered after the illness was diagnosed seemed to have been adequate, there was no evidence in the case file that the applicant had received additional treatment to prevent a relapse.
Furthermore, in the Court's opinion there had been no justification for removing the applicant from the prison hospital twice after a short stay there. The interruption of the hospital treatment did not seem to have been authorised by the doctors and the return to prison in insalubrious conditions of a man whose state of health had already been classified as serious had made him even more vulnerable. If, as the Government alleged, an immune system deficiency was at the origin of the applicant's various ailments, that should have been another reason for the prison authorities to act in concert with the doctors.

Lastly, it was not compatible with Article 3 of the Convention for a detainee to be hospitalised only when his symptoms had reached their peak, then sent back to prison, where he would receive no treatment, before he had been cured.
Conclusion: violation (unanimously).

Article 46 – As it had already done in similar cases (see, in particular, *Poghosyan v. Georgia*, 24 February 2009, Case-Law Information Note no. 116), the Court pointed out that the number of cases pending against Georgia concerning the lack of medical treatment for detainees suffering from contagious diseases revealed a systemic problem. The necessary legislative and administrative measures should be taken without delay to prevent the spread of contagious diseases in Georgian prisons, introduce a screening system for prisoners upon admission and guarantee the prompt and effective treatment of these diseases. As to the applicant's case, the respondent State should have him promptly placed in an establishment capable of administering adequate medical treatment, concurrently, for his viral hepatitis C and his pulmonary tuberculosis.

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

DEGRADING TREATMENT
Female applicant stripped naked in a sobering-up centre by male staff members and immobilised with belts for ten hours; lack of effective investigation: *violation*.

WIKTORKO - Poland (N° 14612/02)
Judgment 31.3.2009 [Section IV]

Facts: In 1999 the applicant, on her way home by taxi after having a drink with a friend, refused to pay the bill unless she was given a proper receipt as she considered the fare excessive; instead of taking her home, the taxi driver drove her to a sobering-up centre. She alleged that, on arrival at the centre, she was insulted, stripped naked by a woman and two men, beaten and put in restraining belts for the night. She was released the following morning. The next day she was examined by a doctor, who noted that she had a bruise on her hip, a scratched wrist, a painful shoulder and a swollen jaw. Shortly afterwards she filed a complaint against the staff of the centre. The ensuing investigation found that the staff had been obliged to use force against the applicant and to place her in restraining belts, given her aggressive behaviour and refusal to comply with the regulations in force by undressing and changing into a gown. The proceedings were discontinued on the ground that no criminal offence had been committed.

Law: (a) *Substantive aspect*: The essential aspect of the instant case was not the exact degree of physical coercion used against the applicant, but the fact that during her detention she had been forcibly undressed by a woman and two men and subsequently placed in restraining belts. The Court took the view, as it had done in the cases concerning strip searches, that to be stripped naked in the presence of an officer of the opposite sex showed a lack of respect and diminished the human dignity of the person concerned. The applicant had therefore been left with feelings of anguish and inferiority capable of humiliating and debasing her. The Court could accept that the aggressive behaviour of an intoxicated individual might require recourse to the use of restraining belts, provided that checks were periodically carried out on the welfare of the individual so immobilised. However, no explanation had been given for putting the applicant in restraining belts for such an excessive period of time as ten hours. Such prolonged immobilisation must have caused her great distress and physical discomfort. The authorities' conduct had therefore amounted to degrading treatment.
Conclusion: violation (unanimously).

(b) *Procedural aspect*: The investigation of the applicant's complaint had focused on justifying her deprivation of liberty and the use of force against her. It had not addressed the question of her right to respect for human dignity. The authorities had failed to assess the proportionality of the force used; nor

had they justified the forced removal of the applicant's clothing by two male employees or the use of restraining belts to immobilise her until the next day. In conclusion, the manner in which the case had been examined was incompatible with the procedural obligations of the State under Article 3 of the Convention.
Conclusion: violation (five votes to two).

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

ARTICLE 5

Article 5 § 1

DEPRIVATION OF LIBERTY
Refusal, on basis of UN Security Council resolutions, of leave to enter and to travel through Switzerland: *communicated*.

NADA - Switzerland (N° 10593/08)
[Section I]

In October 1999 the UN Security Council adopted a Resolution providing for a regime of sanctions against the Taliban and setting up a sanctions committee. In December 2000 the regime was extended to Osama bin Laden and the Al-Qaeda group. In October 2000 the Swiss Federal Council adopted an order introducing measures, *inter alia*, to freeze the assets and economic resources of the persons or entities concerned. The applicant's name was on the list. He made several vain attempts to have his name and those of the organisations he worked with removed from the list.
The persons concerned were also prohibited from entering or passing through Switzerland. In March 2004 the Federal Migration Office rejected an application from the applicant.
In a judgment of November 2007 the Federal Court declared the applicant's appeal admissible but dismissed it on the merits. Obligations under the UN Charter took precedence over obligations under any other international agreement. The ban on travel could be seen as a restriction of people's freedom of movement, but not as a deprivation of liberty as the people concerned could move around freely in their country of residence. The Federal Court accepted, however, that the procedure for having one's name removed from the list could not secure the right of access to a court for the purposes of Article 6 § 1, or the right to an effective remedy within the meaning of Article 13 of the Convention. Lastly, the Federal Court examined whether the restriction on travel went beyond the sanctions provided for in the Security Council resolutions and, if so, whether the Swiss authorities enjoyed a margin of appreciation in the matter. According to the resolutions, restrictions on travel did not apply if entry into or transit through a state were necessary for judicial proceedings, and exceptions could be made for medical, humanitarian or religious reasons. The Federal Court considered that, in spite of its non-constrictive wording, the order concerning the Taliban obliged the authorities to make exceptions whenever the regime of sanctions permitted. The applicant lived in a 1.6 km^2 Italian enclave in a Swiss canton. Because he was prohibited from entering or passing through Switzerland, he was unable to leave his town. In practice this was not unlike house arrest, and constituted a serious restriction of his physical freedom. In such circumstances the Swiss authorities were required to implement all the mitigating measures authorised by the Security Council resolutions. The Federal Migration Office had to determine whether the conditions for an exemption had been met. If the request did not match one of the general exceptions provided for by the Security Council, it had to be submitted to the sanctions committee for approval. According to the applicant the Federal Migration Office rejected several applications he submitted in 2008.
Communicated under Article 5 § 1 to determine whether the applicant had been deprived of his liberty as a result of the prohibition on his entering or passing through Switzerland and, if so, whether, as required by Article 5 § 4, there was an effective procedure by which he could have challenged the restriction of his

freedom of movement; whether, for the same reason, there had been interference with the applicant's right to respect for his private and family life within the meaning of Article 8 § 1, and whether the applicant had had access, as required under Article 13, to an effective domestic remedy to complain about the alleged violations of Articles 5 and 8.

Article 5 § 3

LENGTH OF PRE-TRIAL DETENTION
Failure of domestic law to specify conditions in which time-limit on pre-trial detention could be excluded: *violation*.

KREJČÍŘ - Czech Republic (N° 39298/04 and 8723/05)
Judgment 26.3.2009 [Section V]

Facts: In 2003 the applicant, a national of the Czech Republic, was arrested and questioned in the framework of proceedings against him for the fraudulent use of funds borrowed from a bank under credit contracts. In September 2003 a district court ordered his detention pending trial. He appealed to the municipal court, which dismissed his appeal in October 2003, without a hearing being held. The Constitutional Court also rejected his appeal. The district court dismissed an initial request for the applicant's release. In December 2003 the public prosecutor at the Supreme Court decided that the applicant should remain in detention in view of the seriousness of the offences he stood accused of, the parallel criminal proceedings against him, the possibility of him obtaining forged papers and absconding and the pressure already brought to bear on witnesses. The prosecutor concluded that the time-limit on pre-trial detention provided for in Article 67 b) of the Code of Criminal Procedure ("CCP") did not apply to the present case. The second sentence of Article 71 § 2 of the CCP, permitting exceptions to the time-limit on pre-trial detention where there was a risk of pressure being brought to bear on witnesses, was applied. An appeal lodged by the applicant against that decision was dismissed by the Supreme Court in January 2004, without a hearing being held. The applicant also challenged a decision dismissing his second application for release. Constitutional appeals he lodged against the decisions of December 2003 and January 2004 were dismissed. The applicant was subsequently released on a decision of the public prosecutor, adopted by virtue of provisions of the CCP placing time-limits on detention. During a house search in 2005 the applicant absconded and went first to the Seychelles then to South Africa, where he was arrested. Proceedings were under way to extradite him to the Czech Republic.

Law: Article 5 § 3 – (a) *Lawfulness of the applicant's continued detention*: The applicant alleged that the decisions to keep him in detention had merely reiterated the facts mentioned in the decision ordering his detention pending trial. He also complained that the prosecutor had considered, in the reasons for his decision of December 2003, that there were grounds for applying the second sentence of Article 71 § 2 of the CCP, permitting exceptions to the time-limit on pre-trial detention where there was a risk of pressure being brought to bear on witnesses, to his case, whereas in his opinion it was for a court to order such a measure and include it in the operative part of the corresponding decision. In this case it was the first extension of the applicant's detention, after the initial three-month period, that was at issue. It should be noted in this connection that the court decision of October 2003 made no reference to the application of the second sentence of Article 71 § 2 of the CCP. Indeed, it appeared to be incompatible with the guarantees of Article 5 of the Convention that a court ordering pre-trial detention should anticipate a decision whether or not to extend the measure that was to be taken three months later. Furthermore, it is not disputed that the decision to extend the applicant's detention was taken by the prosecutor, who did not present the requisite guarantees of independence. In this case the Constitutional Court had acknowledged that the CCP did not specify in what manner the non-application of the three-month time-limit provided for in the second sentence of Article 71 § 2 should be declared. Such a shortcoming in domestic law was incompatible with the need for legal certainty and foreseeability. In this context it was not without importance that the impugned provision of Article 71 § 2 of the CCP had been amended on 1 July 2004 to require a judge or a court to take such decisions in the future. Lastly, the national authorities had reached

the decision that the applicant should remain in detention also for a legal reason other than that given in Article 71 § 2. However, as the continuing application of Article 67 b) of the CCP had affected the applicant's conditions of detention and the possibility of him being released subject to guarantees, and in view of the paramount importance of protecting individuals against arbitrariness, the above-mentioned shortcoming in domestic law and the situation that had resulted in this case had violated the applicant's right under Article 5 § 3. That being so, it was not necessary to examine whether the reasons given by the courts had been "relevant and sufficient" or whether the competent national authorities had displayed "special diligence" in the conduct of the proceedings.
Conclusion: violation (unanimously).

(b) *Compatibility of certain provisions of domestic law with Article 5 § 3 of the Convention*: The applicant also complained that he had not been able to aspire to conditional release because of the application of Articles 73 and 73a of the CCP. Article 5 § 3 of the Convention obliged the domestic courts to review a person's pre-trial detention in order to guarantee that they would be released when circumstances no longer justified their further detention. In the present case Articles 73 and 73a § 1 of the CCP combined with Article 67 b) had formed a legal barrier to the courts' consideration of the guarantees offered by the applicant in his first two applications for release. That barrier had remained in place until the courts had decided no longer to hold against the applicant the risk, provided for in Article 67 b) du CCP, of pressure being brought to bear on witnesses. It followed, on the one hand, that the lack of judicial review only concerned the guarantees meant to replace the applicant's pre-trial detention and, on the other, that it had been limited in time. In the light of the decisions taken by various courts throughout the impugned detention, however, it could not be said that there had been no judicial review whatsoever of the continuing existence of reasonable suspicion that the applicant had committed the offence in question, or of other grounds justifying the deprivation of his liberty. The requirements of Article 5 § 3 had therefore been respected.
Conclusion: no violation (unanimously).

Article 5 § 4 – *Adversarial nature of the proceedings*: The applicant alleged that in its decision of October 2003 the Municipal Court had substituted its own reasoning for the superficial, illogical reasons put forward by the first-instance court but without giving him a chance to comment. He also complained that the Supreme Court, in January 2004, had based its decision on a translation of a witness statement to which the defence had not had access, and had not given him an opportunity to be heard. It was not in dispute that the applicant's appeal against the decision reached by the District Court in September 2003, following his hearing, had been examined without a hearing and without the parties being present. While in certain circumstances, particularly when the interested party had been able to appear before the court ruling on his detention in the first instance, the procedural requirements under Article 5 § 4 did not require him to appear again before the appeal courts, the particular circumstances in which the proceedings took place nevertheless had to be borne in mind to determine whether the proceedings afforded the safeguards provided for in Article 5 § 4. In this case the situation certainly appeared to be a particular one in so far as it was not disputed that the Municipal Court had knowingly considerably expanded on and concretised the grounds for the applicant's detention which the District Court had formulated in fairly vague terms. Furthermore, the Municipal Court had requested additional documents from the prosecutor. While it was true that all these documents had been in the case file, where counsel for the defence could have consulted them, there was no way the applicant could have known in advance what specific facts the Municipal Court would rely on to place him in detention. Furthermore, the decision concerned had had at least one major effect on his detention, in so far as it had subsequently been argued that the facts mentioned in that decision justified the application of the second sentence of Article 71 § 2 of the CCP and therefore the non-application of the three-month time-limit on pre-trial detention, because of the risk of pressure being brought to bear on witnesses. Also, it was quite clear that the applicant had been unable to obtain a hearing by applying for release as such hearings were far from automatic at that time. As to the circumstances in which the decision of January 2004 was adopted, it was not disputed that the defence had not known about the impugned document until almost a month after the impugned Supreme Court decision. Lastly, in December 2003 the decision to keep the applicant in detention by virtue of Article 71 § 3 du CCP had been taken by a prosecutor, not by a court as provided for under Article 5 § 4, so the Supreme Court should have provided all the proper guarantees necessary for the type of deprivation of

liberty in question; instead, it had determined the appeal without a hearing, that is, without giving the applicant a chance orally to express his views on matters essential to the review of the lawfulness of his detention, even though the previous hearing had been held not just a few weeks but several months earlier. In the particular circumstances of the case, where the decisions of September and December 2003 were concerned, there had been no judicial remedy available to the applicant which satisfied the requirements of Article 5 § 4 of the Convention.
Conclusion: violation (unanimously).

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

Article 5 § 4

PROCEDURAL GUARANTEES OF REVIEW
Failure by Supreme Court to hold hearing when examining a deprivation of liberty that did not satisfy the Convention requirement for it to be ordered by a court: *violation*.

KREJČÍŘ - Czech Republic (N° 39298/04 and 8723/05)
Judgment 26.3.2009 [Section V]

(See Article 5 § 3 above).

ARTICLE 6

Article 6 § 1 [civil]

APPLICABILITY
CIVIL RIGHTS AND OBLIGATIONS
DISPUTE
Request to public prosecutor at Court of Cassation to lodge appeal on points of law attesting to genuine “dispute” over civil right: *Article 6 applicable*.

GOROU no. 2 - Greece (N° 12686/03)
Judgment 20.3.2009 [GC] following referral

Facts: The applicant, a civil servant in the Ministry of National Education, filed a criminal complaint for perjury and defamation against her superior, S.M., with an application to join the proceedings as a civil party, but without claiming compensation. Before the criminal court, the applicant reiterated her civil-party application, claiming 1,000 drachmas (about 3 euros). On the same day, the criminal court acquitted S.M. of the charges against him. The applicant requested the public prosecutor at the Court of Cassation to lodge an appeal on points of law against the criminal court’s judgment, under Article 506 § 2 of the Code of Criminal Procedure. The public prosecutor at the Court of Cassation returned the applicant’s letter with the following handwritten comment marked on the request: “There are no legal or well-founded grounds of appeal to the Court of Cassation”.

Law: (a) Complaint concerning the lack of reasoning for the decision by which the public prosecutor at the Court of Cassation refused the request to appeal on points of law:

(i) Preliminary objections: As to the civil nature of the proceedings, the applicant had joined the criminal proceedings for perjury and defamation as a civil party, claiming about three euros. Article 6 § 1 was therefore applicable, first of all because the proceedings complained of affected the applicant’s right to

enjoy a "good reputation". Moreover, the proceedings had an economic aspect, on account of the sum – however symbolic – of about three euros which the applicant claimed in joining them as a civil party.
Conclusion: preliminary objection dismissed (unanimously).

As to the characterisation of the request to the public prosecutor, this was a special case as the applicant argued that the right to appeal on points of law through the public prosecutor at the Court of Cassation derived not from the law but from an established judicial practice: that of recognising the possibility for a civil party to request the public prosecutor at the Court of Cassation, who was accustomed to replying, albeit in a summary manner, to such requests, to appeal on points of law. It was therefore more appropriate to examine the real impact of the applicant's request and to ascertain whether the initiative in question was an integral part of the civil-party application procedure and whether it was thus directly related to the initial "dispute". The Court considered that it would be more faithful to the reality of the domestic legal order to take into consideration the practice in question and to accept that the applicant's request to the public prosecutor was a logical part of her challenge to the judgment in which her claim for compensation as a civil party had been rejected. In addition, the Court observed that if the public prosecutor at the Court of Cassation had lodged an appeal on points of law, the applicant's request would have been inextricably linked to the subsequent proceedings. It would therefore be artificial, in these circumstances, to deny that the applicant's request to the public prosecutor arose from a real "dispute", since the request formed an integral part of the whole of the proceedings that the applicant had joined as a civil party with a view to obtaining compensation. Consequently, the applicant's request to the public prosecutor at the Court of Cassation had related to a "dispute over a civil right" for the purposes of Article 6 § 1.
Conclusion: preliminary objection dismissed (eleven votes to six).

(ii) Merits: The Court noted that, when an acquittal had been decided, under domestic law the civil party was not, in principle, entitled to appeal directly on points of law or to seek redress from the public prosecutor at the Court of Cassation. The Court had nevertheless acknowledged that the existence of an established judicial practice could not be disregarded in this case. The public prosecutor was accustomed to replying, albeit in a summary manner, to such requests from the civil party to appeal on points of law. Moreover, it was noted that, under Article 506 of the Code of Criminal Procedure, a "positive" decision by a public prosecutor was not addressed to the civil party but gave rise to the prosecutor's own appeal on points of law. Similarly, a "negative" decision meant that the public prosecutor declined to lodge an appeal on points of law himself. Lastly, contrary to the applicant's assertions, no particular obligation to give reasons arose from the relevant domestic law. To sum up, the handwritten note placed on the applicant's request simply gave information about the discretionary decision taken by the public prosecutor. Seen from that perspective, and having regard to the existing judicial practice, the public prosecutor did not have a duty to justify his response but only to give a response to the civil party. To demand more detailed reasoning would place on the public prosecutor at the Court of Cassation an additional burden that was not imposed by the nature of the civil party's request for him to appeal on points of law against an acquittal. So, by indicating that "[t]here [were] no legal or well-founded grounds of appeal to the Court of Cassation", the public prosecutor had given sufficient reasons for his decision to reject the request.
Conclusion: no violation (thirteen votes to four).

(b) Complaint concerning the length of the proceedings: Like the Chamber, and for the same reasons, the Grand Chamber considered that there had been a violation of Article 6 § 1 of the Convention in respect of the length of the proceedings as a whole.
Conclusion: violation (unanimously).

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

ACCESS TO COURT

Sanctions imposed on applicants on basis of UN Security Council resolutions: *communicated*.

AL-DULIMI and MONTANA MANAGEMENT INC. - Switzerland (N° 5809/08)
[Section I]

The first applicant is an Iraqi national who lives in Jordan and manages a company incorporated under Panamanian law and based in Panama (the second applicant). After the invasion of Kuwait by Iraq in August 1990, the UN Security Council adopted several resolutions inviting member and non-member States to freeze all funds and other financial assets and economic resources that came from Iraq. In November 2003 a sanctions committee was tasked with drawing up a list of the leading members of the former Iraqi regime and their next of kin, and locating the assets belonging to them or to other persons acting on their behalf or under their control. The sanctions committee placed the first and second applicants on its list. Then the Security Council adopted a resolution establishing a procedure for removal from the list. In August 1990 the Swiss Federal Council adopted an order introducing measures to freeze the assets and economic resources of the former Iraqi government and senior government officials and any companies or businesses controlled or managed by them. The Federal Department of Economics was responsible for drawing up a list of the assets concerned using data supplied by the United Nations. The applicants had been on the list since May 2004. The Federal Council further adopted an order, valid until 30 June 2010, confiscating the Iraqi assets and economic resources that had been frozen and transferring them to the Development Fund for Iraq. According to the applicants, their assets in Switzerland had been frozen since August 1990 and proceedings to confiscate them had been under way since the entry into force of the confiscation order in May 2004. The applicants applied by letter in August 2004 to have their names taken off the list and the confiscation proceedings against their assets stayed. When that letter failed to produce the desired effect, the applicants requested by letter in September 2005 that the confiscation proceedings be conducted in Switzerland. In spite of the applicants' objections, the Federal Department of Economics ordered the confiscation of their assets and explained that the sums would be transferred to the bank account of the Development Fund for Iraq within 90 days of the decision becoming effective. In support of its decision, it noted that the applicants' names were on the lists of people and entities drawn up by the sanctions committee, that Switzerland was bound to implement Security Council resolutions, and that names could be removed from the appendix to the order concerning Iraq only by decision of the sanctions committee. The applicants applied to the Federal Court to have the decision set aside. By three almost identical judgments their appeals were dismissed on the merits. The applicants submitted that they had applied to have their names taken off the list. The sanctions committee does not appear to have taken a decision on the matter.
Communicated under Article 6 § 1 to ascertain whether the applicants had had access to a court to present their complaint concerning their civil rights and obligations.

FAIR HEARING

Summary rejection of request to appeal to the Court of Cassation: *no violation.*

GOROU no. 2 - Greece (N° 12686/03)
Judgment 20.3.2009 [GC] following referral

(See above).

REASONABLE TIME
Late payment of (inadequate) reparation awarded in length-of-proceedings case under the "Pinto" law: *violation*.

SIMALDONE - Italy (N° 22644/03)
Judgment 31.3.2009 [Section II]

Facts: In 1992 the applicant brought proceedings before the Regional Administrative Court against his employer, the local public health service, seeking reimbursement of the cost of his daily meals. In April 2002 he applied to the Court of Appeal under the Pinto Act, complaining of a violation of Article 6 § 1 of the Convention and seeking compensation for non-pecuniary damage. In a decision of January 2003 the Court of Appeal found that a reasonable time had been exceeded and awarded the applicant EUR 700 on an equitable basis in compensation for non-pecuniary damage, and EUR 1,000 to his lawyer for costs and expenses, including those before the Court. The amount awarded in execution of the "Pinto decision" was paid on 6 April 2004.

Law: Article 6 § 1 – *Main proceedings*: The main proceedings had lasted more than ten years and three months for one level of jurisdiction. The amount awarded in compensation for this excessive length of proceedings had been insufficient, especially as the length of the "Pinto" proceedings had been excessive and the "Pinto" compensation had been paid belatedly.
Conclusion: violation (unanimously).

Article 6 § 1 and Article 1 of Protocol No. 1 – *Payment of the "Pinto" compensation*: The Court reiterated that, according to its case-law, even though administrative authorities might need a certain lapse of time to make a payment, in the case of a compensatory remedy designed to redress the consequences of excessively lengthy proceedings that lapse of time should not generally exceed six months from the date on which the decision awarding compensation became enforceable. However, the sum awarded to the applicant had been paid twelve months after the Court of Appeal's decision under the Pinto Act had been filed with its registry. By failing for twelve months to take the necessary steps to comply with the court of appeal's Pinto decision, the Italian authorities had deprived the provisions of Article 6 § 1 of the Convention of all useful effect.
Furthermore, the delay in question had amounted to an unjustified interference by the authorities with the applicant's right to the peaceful enjoyment of his possessions. The applicant had brought proceedings for compensation for the damage sustained as a result of the violation of his right to a hearing "within a reasonable time" and had then had to endure additional frustration when it proved difficult to secure payment of the compensation. As to how long a delay was capable of constituting a violation of Article 1 of Protocol No. 1, here too the reference should be a maximum delay of six months from the date on which the decision, not contested by any of the parties before the Court of Cassation, became final. Lastly, concerning compensation for the delays by the payment of default interest, it was pointed out that the applicant had received EUR 23 interest for a twelve-month delay in payment of the Pinto award. However, given the nature of the internal remedy and the fact that the applicant had not been required to institute enforcement proceedings, the payment of interest was not decisive in this case.
Conclusion: violation (unanimously).

Article 13 – Where a State had made a significant move by introducing a compensatory remedy, the Court had to leave a wider margin of appreciation to the State to allow it to organise that remedy in a manner coherent with its own legal system and traditions, in conformity with the country's standard of living. However, the requirements of Article 13 of the Convention were met only if the domestic remedy against violations of Article 6 § 1 remained an effective, adequate and accessible remedy in respect of the excessive length of judicial proceedings. As stated above, the compensation awarded to the applicant under the Pinto Act was actually paid twelve months after the Court of Appeal's decision had been filed with its registry. Furthermore, the number of judgments delivered by the Court since 2006 finding violations by Italy of Article 6 § 1 on account of the excessive length of proceedings before the domestic courts, and the very high number of new applications lodged against Italy solely concerning delays in the payment of Pinto compensation, indicated the existence of a problem in the functioning of that remedy.

However, between 2005 and 2007 the national courts of appeal with jurisdiction under the Pinto Act had delivered some 16,000 decisions, so that the number of applications lodged with the Court concerning delays in the payment of Pinto compensation, although high, did not, for the moment, indicate that the remedy provided under the Pinto Act was structurally ineffective. That being so, the twelve-month delay in the payment of the Pinto compensation in the present case, while constituting a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, was not sufficient to shed doubt on the effectiveness of the Pinto remedy. However, the Court wished to draw the Government's attention to the problem of delays in the payment of Pinto compensation and the need for the national authorities to deploy adequate and sufficient means to guarantee that they honoured their commitments under the Convention and avoid the Court being inundated with large numbers of repetitive cases concerning compensation awarded by the courts of appeal under the Pinto procedure and/or delays in the payment of such compensation, which would be a threat to the future effectiveness of the Convention machinery.
Conclusion: no violation (unanimously).

Article 41 – EUR 3,950 in respect of non-pecuniary damage.

REASONABLE TIME
Delay in execution of decisions taken under the "Pinto" law: *communicated.*

GAGLIONE and 479 Others - Italy (N° 45867/07, etc)
[Section II]

480 cases in which the applicants, who had been parties in civil proceedings, complained solely of delays in the execution by the national authorities of decisions taken in application of the Pinto Act to redress the consequences of excessively lengthy proceedings. They alleged that the delays rendered the Pinto remedy ineffective, violated their right to the peaceful enjoyment of their possessions, and amounted to an abuse of right.
Communicated under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

See also *Simaldone v. Italy* (above) and *Cocchiarella v. Italy* (Information Note no. 85).

Article 6 § 1 [criminal]

FAIR HEARING
Use at trial of evidence obtained through a covert operation: *no violation*.

BYKOV - Russia (N° 4378/02)
Judgment 10.3.2009 [GC] following relinquishment

(See below, under Article 8).

FAIR HEARING
Lack of public hearing before court of appeal hearing an appeal on both factual and legal aspects of case: *violation*.

IGUAL COLL - Spain (N° 37496/04)
Judgment 10.3.2009 [Section III]

Facts: In a judgment delivered after a public hearing which the applicant attended, the criminal court acquitted him of wilfully deserting his family by failing to pay maintenance. Although the maintenance had not been paid, the court considered that as the applicant was unemployed he had not defaulted on the

payments intentionally but because he could not afford to pay. As the *mens rea* for the offence was lacking, there was no offence. The applicant's former wife appealed and requested a public hearing. Without holding a public hearing, the appellate court (*Audiencia Provincial*) found the applicant guilty of wilfully deserting his family, and ordered him to serve eight weekends in prison and to pay the outstanding amounts plus legal costs. In particular, it accepted the facts considered to have been established at first instance and pointed out that the offence was that of failure to pay the maintenance fixed by the judge and, concerning the applicant's personal circumstances, that the sum to be paid had been fixed after objective verification of the applicant's means by the civil court which had settled the terms of the separation. It pointed out that the court had rejected the applicant's request for the payments to be reduced as the applicant, an engineer, had not shown that it was impossible for him to find a job that would enable him to pay the maintenance. The *Audiencia Provincial* further noted that not only had the applicant failed to pay, but he had not taken any steps to pay his debt. In view of the documentary evidence in its possession, the *Audiencia Provincial* found that the *mens rea* for the offence was established and the applicant should accordingly be found guilty. The applicant appealed to the Constitutional Court, complaining that there had been no public hearing in the appeal proceedings. His appeal was dismissed. The Constitutional Court referred to its own case-law according to which the lack of a public hearing before a court of appeal having full jurisdiction could be justified in certain circumstances provided that a hearing had been held at first instance. The evidence that had been examined was not such that there had been any need for the applicant to express himself personally before the *Audiencia Provincial*. It had already been examined at first instance and the *Audiencia Provincial* had not made a new interpretation of it. The lack of a hearing had therefore not violated the applicant's right to a fair trial.

Law: The applicant had been sentenced by the *Audiencia Provincial* without being heard in person. It was therefore necessary to examine the role of that court and the nature of the issues it was to determine. The Code of Criminal Procedure stated that the *Audiencia Provincial* took evidence only in exceptional cases and that this was restricted to evidence the accused had been unable to submit at first instance, evidence he had submitted but which had been rejected without good reason and evidence declared admissible but which it had not been possible to examine at first instance for reasons beyond the control of the accused. The decision whether or not to hold a public hearing before the appellate court when there was no new evidence was left to the discretion of the *Audiencia Provincial*, which could order a hearing if it felt it would shed light on the case. In the instant case it had been open to the *Audiencia Provincial*, as an appellate court, to deliver a new judgment on the merits, which it had done. It could therefore have decided either to uphold the applicant's acquittal or to find him guilty, after assessing the issue of his guilt or innocence. The Court considered that there had been no particular reason for the applicant to request a public hearing. He had been acquitted at first instance after a public hearing during which different evidence had been taken and the applicant had been heard. The court had found that in spite of the fact that the applicant had failed to make the payments, it had not been established that he had done so on purpose. The court had based its conclusion on the applicant's financial situation, which made it impossible for him to meet the payments, referring as its principal source of information to the applicant's income declaration. The *Audiencia Provincial*, on the other hand, had reached the opposite conclusion and found that the applicant had not only knowingly failed to fulfil his obligations when he could have paid, but had not taken any positive steps to secure the necessary income or funds, in spite of his good professional qualifications. Thus the *Audiencia Provincial* had not only taken into account the objective element of the offence – that is to say the non-payment of the maintenance – but had also examined the applicant's intentions and conduct, and the possibility he had of earning more money with his professional qualifications. The factors the *Audiencia Provincial* had taken into consideration led the Court to find that a public hearing should have been held. The *Audiencia Provincial* had not confined itself to interpreting a set of objective facts differently from the court of first instance, but had examined anew facts taken to have been established at first instance and reassessed them, which went beyond strictly legal considerations. The appellate court had thus examined the case as to the facts and the law. In the particular circumstances of the case, namely the applicant's acquittal at first instance after a public hearing at which different evidence had been examined, including documentary evidence, such as bank statements, and personal evidence, such as the applicant's income declaration, the Court considered that the applicant's conviction on appeal by the *Audiencia Provincial,* without him having been heard in

person, did not meet the requirements of a fair trial. The above information was sufficient for it to find that a public hearing before the appellate court had been necessary in the instant case.
Conclusion: violation (unanimously).

ARTICLE 7

Article 7 § 1

NULLUM CRIMEN SINE LEGE
Universal jurisdiction of Contracting State to prosecute torture and barbaric acts despite amnesty law in State where such acts had been committed: *inadmissible.*

OULD DAH - France (N° 13113/03)
Decision 17.3.2009 [Section V]

The applicant is a Mauritanian national. In 1990 and 1991, while an intelligence officer in the Mauritanian army, he committed acts of torture and barbarity against servicemen accused of mounting a coup d'état. In 1993 an amnesty Act was passed in favour of members of the armed forces and the security forces who had committed offences between 1989 and 1992, relating to events involving armed actions and acts of violence. Because of that law the applicant was not prosecuted for acts committed on prisoners. In 1999 the International Federation for Human Rights (FIDH) and the French Human Rights League (LDH) lodged a criminal complaint against the applicant, with an application to join the proceedings as civil parties. He was arrested and charged with acts of torture or barbarity and remanded in custody, then subsequently released on bail. He absconded and a warrant was issued for his arrest. The Indictments Division of the Court of Appeal ordered the applicant to be committed for trial before the Assize Court. An appeal lodged by the applicant was dismissed. In 2005, after hearing his lawyers, the Assize Court convicted the applicant, whose whereabouts were unknown, to ten years' imprisonment for having wilfully subjected certain people to acts of torture and barbarity and for causing such acts to be committed against other prisoners, by abuse of authority of by issuing instructions to the servicemen who had committed them.

Inadmissible: The applicant did not challenge the jurisdiction of the French courts, but he complained that they had applied French rather than Mauritanian law, in a manner incompatible with Article 7. In certain cases the French courts had universal jurisdiction. The instant case was one such case. There was no doubt that for a State on whose territory an offence had been committed to set aside legislation in favour of special decisions or laws passed in order to protect its own nationals or, where applicable, under the direct or indirect influence of the perpetrators, would effectively paralyse the whole principle of universal jurisdiction. Like the United Nations Committee of Human Rights and the International Criminal Tribunal for former Yugoslavia, the Court considered that an amnesty law was generally incompatible with the States' duty to investigate acts of torture or barbarity. In the present case there was no denying that the Mauritanian amnesty Act had been passed not after the applicant had been tried and convicted, but precisely to prevent any criminal proceedings being brought against him. However, in view of the prominent place the prohibition of torture occupied in all the international human rights protection instruments, the obligation to prosecute the perpetrators of such acts must not be undermined by the passing of amnesty laws that left them unpunished and could be considered contrary to international law. The Court noted that international law did not rule out the possibility of another State trying a person who had been amnestied before being tried in his country of origin, as can be seen, for example, in Article 17 of the Statute of the International Criminal Court. Lastly, in the light of Articles 4 and 7 of the Convention against Torture, read together, it was reasonable to assume not only that the French courts had had jurisdiction but also that French law had been applicable. The Mauritanian amnesty Act was not capable in itself of preventing the application of French law by the French courts that had dealt with the case by virtue of universal jurisdiction.

That being so, the question of the accessibility and foreseeability of French law as applied to the applicant had to be examined. At the time of the events acts of torture and barbarity had been expressly provided for in the Criminal Code. The argument that at the time they had constituted not separate offences but aggravating circumstances was not decisive, as they could be held against any person who had committed a crime or an offence and constituted additional factors, separate from the main offence and covered by a special law, which increased the penalty applicable to the main offence. Consequently, at the time they had been committed, the applicant's actions had been offences defined in a sufficiently accessible and foreseeable manner under French and international law and the applicant could reasonably have foreseen, if necessary with the help of informed legal advice, that there was a risk that he would be prosecuted for the acts of torture he had committed in 1990 and 1991: *manifestly ill-founded*.

ARTICLE 8

POSITIVE OBLIGATIONS
Flawed implementation of domestic criminal-law mechanisms in respect of applicant's allegations of physical violence by private individuals: *violation*.

JANKOVIĆ - Croatia (N° 38478/05)
Judgment 5.3.2009 [Section I]

Facts: The applicant was renting a room in a flat she shared with other tenants. In August 1999 she found that the lock of the flat had been changed and her belongings removed. She instituted proceedings before the civil court, which ruled in her favour in May 2002, ordering that she be allowed to reoccupy her room. The court decision was enforced about ten months later. The following day, on arriving at the flat, the applicant was assaulted by two women and a man, who kicked her, pulled her by the hair and pushed her down the stairs, while shouting obscenities. The applicant immediately informed the police, who came to the scene and interviewed her. They subsequently lodged a complaint with the minor-offences court, which initially found the attackers guilty of insulting the applicant and fined them. However, those proceedings were ultimately discontinued as being time-barred. In October 2003 the applicant filed a criminal complaint against seven individuals, alleging that she had been physically attacked and abused by them and threatened with death. The authorities decided not to open an official investigation as they found that the acts complained of constituted an offence for which prosecution had to be brought privately by the victim. The applicant lodged a private complaint, which was at first ignored and ultimately declared inadmissible as being incomplete. Her appeals against that decision were dismissed and her constitutional complaint was still pending when the European Court delivered its judgment. The applicant further complained, to the Constitutional Court in 2002 and to the ordinary court in 2007, about the length of civil and enforcement proceedings for the repossession of her room. While the Constitutional Court dismissed her complaint, in March 2008 the ordinary court ruled in her favour awarding her compensation in respect of non-pecuniary damage. Meanwhile, the applicant asked the civil court to resume the enforcement proceedings in order to regain access to her room but her request was declared inadmissible in January 2008.

Law: Recalling the States' positive obligations under Article 8, the Court observed that acts of violence such as those alleged by the applicant required States to adopt adequate positive measures in the sphere of criminal-law protection. Under Croatian law, certain criminal offences were to be prosecuted by the State Attorney's Office, either of its own motion or upon a private application, and those of a lesser nature were to be prosecuted by means of private prosecution. Further, a criminal complaint lodged in due time in respect of a criminal offence subject to private prosecution was to be treated as a private prosecution act. The applicant had brought a criminal complaint submitting a detailed description of the impugned events, alleging that they amounted to the criminal offence of violent behaviour and making serious threats. In the Court's view, her decision to request an investigation into those charges rather than to bring a private prosecution on lesser charges complied with the relevant rules of criminal procedure and might not have been regarded as unfounded. Furthermore, even though the applicant's request for an investigation had

not strictly followed the usual form required for such requests, the Court attached importance to the fact that she was not represented by a lawyer and did not qualify for legal aid under domestic law. She had nonetheless made it clear that she sought a criminal investigation into acts of violence against her, which she had described in detail and in respect of which a police report had been drawn up. The information provided was therefore sufficient to enable the competent authorities to act upon the applicant's request. Moreover, once the competent authority decided not to open an official investigation because in their view the act in question had to be prosecuted privately by the victim, pursuant to domestic law her criminal complaint should have been treated as a private prosecution. Finally, it could not be concluded that the applicant was given protection in the minor-offences proceedings, since they had been time-barred and had thus ended without a final decision on the attackers' guilt. In such circumstances, the Court concluded that the manner in which the domestic authorities had implemented the existing criminal-law mechanisms in the applicant's case was defective, contrary to the State's positive obligations under Article 8.
Conclusion: violation (unanimously).

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

PRIVATE LIFE
Interception and recording of conversation by a radio-transmitting device during a police covert operation without procedural safeguards: *violation*.

BYKOV - Russia (N° 4378/02)
Judgment 10.3.2009 [GC] following relinquishment

Facts: The applicant was an important businessman and a member of a regional parliamentary assembly. In 2000 he allegedly ordered Mr V., a member of his entourage, to kill Mr S., a former business associate. V. did not comply with the order, reported the applicant to the Federal Security Service ("the FSB") and handed in the gun he had allegedly received from him. Shortly afterwards, the FSB and the police conducted a covert operation to obtain evidence of the applicant's intention to murder S. The police staged the discovery of two dead bodies at S.'s home. It was officially announced in the media that one of those killed had been identified as S. Under instructions from the police, V. met the applicant at his home and engaged him in conversation, telling him that he had carried out the murder. As proof, he handed the applicant several objects borrowed from S. He carried a hidden radio-transmitting device and a police officer outside received and recorded the transmission. As a result, the police obtained a 16-minute recording of the conversation between V. and the applicant. The next day, the applicant's house was searched. The objects V. had given him were seized. The applicant was arrested and remanded in custody. Two voice experts were appointed to examine the recording of the applicant's conversation with V. They found that V. had shown subordination to the applicant, that the applicant had shown no sign of mistrusting V.'s confession to the murder and that he had insistently questioned V. on the technical details of its execution. In 2002 the applicant was found guilty of conspiracy to commit murder and conspiracy to acquire, possess and handle firearms and sentenced to six and a half years' imprisonment. He was conditionally released on five years' probation. The sentence was upheld on appeal.

Law: Article 8 – The measures carried out by the police had amounted to interference with the applicant's right to respect for his private life. The Russian Operational-Search Activities Act was expressly intended to protect individual privacy by requiring judicial authorisation for any operational activities that might interfere with the privacy of the home or the privacy of communications by wire or mail services. In the applicant's case, the domestic courts had held that since V. had entered his house with his consent and no wire or mail services had been involved (as the conversation had been recorded by a remote radio-transmitting device), the police operation had not breached the regulations in force. In the Court's view, the use of a remote radio-transmitting device to record the conversation between V. and the applicant was virtually identical to telephone tapping, in terms of the nature and degree of the intrusion into the privacy of the individual concerned. However, the applicant had enjoyed very few, if any, safeguards in the procedure by which the interception of his conversation with V. had been ordered and implemented. In

particular, the legal discretion of the authorities to order the interception had not been subject to any conditions, and the scope and the manner of its exercise had not been defined; no other specific safeguards had been provided for. The possibility for the applicant to bring court proceedings seeking to declare the "operative experiment" unlawful and to request the exclusion of its results as unlawfully obtained evidence could not remedy those shortcomings. In the absence of specific and detailed regulations, the use of this surveillance technique as part of an "operative experiment" had not been accompanied by adequate safeguards against various possible abuses. Accordingly, its use had been open to arbitrariness and was inconsistent with the requirement of lawfulness.
Conclusion: violation (unanimously).

Article 6 § 1 – The applicant had been able to challenge the methods employed by the police in the adversarial procedure at first instance and on appeal. He had been able to argue that the evidence adduced against him had been obtained unlawfully and that the disputed recording had been misinterpreted. The domestic courts had addressed all these arguments in detail and had dismissed each of them in reasoned decisions. Furthermore, the impugned recording, together with the physical evidence obtained through the covert operation, had not been the only evidence relied on by the domestic court as the basis for the applicant's conviction. In fact, the key evidence for the prosecution had been the initial statement by V., made before, and independently from, the covert operation, in his capacity as a private individual and not as a police informant. Furthermore, V. had reiterated his incriminating statements during his subsequent questioning and during the confrontation between him and the applicant at the pre-trial stage. The failure to cross-examine V. at the trial was not imputable to the authorities, who had taken all necessary steps to establish his whereabouts and have him attend the trial, including by seeking the assistance of Interpol. The applicant had been given an opportunity to question V. on the substance of his incriminating statements when they had been confronted. Moreover, the applicant's counsel had expressly agreed to having V.'s pre-trial testimonies read out in open court. The trial court had thoroughly examined the circumstances of V.'s subsequent withdrawal of his incriminating statements and had come to a reasoned conclusion that the repudiation was not trustworthy. Finally, V.'s incriminating statements were corroborated by circumstantial evidence, in particular numerous witness testimonies confirming the existence of a conflict of interest between the applicant and S. The statements by the applicant that had been secretly recorded had not been made under any form of duress; had not been directly taken into account by the domestic courts, which had relied more on the expert report drawn up on the recording; and had been corroborated by a body of physical evidence. Having regard to the safeguards which had surrounded the evaluation of the admissibility and reliability of the evidence concerned, the nature and degree of the alleged compulsion, and the use to which the material obtained through the covert operation had been put, the proceedings in the applicant's case, considered as a whole, had not been contrary to the requirements of a fair trial.
Conclusion: no violation (eleven votes to six).

The Court also unanimously found a violation Article 5 § 3 on account of the length of the applicant's pre-trial detention.

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

ARTICLE 10

FREEDOM OF EXPRESSION
Conviction of magazines for illegal advertising of tobacco: *no violation*.

HACHETTE FILIPACCHI PRESSE AUTOMOBILE and DUPUY - France (N° 13353/05)
SOCIETE DE CONCEPTION DE PRESSE ET D'EDITION and PONSON - France (N° 26935/05)
Judgments 5.3.2009 [Section V]

Facts: The cases concern the conviction of the publishers of two magazines – *Action Auto Moto* in the first case and *Entrevue* in the second – and their publication directors.
In the first case the magazine *Action Auto Moto* published a photograph of Formula 1 racing driver Michael Schumacher celebrating his victory on the podium of the Australian Grand Prix, sporting the name of the M. cigarette brand, which sponsors his racing team, on his sleeve. On the right sleeve of another driver's suit the name of another brand of cigarettes – W – was visible. Under an anti-tobacco and anti-alcohol law the court sentenced the publication director to a EUR 30,000 fine for indirect or unlawful advertising of tobacco products. The publishing company was declared jointly and severally liable for the full amount of the fine. The sentence was upheld on appeal and the Court of Cassation declared a subsequent appeal on points of law inadmissible.
In the second case the magazine *Entrevue* published an article on money in sport. It featured a photograph of Michael Schumacher sporting the logo of a brand of cigarettes (M.). Another photograph showed Michael Schumacher's helmet in the M. cigarette brand's colours, with the following caption: "F1 Michael Schumacher: EUR 65 M/year (430 million francs), including salary of EUR 34 M and the remainder from advertising contracts...". Furthermore, the penultimate page of the magazine showed a series of satirical photomontages, one of which featured two packets of M. brand cigarettes cut out to represent two human figures engaged in the act of sodomy, with the caption "Beware: smoking causes anal cancer". The court found that the photomontage concerned did not constitute pro-tobacco propaganda or advertising, but sentenced the publication director to a EUR 20,000 fine for direct advertising or propaganda in favour of tobacco or tobacco products because of the photographs published. The publishing company was declared jointly and severally liable. The Court of Appeal upheld the sentence imposed by the court below and also found the accused guilty of unlawful advertising of tobacco products and the applicant company civilly liable on account of the satirical photomontage. The Court of Cassation dismissed an appeal on points of law.

Law: Article 10 – In neither case was the publication concerned strictly speaking a "trade" magazine, so the margin of appreciation enjoyed by the State was limited. In the first case the offending publication focused on the motor vehicle trade, but from a news angle. In the second case the offending photographs of sporting events were part of a news article about earnings in sport. The question was whether the impugned measures were proportionate to the aim pursued.
The applicants had been sentenced for publishing photographs showing a cigarette manufacturer's logo and, in the second case, a photomontage featuring the same brand of cigarettes. The restriction of cigarette and tobacco-related advertising was an essential part of a broader strategy in the fight against the social evil of smoking. Fundamental considerations of public health, on which legislation had been enacted in France and the European Union, could prevail over economic imperatives and even over certain fundamental rights such as freedom of expression. There was a European consensus as to the need for strict regulation of tobacco advertising, and a general trend towards such regulation could now be seen worldwide. The Court did not have to take into account the actual impact on tobacco consumption of a ban on advertising, including indirect advertising. The fact that the offending publications were regarded as capable of inciting people, particularly young people, to consume such products was, for the Court, a "relevant" and "sufficient" reason to justify the interference.
In the first case there was no doubt that the aim of the photograph was to advertise brands of cigarettes, amongst other products, and even if the impugned logos took up very little space, they were easily

identifiable and directly associated with success in sport. In the second case the logos of cigarette brands took up more space in the photographs and were particularly visible and directly associated with success in sport. The Court considered that in both cases the applicants could have blurred the offending logos, a technically simple process, without altering the substance of the photographs or affecting the accuracy of the information imparted. Being media professionals, the applicants could easily have made these slight alterations. Moreover, these magazines' readership included young people and it was necessary to take into account the impact of the logos on these readers, who were particularly attentive to success in sport or finance. Lastly, while the amounts the applicants were ordered to pay were certainly not negligible, in assessing whether they were harsh they had to be compared with the revenue of high-circulation magazines such as those concerned here. Bearing in mind how important it was to protect public health, the pressing need to take steps to protect our societies from the scourge of smoking, and the existence of a consensus at the European level regarding the prohibition of advertising in respect of tobacco products, the restrictions imposed on the applicants' freedom of expression in the instant case had answered a pressing social need and had not been disproportionate to the legitimate aim pursued.
Conclusion: no violation (unanimously).

Article 14 in conjunction with Article 10 – In both cases the applicants challenged Article L. 3511-5 of the Public Health Code, which authorised the audiovisual media to broadcast motor-sports competitions in France – without concealing the cigarette brands displayed on the cars, drivers' suits or tracks – when the events took place in countries where tobacco advertising was authorised. While it was not yet feasible, by technical means, to hide lettering, logos or advertisements on footage used by broadcasters, it was possible to refrain from taking photographs of such symbols, or to conceal or blur them, on the pages of magazines. The print media had the necessary time and technical facilities to modify their pictures and blur any logos suggestive of tobacco products. The Court of Cassation had in fact confirmed that the live broadcasting of a race was the only exception to the ban on the indirect advertising of tobacco products. Thus the audiovisual media and the print media were not in similar or comparable situations.
Conclusion: no violation (unanimously).

FREEDOM OF EXPRESSION
Rule that new cause of action accrues every time defamatory material on the Internet is accessed: *no violation*.

TIMES NEWSPAPERS LTD (Nos. 1 and 2) - United Kingdom (N[os] 3002/03 and 23676/03)
Judgment 10.3.2009 [Section IV]

Facts: This case concerned the application, in the context of the Internet, of the common-law rule that successive publications of a defamatory statement give rise to separate causes of action.
In December 1999 the applicant newspaper published two articles that were allegedly defamatory of a private individual, G.L. Both articles were uploaded onto the newspaper's website. G.L. brought proceedings for libel against the newspaper, its editor and the two journalists who had written the articles. In their defence, the defendants pleaded qualified privilege on the grounds that the allegations were of such a kind and seriousness that they had a duty to publish and the public a corresponding right to know. While the first libel action was under way, the articles remained accessible on the newspaper's website, as part of its archive of past issues. In December 2000 G.L. brought a second action for libel in relation to the continuing Internet publication of the archives. Following this, the newspaper added a notice to the Internet archives announcing that both articles were subject to libel litigation and were not to be reproduced or relied on without reference to its legal department. In its defence to the second action, it argued in favour of a single-publication rule, such that only the first publication of an article posted on the Internet could give rise to a cause of action in defamation and not any subsequent downloads by Internet readers. However, applying the rule established in *Duke of Brunswick v. Harmer* [1849] 14 QB 154 that successive publications of a defamatory statement give rise to separate causes of action, the High Court held that a new cause of action accrued every time the defamatory material was accessed ("the Internet publication rule"). The Court of Appeal upheld that decision after noting that the maintenance of archives was a relatively insignificant aspect of freedom of expression, and that it would have been advisable to

attach a notice warning readers against treating the archive material as the truth as soon as it was known that it might be defamatory.

Law: The case essentially turned on whether the application of the Internet publication rule was "necessary in a democratic society". The Court accepted that Internet archives were an important source for education and historical research, but noted that the States' margin of appreciation was likely to be greater where archives, rather than current affairs, were concerned and that the duty of the press to ensure accuracy was likely to be more stringent in respect of such information. In the instant case, it was significant that although libel proceedings had been commenced in respect of the two articles in question in December 1999, no qualification had been added to the archived copies until December 2000. Since the archives were managed by the newspaper itself and the domestic courts had not suggested that the articles be removed altogether, the requirement to add an appropriate qualification to the Internet version was not disproportionate.

While, in view of that conclusion, the Court did not consider it necessary to consider the broader chilling effect allegedly created by the Internet publication rule, it nonetheless addressed the issue of limitation periods in libel proceedings and the newspaper's allegation that the rule gave rise to ceaseless liability. It observed that, on the facts of the instant case, the newspaper had not been prejudiced by the passage of time in mounting its defence as the two libel actions related to the same articles and had both been commenced within 15 months of the initial publication. However, where libel proceedings were brought after a significant lapse of time, they might well, in the absence of exceptional circumstances, give rise to a disproportionate interference with the freedom of the press under Article 10.

Conclusion: no violation (unanimously).

FREEDOM OF EXPRESSION

Police seizure of material that could have led to identification of journalistic sources: *no violation*.

SANOMA UITGEVERS B.V. - Netherlands (N° 38224/03)
Judgment 31.3.2009 [Section III]

Facts: The applicant company was the publisher of a car magazine. Journalists from the magazine attended an illegal road race and were given permission by the organisers to take photographs on condition that they did not disclose the participants' identity. They planned to publish an article on illegal road racing in which the photographs would be edited to hide the identities of both the cars and the participants. The original photographs were stored on a CD-ROM. Before the article could be published, the company's editor-in-chief was served with a summons from a public prosecutor requiring the company to surrender the photographs as they were required in connection with a criminal investigation into offences of theft and/or robbery. When the editor-in-chief refused to hand them over, he was threatened with prosecution and detention and told that the company's premises would be closed for the entire weekend so that they could be searched. This would have entailed important financial losses for the company. The editor-in-chief was later detained for a period of four hours before the CD-ROM containing the photographs was surrendered after an investigating judge had stated that the needs of the criminal investigation outweighed the company's journalistic privilege. The seizure was subsequently ruled lawful by a regional court after it had heard evidence from the public prosecutor that the photographs were required to help identify a car that had been used in raids on cash dispensers, and that the investigation did not concern the road race. That decision was upheld on appeal.

Law: The interference with the applicant's right to freedom of expression was prescribed by law and pursued the legitimate aim of preventing disorder or crime. As to the necessity for such interference in a democratic society, the Court reiterated that an order for the disclosure of journalistic sources could only be compatible with Article 10 if it was justified by an overriding requirement in the public interest. In cases involving the compulsory handover of journalistic material, the domestic authorities were entitled to balance the interest in prosecuting the suspected crimes against the interest in the protection of journalistic privilege. Relevant considerations included the nature and seriousness of the crimes, the precise nature

and content of the information demanded, the existence of alternative means of obtaining it, and any restraints on the authorities' obtention and use of the materials concerned.
Applying those principles to the applicant's case, the Court noted that the suspected offences were serious as they had involved the use of firearms, the information contained on the CD-ROM was relevant and capable of identifying the offenders, there were no reasonable alternatives to identify the vehicle used by the suspects and, lastly, the only use to which the information appeared to have been put was to identify and prosecute the offenders. The applicant company's sources did not appear to have been put to any inconvenience. The Court also noted with satisfaction that the public prosecutor had obtained the investigating judge's approval to the measure, although it found it disquieting that this was no longer a requirement of the domestic law. In sum, while agreeing with the regional court that the police and public prosecutors had acted with a regrettable lack of moderation, the Court found that in the very particular circumstances of the case, the reasons advanced for the interference were "relevant" and "sufficient" and "proportionate to the legitimate aims pursued".
Conclusion: no violation (four votes to three).

ARTICLE 11

FREEDOM OF PEACEFUL ASSEMBLY
Complete blockade of motorway by heavy-goods vehicles in "go-slow" operation: *no violation*.

BARRACO - France (N° 31684/05)
Judgment 5.3.2009 [Section V]

Facts: The applicant is a lorry driver. In 2002 seventeen motorists, including the applicant, took part in a traffic-slowing operation on a motorway, which involved driving along a predetermined route in a convoy, at slow speed, occupying several lanes, to slow down the traffic on the motorway. When three drivers at the front of the convoy, one of whom was the applicant, stopped their vehicles, completely blocking the road for other users, the police arrested them. The drivers concerned were summoned to appear in court for having obstructed the public highway by placing or attempting to place on it an object that obstructed vehicular traffic, or using or attempting to use any means to obstruct it – in the instant case by stopping their vehicles several times. The court acquitted the accused, but the public prosecutor appealed and the Court of Appeal set aside that judgment, found them guilty as charged and sentenced them each to a suspended term of three months' imprisonment together with a EUR 1,500 fine. The Court of Cassation dismissed an appeal on points of law lodged by the applicant.

Law: The applicant's conviction had amounted to interference by the public authorities with his right to freedom of peaceful assembly, which included freedom to demonstrate. The interference had been "prescribed by law" and had pursued the legitimate aims of preventing disorder and protecting the rights and freedoms of others. As to whether it had been necessary in a democratic society, it was to be noted that no formal prior notice of the demonstration had been given as required by the relevant domestic law. However, the authorities had been aware of it and had also had the opportunity to take measures for the protection of safety and public order, for example by organising police protection and a police escort. So even if the demonstration had not been tacitly tolerated, at least it had not been prohibited. Moreover, the applicant had not been convicted of taking part in the demonstration as such, but for his particular conduct during the demonstration, namely, blocking a motorway and thereby causing more of an obstruction than would normally be caused by exercising one's right to freedom of peaceful assembly. It was indeed clear from the case file that while the demonstration was in progress, from 6 to 11 a.m., the traffic had been held up, but also that several total stoppages had been caused by drivers at the head of the convoy, including the applicant, stopping their vehicles. This complete blockage of the traffic had clearly gone beyond the mere inconvenience caused by any demonstration on the public highway. The police, whose task had been to protect safety and public order, had arrested the three demonstrators only in order to unblock the traffic, after the drivers had been warned several times not to stop their vehicles on the motorway and informed of the penalties they could incur. In that context and for several hours, the

applicant had been able to exercise his right to freedom of peaceful assembly and the authorities had displayed the tolerance that should be shown towards such gatherings. The applicant's conviction and sentence had therefore not been disproportionate to the aims pursued.
Conclusion: no violation (unanimously).

ARTICLE 13

EFFECTIVE REMEDY
Significant delays in payment of compensation under "Pinto" law not indicative of structural problem in procedure: *no violation*.

SIMALDONE - Italy (N° 22644/03)
Judgment 31.3.2009 [Section II]

(See Article 6 § 1 [civil] above).

ARTICLE 14

DISCRIMINATION (Article 3)
Failure by authorities to check whether there had been racist motive for police brutality in course of arrest: *violation*.

CAKIR - Belgium (N° 44256/06)
Judgment 10.3.2009 [Section II]

Facts: The applicant, who is of Turkish origin, was arrested by police officers when they came to his family home to arrest his brother. The versions of the circumstances of the arrest given by the applicant and the Government differed. In any event, a medical certificate drawn up the next day noted various injuries on the applicant's body which led to him being admitted to hospital. He lodged a civil-party claim, complaining of assault occasioning actual bodily harm resulting in unfitness for work, and of a breach of the Law of 30 July 1981 prohibiting certain acts of a racist and xenophobic nature, because of racist insults on the part of the police officers. The investigating judge took numerous measures to elucidate the matter and, in view of the information gathered, the prosecution suggested that no further action needed to be taken on the instructions of the investigating judge. The *chambre du conseil* examined an application by the public prosecutor for the proceedings to be dropped. At the request of counsel for the applicant, the *chambre du conseil* ordered further investigatory measures, which were completed. These included an in-house investigation by the Police Authority. The investigating judge issued a new order. At the same time, the Crown prosecutor invited the *chambre du conseil* to declare that there were no grounds to continue the proceedings, pointing out that the evidence in the case file indicated that the violence allegedly committed by the accused had been motivated by the complainant's own behaviour and that the accused had used force in the line of duty solely for legitimate reasons. Concerning the alleged offences under the above-mentioned law, the prosecutor considered that they were no different from the other charges. The case was once again brought before the *chambre du conseil*, which found that there was no case to answer. The applicant appealed to the Indictments Division, but the case was never examined, in spite of repeated requests by the applicant's counsel to the prosecutor's office. The Indictments Division ruled that prosecution was time-barred. The Minister of Justice admitted in a letter to the applicant that there had been a malfunction in the domestic proceedings. He said that structural measures had been taken to avoid such situations in the future. The ministry published a press release containing a letter from the public prosecutor to the minister admitting that for five years the case had not been given the attention it deserved, but explaining that this had not been a deliberate attempt to obstruct the proceedings but a case of negligence, no doubt attributable to the very serious health problems the judge in charge of the case had suffered. The press release added that there was no evidence of any

ostensibly intentional inertia or any collusion between the prosecuting authorities and the police. The Inquiry and Advisory Committee declared a complaint lodged by the applicant's counsel well-founded, considering that in spite of the assurances that it was an isolated case, such a delay in the processing of a case could not be tolerated and it was for the chief prosecutor to supervise the progress of the case files under his responsibility.

Law: Article 3 – (a) *Substantive aspect*: The applicant had suffered injuries when the police arrested him, as witnessed by the medical certificate drawn up the following day and another drawn up ten days later, stating that he had been temporarily unfit for work for about ten days, during which time he had been in hospital. The three police officers concerned had never denied striking the applicant. However, the Court could not accept their argument that the applicant's condition following his arrest and police custody had been the result of him falling to the ground and being kicked by mistake a few times by members of the crowd that gathered round and tried to kick the policeman who was pinning him down on the ground. The applicant had spent ten days in hospital, his body covered in wounds and bruises, and with a fractured nose and several broken teeth. According to two medical certificates drawn up about ten years later, he was still suffering from serious after-effects of the aggression. It had not been shown, therefore, that the injuries could have been caused by the use by the police officers of such force as was made strictly necessary by the applicant's conduct.
Conclusion: violation (unanimously).

(b) *Procedural aspect*: The authorities had not remained inactive in response to the applicant's allegations of ill-treatment. The investigating judge had assigned a forensic medical examiner to examine the applicant's injuries and determine their nature, how they had been caused and their likely consequences. A full report had been drawn up. The investigating judge had requested that the three police officers accused of hitting the applicant be identified and that his parents and sister be heard. Acting on those instructions, the police inspector assisting the public prosecutor had drawn up a report. At a hearing, the *chambre du conseil* had allowed a request made by the applicant's lawyer and ordered further investigatory measures, which had been carried out. Lastly, the *chambre du conseil* had decided that there was no case to answer. As to whether the authorities had conducted the investigation into the applicant's allegations of ill-treatment by the police with due diligence, counsel for the applicant had appealed to the Indictments Division against the decision not to prosecute, but the case had never been examined. Counsel for the applicant had made repeated representations to the prosecutor's office, but to no avail. The Indictments Division had declared that prosecution was time-barred. In that connection the Court had already held that where a State agent was accused of actions contrary to Article 3, the proceedings or conviction should not be allowed to lapse by becoming time-barred, and the application of measures such as an amnesty or pardon should not be authorised. In particular the national authorities must on no account give the impression that they were ready to let such ill-treatment go unpunished. The Minister of Justice himself had felt obliged to admit, in a letter to the applicant, that there had been a malfunction, and to issue a press release in which he attempted to explain the delay in the examination of the case. Lastly, the Inquiry and Advisory Committee had declared a complaint lodged by the applicant's counsel concerning the delay well-founded. Accordingly, the investigation conducted by the domestic authorities into the applicant's complaint of ill-treatment had been ineffective.
Conclusion: violation (unanimously).

Article 14 taken in conjunction with Article 3 – When investigating violent incidents, State authorities also had a duty to take all reasonable steps to ascertain whether there was any racist motivation or any hatred or prejudice based on ethnic origin behind the events. The Court had found that the authorities had violated Article 3 in failing to conduct an effective investigation into the incident. It decided to examine separately the complaint that they had also failed to look into the possibility that there had been a causal effect between the alleged racist attitudes and the violence the police had shown towards the applicant. The general context at the material time did not suffice to explain the allegedly racist attitude of the police at the time of the arrest. In his criminal complaint and request to join the proceedings as a civil party, the applicant had referred specifically to an infringement of sections 1 and 4 of the Law of 30 July 1981 prohibiting certain acts of a racist and xenophobic nature, alleging that the police had used such racist insults as "dirty wog" and "Arab scum". In his submissions inviting the *chambre du conseil* to find that

there was no case to answer, the Crown Prosecutor had not expressed an opinion on this part of the complaint, considering that the actions which could be categorised as offences under the law of 30 July 1981 were equivalent to those covered by the other charges. The *chambre du conseil* had endorsed the prosecutor's submissions and the Indictments Division had found that the prosecution was time-barred, which had led the Court to find a procedural violation of Article 3. The authorities had therefore failed in their obligation, under Article 14 taken in conjunction with Article 3, to take all the necessary measures to ascertain whether discriminatory conduct could have played a role in the events in question.
Conclusion: violation (unanimous).

See *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, §§ 160 and 161, ECHR 2005-VII, Information Note no. 77.

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

DISCRIMINATION (Article 6 § 1)
Unlawfully resident alien refused legal aid for contesting paternity of her child: *violation*.

ANAKOMBA YULA - Belgium (N° 45413/07)
Judgment 10.3.2009 [Section II]

Facts: The applicant was unlawfully resident in Belgium. She applied for regularisation of her residence status, partly because she and her husband, a Congolese national, had separated, and partly because the couple's children, who were legal residents, lived with her. Her application was also based on the fact that the biological father of her youngest child was a Belgian national, but could not acknowledge paternity because the applicant had been married when the child was born. The only solution was for her to bring an action against her husband, within a year of the child's birth, to contest his paternity of the child. With the aid of secondary legal assistance she lodged an application with the court of first instance, in conformity with the Judicial Code, requesting legal aid so that she would not have to pay various costs amounting to approximately EUR 1,360. Her application was rejected because she was not lawfully resident in Belgium, and the purpose of the proceedings concerned was not to regularise her situation, so she did not meet the conditions of entitlement to legal aid. She appealed. The court of appeal upheld the lower court's decision, noting that the difference in treatment provided for in the Judicial Code was based in this case on an objective criterion, namely lawful residence in Belgium, that it was reasonable, proportionate to the aim pursued in so far as it applied only where there were no agreements with non-member States of the Council of Europe providing for their nationals to receive legal aid, and fell outside the provisions of the Judicial Code. The applicant therefore needed to regularise her situation before claiming any legal aid she might be entitled to in proceedings to contest paternity. She asked the public prosecutor's office to appeal on points of law but it did not consider it necessary. To prevent the action to contest paternity from being time-barred, the applicant and her husband jointly filed an application to appear voluntarily before the court of first instance. The registration fee was EUR 82. The court found in the applicant's favour, considering that she had adduced the proof of non-paternity required under Congolese law. However, without giving any specific reason, it ordered her to pay the costs. The judgment was served on the applicant's husband by a bailiff, whose fees amounted to EUR 206.17.

Law: The court of first instance rejected the applicant's request for legal aid to cover the cost of proceedings in her action to contest paternity. It found that the applicant was not lawfully resident in Belgium, and the purpose of the proceedings concerned was not to regularise her situation, so she did not meet the conditions of entitlement to legal aid under Article 668 of the Judicial Code. That Article provided for legal aid to be granted to nationals of States which had concluded treaties with Belgium, nationals of Council of Europe member States, persons lawfully resident in Belgium or a European Union member State and those requesting aid in connection with proceedings concerning their entry, residence or settlement in, or expulsion from, Belgium. When the applicant appealed, the court of appeal upheld the first-instance decision, noting that the difference in treatment provided for in the Judicial Code was based on an objective criterion, namely, lawful residence in Belgium, and was reasonable in that it required a

minimal tangible connection with Belgium, in conformity with the law on the entry, residence, settlement and expulsion of aliens. The applicant had been ordered to pay EUR 288.17, to cover the registration of her action and service of the judgment, although she was without means.
The case before the domestic courts had concerned serious issues related to family law that were decisive not only for the applicant but also for other individuals. There ought to have been particularly compelling reasons to justify the difference in treatment between individuals with a residence permit and those without, like the applicant. Particularly as the Judicial Code did not make entitlement to free legal advice – which the applicant had received – conditional on lawful residence. Furthermore, the applicant's residence permit had expired a month and a half after her daughter's birth and, before it expired, she had already taken steps to regularise her situation in line with her family life in Belgium, the father of her child being a Belgian national. Lastly, it had been essential to act quickly, since actions to contest paternity had to be lodged before the child's first birthday. In the light of the above, the Court considered that the State had failed in its obligation to regulate the right of access to a court in a manner that was compatible with the requirements of Article 6 § 1, taken together with Article 14.
Conclusion: violation (unanimously).

Article 41 – EUR 288.17 in respect of pecuniary damage.

DISCRIMINATION (Article 8)
Refusal to pay a benefit on account of parental status and nationality: *violation*.

WELLER - Hungary (N° 44399/05)
Judgment 31.3.2009 [Section II]

Facts: The first applicant, a Hungarian national, married a Romanian citizen, who gave birth to their twin sons, the second and third applicants, in 2005. Both twins acquired Hungarian nationality by birth. The first applicant requested maternity benefit in his own name and on behalf of his children. The authorities refused his request as, under the Act on Family Support ("the Act"), only mothers with Hungarian citizenship, adoptive parents and guardians were entitled to the benefit in question and a natural father could apply for such an allowance only if the mother died. Moreover, the Act applied only to those non-Hungarian citizens who had obtained settlement permits, being either refugees or citizens of another Member State of the European Union. Since the applicant's wife did not fall into either of these categories, the claim had to be rejected. The first applicant unsuccessfully challenged this decision before the courts.

Law: The applicants' exclusion from the maternity benefit had amounted to a difference in treatment on grounds of the first applicant's parental status and the nationality of the mother of the second and the third applicants. In the Court's view, the wide range of entitled persons proved that the allowance was aimed at supporting newborn children and the whole family raising them, and not only at reducing the hardship of giving birth sustained by the mother. The applicants' situation could therefore be compared to those families and their members who enjoyed maternity benefits. However, neither the domestic authorities nor the Government had put forward any objective and reasonable ground to justify the general exclusion of natural fathers from a benefit aimed at supporting all those who were raising newborn children, when mothers, adoptive parents and guardians were entitled to it. The first applicant had therefore suffered discrimination on the ground of his parental status in the exercise of his right to respect for his family life.
Concerning the second and third applicants, there was no indication in the case file that the applicants' mother had abused or at least intended to misuse the Hungarian social-security system. Her situation in Hungary was lawful and fully regulated by the authorities. The applicants could not benefit from the allowance at issue since their father was a Hungarian and their mother a foreigner, whereas the Act conferred such an entitlement on a family with children of a Hungarian mother and a foreign father. The Court found no reasonable justification for this practice. Nor had the Government put forward any convincing argument to justify it. The difference in treatment had therefore amounted to discrimination.
Conclusion: violation (unanimously).

Article 41 – EUR 720 in respect of pecuniary damage and EUR 1,500 in respect of non-pecuniary damage.

DISCRIMINATION (Article 1 of Protocol No. 1)
Deduction from pension of statutory contribution towards the costs of prisoner's maintenance: *communicated*.

DOBOS - Hungary (N° 45069/05)
[Section II]

The applicant, a pensioner, has been serving a prison sentence since 1999. In line with the domestic law, the prison authorities deduct from his pension, which he receives directly in prison, a statutory contribution to the costs of his maintenance there.
Communicated under Article 14 in conjunction with Article 1 of Protocol No. 1 to the Convention.

ARTICLE 34

HINDER THE EXERCISE OF THE RIGHT OF PETITION
Failure of the authorities to comply with an interim measure indicated by the Court under Rule 39 of the Rules of Court: *violation*.

PALADI - Moldova (N° 39806/05)
Judgment 10.3.2009 [GC] following referral

Facts: In September 2004 the applicant was taken into custody on suspicion of abuse of position and power. He suffered from a number of serious illnesses (diabetes, angina, heart failure, hypertension, chronic bronchitis, pancreatitis and hepatitis) and, while in detention, was examined by various doctors who all recommended medical supervision. However, he was only able to obtain sporadic medical visits and assistance in emergencies. In March 2005 he was transferred to a prison hospital. In May 2005 a neurologist from the Republican Neurology Centre recommended his transfer to an institution where he could receive hyperbaric oxygen (HBO) therapy. However, he did not start to receive therapy until September 2005. The therapy was given at the Republican Clinical Hospital and produced positive results. It was prescribed until the end of November 2005. On 10 November 2005 the district court ordered the applicant's transfer back to the prison hospital, as the Republican Neurology Centre had made no reference to HBO therapy in its most recent recommendations and indicated that the applicant's condition had stabilised. That same evening, the Court indicated by facsimile an interim measure to the Government under Rule 39 of the Rules of Court, stating that the applicant should not be transferred back to the prison hospital until the Court had had an opportunity to examine the case. The next day a Deputy Registrar of the Court unsuccessfully tried several times to contact the Government Agent's Office in Moldova by telephone. On the basis of the Court's interim measure, the applicant's lawyer requested the district court to stay the execution of its decision, but his request was refused. The applicant was transferred to the prison hospital the same day. Eventually, following requests by both the applicant's lawyer and the Agent of the Government, on 14 November 2005 the district court ordered the applicant's transfer back to the neurological centre. He was made to wait six hours before being admitted, apparently because his medical file had arrived late. In December 2005 the applicant's detention pending trial was replaced with an obligation not to leave the country. In 2006 he was declared as having a second-degree disability.

Law: Article 3 – The applicant had a serious medical condition which had been confirmed by a number of medical specialists. Nonetheless, he had not been provided with the level of medical assistance adequate for his condition, as detailed in the Chamber judgment. The Grand Chamber therefore agreed with the Chamber that the overall level of medical assistance the applicant received in detention had been insufficient.

Conclusion: violation (by fifteen votes to two).

Article 34 – The interim measure issued on 10 November 2005 had included clear instructions to the authorities to refrain from transferring the applicant from the neurological centre. Despite becoming aware of this measure at the latest on the morning of 11 November 2005, the authorities did not prevent the applicant's transfer on that day. The Government had submitted that it had been impossible to comply with the indicated measure prior to 14 November 2005, when it was in fact implemented. The trial court competent to decide on the place of the applicant's detention pending trial had been informed by the Government Agent's Office of the interim measure on Friday 11 November 2005, but had been unable to summon all the parties on that day. It had therefore held a meeting on the next working day, which was Monday 14 November 2005. However, the Government had provided no evidence that the trial court had indeed tried to summon the parties on 11 November 2005, and, even assuming that it had, there had been only two parties to the proceedings: the applicant and the prosecutor. The applicant's lawyer, who had himself on the morning of 11 November urged the trial court to issue an injunction on the basis of the Court's interim measure, had surely been available to attend a hearing, whereas the inability of the prosecutor's office to send a prosecutor to an urgent meeting called by the trial court was open to doubt. Moreover, even if the trial court had been unable to examine the applicant's lawyer's request on 11 November, it could have done so much sooner than it eventually did. It was usual practice to designate a duty roster for judges to respond to any urgent requests made during weekends or public holidays. Finally, from the documents in its possession, the Court concluded that the trial court had not received the Government Agent's letter before 14 November 2005 for reasons of negligence incompatible with the requirement to take all reasonable steps to ensure immediate compliance with the interim measure. Further, nobody in the Government Agent's Office had been available to answer the urgent calls from the Registry on 11 November 2005. The domestic authorities had thus displayed a lack of commitment in assisting the Court to prevent the commission of irreparable damage. Moreover, the Government had failed to show the existence of objective impediments to comply with the interim measure indicated by the Court. As to their argument that HBO therapy had eventually proven not to have been essential for the applicant's treatment, the Court observed that the authorities had not been aware of such facts at the time the events took place. As far as was known at the material time, the failure to take immediate action to comply with the Court's interim measure could have led to irreparable damage to the applicant and could thus have deprived the proceedings of their object. The fact that ultimately the risk had not materialised did not alter the fact that the attitude of the authorities and their lack of action were incompatible with their obligations under Article 34 of the Convention.
Conclusion: violation (nine votes to eight).

The Court also found a violation of Article 5 § 1.

Article 41 – EUR 2,080 in respect of pecuniary and EUR 15,000 in respect of non-pecuniary damage.

ARTICLE 37

Article 37 § 1 (c)

CONTINUED EXAMINATION NOT JUSTIFIED
Request for pursuit of proceedings by a person who had not established that he was an heir or a close relative or that he had a legitimate interest: *struck out of the list*.

LÉGER - France (N° 19324/02)
Judgment 30.3.2009 [GC] following referral

Facts: In 1964 the applicant was arrested and charged with the abduction and murder of an 11-year-old boy. The Assize Court found him guilty as charged and, finding that there were mitigating circumstances, sentenced him to life imprisonment, but without setting a minimum term. The Court of Cassation

dismissed an appeal on points of law by the civil party. In 1979 the applicant became eligible for parole. Between 1985 and 1998 he made numerous applications for release, all of which were refused. In 1999 he again requested his release on licence. Despite a favourable opinion by the Sentence Enforcement Board and the opinion of the judge responsible for the execution of sentences that there were no obstacles to the applicant's release on licence, the Minister of Justice refused his application for release following the reform of the post-sentencing system under Law no. 2000-516 of 15 June 2000, in particular the conditions and procedure for releasing long-term prisoners on licence, and referred his case to the newly established courts. In 2001 the applicant submitted an application under the new judicial procedure. The Sentence Enforcement Board issued a unanimous opinion in favour of his release on licence, but the competent courts refused the application. In 2005 the applicant lodged a further application for release on licence. The prison authorities recommended applying a probationary semi-custodial regime. In a judgment, subsequently upheld on by the Post-sentencing Division of the Court of Appeal, the applicant was released on licence with effect from October 2005 until October 2015. The applicant died in July 2008.
The applicant had complained to the Court under Article 5 § 1 (a) that his continued detention had been arbitrary. He had also submitted that in practice his sentence had been tantamount to a whole-life sentence and therefore constituted inhuman and degrading treatment within the meaning of Article 3 of the Convention. In a judgment of 11 April 2006 the Chamber had found no violation of Article 5 § 1 (a) of the Convention (by five votes to two) and no violation of Article 3 of the Convention (five votes to two).

Law: The applicant had been found dead in his home on 18 July 2008 and the ensuing request to pursue the proceedings in his place had been submitted by someone who had provided no evidence either of her status as an heir or a close relative of the applicant, or of any legitimate interest. Therefore, under Article 37 § (c) of the Convention, it was no longer justified to continue the examination of the application. Nor did the Court consider that respect for human rights required the examination of the case to be continued, given that the relevant domestic law had in the meantime changed and that similar issues in other cases before it had been resolved.
Conclusion: striking out (thirteen votes to four).

ARTICLE 41

JUST SATISFACTION
Obligation to execute final judicial order quashing administrative decisions.

NIŢESCU - Romania (N° 26004/03)
Judgment 23.3.2009 [Section III]

Facts: The municipal council authorised a company to convert an apartment in the residential building where the applicant lived into a shop. Subsequently the company obtained planning permission for structural alterations inside the apartment. The court of first instance and the court of appeal allowed an urgent application to have the work stopped. The bailiff sent to the site found that no structural alterations had been made and drew up a report stating that the judgment would continue to be enforced at the claimant's request.
The applicant applied to have the municipal decisions and the planning permission set aside, but the court of first instance rejected the application. By a judgment of 2002 the court of appeal allowed the applicant's appeal in part, quashed the judgment of the district court and set aside the decision of the local council and the mayor's order. It held that under Romanian law the applicant's agreement was an essential condition for the conversion of the apartment, as the law expressly required the agreement of the owner of the apartment above. Furthermore, the business being conducted in the flat below was affecting the applicant's enjoyment of his place of residence. The planning permission, however, did not affect him, as it simply authorised certain changes to the premises and not their actual conversion. An application to have that judgment set aside was rejected and the judgment became enforceable. A bailiff from the court of appeal sought authorisation to enforce the judgment and close the shop. In 2003 the court of first

instance rejected the request on the grounds that the judgment concerned made no mention of closing the shop. The applicant appealed unsuccessfully to the district court. He further took various steps to have the shop closed down, but to no avail.

Law: Article 6 § 1 – Although the applicant had obtained a final judgment in 2002 setting aside municipal administrative decisions on the grounds that they violated his right to oppose the conversion of the apartment, that judgment had not been enforced or set aside or amended by any appeal procedure provided for by law. In 2003 the court of first instance had rejected the applicant's request for authorisation to have the judgment enforced and the shop closed, on the grounds that the judgment concerned made no mention of an obligation for the shop to close. While it was true that the operative part of the judgment did not expressly order the authorities to close the shop, it did clearly indicate its reasons for setting aside the administrative decisions, so that the authorities should have considered their position in the light of the court of appeal's finding of a breach of the law. The Court could but note that the quashing of the administrative decisions in question had had no effect on the operation of the shop, in spite of the obligation on the authorities to comply with the judgment. Quashing the administrative decisions had been a necessary step prior to putting a stop to the shop's activities, and only the local authorities had had the power to take the necessary action. Furthermore, although the court of appeal had quashed the administrative decisions, finding against the company and in favour of the applicant, all further action by the applicant against the company had been frustrated by the authorities' failure to comply with the judgment. By failing, for six years, to cancel the impugned decisions, the authorities had deprived the applicant of effective access to a court.
Conclusion: violation (unanimously).

Article 41 – A judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. In this case the Court had found a violation of Article 6 § 1 because of failure to enforce the judgment of 2002. It considered, accordingly, that full enforcement of the judgment in question would place the applicant as far as possible in the situation he would have been in had there been no violation of Article 6 § 1.
EUR 5,000 in respect of non-pecuniary damage.

ARTICLE 46

EXECUTION OF A JUDGMENT
Structural inadequacy of medical care in prisons: *violation*.

GHAVTADZE - Georgia (N° 23204/07)
Judgment 3.3.2009 [Section II]

(See Article 3 above).

ARTICLE 1 OF PROTOCOL No. 1

POSSESSIONS
PEACEFUL ENJOYMENT OF POSSESSIONS
Refusal to enter Greek Orthodox Church foundation in land register as owner of property it had held without interruption for more than twenty years: *violation*.

BOZCAADA KİMİSİS TEODOKU RUM ORTODOKS KİLİSESİ VAKFI - Turkey (No. 2)
(Nos 37639/03, 37655/03, 26736/04 and 42670/04)
Judgment 3.3.2009 [Section II]

Facts: The applicant is a Foundation of the Greek Orthodox Church. It submitted that it had acquired by donation or legacy three pieces of land and a building. However, although the applicant foundation had owned the property for many years, it had never been registered in the land register in its name. In May 1991 the land register was reorganised and the pieces of land in question were divided into a number of plots, each with a new registration number. The boxes in which the owners' names were to be entered in the land register were left empty, the applicant foundation having failed to submit its declaration of the property it owned, as required under Law no. 2762 on foundations. The land registry entries for the properties concerned stated that no title had been recorded in the land register in the applicant foundation's name, although experts and witnesses had confirmed that the foundation did own them. As the foundation did not lodge an objection within the 30 days allowed by law, the cadastral plans were published and became final. In 2001 and 2002 the applicant foundation applied to the land registration tribunal to have its title to each of the properties recorded in the land register. The tribunal allowed the application and ordered the properties to be registered in the applicant foundation's name. The Court of Cassation quashed that judgment. In August 2002 Law no. 4771, amending Law no. 2762, entered into force. It opened up the possibility for foundations to have real estate which they could prove, in one way or another, that they owned recorded in the land register. The land registration tribunal, in keeping with the judgments of the Court of Cassation, dismissed the applicant foundation's requests and ordered title to the disputed property to be vested in the Treasury. The Court of Cassation dismissed appeals lodged by the applicant foundation, thereby upholding the first-instance judgments. In the meantime, based on Law no. 4771, the applicant foundation had filed an application with the General Directorate of Foundations to have the properties in question registered in its name in the land register. Its application was dismissed on the grounds that ownership was already listed in the register in the name of the Treasury or third parties. The Administrative Court rejected the applicant's subsequent appeal to have that decision set aside. The Council of State upheld the first-instance judgment.

Law: That the applicant foundation had not been in possession of the title deeds to the properties concerned was not in dispute. The question was whether the foundation could rightfully claim to have acquired the property by adverse possession, and therefore request its registration in the land registry under its name. In this case the applicant foundation could legitimately have believed that it had satisfied all the requirements for its title to the real property it had owned for a very long time to be recognised. Its proprietary interest was of a sufficient nature to constitute a substantive interest and hence a "possession" within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No. 1, which provision was therefore applicable to this aspect of the complaint. The interference with the right to peaceful enjoyment of possessions seen here in the refusal to register the property in the applicant foundation's name and its registration in that of the Treasury instead, ought, above all, to have been legal. However, the relevant legislative provisions in force were sufficiently clear. Section 14 of the Land Registry Act listed the conditions for acquisition of a property by adverse possession. In addition, Law no. 2762 on foundations, as amended after 2002, recognised the capacity of foundations of religious minorities to acquire property on the basis of possession. Consequently, and in the light of the above considerations, the Turkish courts' refusal to register the disputed property in the land register in the applicant foundation's name could not be regarded as sufficiently foreseeable for the foundation, which had possessed it uninterruptedly for more than 20 years for the purposes of section 14 of the Land Registry Act. The interference complained of was incompatible with the principle of legality.
Conclusion: violation (unanimously).

Article 41 – Disputed property to be registered in the land register in the applicant foundation's name; failing that, payment of EUR 100,000 to the applicant foundation in respect of pecuniary damage.

PEACEFUL ENJOYMENT OF POSSESSIONS
Late payment of inadequate reparation awarded in length-of-proceedings case under the "Pinto" law: *violation*.

SIMALDONE - Italy (N° 22644/03)
Judgment 31.3.2009 [Section II]

(See Article 6 § 1 [civil] above).

PEACEFUL ENJOYMENT OF POSSESSIONS
Delay in execution of decisions taken in "Pinto" proceedings: *communicated.*

GAGLIONE and 479 Others - Italy (Nos 45867/07, etc)
[Section II]

(See Article 6 § 1 [civil] above).

ARTICLE 2 OF PROTOCOL No. 1

RIGHT TO EDUCATION
Temporary suspension of students for having petitioned university authorities to provide optional Kurdish language courses: *violation*.

TEMEL and Others - Turkey (N° 36458/02)
Judgment 3.3.2009 [Section II]

Facts: The applicants were university students. In January 2002 they petitioned the university requesting that optional Kurdish language classes be introduced. As a result, all but one of them were suspended from the university for a period of two terms; the remaining student, who had shown remorse, was suspended for one term. They made an unsuccessful request for a stay of execution of the disciplinary decisions against them. Their requests for annulment were also initially rejected by the courts, on the grounds that the petitions had been likely to give rise to polarisation on the basis of language, race, religion or denomination, and that they represented part of the new strategy of civil disobedience by the Kurdistan Workers' Party (PKK, an illegal armed organisation). However, the Supreme Administrative Court quashed the lower courts' decisions and remitted the cases for fresh examination to the first-instance court. In May 2004 the competent court annulled the disciplinary sanctions against the applicants, finding that their petitions for optional Kurdish language classes were fully in line with the general aim of Turkish higher education, which was to train students in becoming objective and broad-minded citizens who were respectful of human rights.

Law: The applicants' suspension from the university had constituted a restriction on their right to education. The central issue was the question of proportionality. The applicants had not committed any reprehensible act, nor had they resorted to violence or attempted to breach the peace or order in the university. They had been sanctioned merely for submitting petitions and because of the views expressed therein. However, neither their views, nor the form in which they had been conveyed, could be construed as an activity which would lead to polarisation of the university population on the basis of language, race, religion or denomination. Even though the right to education did not, in principle, exclude recourse to disciplinary measures, including suspension or expulsion from an educational institution in order to ensure compliance with its internal rules, such regulations should not injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols. In the instant case the applicants had been suspended from the university as a result of the exercise of their freedom of expression. The imposition of such a disciplinary sanction could not be considered as reasonable or proportionate.

Although the sanction had been subsequently annulled on grounds of unlawfulness, the Court found it regrettable that by that time the applicants had already missed one or two terms of their studies and the outcome of the domestic proceedings had failed to redress their grievances under this head.
Conclusion: violation (unanimously).

Article 41 – EUR 1,500 in respect of non-pecuniary damage to each applicant.