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COUR EUROPÉENNE DES DROITS DE L'HOMME

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ARTICLE 3

Effective investigation

Failure to carry out effective investigation into allegations of violent sexual abuse of a child: *violation*

C.A.S. and C.S. v. Romania - 26692/05
Judgment 20.3.2012 [Section III]

Facts – In January 1998, the first applicant, a seven-year-old boy, was followed home from school by a man who forced his way into the family home and subjected him to a violent sexual assault before warning him at knife-point that he would be killed if he told anyone what had happened. Over the following months the abuse continued several times a week. In April 1998, after finally being told by his son what was happening, the boy's father (the second applicant) alerted the police, who started an investigation. The first applicant identified his aggressor in a line-up and several witnesses stated that they had seen the man either entering, or in the vicinity of, the boy's flat during the period in question. Two medical examinations of the boy indicated injuries consistent with repeated sexual abuse. After the investigation had been discontinued three times, the suspect eventually stood trial in 2004, when he was acquitted of rape and unlawful entry of the boy's home. The domestic courts found that the parties and witnesses had given contradictory statements and were particularly concerned by the fact that the parents had waited a long time before going to the police. They further noted that the first applicant had not given an accurate description of the facts and was prone to fantasizing.

Law – Articles 3 and 8: Despite the gravity of the allegations and the particular vulnerability of the victim, the investigation had been neither prompt nor effective. The authorities had waited three weeks before ordering a medical examination of the victim and two months before interviewing the main suspect. Overall, the investigation had lasted five years. Furthermore, seven years after the incident, the main suspect had been exonerated without the authorities even trying to find out if there was any other suspect. Of even further concern in such a case of violent sexual abuse of a minor was that the authorities had not tried to weigh up the conflicting evidence and establish the facts or carry out a rigorous and child-sensitive investigation. In fact, while the courts had paid no attention to the length of the investigation, they had attached significant importance to the fact that the family had not reported the crimes immediately to the police and, to a certain extent, that the victim had not reacted sooner. The Court failed to see how the parents' alleged negligence could have any impact on the diligence of the police in their response to the rape of a seven-year-old boy. Nor could it understand why the authorities had not been more aware of the particular vulnerability of the victim and the special psychological factors involved, which could have explained his hesitation in reporting the abuse and describing what had happened to him. The States had an obligation under Articles 3 and 8 to ensure the effective criminal investigation of cases involving violence against children, with respect for their best interests being paramount. It was particularly regrettable that the first applicant had never been given counselling or been accompanied by a qualified psychologist either during the rape proceedings or afterwards. The failure to adequately respond to allegations of child abuse in this case cast doubt over the effectiveness of the system Romania had put in place to comply with its international obligations to protect children from all forms of violence and to help the recovery and social reintegration of victims. Indeed, it had left the criminal proceedings devoid of any meaning. In sum, the authorities had failed to carry out an effective investigation into the allegations of violent sexual abuse of the first applicant and to ensure adequate protection of his private and family life.

Conclusion: violation (unanimously).

Article 41: EUR 15,000 to the first applicant in respect of non-pecuniary damage.

ARTICLE 5

Article 5 § 1

Deprivation of liberty

Containment of peaceful demonstrators within a police cordon for over seven hours: *Article 5 not applicable; no violation*

Austin and Others v. the United Kingdom - 39692/09, 40713/09 and 41008/09
Judgment 15.3.2012 [GC]

Facts – On 1 May 2001 a large demonstration against capitalism and globalisation took place in London. The organisers gave no notice to the police

of their intentions and publicity material they distributed beforehand included incitement to looting, violence and multiple protests all over London. The intelligence available to the police indicated that, in addition to peaceful demonstrators, between 500 and 1,000 violent and confrontational individuals were likely to attend. In the early afternoon a large crowd made its way to Oxford Circus, so that by the time of the events in question some 3,000 people were within the Circus and several thousand more were gathered in the streets outside. In order to prevent injury to people and property, the police decided that it was necessary to contain the crowd by forming a cordon blocking all exit routes from the area. Because of violence and the risk of violence from individuals inside and outside the cordon, and because of a policy of searching and establishing the identity of those within the cordon suspected of causing trouble, many peaceful demonstrators and passers-by, including the applicants, were not released for several hours.

Following these events, the first applicant brought a test case in the High Court for damages for false imprisonment and a breach of her Convention rights. Her claim was dismissed and that decision was upheld on appeal. In a unanimous ruling,[1] the House of Lords found that there had been no deprivation of liberty within the meaning of Article 5 of the Convention since the intention of the police had been to protect both demonstrators and property from violence, and the containment had continued only as long as had been necessary to meet that aim. In its view, the purpose of the confinement or restriction of movement and the intentions of those responsible for imposing it were relevant to the question of whether there had been deprivation of liberty, and measures of crowd control that were proportionate and undertaken in good faith in the interests of the community did not infringe the Article 5 rights of individual members of the crowd whose freedom of movement was restricted.

Law – Article 5 § 1: This was the first case in which the Court had considered the application of Article 5 § 1 in respect of the "kettling" or containment of a group of people by the police on public-order grounds. The following general principles were of particular relevance in this context:

(a) The police had to be afforded a degree of discretion in taking operational decisions. Article 5 could not be interpreted in a way that made it impracticable for them to fulfil their duties of maintaining order and protecting the public, provided they complied with the underlying principle of Article 5, which was to protect the individual from arbitrariness.

(b) Article 5 § 1 was not concerned with mere restrictions on liberty of movement, which were governed by Article 2 of Protocol No. 4 (which Protocol the United Kingdom had not ratified). In order to determine whether someone had been "deprived of his liberty" within the meaning of Article 5 § 1, the starting point had to be his or her concrete situation and account had to be taken of a whole range of criteria such as the type, duration, effects and the manner of implementation of the measure in question. The difference between deprivation of liberty and restriction upon liberty was one of degree or intensity, not of nature or substance.

(c) The purpose behind the measure in question was not a factor to be taken into account when deciding whether there had been a deprivation of liberty (although it might be relevant to the subsequent inquiry whether the deprivation of liberty was justified under one of the subparagraphs of Article 5 § 1).

(d) Conversely, the context in which the measure in question was imposed was an important factor. Members of the public were often called on to endure temporary restrictions on freedom of movement in certain contexts, such as travel by public transport or on the motorway, or attendance at a football match. Such commonly occurring restrictions could not properly be described as "deprivations of liberty" within the meaning of Article 5 § 1, so long as they were rendered unavoidable as a result of circumstances beyond the control of the authorities, were necessary to avert a real risk of serious injury or damage, and were kept to the minimum required for that purpose.

Turning to the facts of the applicants' case, the Court noted that following a three-week trial and consideration of a substantial body of evidence, the trial judge had found that the police had expected a "hard core" of 500 to 1,000 violent demonstrators to form at Oxford Circus at around 4 p.m. and that there was a real risk of serious injury, even death, and damage to property if the crowds were not effectively controlled. They were taken by surprise when over 1,500 people gathered there two hours earlier and decided that an absolute cordon had to be imposed if they were to prevent violence and the risk of injury and damage. From 2.20 p.m., when a full cordon was in place, no-one

1. *Austin (FC) & another v. Commissioner of Police of the Metropolis* [2009] UKHL 5.

in the crowd was free to leave the area without permission. There was space within the cordon for people to walk about and no crushing, but conditions were uncomfortable, with no shelter, food, water or toilet facilities. Although the police tried throughout the afternoon and evening to start releasing people, their attempts were repeatedly suspended because of the violent and uncooperative behaviour of a significant minority both within and outside the cordon and full dispersal was not completed until 9.30 p.m. Approximately 400 individuals who could clearly be identified as not being involved in the demonstration or who had been seriously affected by being confined were, however, permitted to leave beforehand.

On the basis of these findings, the Court considered that the coercive nature of the containment within the cordon, its duration; and its effect on the applicants, in terms of physical discomfort and inability to leave Oxford Circus, pointed towards a deprivation of liberty. However, the Court also had to take into account the "type" and "manner of implementation" of the measure in question as the context in which the measure was imposed was significant.

The cordon had been imposed to isolate and contain a large crowd in dangerous and volatile conditions. It was a measure of containment that had been preferred over more robust methods which might have given rise to a greater risk of injury. The Court had no reason to depart from the judge's conclusion that in the circumstances an absolute cordon had been the least intrusive and most effective means of averting a real risk of serious injury or damage. In this context, the Court did not consider that the putting in place of the cordon had amounted to a "deprivation of liberty". Indeed, the applicants had not contended that, when it was first imposed, those within the cordon had been immediately deprived of their liberty and the Court was unable to identify a moment thereafter when the containment could be considered to have changed from what had been, at most, a restriction on freedom of movement, to a deprivation of liberty. It was striking that some five minutes after an absolute cordon had been imposed, the police had been planning to commence a controlled release. They made frequent attempts thereafter and kept the situation under close review throughout. Accordingly, on the specific and exceptional facts of the instant case, there had been no deprivation of liberty within the meaning of Article 5 § 1. In conclusion, since Article 5 was inapplicable, there had been no violation of that provision in this case.

The Court underlined, however, that measures of crowd control should not be used by national authorities directly or indirectly to stifle or discourage protest, given the fundamental importance of freedom of expression and assembly in all democratic societies. Had it not remained necessary for the police to impose and maintain the cordon in order to prevent serious injury or damage, the "type" of the measure would have been different, and its coercive and restrictive nature might have been sufficient to bring it within Article 5.

Conclusion: no violation (fourteen votes to three).

ARTICLE 6

Article 6 § 1 (civil)

Civil rights and obligations
Adversarial trial
Equality of arms

Non-disclosure to employer of medical documents establishing occupational nature of employee's disease: *inadmissible*

Eternit v. France - 20041/10
Decision 27.3.2012 [Section V]

Facts – In December 2005 the Health Insurance Office forwarded an occupational disease declaration to the applicant company, together with other documents sent in by one of the company's former blue-collar employees. The Health Insurance Office subsequently informed the applicant company that the former employee's file had been examined and the company had twenty-one days to consult it. The Office sent the company the different documents in the file, including the consulting doctor's opinion that the disease was occupation-related. In February 2006 the Health Insurance Office notified the applicant company of its decision to acknowledge the occupational origin of the former employee's condition. The applicant company appealed to the social-security tribunal, complaining that the adversarial principle had not been respected as the Health Insurance Office had failed to produce the medical information on which the consulting doctor had based his opinion. In 2008 the court of appeal set aside the first-instance judgment in favour of the applicant company and upheld the decision of the Health Insurance Office to cover the former employee's disease. The applicant company appealed on points of law, but the appeal was dismissed.

Law – Article 6 § 1

(a) *Applicability* – The civil limb of Article 6 § 1 of the Convention was applicable where an employer challenged the decision that a disease was occupation-related, because of the private-law aspects of the social-security system in matters related to industrial accidents and diseases. The relationship between an employer and the Health Insurance Office was comparable in many respects to that between the insured and the insurer: the employer paid contributions to the Health Insurance Office, which covered industrial accidents and diseases and charged the employer a premium that reflected in part the number of industrial accidents and diseases reported in the company concerned.

(b) *Fairness* – An expert medical opinion, in so far as it pertained to a technical field that was outside the judges' field of knowledge, was likely to have influenced their assessment of the facts and convinced them of the occupational origin of the disease. However, the failure to give the employer access to the employee's medical records and the observations of the consulting doctor was explained by the medical confidentiality required of the doctor. True, the right to medical confidentiality was not absolute, but it had to be taken into account, as did the applicant company's right to an adversarial procedure, and this had to be done in such a way that neither right was impaired in its very essence. This balance was achieved where an employer challenging the occupational nature of a disease could ask the court to appoint an independent medical expert who could review the employee's medical records and draw up a report – respecting the confidentiality of the medical records – to guide the court and the parties. The procedure by which the Health Insurance Office reached a decision as regards the industrial nature of an employee's disease or accident generally obeyed the adversarial principle and the obligation to inform the employer, as provided for in French law and guaranteed by the social-security tribunals. The possibility for the employer to have access, via a medical expert, to an employee's medical records guaranteed an adversarial procedure without impairing the employee's right to medical confidentiality. The fact that an expert report was not commissioned every time an employer requested one, but only when the court considered it had insufficient information, met the requirements of a fair trial under Article 6 § 1 of the Convention. It was not the Court's role to say whether an expert opinion should have been sought in the present case, but rather to determine whether the proceedings as a whole, including the presentation of the evidence, had been fair. The Health Insurance Office had reached its decision based solely on the opinion of its consulting doctor. That doctor, however, was not under the direct authority of the Health Insurance Office concerned but under that of the National Health Insurance Fund for Salaried Employees. This applied both to the independent status of the doctor *vis-à-vis* the administrative services of the Health Insurance Office and to the duty of confidentiality by which he was bound. That being so, the administrative services of the Health Insurance Office had not had access to the medical records requested by the applicant company either, so the Health Insurance Office had not been given a clear advantage over the applicant company in the proceedings.

Conclusion: inadmissible (manifestly ill-founded).

Access to court

Refusal of legal aid to foreign company wishing to issue civil proceedings in German courts: *no violation*

Granos Organicos Nacionales S.A. v. Germany - 19508/07
Judgment 22.3.2012 [Section V]

Facts – The applicant company is registered under Peruvian law and based in Lima. In 2005 it requested legal aid to bring a civil action in Germany against two German companies. The German courts refused the request on the grounds that under German law only legal persons based in the European Union or the European Economic Area were entitled to legal aid. In its application to the European Court the applicant company complained of a violation of its right of access to a court (Article 6 § 1 of the Convention) and of discrimination (Article 6 § 1 in conjunction with Article 14).

Law – Article 6 § 1: There did not appear to be a consensus or even a consolidated tendency among the State parties to the Convention as regards the granting of legal aid to legal persons. Indeed, the law of a substantial number of States did not provide any form of legal aid to legal persons. Under German law legal aid was only available to foreign legal persons if they were registered or residing in the European Union or the European Economic Area. According to the German courts this difference in treatment was justified by the principle of reciprocity. The Court noted that Peruvian law expressly provided for legal aid to be granted to

natural persons only and that the applicant company had been unable to submit any case-law with respect to the granting of legal aid to foreign legal persons. It therefore considered that the domestic courts had based their decision to deny the applicant company legal aid on relevant grounds.

As regards the question whether the restriction on the applicant company's right of access to a court could be considered proportionate to the aims pursued, specific weight had to be attached to the procedural safeguards provided in German law, notably the possibility to lodge a request for exemption from the obligation to advance payment of the court fee if immediate payment would cause difficulty. That possibility was open to natural and legal persons alike and did not differentiate between domestic and foreign legal entities. The applicant company could have lodged such a request, but had not done so. While it was true that, even if it had obtained such an exemption, the applicant company might still have been liable to make an advance payment on its own counsel's fees or to provide security for the payment of its opponents' court fees, the Court noted that the advance payment of counsel's fees was not compulsory under German law and it had not been established that the question of providing security had been raised during the proceedings. In these circumstances, the limitations imposed on the applicant company's right of access to a court were proportionate to the aims pursued.

Conclusion: no violation (unanimously).

Article 6 § 1 in conjunction with Article 14: In the light of its findings under Article 6 § 1, the Court considered that the Government had submitted relevant reasons for the different treatment of natural and legal persons (the necessity to control the use of public funds for financing litigation by private companies), and of domestic and foreign legal entities (the principle of reciprocity).

Conclusion: no violation (unanimously).

Article 6 § 1 (criminal)

Access to court

Inability to contest alleged road-traffic offence after payment of on-the-spot fine: *violation*

Célice v. France - 14166/09
Josseaume v. France - 39243/10
Judgments 8.3.2012 [Section V]

Facts – In the *Célice* case, the applicant's car was caught on a speed camera in June 2008 exceeding the speed-limit by 1 kph. The applicant received notice of the road-traffic offence with an order to pay a standard fine. In the *Josseaume* case the applicants are father and son. A parking offence was notified in respect of a vehicle registered in the son's name and of which the father was the owner. In both cases the applicants paid the standard fine and applied to the public prosecutor's office for an exemption. Their applications were declared inadmissible.

Law

(a) *Admissibility (exhaustion of domestic remedies)* – In the *Célice* case, since the application for exemption had been declared inadmissible by the prosecuting authorities, the advance paid by the applicant was deemed to constitute payment of the standard fine and no surcharge was added. It was possible to appeal to a court only against a payment order following non-payment of the fine and the addition of a surcharge.

In the *Josseaume* case the prosecuting authorities had failed to respond to the applicants' appeal against the order to pay the fine, as increased by the surcharge, after apparently declaring it inadmissible. He had thus deprived the applicants of the possibility of appealing to a community judge (*juge de proximité*).

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – Article 6 § 1: The right to a court, of which the right of access was one aspect, was not absolute; it was subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal were concerned. However, such limitations could not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right was impaired. They must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

Under the Code of Criminal Procedure, the prosecuting authorities responsible for verifying the admissibility of exemption applications and appeals against fines had three options: to drop the proceedings; to refer the matter to the competent court; or, where the application did not give reasons or was not accompanied by the notice, to inform the applicant of its inadmissibility.

In the *Célice* case the prosecution had taken the view that the application was inadmissible, finding

that it was a "request for a photograph without an explicit denial of the offence". However, that reason had been erroneous, because the applicant had clearly indicated, on the appropriate form, that he was challenging the offence of which he was accused and had set out his grounds in the requisite letter accompanying the application for exemption. In addition, by making that assessment the prosecuting authorities, whose remit was limited to examining the formal admissibility of the application, had acted *ultra vires*. Furthermore, the inadmissibility decision by that official had led to the retention of the sum paid in advance, which was considered to constitute payment of the standard fine. Therefore, in spite of the applicant's objection, the fine was considered paid and the prosecution closed, without the "charge" against him having been determined by a "tribunal", within the meaning of Article 6 § 1 and without his arguments having been heard.

Moreover, in September 2010, the French Constitutional Council found that, where prosecuting authorities declared inadmissible an application for exemption from a standard fine, after the deposit had been paid, and where that declaration had the effect of converting the deposit into the fine itself, the inability to appeal against such a decision before the community judge was incompatible with the "right to an effective judicial remedy".

In the *Josseaume* case the Code of Criminal Procedure provided that an admissible application stayed execution of the order to pay the fine, and the prosecuting authorities were required to inform the Treasury thereof immediately. The fact that the collection procedure had continued indicated that the authorities had deemed the applicants' application inadmissible. In addition to the fact that the inadmissibility decision must have been based on a ground other than the two provided for in the Code of Criminal Procedure, because the application contained reasons and was duly accompanied by the notice, the prosecuting authorities had also failed to inform the applicants that the application had been dismissed. It thus appeared that the prosecuting authorities, acting *ultra vires*, had ruled on the merits of the application and thus deprived the applicants of their right to have the "charge" in question determined by a community judge.

Thus the very essence of the applicants' right of access to a court had been impaired.

Conclusion: violation (unanimously).

Article 41: The finding of a violation was sufficient in itself for the non-pecuniary damage in the *Célice* case; the applicants had failed to submit a claim in the required form in *Josseaume*.

Article 6 § 2

Presumption of innocence

Refusal of operating licence owing to risk that it would be used to commit criminal offences: *Article 6 not applicable*

Bingöl v. the Netherlands - 18450/07
Decision 20.3.2012 [Section III]

Facts – The applicant was refused an operating licence to run catering and sports facilities on the grounds that there was a serious danger that the licence would be used to commit criminal offences or to enjoy the proceeds of crime. That decision was based on the applicant's previous convictions, *inter alia*, for the illegal employment of aliens, and his allegedly suspicious conduct. In his application to the European Court, the applicant alleged a violation of his right to be presumed innocent as guaranteed by Article 6 § 2 of the Convention.

Law – Article 6 § 2: The applicant's complaint was not that the wording of a judicial or other decision had reflected a finding of guilt on his part after a prosecution that did not result in a conviction, but that the refusal of the operating licence in and of itself had violated Article 6 § 2 in that it took his criminal antecedents into account. The Court and Commission had taken the view in previous cases that, for the purposes of conviction and sentencing, Article 6 did not prevent domestic courts from having regard to an existing criminal record. There was no reason of principle why Article 6 § 2 should prevent a competent authority from doing so when considering whether a person met standards of probity required for a particular purpose. Likewise, in its decision in *McParland*,[1] the Court had found that the refusal of a road service licence on the ground that the applicant's criminal record was such that he could not be considered to be of "good repute" had not involved the determination of a criminal charge within the meaning of Article 6 § 1. Identical reasons applied to the instant case in which the applicant had been refused an operating licence on the ground that, in view of his criminal

1. *McParland v. the United Kingdom* (dec.), no. 47898/99, 30 November 1999.

antecedents, he was deemed unfit to carry on his intended business.

Conclusion: inadmissible (incompatible *ratione materiae*).

Publication of investigative body's report in press before independent administrative authority hearing the case had reached its decision: *inadmissible*

Société Bouygues Telecom v. France - 2324/08
Decision 13.3.2012 [Section V]

Facts – The applicant company was one of three mobile telephone operators present on the French market. The Competition Commission and a consumer association accused them of conspiring to stabilise their respective market shares on the basis of jointly agreed targets, thereby distorting competition. In the summer of 2003 the Directorate-General for Competition, Consumer Affairs and Fraud Prevention (DGCCRF) began an investigation. A report was completed and communicated to the parties in June 2005 for comment. In August 2005 some newspapers published details of the DGCCRF report, which were relayed in the media. In November 2005 the Competition Commission imposed financial penalties on the three companies, including a fine of fifty-eight million euros on the applicant company, for anti-competitive practices on the mobile telephone market.

Law – Article 6 § 2: The Court was unable to determine whether or not the administrative authorities had been responsible for the disclosure of the DGCCRF report to the media. It sought instead to ascertain whether the leaks in question had undermined the fairness of the proceedings, by influencing public opinion and, by the same token, the members of the Competition Commission whose task it was to decide whether the companies concerned, including the applicant company, were guilty. That question was all the more pertinent in the instant case because the Competition Commission (the supervisory body responsible for competition since 13 January 2009) was not composed of a majority of professional judges. The press, by and large, had not claimed that the applicant company was definitely guilty but had adopted a moderate tone. Readers had been left to make up their own minds, in the knowledge that the case had not yet been judged. In any event, the only factors capable of influencing the Competition Commission's decision would have been the extracts from the DGCCRF report itself, which had been in the Commission's possession since May 2004. Furthermore, the applicant company could have made use of an urgent procedure which was available to anyone wishing to complain of an infringement of the right to be presumed innocent. The State had been under no obligation to set that procedure in motion automatically. All in all the State had acted with the requisite diligence in order to secure respect for the applicant company's right to be presumed innocent. The Competition Commission had informed the public prosecutor of the disclosure of the DGCCRF's report to the press and of the fact that it had published a statement on the eve of the judgment in reaction to the press articles announcing that it had found against the applicant company and giving the amount of the fines. Lastly, the Commission's decision had been upheld by the Court of Appeal, which had been empowered to rule on both the facts and the law, and also, in substance, by the Court of Cassation in a judgment given some considerable time after the comments on the report had appeared in the press.

Conclusion: inadmissible (manifestly ill-founded).

The Court also declared the applicant company's complaints under Article 6 § 1 of the Convention manifestly ill-founded.

ARTICLE 8

Respect for private life

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

Aksu v. Turkey - 4149/04 and 41029/04
Judgment 15.3.2012 [GC]

Facts – In 2000 the Ministry of Culture published a book entitled *The Gypsies of Turkey* that had been written by an associate professor. The applicant protested, claiming that the book contained remarks and expressions that humiliated and debased Gypsies, and subsequently brought an action in damages against the Ministry and the author of the book. The first-instance court dismissed the claim after finding that the book was the result of academic research, was based on scientific data and examined social structures of Gypsies in Turkey and that the impugned expressions did not insult the applicant. That judgment was upheld on appeal.

Meanwhile, the applicant had also brought civil proceedings against a non-governmental association which, with the aid of finance from the Ministry

of Culture, had published two dictionaries entitled *Turkish Dictionary for Pupils* and *Turkish Dictionary* that the applicant alleged contained certain entries that were insulting to and discriminatory against Roma. The domestic courts dismissed that claim too, after finding that the definitions and expressions in the dictionary were based on historical and sociological reality and that there had been no intention to humiliate or debase an ethnic group. They also noted that other similar expressions in the Turkish language concerning other ethnic groups could also be found in dictionaries and encyclopaedias.

In a judgment of 27 July 2010 (see Information Note no. 132), a Chamber of the Court held by four votes to three that there had been no violation of Article 14 of the Convention taken in conjunction with Article 8.

Law – Article 8

(a) *Applicability* – Despite the fact that the Chamber had examined the case under Article 14 taken in conjunction with Article 8, the Grand Chamber held that the case did not concern a difference in treatment or ethnic discrimination, since the applicant had failed to produce prima facie evidence that the impugned publications had a discriminatory intent or effect. The case was therefore not comparable to other applications previously lodged by members of the Roma community. The main issue to be examined was accordingly whether the impugned publications disproportionately interfered with the applicant's right to respect for his private life. The case would therefore be examined under Article 8 only.

(b) *Admissibility (victim status)* – The Grand Chamber accepted that, even though the applicant was not personally targeted by the impugned remarks and expressions, he could have felt offended by the remarks concerning the ethnic group to which he belonged. In view of that conclusion, as well as the fact that no dispute concerning the applicant's standing had ever arisen in the domestic proceedings, the applicant could claim to be a victim of the facts complained of within the meaning of Article 34 of the Convention.

Conclusion: preliminary objection dismissed (unanimously).

(c) *Merits*

(i) *Application concerning the book* – The main issue in the applicant's case was to determine whether the respondent Government had complied with their positive obligation to protect the applicant's private life from alleged interference by the author of the book. In cases like the present one, where the complaint was that rights protected under Article 8 had been breached as a consequence of the exercise by others of their right to freedom of expression, the Court needed to balance the applicant's Article 8 rights against the public interest in protecting freedom of expression. In dismissing the applicant's claim at two levels of jurisdiction, the Turkish courts had relied on a report prepared by seven university professors which characterised the book as an academic study based on scientific research and considered that the remarks and expressions therein had been of a general nature, did not concern all Roma and did not constitute an attack on the applicant's identity. These conclusions were not unreasonable or based on a misrepresentation of relevant facts. Thus, for instance, while the author had pointed to certain illegal activities on the part of some Roma living in particular areas, nowhere in the book had he made negative remarks about the Roma in general or claimed that all Roma engaged in illegal activities. Furthermore, in the preface, introduction and conclusion of the book the author had emphasised in clear terms that his intention had been to shed light on the unknown world of the Roma community, which had been ostracised and targeted by mainly prejudicial remarks. In the absence of any evidence justifying the conclusion that the author's statements had been insincere, it was not unreasonable for the domestic courts to have held that he had put effort into his work and had not been driven by racist intentions. The applicant had been able to bring his case and had obtained reasoned decisions dealing with his claim. In balancing the conflicting fundamental rights under Articles 8 and 10 of the Convention, the Turkish courts had made an assessment based on the principles from the Court's well-established case-law and had not overstepped their margin of appreciation or disregarded their positive obligation to secure the applicant effective respect for his private life.

Conclusion: no violation (sixteen votes to one).

(ii) *Application concerning the dictionaries* – Considering a dictionary as a source of information listing words of a language and giving them various meanings – the basic descriptive one, but also figurative, allegorical or metaphorical ones – its main purpose was to reflect the language used by society. The impugned dictionaries were substantial in volume and meant to cover the entire Turkish language. They contained an objective definition of the word "Gypsy", but also metaphorical meanings of the word as well as certain other expressions

used in spoken Turkish such as "Gypsy money" and "Gypsy pink". It would have been preferable to label the expressions that formed the daily language as "pejorative" or "insulting" – in particular in the dictionary aimed at pupils – as such a precaution would have also been in line with ECRI General Policy Recommendation No. 10[1] which stipulated the States' obligation to promote critical thinking among pupils. However, this element alone was insufficient for the Court to substitute its own view for that of the domestic courts, having regard to the fact that the impugned dictionary was not a school textbook part of the official school curriculum. In conclusion, the domestic authorities had not overstepped their margin of appreciation or disregarded their positive obligation to secure the applicant effective respect for his private life.

Conclusion: no violation (sixteen votes to one).

Respect for family life

Placement of child from abusive background with prospective adoptive parent: *no violation*

Y.C. v. the United Kingdom - 4547/10
Judgment 13.3.2012 [Section IV]

Facts – The applicant and her partner of several years had a son in 2001. In 2003 the family came to the attention of social services as a result of an "alcohol fuelled" incident between the parents. There were subsequent incidents of domestic violence and alcohol abuse which escalated from the end of 2007 with the police being called to the family home on numerous occasions. In June 2008 the local authority obtained an emergency protection order after the boy was injured during a further violent altercation between the parents. That order was followed up by an interim care order and the boy was placed in foster care. A guardian was appointed to protect his interests. The interim care order was repeatedly extended pending detailed reports by social services, the boy's guardian and a psychologist. In April 2009 the family proceedings court decided not to make a full care order and a placement order after finding that the applicant, who claimed that she had separated from the father, should be given one last opportunity to have her parenting ability assessed in the light of that separation. It made a further interim care order instead. That order was overturned by the County Court on an appeal by the local authority and the child's guardian after the judge found that "the only effect of postponing the decision to make a care order [would be] to delay, and therefore to jeopardise, the process of finding an alternative long term placement". The applicant was refused leave to appeal to the Court of Appeal and her son was placed with a prospective adoptive parent in January 2010.

Law – Article 8: There was no doubt that the decision to refuse a further assessment and to make a care and placement order constituted a serious interference with the applicant's right to respect for her family life. The interference was "in accordance with the law" and pursued the legitimate aim of protecting the rights of the child.

As to whether the interference was necessary in a democratic society, the County Court judge had noted when considering the child's best interests that any further assessment would entail a degree of disruption to the child's foster placement and a risk of emotional harm should the assessment break down. He considered that an assessment of the applicant would never be able to provide sufficient evidence to justify the refusal of a care order, given her shortcomings and the real risk that she would resume her relationship with the father, and would serve only to delay and jeopardise the prospect of finding a long-term placement. In the light of the history of the case and the reports, the judge's view that a resumption of the applicant's relationship with the father was likely and entailed a risk to the child's well-being did not appear unreasonable. Accordingly, while it was in a child's best interests that his or her family ties be maintained where possible, it was clear that in the instant case this consideration had been outweighed by the need to ensure the child's development in a safe and secure environment. Attempts had been made to rebuild the family through the provision of support for alcohol abuse and opportunities for parenting assistance. The applicant did not appear to have accessed domestic-violence support despite being given the relevant details. The reports prepared by the social worker, the guardian and the psychologist had highlighted the difficulties that had been encountered as a result of the parents' failure to engage with the authorities.

In reaching his decision, the County Court judge had directed his mind, as required by Article 8, to the child's best interests, had had regard to various relevant factors and made detailed reference to the

1. ECRI General Policy Recommendation no. 10 on combating racism and racial discrimination in and through school education adopted on 15 December 2006 by the European Commission against Racism and Intolerance (ECRI).

reports and oral evidence of the social worker, the guardian and the psychologist, all of whom had identified the issues at stake. The applicant had been afforded an opportunity to seek any clarification she might require as to the reasons for the judge's decision and to seek a further review by the Court of Appeal. Accordingly, the decision to make a placement order had not exceeded the State's margin of appreciation and the reasons for the decision had been relevant and sufficient. The applicant had been given every opportunity to present her case and had been fully involved in the decision-making process.

Conclusion: no violation (six votes to one).

ARTICLE 13

Effective remedy

Lack of remedy in damages for suicide of applicant's son while in voluntary psychiatric care: *violation*

Reynolds v. the United Kingdom - 2694/08
Judgment 13.3.2012 [Section IV]

Facts – The applicant's son, who had been diagnosed with schizophrenia, was hospitalised in March 2005 due to fear that he might attempt to commit suicide. He was admitted as a voluntary in-patient to a crisis room at an intensive support unit run by the local council. On the first night of his stay, he died after jumping out of the window of the crisis room. An internal investigation and an inquest were carried out and made recommendations for windows in crisis rooms to be reinforced. The applicant then lodged an action for damages under the Human Rights Act 1998. The action was, however, struck out since the court found that there were no reasonable grounds for bringing the claim as, in cases of alleged medical negligence, the claimant had to prove at least gross negligence. In her application to the European Court, the applicant complained that she had no remedy at her disposal that would allow her to claim compensation for non-pecuniary damage caused by her son's death.

Law – Article 13 in conjunction with Article 2: The Court considered that there had been an arguable claim that an operational duty arose to take reasonable steps to protect the applicant's son from a real and immediate risk of suicide and that that duty had not been fulfilled. The inquest had constituted a detailed examination of the circumstances of the applicant's son's death but could not examine individual civil liability. The applicant's action under the Human Rights Act had been struck out on the basis that she had no reasonable grounds for bringing the claim. It was not until February 2012 that the Supreme Court had confirmed in a separate case[1] that an operational duty to protect suicide-risk patients could arise as regards voluntary psychiatric patients such as the applicant's son, and that parents would be entitled to non-pecuniary damage following the loss of a child in such a situation. However, prior to that date the applicant had not had any remedy available in respect of her non-pecuniary loss.

Conclusion: violation (unanimously).

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

ARTICLE 14

Discrimination (Article 5 § 1)

Refusal of social therapy or relaxation of conditions of preventive detention due to applicant's foreign nationality: *violation*

Rangelov v. Germany - 5123/07
Judgment 22.3.2012 [Section V]

Facts – The applicant, a Bulgarian national, had a string of convictions for theft and burglary. The German authorities ordered his expulsion immediately after he finished serving the last of his prison sentences in June 2003. However, since that date he has been held in preventive detention on the grounds that he has shown no remorse for his crimes and is therefore very likely to commit further offences. Although social therapy was recommended in his case, he was unable to participate because he was a foreign national. For the same reason it has not been possible to relax the conditions of his detention. In his application to the European Court, the applicant complained, *inter alia*, of discrimination on grounds of his nationality.

Law – Article 14 in conjunction with Article 5 § 1: In determining whether the applicant had been treated differently in relation to the order for execution of his preventive detention on grounds of his nationality, regard had to be had to the

1. *Rabone v. Pennine Care NHS Trust* [2012] UKSC 2.

reasons given by the domestic courts for making that order. Although they had found that the applicant would have to successfully complete social therapy if he wished to establish he was no longer a threat to the public, this had been refused in view of his imminent expulsion. The domestic courts had also observed that the prison authorities were unlikely to relax the conditions of his preventive detention since he was not a German national. The Court was not convinced by the Government's argument that the applicant's attitude and conduct had been decisive for the refusal of therapy. The domestic administrative practice clearly showed that prisoners against whom an enforceable expulsion order had been issued were excluded from eligibility for transfer to a social therapeutic institution and since this had been made clear to the applicant, there must have been little incentive for him to change his attitude. The Court therefore concluded that the applicant had been treated differently compared to prisoners in a comparable situation on the grounds of his nationality.

The reason given for excluding foreign nationals from social therapy was that the therapists were not in a position to prepare them for life in another country with unfamiliar living conditions. The apparent aim of not relaxing the conditions of detention of foreign nationals appeared to be to prevent them from absconding and to ensure the execution of the expulsion order. The Court reiterated, however, that very weighty reasons were required to justify a difference in treatment on the basis of nationality. The refusal to grant the applicant the therapeutic measures usually needed to obtain suspension of an order for preventive detention had not been compensated for by offering him different therapy or any other measures adapted to his situation. In such circumstances, the difference in treatment of the applicant had lacked objective justification.

Conclusion: violation (unanimously).

Article 41: EUR 6,000 in respect of non pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Ostermünchner v. Germany*, no. 36035/04, 22 March 2012)

Discrimination (Article 8)

Difference in treatment between male and female military personnel regarding rights to parental leave: *violation*

Konstantin Markin v. Russia - 30078/06
Judgment 22.3.2012 [GC]

Facts – Under Russian law civilian fathers and mothers are entitled to three years' parental leave to take care of their minor children and to a monthly allowance for part of that period. The right is expressly extended to female military personnel, but no such provision is made in respect of male personnel. The applicant, a divorced radio intelligence operator in the armed forces, applied for three years' parental leave to bring up the three children of the marriage, but this was refused on the grounds that there was no basis for his claim in domestic law. He was subsequently granted approximately two years' parental leave plus financial aid by his superiors in view of his difficult personal circumstances. He nevertheless lodged a complaint with the Constitutional Court in which he submitted that the legislation was incompatible with the constitutional guarantee of equal rights. Dismissing that complaint, the Constitutional Court held that the prohibition on servicemen taking parental leave was based on the special legal status of the military and the need to avoid large numbers of military personnel becoming unavailable to perform their duties. It noted that servicemen assumed the obligations connected with their military status voluntarily and were entitled to early termination of service should they decide to take care of their children personally. The right for servicewomen to take parental leave had been granted on an exceptional basis and took into account the limited participation of women in the military and the special social role of women associated with motherhood.

In a judgment of 7 October 2010 (see Information Note no. 134), a Chamber of the Court held by six votes to one that there had been a violation of Article 14 in conjunction with Article 8.

Law – Article 14 in conjunction with Article 8: Parental leave and parental allowances came within the scope of Article 8, as they promoted family life and necessarily affected the way it was organised. Article 14 of the Convention was thus applicable (in conjunction with Article 8). Men were in an analogous situation to women with regard to parental leave (as opposed to maternity leave) and parental-leave allowances. Accordingly, as a serviceman, the applicant had been in an analogous situation to servicewomen. The Court therefore had to determine whether the difference in treatment between servicemen and servicewomen with respect to the right to parental leave was objectively and reasonably justified.

In that connection, it noted that the advancement of gender equality was now a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before a difference of treatment on the grounds of sex could be regarded as compatible with the Convention. In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country would be insufficient.

The Court did not accept that justification for the difference in treatment in the applicant's case could lie, as the Government had alleged, in the special social role of women in the raising of children. Contemporary European societies had moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and men's caring role had gained recognition. The majority of European countries, including Russia, now allowed both civilian men and women to take parental leave and a significant number of countries also extended that right to both servicemen and servicewomen. The difference in treatment in the applicant's case could not be seen as positive discrimination in favour of women, as it was clearly not intended to correct the disadvantaged position of women in society. Instead, it had the effect of perpetuating gender stereotypes and was disadvantageous both to women's careers and to men's family life. In sum, the reference to the traditional distribution of gender roles in society could not justify the exclusion of men, including servicemen, from the entitlement to parental leave.

The Court was not persuaded either by the Government's argument that extending parental leave to servicemen would have a negative effect on the fighting power and operational effectiveness of the armed forces. The Russian authorities had not carried out any expert study or research to evaluate the number of servicemen who would be able or willing to take three years' parental leave in order to assess how that might affect operational effectiveness. Such statistical information as they had submitted was inconclusive. The mere fact that all servicemen were of "childbearing age" was insufficient to justify the difference in treatment between servicemen and servicewomen. The Court nevertheless accepted that, given the importance of the army for the protection of national security, certain restrictions on the entitlement to parental leave could be justifiable provided they were not discriminatory. Thus, for instance, military personnel, whether male or female, could be excluded from parental-leave entitlement if they were not easily replaceable owing to their hierarchical position, rare technical qualifications, or involvement in active military actions. However, in Russia the exclusion from entitlement to parental leave applied automatically to all servicemen, irrespective of their position in the army, the availability of a replacement or their individual situation. In the Court's view, such a general and automatic restriction applied to a group of people on the basis of their sex fell outside any acceptable margin of appreciation of the State.

The applicant had served as a radio intelligence operator and could therefore have been replaced by either servicemen or servicewomen. Significantly, equivalent posts in his unit were often held by servicewomen, who, unlike him, had an unconditional entitlement to three years' parental leave. The applicant had therefore been subjected to discrimination on grounds of sex without reasonable or objective justification. In view of the fundamental importance of the prohibition of discrimination on grounds of sex, the fact that he had signed a military contract could not constitute a waiver of his right not to be discriminated against.

Conclusion: violation (sixteen votes to one).

Article 34: The applicant had complained that, while his application before the European Court was pending, he had received an unsolicited visit at his home from a prosecutor requesting information relating to the applicant's case. The Court noted that it was, in principle, not appropriate for the authorities of a respondent State to enter into direct contact with an applicant in connection with his or her case before the Court. However, in the instant case, there was no evidence that the prosecutor's visit to the applicant's home to obtain up-to-date information about the family situation had been calculated to induce the applicant to withdraw or modify his complaint, or that it had had that effect. Accordingly, the authorities could not be held to have hindered the applicant in his exercise of his right to individual petition.

Conclusion: no failure to comply with Article 34 (fourteen votes to three).

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

Refusal of simple adoption order in favour of homosexual partner of biological mother: *no violation*

Gas and Dubois v. France - 25951/07
Judgment 15.3.2012 [Section V]

Facts – The applicants are two French women who have been cohabiting since 1989 and who entered into a civil partnership agreement in April 2002. In September 2000 the second applicant gave birth in France to a daughter who had been conceived in Belgium by means of medically assisted procreation with an anonymous donor. The child has lived all her life in the applicants' shared home and was formally recognised by her mother in October 2000. In March 2006 the first applicant applied for a simple adoption order in respect of her partner's daughter, with her partner's express consent. The *tribunal de grande instance*, while observing that the statutory requirements for the adoption had been met, nevertheless refused the application on the grounds that the adoption would have legal implications which ran counter to the applicants' intentions and the child's interests, since parental responsibility would be transferred to the first applicant, thereby depriving the second applicant, the child's biological mother, of her own rights in relation to her child. The first applicant appealed against that decision. The court of appeal dismissed the challenge and upheld the finding that the legal consequences of the adoption would be contrary to the child's best interests. The court further considered that simply delegating the exercise of parental responsibility at a later date would not suffice to eliminate the risks to the child resulting from the loss of parental responsibility on the part of her mother.

Law – Article 14 in conjunction with Article 8: The present case differed from the case of *E.B. v. France*,[1] which concerned the response to an application for authorisation to adopt lodged by a single homosexual, as the applicants in the instant case complained of the refusal to grant a simple adoption order. Since the applicants were not married they were prevented from sharing parental responsibility. Accordingly, in the instant case, the legal consequences of simple adoption would be contrary to the child's interests, given that the adoption would entail the transfer of parental responsibility to the adoptive parent while depriving the child's biological mother of her rights, despite the fact that she intended to continue bringing up her child.

As to the issue of medically assisted procreation using an anonymous donor, this was available in France only to infertile opposite-sex couples, a situation which was not comparable to that of the applicants. It followed that the French legislation on the subject could not be said to give rise to a difference in treatment to the detriment of the applicants.

With regard to the legal situation of the applicants, who did not have the right to marry but had entered into a civil partnership agreement, compared with that of married couples, the Convention did not require the Governments of the Contracting Parties to grant same-sex couples access to marriage. If States chose to provide same-sex couples with an alternative means of legal recognition, they enjoyed a certain margin of appreciation regarding the exact status conferred (see the *Schalk and Kopf*[2] judgment). Marriage conferred a special status on those who entered into it. The exercise of the right to marry was protected by Article 12 of the Convention and gave rise to social, personal and legal consequences. Hence, the applicants' legal situation could not be said to be comparable to that of married couples when it came to adoption by the second parent.

In examining the applicants' situation compared with that of opposite-sex couples who had entered into a civil partnership, the Court observed that the latter were likewise prohibited from obtaining a simple adoption order. Accordingly, the applicants had not been discriminated against on the basis of their sexual orientation.

In view of the underlying purpose of Article 365 of the Civil Code, which governed the transfer of parental responsibility in the event of simple adoption, there was no justification, on the sole basis of a challenge to the application of that provision, for authorising the establishment of a dual parental tie with the child.

Conclusion: no violation (six votes to one).

Discrimination (Article 10)

Selection, by drawing of lots, of journalists authorised to attend criminal trial: *inadmissible*

Axel Springer AG v. Germany - 44585/10
Decision 13.3.2012 [Section V]

Facts – Two men were charged with the murder of a couple and their two daughters and with several counts of theft. In accordance with the Juvenile Courts Act, the public was excluded from the trial because the defendants had been juveniles at the time of the thefts. The president of the regional

1. *E.B. v. France* [GC], no. 43546/02, 22 January 2008, Information Note No. 104.

2. *Schalk and Kopf v. Austria*, no. 30141/04, 24 June 2010, Information Note No. 131.

court's juvenile criminal division set a limit of nine on the number of journalists authorised to attend the trial. A selection process was set up whereby journalists were divided into three categories, each being entitled to three places. The first category concerned regional print media, the second supra-regional print media or press agencies, and the third television and radio (both public and private broadcasters). Forty press representatives subsequently applied to attend the trial. After lots were drawn, the applicant company's representative, writing for the national daily newspaper *Bild*, failed to gain a place. Of the journalists selected in the "supra-regional print media" category, two worked for weekly magazines and the third was a press-agency representative. The applicant company complained to the division president about the selection method used, objecting that no journalists from a supra-regional daily newspaper had been selected in the category to which it belonged. It asked for the places to be reallocated and proposed a "pool" system so that the media admitted to the trial would not enjoy a monopoly on information. The division president refused its request. The Federal Constitutional Court dismissed a constitutional complaint by the applicant company, holding that the company had not suffered a particularly serious disadvantage and that the complaint was not of fundamental importance in the particular circumstances of the case.

Law – Article 14 in conjunction with Article 10: Although no right *per se* for the press to have access to a particular source of information could be inferred from the Convention, the exclusion of the applicant company from the courtroom when other journalists had been admitted fell within the ambit of Article 10. The division president had been perfectly aware of the interest of the press in following the trial and the public interest in being informed about it despite the restrictions that had had to be imposed on the public nature of proceedings because of the defendants' age. The applicant company had, moreover, acknowledged this since it had not challenged the decision to allow only a limited number of journalists inside the courtroom. What it objected to was the method for selecting the journalists admitted, which in its view had given rise to discrimination against it (and against other publishing outlets that had not been admitted); this could have been avoided either by opting for a pool system (as long as the presence of a journalist from a daily newspaper was guaranteed) or by admitting only journalists working for press agencies. The applicant company had been subjected to a difference in treatment for the purposes of Article 14 – in so far as it referred to "any other status" – since it had been put in a less favourable position than other newspaper publishers in the same category whose journalists had been admitted to the courtroom. The restriction on the number of places, and hence the possibility that some journalists might not be selected, had pursued the legitimate aim of protecting the interests of the defendants, who had been juveniles at the time of some of the alleged offences. As to whether the means employed had been reasonably proportionate to the aim pursued, the method of selection by lot had been incapable of favouring any particular press representative since it had afforded all interested journalists equal access to the neutral process of allocating the places available. The applicant company had not been prevented from reporting on the trial because the regional court had published press releases at the close of each day's proceedings; indeed, the journalists who had been allowed to attend the trial had themselves relied on the press releases as their sole source of information in respect of the hearings from which all media representatives had been excluded. The journalists selected in the supra-regional print-media category had included a correspondent from a press agency, the general function of which was to make information available to other media (for a fee). It could not therefore be maintained that the applicant company had been unable to inform its readers about the trial. In conclusion, given that it had been necessary in the present case to restrict access to the hearings in the regional court and the system of drawing lots had afforded all interested journalists equal access to the selection process, and having regard to the margin of appreciation enjoyed by the Contracting States in this sphere, the applicant company had not been subjected to an unjustified difference in treatment.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 34

Hinder the exercise of the right of petition

Failure to comply with interim measure indicated by Court on account of real risk of torture: *violation*

Mannai v. Italy - 9961/10
Judgment 27.3.2012 [Section II]

Facts – The applicant is a Tunisian national who lives in Tunisia. In May 2005 the Italian authorities

issued a warrant for his arrest on suspicion of his involvement in a criminal conspiracy linked to fundamentalist Islamist groups. He was arrested in Austria in May 2005 and extradited to Italy in July 2005. In October 2006 he was found guilty and sentenced to approximately five years' imprisonment. The judgment specified that he was to be deported from Italy after serving his sentence.

On 19 February 2010, at the applicant's request, the Court indicated to the Italian Government, under Rule 39 of the Rules of Court, that it was advisable for the applicant not to be deported to Tunisia until further notice. The Court also drew attention to the fact that failure to comply with that measure could give rise to a violation of Article 34 of the Convention. After being granted a remission, the applicant finished serving his sentence on 20 February 2010. On the same day, the prefect issued an order for his deportation. The applicant was deported to Tunisia on 1 May 2010. In reply to a letter of 3 May 2010 from the Court, the Italian Government stated that the applicant had been deported because he represented a threat to national security. The applicant also alleged that he had been arrested on arriving in Tunisia and had been tortured by the police while in detention, although this was disputed by the Italian Government. Proceedings were still pending in the Court of Cassation on the date of the judgment.

Law – Article 3: The applicant had been deported to Tunisia, where he had faced a risk of ill-treatment at the material time. The enforcement of the order for his deportation had therefore breached Article 3 of the Convention.

Conclusion: violation (unanimously).

Article 34: The applicant had been deported to a country that was not a party to the Convention, where he claimed that he would face the risk of treatment in breach of the Convention. His deportation had therefore at the very least rendered any finding of a violation of the Convention meaningless and had irreversibly weakened the level of protection of the rights set forth in Article 3. Furthermore, the fact that the applicant had been able to pursue the proceedings, since he currently enjoyed freedom of movement and was allowed to remain in contact with his lawyer, did not preclude an issue from arising under Article 34. The exercise of the rights enshrined in that Article had been hindered in that it was now more difficult for the applicant to avail himself of his right of application as a result of the respondent Government's actions. In addition, before deporting the applicant, the respondent Government had not requested the discontinuation of the Rule 39 interim measure, which they had known to be still in force. The fact that the applicant had been removed from Italy's jurisdiction therefore constituted a serious obstacle liable to prevent the Government from discharging their obligations to protect the applicant's rights and to remedy the consequences of the violations found by the Court. This situation had hindered the applicant's effective exercise of his right of individual application. Accordingly, by failing to comply with the interim measure, Italy had been in breach of its obligations under Article 34 of the Convention.

Conclusion: violation (unanimously).

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

ARTICLE 35

Article 35 § 3 (b)

No significant disadvantage

Reduction of prison sentence in length-of-criminal-proceedings case: *inadmissible*

Gagliano Giorgi v. Italy - 23563/07
Judgment 6.3.2012 [Section II]

Facts – In 1988 criminal proceedings were brought against the applicant. They lasted until 1999. The applicant was convicted of forgery and given a one-year suspended prison sentence. He was also debarred from public office for one year. A bribery charge was declared time-barred. The "Pinto" proceedings initiated by the applicant in 2001 to complain about the length of the criminal proceedings ended in 2006. He was not awarded any compensation.

Law – Article 35 § 3 (b): As a result of the length of the criminal proceedings, the court of appeal had in 1998 declared the bribery charge time-barred. That had clearly reduced the applicant's sentence, especially as the time-barred charge had been the more serious of the two, even though the material before the Court did not indicate the exact extent of that reduction nor clarify whether there was ultimately any connection between the reduction and the violation of the "reasonable-time" requirement. The applicant had chosen not to waive the time bar, a possibility open to him under Italian law. In those circumstances, the reduction

in sentence had at least compensated for or significantly reduced the damage normally entailed by the excessive length of criminal proceedings. The Court thus took the view that the applicant had not suffered a "significant disadvantage" in respect of his right to a hearing within a reasonable time. This complaint raised the question of the right to trial within a "reasonable time" in criminal matters, a subject on which the Court had much case-law. Pursuit of the examination of the complaint was thus not justified by any imperatives of European *ordre public* of which the Convention and Protocols formed part. The question of the length of the criminal proceedings had been examined on two occasions by the competent courts (court of appeal and Court of Cassation) for the purposes of the "Pinto" legislation, the applicant having submitted to the latter court his grounds of appeal against the decision by the former not to award him compensation. In those circumstances, the case had been duly considered by a domestic tribunal and no important questions affecting the application or interpretation of the Convention or concerning national law had been left unanswered. The conditions of the inadmissibility test having been met, that complaint was thus declared inadmissible.

Conclusion: inadmissible (no significant disadvantage).

The Court also found, unanimously, a violation of Article 6 § 1 on account of the unreasonable length of the "Pinto" proceedings.

Lengthy inactivity by applicant in enforcing low-value claim: *inadmissible*

Shefer v. Russia - 45175/04
Decision 13.3.2012 [Section I]

Facts – In 2004 the applicant was awarded approximately EUR 34 (later increased to approximately EUR 61) in damages against a private party. The bailiff's service returned the unenforced writ of execution to the applicant because it did not contain all the necessary information concerning the debtor. On an appeal by the applicant, the second-instance court found that the writ of execution was indeed defective and that the bailiff had been entitled to return it for correction. The applicant never re-submitted the writ to the bailiffs' service as required under domestic law.

Law – Article 35 § 3 (b): Given the low amount of the award, there were no grounds to hold that the enforcement of the judgment had been objectively significant for the applicant. As to subjective significance, the Court attached decisive importance to the fact that the applicant never re-submitted the writ of execution to the bailiffs' service, even though that had been the only legal avenue for the enforcement of her award. By effectively remaining inactive for more than seven years, the applicant had demonstrated that she had no significant interest in the outcome of the proceedings. Respect for human rights did not require an examination of the merits of the application since the issue of legal assistance in the enforcement of judgments had already been examined in previous cases against Russia. Finally, the Court was satisfied that the applicant's complaint had been examined before two levels of domestic jurisdiction and that the facts of her case taken as a whole did not disclose a denial of justice.

Conclusion: inadmissible (unanimously).

ARTICLE 37

Article 37 § 1

Striking out applications

Applicant's express agreement to terms of Government's unilateral declaration considered friendly settlement: *partial strike-out*

Cēsnieks v. Latvia - 9278/06
Decision 6.3.2012 [Section III]

Facts – In his application to the European Court the applicant, who had been arrested in connection with a homicide, complained that he had been subject to ill-treatment in police custody and that there had been no effective investigation into his accusations against the police. He relied on Articles 3 and 13 of the Convention. He also complained under Article 6 that he had been denied a fair trial in respect of the homicide.

Law – Article 37 § 1: The Government had informed the Court that they proposed to make a unilateral declaration with regard to the applicant's complaints under Articles 3 and 13. They acknowledged a breach of those provisions and offered to pay the applicant EUR 10,000 in compensation. The applicant informed the Court that he agreed to the terms of the Government's declaration. Given his express agreement, the Court considered

that there had been a friendly settlement between the parties in respect of this part of the application.

The examination of the Article 6 complaint was adjourned.

Conclusion: partly struck-out (unanimously).

(See also *Moroz v. Ukraine* (dec.), no. 42009/07, 6 March 2012)

Article 37 § 1 (c)

Continued examination not justified

Absence of real and imminent risk of extradition: *struck out*

Atmaca v. Germany - 45293/06
Decision 6.3.2012 [Section V]

Facts – The applicant, who was of Turkish and Armenian origin, had been detained and allegedly tortured in a Turkish military prison in the 1980s on account of his activities as a leading member of the Workers' Party of Kurdistan (PKK). He entered Germany in 2005 and requested asylum, but was arrested and detained pursuant to a Turkish request for his extradition. He subsequently lodged an application with the European Court, which in October 2007 indicated under Rule 39 of the Rules of Court that the applicant should not be extradited until further notice. The German Ministry of Justice has not yet taken a decision on whether or not to authorise the applicant's extradition. The applicant was released from detention pending extradition in April 2008. In February 2012, at the Court's request, the German Government gave an undertaking that, if the Court discontinued the existing interim measure, they would allow the applicant to re-apply to the Court for further measures in the event that his extradition was subsequently authorised.

Law – Article 37 § 1 (c): The Court had to ascertain whether, in the light of the factual developments in the case since 2007, it was appropriate to strike the application out of its list. In that connection, it noted that, while it enjoyed a wide discretion in identifying grounds on which to strike out an application under Article 37 § 1 (c), the instant application differed from previous cases in which that provision had been applied in that there had been neither a lack of diligence on the applicant's part nor any measures of redress by the domestic authorities. However, since the applicant could not be extradited without Ministry of Justice authorisation, and had been released from detention pending extradition and given an undertaking that he would have a real opportunity to re-apply to the Court for interim measures if his extradition was authorised in the future, he could not be considered to be facing a real and imminent risk of extradition. Moreover, if the Ministry were ultimately to refuse to authorise his extradition, the matter might then be resolved at the domestic level without the Court's intervention, in accordance with the principle of subsidiarity. In these circumstances, the continued examination of the application was no longer justified.

Conclusion: struck out (unanimously).

ARTICLE 46

Pilot judgment – General measures

Respondent State required to introduce an effective remedy securing adequate redress for excessive length of proceedings

Ümmühan Kaplan v. Turkey - 24240/07
Judgment 20.3.2012 [Section II]

Facts – In 1970 the applicant's father brought proceedings before the land tribunal seeking the registration of plots of land in his name. After his death in 1995, the applicant took the necessary steps to be joined as a civil party to the proceedings in his place. The proceedings were still pending when the Court examined the application.

Law – Article 46: The Court found a violation of Article 6 § 1 and Article 13 of the Convention on account of the excessive length of the proceedings at issue and the lack of an effective remedy by which to complain of that length. The violation of the applicant's rights had arisen out of a structural problem in Turkey. As of 31 December 2011, over 2,700 applications stemming from the same issue had been pending before the Court (of which 2,373 had not been communicated to the Turkish Government and 330 had been communicated). Against that background, the Court decided to apply the pilot-judgment procedure, in view of the growing number of applicants and potential judgments finding a violation. It also drew the Government's attention to the fact that they had already adopted measures aimed at putting an end to a structural or systemic problem concerning displaced Greek Cypriots owning immovable property in the northern part of Cyprus. It further noted

with interest the legislative reforms already enacted, in particular the individual appeal to the Constitutional Court due to enter into force on 23 September 2012, as well as the pledge made by the Minister of Justice to remedy this structural problem. The Court held that, with regard to the applications pending before it and those lodged by 23 September 2012, Turkey had to put in place, no later than one year from the date on which the judgment in the present case became final, an effective remedy affording adequate and sufficient redress in cases where judicial proceedings exceeded a reasonable time. The Court further decided to adjourn examination of similar applications not yet communicated to the Turkish Government and those lodged by 23 September 2012. Applications already communicated would continue to be examined by the Court under the normal procedure.

Article 41: EUR 15,600 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

ARTICLE 3 OF PROTOCOL No. 1

Vote
Free expression of opinion of people

Lack of legislation covering procedure for Greek nationals resident overseas to vote in parliamentary elections: *no violation*

Sitaropoulos and Giakoumopoulos v. Greece - 42202/07
Judgment 15.3.2012 [GC]

Facts – The applicants are two Greek nationals who are permanently resident in Strasbourg (France). In a letter dated 10 September 2007 to the Greek Ambassador in France, they expressed the wish to exercise their voting rights from their country of residence in the parliamentary elections to be held in Greece on 16 September 2007. Two days later the Ambassador replied that their request could not be met because no rules existed laying down the conditions governing the exercise of voting rights by Greek voters who were outside the country. The general election took place and the applicants, who did not travel to Greece, did not exercise their right to vote.

In its judgment of 8 July 2010 (see Information Note no. 132), a Chamber of the Court held that there had been a violation of Article 3 of Protocol No. 1 to the Convention.

Law – Article 3 of Protocol No. 1: The applicants complained of the fact that the Greek legislature had not put in place arrangements enabling citizens living abroad to vote in parliamentary elections from their current place of residence. Although provision had been made in the Constitution for the last thirty-five years for voting arrangements to be made for expatriates, no measures had been taken to give effect to the right in question. The Court therefore had to examine whether, despite the failure to enact legislation on the conditions for exercising the right to vote, the electoral system nevertheless permitted "the free expression of the opinion of the people" and preserved "the very essence of the right to vote", and, more generally, whether Article 3 of Protocol No. 1 placed States under an obligation to introduce a system enabling expatriate citizens to exercise their voting rights from abroad.

Firstly, neither the relevant international and regional treaties nor their interpretation by the competent international bodies provided a basis for concluding that voting rights for persons temporarily or permanently absent from the State of which they were nationals extended to requiring the State concerned to make arrangements for their exercise abroad. It was true that the institutions of the Council of Europe had on several occasions invited the member States to enable their citizens living abroad to participate to the fullest extent possible in the electoral process. However, as pointed out by the Venice Commission,[1] facilitating the exercise of expatriates' voting rights, while certainly desirable, was not mandatory for States but rather was a possibility to be considered by the legislature in each country.

Secondly, a comparative survey of the legislation of Council of Europe member States showed that, as the law stood, it could not be argued that those States were under an obligation to enable their citizens living abroad to exercise the right to vote. While the great majority of the Contracting States allowed their nationals to vote from abroad, some did not. As to the conditions governing the exercise of that right, they currently varied considerably, which implied that the Contracting States had a wide margin of appreciation in the matter.

Thirdly, although the Greek Constitution contained a provision allowing the legislature to

1. The European Commission for Democracy through Law, better known as the Venice Commission, is an advisory body of the Council of Europe on constitutional matters which was established in 1990.

arrange for the exercise of expatriates' voting rights from their place of residence, it did not oblige the legislature to do so, as the content of the provision was optional. Hence, it was not the Court's place to indicate to the national authorities when and how to implement that provision. Furthermore, it was undeniable that the Greek authorities had made repeated attempts to enact legislation giving effect to the provision in question; however, those attempts had failed to secure political agreement.

Lastly, despite the fact that the applicants were concerned by the issues in their country to the same extent as residents, that was not sufficient to call into question the legal situation in Greece. In any event, the competent authorities could not take account of every individual case in regulating the exercise of voting rights but had to lay down a general rule. As to the disruption to the applicants' financial, family and professional lives that would have been caused had they had to travel to Greece in order to vote, this did not appear to be disproportionate to the point of infringing the right relied upon.

Conclusion: no violation (unanimously).

COURT NEWS

Brighton Conference on the future of the Court

A high level Conference on the future of the Court is being organised by the United Kingdom in Brighton on 18-20 April 2012, during the British Chairmanship of the Committee of Ministers of the Council of Europe. The Plenary Court has adopted a preliminary opinion for the preparation of the Conference.

The Court and LGBT-rights issues

Sir Nicolas Bratza, President of the Court, participated in a conference entitled "Combating discrimination on the grounds of sexual orientation or gender identity across Europe: sharing knowledge and moving forward", which was held in Strasbourg on 27 March 2012. This conference was organised by the British Chairmanship of the Committee of Ministers

Link to President Bratza's speech

Links to the factsheets drafted by the Registry's Press Unit on the related themes of gender identity issues and sexual orientation issues.

RECENT COURT PUBLICATIONS

1. Publications in non-official languages

- ***Handbook on non-discrimination***

New translations into Croatian, Danish, Dutch, Estonian, Finnish, Greek, Latvian, Lithuanian, Portuguese, Slovak, Slovenian and Swedish of the Handbook – published jointly by the Court and the European Union Agency for Fundamental Rights (FRA) in 2011 – are available on the Court website, increasing the total number of available languages to more than twenty (<www.echr.coe.int> – Case-law).

Priručnik o europskom antidiskriminacijskom pravu (hrv)

Håndbog om europæisk lovgivning om ikke-forskelsbehandling (dan)

Handboek over het Europese non-discriminatierecht (nld)

Euroopa võrdse kohtlemise õiguse käsiraamat (est)

Euroopan syrjinnänvastaisen oikeuden käsikirja (fin)

Εγχειρίδιο σχετικά με την ευρωπαϊκή νομοθεσία κατά των διακρίσεων (ell)

Eiropas diskriminācijas novēršanas tiesību rokasgrāmata (lav)

Europos nediskriminavimo teisės vadovas (lit)

Manual sobre a legislação Europeia Andiscriminação (por)

Príručka o európskom antidiskriminačnom práve (slk)

Priročnik o evropski zakonodaji o nediskriminaciji (slv)

En handbok i europeisk diskrimineringsrätt (swe)

- ***Practical guide on admissibility criteria***

The updated version of this guide, published at the end of 2011, has now been translated into Ukrainian and Serbian (the latter translation being organised within the bilateral co-operation activities of the Council of Europe in the field of human rights in Serbia). These translations are available on the Court's website (<www.echr.coe.int> – Case-law), together with the Russian and Turkish ones.

Translations of the original version of the guide into Azerbaijani and Romanian have been provided by the Ministry of Justice of Azerbaijan and the Ministry of Foreign Affairs of Romania respectively. Translations into Bulgarian, German, Greek, Italian and Spanish are already available.

Şikayətlərin qəbul edilməsi kriteriyalarına dair Praktiki Bələdçi (aze) (2009)

Ghid Practic cu privire la Admisibilitate (ron) (2009)

Praktični Vodič kroz Uslove Prihvatljivosti (srp) (2011)

Практичний посібник щодо прийнятності заяв (ukr) (2011)

2. Annual Report 2011 of the European Court of Human Rights

The Court has just issued the printed version of its Annual Report for 2011. This report contains a wealth of statistical and substantive information such as the Jurisconsult's short survey of the main judgments and decisions delivered by the Court in 2011 as well as a selection in list form of the most significant judgments, decisions and communicated cases. An electronic version is available on the Court's Internet site (<www.echr.coe.int> – Reports).