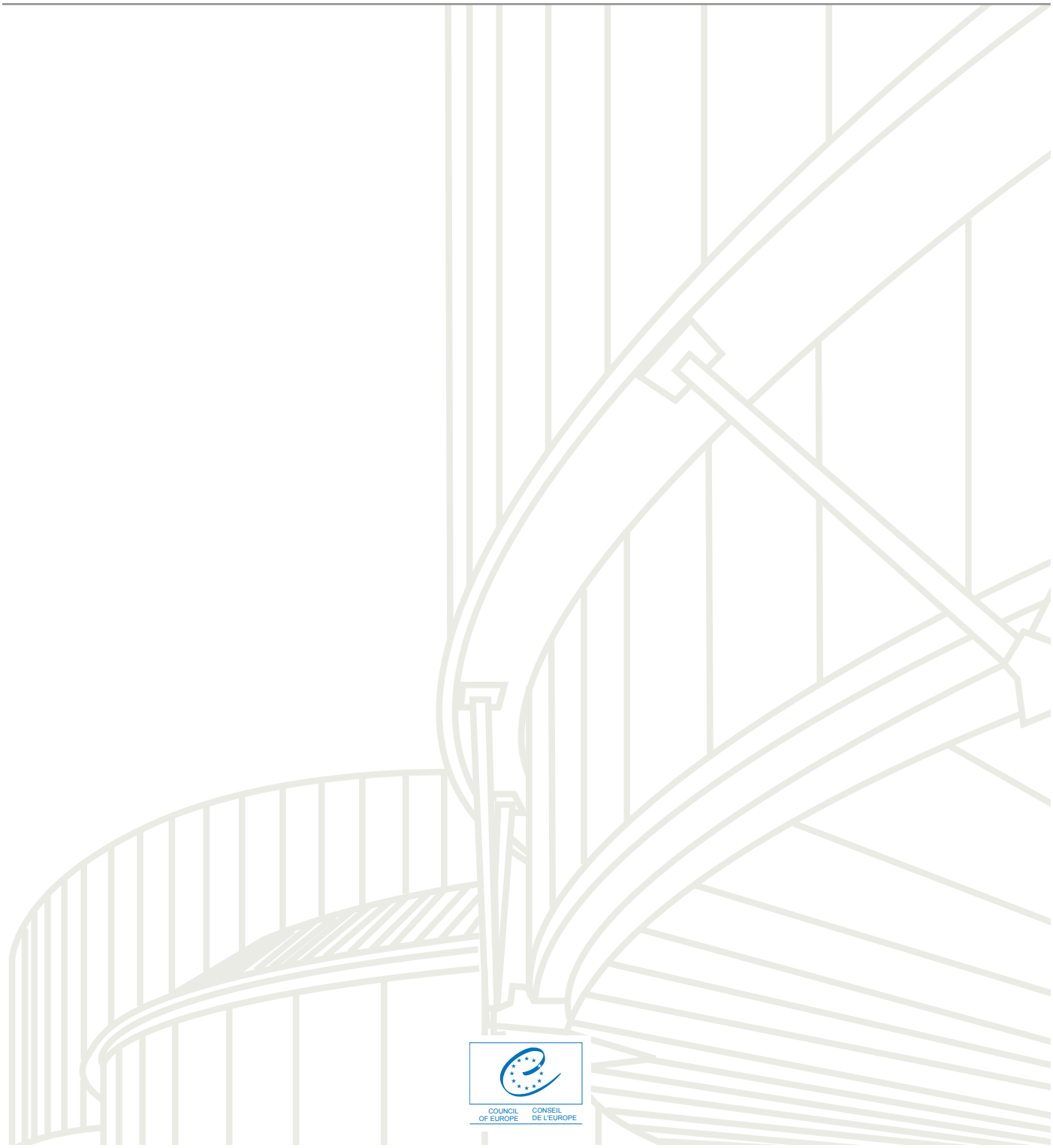
EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

Information Note on the Court's case-law

No. 119 May 2009



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

The Information Note, compiled by the Registry's Case-Law Information and Publications Division, contains summaries of cases examined during the month in question which the Jurisconsult, the Section Registrars and the Head of the aforementioned Division have indicated as being of particular interest. The summaries are not binding on the Court. In the provisional version the summaries are normally drafted in the language of the case concerned, whereas the final single-language version appears in English and French respectively. The Information Note may be downloaded at http://www.echr.coe.int/echr/NoteInformation/en. A hard-copy subscription is available from mailto:publishing@echr.coe.int for EUR 30 (USD 45) per year, including an index.

ISSN 1996-1545

CONTENTS

ARTICLE 8

Judgment

Inadmissible

Judgments

ARTICLE 9

Judgment

ARTICLE 10

Judgment

Communicated

ARTICLE 14

Inadmissible

ARTICLE 2

LIFE
POSITIVE OBLIGATIONS
Alleged failure of authorities to act to prevent murder of a journalist who had been convicted of insulting "Turkish identity": *communicated*.

FIRAT DINK and Others - Turkey (N° 2668/07, etc.)
[Section II]

(See Article 10 below).

ARTICLE 3

EXPULSION
Proposed removal of Iraqi asylum seeker to Greece under the Dublin Regulation: *communicated*.

AWDESH - Belgium (N° 12922/09)
[Section II]

The applicant, a Christian, fled Iraq, allegedly as a result of religious persecution that had resulted in his being threatened and shot at. He attempted to join his brother, who had been granted asylum in Belgium. His route took him through Greece and Germany. After the German authorities had refused him asylum on the grounds that under the Dublin Regulation his application should have been made in Greece, the applicant made a fresh claim for asylum in Belgium. The Belgian authorities likewise considered that his application had to be examined in Greece, that being his point of entry into the Schengen area, and gave directions for his removal. The applicant was refused a stay of execution by the Aliens' Office in a decision that was subsequently upheld by the Aliens' Appeal Council. However, his removal to Greece was deferred following a Rule 39 indication from the European Court in the light of reports, notably by the United Nations High Commissioner for Refugees, criticising certain aspects of procedures for Dublin returnees in Greece. Further appeals by the applicant are currently pending in the Belgian courts. This case raises issues similar to those in *K.R.S. v. United Kingdom* (no. 32733/08, Information Note no. 114). *Communicated* under Article 3 of the Convention.

ARTICLE 5

Article 5 § 1

LAWFUL ARREST OR DETENTION
Alleged political motives for detaining a well-known business executive supporting opposition parties: *admissible*.

KHODORKOVSKIY - Russia (N° 5829/04)
Decision 7.5.2009 [Section I]

The applicant was a board member of and major shareholder in Yukos, a large oil company. In 2002-03 Yukos was pursuing a number of business projects which would make it one of the strongest players on the market, independent from the State. Around the same time the applicant became engaged in politics, announcing that he would allocate significant funds to support the opposition parties Yabloko and SPS. The applicant asserts that those activities were perceived by the Russian leadership of the country as a

breach of loyalty and a threat to national economic security. As a countermeasure the authorities launched a massive attack on the applicant, his company, colleagues and friends, including arrests, criminal charges, extradition requests and searches of company premises. On 23 October 2003, while the applicant was on a business trip in Eastern Russia, an investigator summoned him to appear as a witness in Moscow on the following day. The summons was delivered to the applicant's office in Moscow, where his staff told the investigator that the applicant would be away for another five days and explained why. As the deadline had passed without the applicant having appeared before him, the investigator ordered his arrest. Early on 25 October, armed officers of the Federal Security Service launched an assault on the applicant's aeroplane on an airstrip in Novosibirsk, from where he was flown to Moscow to be brought before the investigator. The investigator explained to the applicant why he had been arrested, interviewed him as a witness, charged him, and then interviewed him as a defendant. The applicant was subsequently detained on remand for suspected white-collar crimes. In May 2005 he was convicted and sentenced to nine years' imprisonment. The applicant complains, among other things, that the conditions of his detention and his treatment during court hearings were inhuman and degrading; that his arrest in Novosibirsk was unlawful; that he was not informed promptly of the reasons for his arrest; that his detention on remand was unlawful on account of various flaws in the detention proceedings; that he was detained for an unreasonable period of time; that the hearings in which the domestic courts ordered or prolonged his detention offered no procedural guarantees; and that his arrest, detention, and prosecution were politically motivated.
Admissible under Article 3, Article 5 §§ 1, 3 and 4, and Article 18.

ARTICLE 6

Article 6 § 1 [civil]

FAIR HEARING
Conformity with fair-hearing requirements of Nato's internal labour dispute resolution machinery: *inadmissible*.

GASPARINI - Italy and Belgium (N° 10750/03)
Decision 12.5.2009 [Section II]

The applicant was recruited by the North Atlantic Treaty Organisation (NATO) in 1976 and since then has been working at the organisation's headquarters in Brussels. In late 1999 the North Atlantic Council, the organisation's decision-making authority, decided to raise the rate of staff contributions to the pension scheme from 8% to 8.3% of the basic salary. In 2001 the applicant appealed to the NATO Appeals Board seeking the cancellation of that decision and the reimbursement to him of the additional sum (the difference between the two rates) which had been deducted from his salary since 1 January 2000. At the hearing the applicant challenged the conformity of the Appeals Board proceedings with Article 6 § 1 of the Convention, complaining in particular that hearings were not held in public. In an unappealable decision of 2002 the Appeals Board rejected the complaint concerning publicity and dismissed the applicant's appeal on the merits.
The applicant complained under Article 6 of the Convention that the proceedings before the NATO Appeals Board had not met the requirements of a fair hearing. He specifically complained that the hearings had not been public and that the members of the Appeals Board had not been impartial. In general the applicant claimed that Belgium, as NATO's host State, and Italy, the country of which he was a national, had failed to ensure the creation by the Organisation, at the outset, of an internal dispute resolution mechanism that complied with Convention requirements.

Inadmissible: The Court began by reiterating the principles set out in the cases of *Bosphorus* (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI, see Information Note no. 76), *Behrami and Behrami v. France* ((dec.) [GC], no. 71412/01, 31 May 2007, see Information Note no. 97) and *Saramati v. Germany, France and Norway* ((dec.) [GC], no. 78166/01, 31 May 2007, see Information Note no. 97). It then pointed out that in the present case, unlike the situation in

the cases of *Boivin* (*Boivin v. 34 Member States of the Council of Europe* (dec.), no. 73250/01, ECHR 2008-.., see Information Note no. 111) and *Connolly* (*Connolly v. 15 Member States of the European Union* (dec.), no. 73274/01, 9 December 2008, unreported), the applicant had expressly alleged that NATO's internal dispute resolution mechanism did not protect fundamental rights in a manner which was equivalent to that of protection under the Convention. The applicant had challenged certain intrinsic features of the system and the Court therefore had to ascertain whether the impugned dispute resolution mechanism, namely proceedings before the NATO Appeals Board, was "manifestly deficient", such as to rebut the presumption of compliance by the respondent States with their Convention obligations. However, the scrutiny exercised by the Court in order to determine whether the proceedings before the NATO Appeals Board, an organ of an international organisation having its own legal personality and not being a party to the Convention, were "manifestly deficient", would necessarily be less extensive than its scrutiny under Article 6 in respect of domestic proceedings in States that were parties to the Convention and thus bound by its provisions. The Court, in reality, had to ascertain whether the respondent States, at the time they joined NATO and transferred to it some of their sovereign powers, had been in a position, in good faith, to determine that NATO's internal dispute resolution mechanism did not flagrantly breach the provisions of the Convention.

As to the complaint concerning the publicity of the proceedings: Whilst Article 4.71 of Annex IX to the *NATO Civilian Personnel* Regulations expressly provided that "[t]he meetings of the Appeals Board [would] be held in private", that provision was considerably nuanced by the following article, which allowed parties to a dispute to "attend the hearings and make oral statements in support of the arguments put forward in their submissions" and to "be aided or represented for this purpose either by a member of the civilian or military personnel of NATO or by counsel selected by them". In general terms, the NATO Appeals Board entertained disputes between NATO's administrative bodies and the civilian personnel employed by the organisation. It therefore heard disputes in civil matters which generally concerned technical issues and required prompt decisions. Lastly, in its decision dismissing the appeal the NATO Appeals Board had justified the non-public nature of the hearings by the need "to keep them dispassionate in the specific context of an organization such as NATO ...". With all those factors in mind the Court found that the two respondent States had rightly considered, at the time they approved the *NATO Civilian Personnel* Regulations, that the type of cases heard by the NATO Appeals Board could be examined and adjudicated by it appropriately in the context of the procedure laid down by the applicable regulations and that, having regard to all the provisions thereof, the requirements of fairness were met without the holding of a public hearing. It could be seen from the decision of the NATO Appeals Board and the other material in the file that the lack of publicity had not undermined the fairness of the proceedings as a whole.

As to the applicant's complaint about alleged bias on the part of the Appeals Board's members: The Court first observed that the three members of the NATO Appeals Board, who were appointed for three years by the North Atlantic Council, had to be persons from outside the organisation and of "recognized" competence. Moreover, an appeal to the Appeals Board had to be lodged against a decision of the Head of a NATO body, whether or not the latter was applying a decision of the North Atlantic Council. In the decision complained of by the applicant, the Appeals Board had in fact expressly stated that it was "not competent to rule directly on a decision by the North Atlantic Council". In addition, applicants were entitled to ask for a change in the composition of the Appeals Board on account of "presumed partiality", but the applicant had not exercised that right during the proceedings before the Board. Having regard to all the relevant regulatory provisions, the two respondent States had been in a position to consider, at the time they adopted the applicable regulations, that the latter provided for a tribunal in accordance with the Article 6 requirements.
In view of the foregoing, the Court found that the two respondent States had rightly considered, at the time they approved the *NATO Civilian Personnel* Regulations and its annexes, through their permanent representatives on the North Atlantic Council, that the provisions governing the procedure before the Appeals Board guaranteed a fair hearing. Consequently, the protection afforded to the applicant in the present case by NATO's internal dispute resolution mechanism was not "manifestly deficient" within the meaning given to that expression by the *Bosphorus* judgment, particularly in the specific context of an organisation such as NATO. The applicant had not therefore been justified in complaining that Italy and

Belgium had endorsed a system that was in breach of the Convention, and the presumption of compliance with the Convention by those two States had not been rebutted: *manifestly ill-founded*.

EQUALITY OF ARMS
Bringing of civil action by public prosecutor's office: *no violation*.

BATSANINA - Russia (N° 3932/02)
Judgment 26.5.2009 [Section III]

Facts: The applicant's husband was a staff member of a State-owned scientific institution. He was placed on a waiting list to receive housing. In December 1998 the applicant and the Institute signed an exchange agreement whereby the applicant transferred title to her own flat to the Institute in order to obtain a larger one. The Institute subsequently discovered that the applicant had sold her old flat in March 1998. The town prosecutor, acting on behalf of the Institute and the person to whom the applicant's old flat had been allocated, brought proceedings against the applicant and her husband to have the exchange agreement invalidated and to evict the applicant's family from the flat granted to her husband. The applicant's husband brought a counter claim seeking a declaration that he was entitled to the new flat he had received from the Institute. The first-instance court heard the prosecutor, the applicant, her husband and their counsel. The institution and the third party's representatives were also present and made submissions to the court. In 2001 the court granted the public prosecutor's claim and dismissed the counter claim. The applicant appealed unsuccessfully. The prosecutor was present at the appeal hearing. There was no written proof that the applicant had received any summons for the appeal hearing.

Law: *Equality of arms*: In the instant case the prosecutor had not participated in the judicial deliberations. His lawsuit had been communicated to the applicant and she had used the opportunity to reply to the prosecutor's arguments. Nevertheless, the Court reiterated that since a prosecutor or comparable officer, in undertaking the status of a procedural plaintiff, became in effect the ally of one of the parties, his participation was capable of creating a feeling of inequality in respect of the other. While the independence and impartiality of the prosecutor or similar officer were not open to criticism, the public's increased sensitivity to the fair administration of justice justified the growing importance attached to appearances. The fact that a similar point of view had been defended before a court by several parties or the fact that the proceedings had been initiated by a prosecutor did not necessarily place the opposing party in a position of "substantial disadvantage" when presenting her case. The Court did not exclude that support by the prosecutor's office of one of the parties could be justified in certain circumstances, for instance for the purposes of protecting vulnerable persons, or where a large number of people were affected by the wrongdoing, or where identifiable State assets or interests needed to be protected. The applicant's opponent in the proceedings in question was a State-owned organisation. A private individual had also had a vested interest in the outcome of the proceedings. Although both organisation and the private individual had been represented in the proceedings, the public prosecutor had acted in the public interest in bringing proceedings against the applicant and her husband. The applicant and her husband had also been represented by counsel and had made both written and oral submissions to the first-instance court. It had not been shown that the prosecutor's decision to initiate civil proceedings had no legal basis under Russian law, or that that decision fell outside the scope of his discretion. In the circumstances of the case there was no reason to believe that the institution of the civil proceedings by the public prosecutor was aimed at or had the effect of unduly influencing the civil court or preventing the applicant from mounting an effective defence. Thus, in the Court's opinion, the principle of equality of arms, requiring a fair balance between the parties, had been respected.
Conclusion: no violation (six votes to one).

Appeal hearing: The Court found a violation of Article 6 § 1 on account of the domestic authorities' failure to inform the applicant of the appeal hearing.

EQUALITY OF ARMS
Preferential treatment of State with respect to limitation period in private-law proceedings against a private entity: *violation*.

VARNIMA CORPORATION INTERNATIONAL S.A. - Greece (N° 48906/06)
Judgment 28.5.2009 [Section I]

Facts: The applicant company entered into a contract with the State for the importation of petroleum products on its behalf. The State brought a claim against it for damages before the Court of First Instance, alleging that the company had failed to fulfil its contractual obligations. The company then lodged a counterclaim for damages on the grounds that the State had not fully performed the contract. The Court of First Instance joined the two actions. It subsequently rejected the applicant company's action as time-barred. Among other things, the court observed that, by law, an action concerning a contract for the transfer of goods was to be regarded as time-barred, where the proceedings were already pending, if the difference in time between two successive procedural acts, initiated either by the parties or by the court, exceeded one year. The same court further considered that, as regards the action brought by the State against the applicant company, the one-year limitation period was not applicable. It declared applicable the law governing the limitation period for claims of the State against private individuals. Under that law, claims of the State arising from non-performance of a contract had a limitation period of twenty years. The court upheld the State's claim and awarded it the sums requested. The applicant company appealed but the Court of Appeal partly upheld the decision. In particular, it accepted that the reasons for preferential treatment of the State in relation to the limitation period did not cease to exist when the State was acting *jure gestionis*, that is to say not in the exercise of its sovereign power but in the context of the private management of its resources. The Court of Appeal added that the importing of petroleum products served the general interest and satisfied the fundamental needs of society. It lastly found that the application of two different limitation period for the two parties did not contravene the provision of the Constitution enshrining the principle of equality, nor was it in breach of Article 6 § 1 of the Convention. An appeal on points of law by the applicant company was dismissed.

Law: The domestic courts, in the same case, had applied two different limitation periods in relation to the respective claims of each party. The applicant company's claim against the State had thus been regarded as time-barred after one year and, as regards the State's claim against the applicant company, the rule setting a twenty-year limitation period for claims of the State had been declared applicable. In addition to the substantial disadvantage *per se* of one party in relation to the other, as regards the possibility of bringing a claim, the Court also took into account the equivalent status and role of the parties to the proceedings in deciding whether or not there had been a breach of the principle of the equality of arms. In the present case, the application of different limitation periods had unquestionably placed the applicant company in a position of substantial disadvantage compared to the State for the submission of its claim. As a result of the imposition on the applicant of a limitation period twenty times shorter than that granted to the opposite party, its claims had been dismissed by the domestic courts.
It was therefore also appropriate to ascertain whether the two parties enjoyed an equivalent status in the proceedings in question, as that would confirm the breach of the principle of the equality of arms. The dispute in question concerned a private commercial transaction governed by private law rather than a sovereign act of authority by the State. The State had not entered into the contract *jure imperii*, in the exercise of its sovereign power, but *jure gestionis*, that it to say in a private management context, acting as a private person. In the context of private-law procedures the authorities could be pursuing public-law missions, for which the requisite privileges and immunities might possibly be granted to it. However, the mere fact of belonging to the structure of the State did not suffice in itself to render legitimate, in all circumstances, the application of State privileges, which had to be necessary for the proper exercise of public authority. The application to the State in the present case of a twenty-year limitation period for its claims did not appear to be justified by a need to ensure the efficient management of public finance or the fulfilment of the State's budgetary objectives. The mere interest of the public treasury could not by itself be deemed a public or general interest that might justify in a given case a breach of the principle of the equality of arms. Accordingly, the application of a twenty-year limitation period for the State's claims against the applicant company was not sufficiently justified by the general interest. The Court therefore

took the view that the application, to the detriment of the applicant company's claims against the State, of different periods of limitation to the opposing parties, entailing a considerable discrepancy between them, contravened the principle of the equality of arms. Accordingly, the Court dismissed the Government's preliminary objection to the effect that the applicant company's complaint was inadmissible *ratione materiae*.
Conclusion: violation (unanimously).

Article 41 – EUR 6,000 for non-pecuniary damage.

EQUALITY OF ARMS
Rule exempting judges, on account of their office, from legal costs when they are parties to proceedings: *inadmissible*.

GOUVEIA GOMES FERNANDES and FREITAS E COSTA - Portugal (N° 1529/08)
Partial decision 26.5.2009 [Section II]

(See Article 14 below).

Article 6 § 1 [criminal]

ACCESS TO COURT
Court's failure to inform the accused that they had a new time-limit for lodging a cassation appeal after their legal-aid lawyers had refused to assist them: *violation*.

KULIKOWSKI - Poland (N° 18353/03)
ANTONICELLI - Poland (N° 2815/05)
Judgments 19.5.2009 [Section IV]

Facts: Both applicants were convicted in criminal proceedings at first instance, and had their convictions upheld on appeal. They were prevented from appealing to the Supreme Court – where legal representation was compulsory – after the lawyers who had been appointed to assist them under the legal-aid scheme declined to act after advising that an appeal had no reasonable prospects of success. The domestic courts informed the applicants of that refusal and did not appoint other lawyers to assist them further.

Law: The Polish criminal procedural law required a lawyer to assist individuals whose conviction had been upheld by an appellate court in the preparation of their cassation appeals. The Supreme Court had recognised that difficulties might arise for convicted individuals to have access to the cassation court in cases in which their legal-aid lawyers had withdrawn from the case. Hence, it had held that the time-limit for lodging a cassation appeal started to run only on the date on which the defendant was informed of the lawyer's refusal to assist him further. It could not therefore be said that the applicants had been left with so little time to have a cassation appeal prepared that they had been denied a realistic opportunity of having their case brought to and argued before the cassation court (compare and contrast with *Siałkowska v. Poland*, in Information Note no. 95, where the time-limit had started to run when the legal-aid lawyer had been served with the judgment and the applicant had been informed of the lawyer's refusal only three days before the expiry of the time-limit). Moreover, it had not been shown or argued that it would have been impossible for them to find a new lawyer to represent them. The fact that neither applicant had been financially able to hire a lawyer of his own choice did not raise an issue under Article 6, as that Article did not oblige a State to ensure assistance by successive legal-aid lawyers for the purposes of pursuing legal remedies which had already been found not to offer reasonable prospects of success. In the absence of indications of negligence or arbitrariness on the lawyers' part, the State could be said to have complied with its obligations to provide effective legal aid to the applicants in connection with the cassation proceedings. However, the relevant court of appeal had failed to inform the applicants of their procedural

rights and the time-limit, as required by the case-law of the Supreme Court. The applicants, who had been left without legal representation, had therefore no way of knowing that they had a new time-frame within which to find a lawyer who might be persuaded to file a cassation appeal on their behalf. To that limited but crucial extent, the relevant procedural framework available under Polish law had been deficient in the applicants' case, with the result that their right of access to the Supreme Court had not been secured in a "concrete and effective manner".
Conclusion: violation (unanimously).

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

ARTICLE 8

PRIVATE LIFE
Imposition of nationality requirement on aspirant lawyer at final stage of admission procedure after completion of compulsory training: *violation*.

BIGAEVA - Greece (N° 26713/05)
Judgment 28.5.2009 [Section I]

Facts: The applicant, a Russian national living in Greece, where she had obtained various work permits, graduated in law from the Athens Law Faculty. In 2000 the applicant was admitted to pupillage by the Bar Council (the "Council"). According to a certificate issued by the Council in 2007, the applicant had been admitted to pupillage by mistake, it having been assumed that she was a Greek citizen as she had a Master's degree from a Greek university. Under the Legal Practice Code, an eighteen-month pupillage was a prerequisite for admission to the Bar. After she had completed her pupillage, in 2002, the Council refused to allow the applicant to sit for the Bar examinations on the grounds that she was not a Greek national, as required by the Legal Practice Code. In 2005 the Supreme Administrative Court confirmed that the decision had been lawful.

Law: Applicability of Article 8: The applicant had settled legally in Greece at the age of twenty-three. She had learned the language and continued her undergraduate and postgraduate studies in law in that country. In that context, her subsequent choice to undertake the requisite pupillage with a view to sitting for the Bar examinations had been closely related to personal decisions that had been taken over a period of time and that had had repercussions on both her personal and professional life. The completion of the pupillage and the prospect of sitting for the examinations had thus been the culmination of a long personal and academic endeavour, reflecting her desire to integrate into the society of her host country while pursuing her career in line with her professional qualifications. The impugned restriction had thus had certain consequences for the applicant's enjoyment of her right to respect for her private life within the meaning of Article 8. It was thus appropriate to dismiss the Government's objection *ratione materiae* and to find that, in the circumstances of the case, Article 8 of the Convention was applicable.

Merits: The refusal to allow the applicant to sit for the Bar examinations had clearly constituted an interference with her right to respect for her private life. That interference had been provided for by law, namely by the Legal Practice Code, and had pursued the legitimate aim of preventing disorder, since its purpose was to regulate admission to the Bar, whose members helped to ensure the proper administration of justice. As to the necessity of such interference in a democratic society, the Council had initially allowed the applicant to undertake her pupillage, which she had completed with a view to admission to the Bar. The Council had thus, for all intents and purposes, given the applicant an expectation that she would be able to sit for the final examinations. By law, the completion of an eighteen-month pupillage was not an option left to the discretion of the person concerned but a prerequisite for subsequent participation in the Bar examinations. Accordingly, professional activity as a pupil was a mandatory stage to be completed in order for the pupil to go on to practise law in his or her own right. In the present case, the crux of the problem was the fact that the Council had overturned its initial decision to allow the

applicant to undertake pupillage and had not ultimately authorised her to sit for the examinations in question. It had issued its refusal at the last stage of the process leading to the applicant's admission to the Bar and the question of her nationality had been raised for the first time at that stage as an impediment that prevented her from taking the examinations organised by the Council. By doing so the Council had suddenly disrupted the applicant's professional situation, after leading her to set aside eighteen months of her career in order to comply with the regulatory obligation to undertake pupillage. In view of the nature and purpose of the mandatory pupillage, as was apparent from the relevant domestic law, the applicant would have had no obvious reason to undertake pupillage if the Council had indicated its refusal at the outset. Admittedly, the Government had referred to a certificate issued in 2007 by the Council according to which the applicant had been admitted to pupillage by mistake. However, even supposing that the commencement of pupillage by the applicant had been the result of a mistake on the part of the Council, and that it was therefore not as if the Council had tacitly acknowledged her right to sit for the examinations despite her nationality, that hypothesis would not suffice to remove the damage caused to her professional life. The question whether the reason given to exclude the applicant from the Bar examinations, namely her nationality, was well-founded was thus not of primary importance in the present case. By contrast, the essential point was that the authorities had allowed the applicant to commence pupillage when it was clear that on completion she would not be entitled to sit for the Bar examinations. This conduct on the part of the competent authorities had thus shown a lack of consistency and respect towards the applicant personally and professionally and had thus constituted unlawful interference with her private life within the meaning of Article 8. Accordingly, the Court dismissed the Government's objection that the applicant did not have victim status.
Conclusion: violation (four votes to three).

Article 8 in conjunction with Article 14 – The applicant had accused the State of excluding non-EU foreign nationals from access to the legal profession, in an arbitrary and discriminatory manner. Firstly, a difference in treatment did not normally fall under Article 14 if it related to access to a particular profession. The Convention did not guarantee the right to freedom of profession. Moreover, the Court agreed with the Government that, whilst the practice of law was an independent profession, it was nevertheless a service in the public interest. As a result it was therefore for the national authorities, which had a margin of appreciation in laying down the conditions for admission to the Bar, to decide whether Greek nationality or the nationality of an EU State would be a prerequisite. The relevant regulations, excluding nationals of third States from membership of the Bar, did not suffice in themselves to create a discriminatory distinction between the two categories of persons in question. It was not therefore for the Court to substitute its own assessment for that of the competent State authorities, which had decided on the basis of the Legal Practice Code not to allow the applicant to sit for the Bar examinations. In the absence of any arbitrariness, the Court could not call into question the reasons for which the national authorities had considered such choice to be based on an objective and reasonable justification.
Conclusion: no violation (unanimously).

Article 41 – EUR 7,000 for non-pecuniary damage.

PRIVATE LIFE
Refusal of request by applicant to have her deceased father recognised as the son of a man she alleged was her deceased grandfather: *inadmissible*.

MENÉNDEZ GARCIA - Spain (N° 21046/07)
Decision 5.5.2009 [Section III]

The applicant submitted to the Court of First Instance an application to have her late father recognised as the illegitimate child of V.T.A., who was also deceased. For that purpose she alleged that her father's paternity had been established by reputation and adduced evidence. She also applied for a DNA test on the body of V.T.A. in order to clarify the alleged paternity. She lastly sought to be recognised as the granddaughter of V.T.A. The court rejected the application on the ground that she had no legitimate entitlement, explaining that neither the legislation in force at the time of her father's death or of V.T.A.'s

death, nor that in force at the time the application was lodged, afforded her such a possibility. Moreover, it regarded as unproven the claim that her father's paternity had been established by reputation, since it had been based exclusively on rumours. The applicant lodged an appeal with the *Audiencia Provincial*, which dismissed it on the ground that she had not been legitimately entitled to bring an action to establish the paternity in question. Under the applicable law, such actions were available only to the child of the putative father and that child's heirs had such standing only if the child had died as a minor or had no legal capacity. Lastly, there was a five-year time-limit for the lodging of such an application. As regards the applicant's request to be acknowledged as V.T.A.'s granddaughter, the judgment indicated that it had to be rejected as her father's paternity had not been established. An appeal on points of law by the applicant was dismissed. The Court of Cassation upheld the decisions of the courts below and confirmed that an acknowledgment of "grand paternity" was subject to the prior acknowledgment of the father's paternity, which in the present case had not been established. The applicant lodged an *amparo* appeal with the Constitutional Court but was unsuccessful. That court first found that the decisions dismissing the applicant's action to establish her father's paternity were sufficiently reasoned and devoid of arbitrariness. Secondly, it found that the action for acknowledgment of "grand paternity" could not be upheld since there had been no prior acknowledgment of the father's paternity.

Inadmissible under Article 6 § 1: The applicant had confined herself to expressing her disagreement with the decisions of the domestic courts, which had found that she lacked *locus standi* to apply for an acknowledgement of descent under the applicable law, namely the law which had been in force at the time of the deaths of V.T.A. and of the applicant's father. However, the domestic courts had given sufficiently reasoned decisions that could not be regarded as arbitrary: *manifestly ill-founded*.

Inadmissible under Article 8: The finding by the domestic courts that the applicant lacked *locus standi* and, as a result, their rejection of her application for acknowledgment of "grand paternity", had had an impact on her private life. Article 8 was therefore applicable in the present case. The interest in knowing one's identity varied depending on the degree of kinship in the ascending line. Whilst it was appropriate to regard first-degree ascendants, namely parents, as being of the highest importance, the weight of such interest in relation to other interests diminished as the degree of kinship became more distant. It was for each State to organise its domestic legal system, using its margin of appreciation, so that the various interests were given due weight in each case. One of the means was the regulation of the conditions for granting *locus standi* in actions to establish descent. In the present case, neither the refusal to grant *locus standi* to the applicant for the purpose of establishing her father's paternity, nor the absence of a direct action to establish that relationship, could be regarded as disproportionate or arbitrary in the light of the interests involved and the reduced impact of that relationship for the applicant's private life. First, both the applicant's father and V.T.A. were already dead at the time she brought her action. Since neither of them had expressed any intention of having the relationship established, the Court had doubts as to whether they would really have wished to take such steps and it also took account of the restrictions imposed by the applicable law in the present case on the bringing of an action to establish paternity by anyone other than the putative child. Accordingly, the applicant had not been able to act on behalf of her father and she could not be certain that he would have wished to have V.T.A. established as his biological father. Secondly, the applicant's right to respect for her private life was concerned in so far as she had sought to be acknowledged as V.T.A.'s granddaughter. Whilst the Court did not doubt the importance of knowing the identity of one's grandfather, it could not find that this had the same impact on private life as the right to know one's father, which was not the issue in the present case. Therefore, when balancing the various interests at stake, that of the applicant had to remain subordinate to the protection of the rights of V.T.A.'s family and to the principle of legal certainty: *manifestly ill-founded*.

Inadmissible under Article 13: The applicant had had the opportunity to raise the arguments that she considered necessary in support of her claims before a number of courts and, in the last instance, before the Constitutional Court by means of an *amparo* appeal: *manifestly ill-founded*.

See *Jäggi v Switzerland*, no. 58757/00, 13 July 2006, Information Note no. 88.

PRIVATE LIFE
Press article and television programme calling into question businessman's reputation: *inadmissible*.

PIPI - Turkey (N° 4020/03)
Decision 12.5.2009 [Section II]

At the material time the applicant was an agent in show-business and a partner in a private limited production company. In 2000, following a complaint filed against him for issuing a cheque without sufficient funds on behalf of the production company, he paid off the debt and all proceedings against him were dropped. A few days later the daily newspaper *Star* published an article under the heading "M.A.E. saves Pipis from property seizure". It was illustrated by three photographs showing the applicant with his partner M.A.E. accompanied by four ladies and with his girlfriend, E.G., a famous singer. On the same day, on the television programme "Paparazzi", broadcast by the channel Interstar, the applicant's situation was also mentioned in a voice-over commentary.
The applicant demanded, unsuccessfully, the publication of a correction by the *Star* newspaper, arguing that the comments published had been misleading and defamatory. The Justice of the Peace upheld the applicant's claim to use his right of reply on the ground that the offending article had not been based on any evidence in support of the comments, which he found "demeaning". An appeal by the *Star* was dismissed. However, the correction demanded by the applicant was never published. He brought a similar claim before the Justice of the Peace against the channel Interstar but it was dismissed on the ground that he had not adduced any "real evidence or document capable of proving that the comments broadcasted were not truthful". His appeal was dismissed. The applicant also filed two compensation claims for non-pecuniary damage before the District Court, one against the publishing company and editor-in-chief of the *Star*, the other against the channel Interstar. Both actions were dismissed in judgments which were upheld by the Court of Cassation.

Inadmissible: No issue arose in connection with the photographs and pictures that illustrated the offending article and programme, because they were already in the public domain and, in any event, did not concern details of the applicant's private life. As regards the actual article and programme, they had involved a series of speculations based on a judicial development, reported in a rumour-type manner that was typical of the kind of media concerned, but the information in question did not concern purely personal details of the applicant's life, nor was it the result of an intolerable or ongoing intrusion into his private life. Such information had not constituted, for the applicant's private life, an interference serious enough for his person integrity to be impugned. The only thing that might have been affected was his reputation, the protection of which was precisely one of the limits to freedom of expression under Article 10 § 2 of the Convention. It thus remained for the Court to examine the position taken by the domestic courts on that issue.
In the present case, the District Court, on two occasions, had taken the view that the information contained in the article published by the *Star* and in the programme broadcast by the channel Interstar related to subject matter that fell within the press' duty to impart information, and that there had been no infringement of the applicant's personality rights, there being no illegality causing non-pecuniary damage. Without dealing specifically with the question whether that information amounted to "statements of fact" or "value judgments", the courts considered that it had been "in substance, correct" because it had come from official files in cases opened against the applicant by the prosecutor's office and the executions bureau. In the courts' opinion, there had therefore been a sufficient factual basis to justify the comments in questions and, consequently, there was no cause to penalise those that had made such comments. That interpretation was justifiable even though the offending article and programme contained some statements about which nothing could be found in the official files in question. This situation might be open to criticism in terms of ethics in journalism, but the Court regarded it rather as reflecting the "degree of exaggeration" that was permitted in the context of journalistic freedom. There was therefore nothing to suggest that the District Court had overstepped its margin of appreciation when it had attributed less weight to the applicant's right to the protection of his private life, within the meaning of Article 8, in balancing the competing interests of the media in question in the light of Article 10 of the Convention: *manifestly ill-founded*.

PRIVATE AND FAMILY LIFE
Authorities' refusal to take specific measures requested by the applicants relating to environmental issues: *inadmissible*.

GREENPEACE E.V. and Others - Germany (N° 18215/06)
Decision 12.5.2009 [Section V]

The applicant association had its business premises and the other four applicants their houses close to busy roads and intersections in Hamburg. In 2001 they requested the Federal Bureau of Motor Vehicles and Drivers to order car manufacturers to take specific measures in order to reduce respirable emissions from diesel vehicles, but their request was eventually rejected. The applicants then brought an action in the administrative courts which was ultimately dismissed, after the courts concluded that in respect of the critical values on respirable dust emissions the German legislation was in line with the European legislation and that the State's positive obligation did not compel the authorities to take the measures specifically requested by the applicants.

Inadmissible: The applicants had in essence complained of the State's failure to protect their health sufficiently. However, even though noise or other pollution seriously affecting an individual's health could raise an issue under Article 8, under the Convention as such there was no explicit right to a clean and quiet environment. It was uncontested that the State had taken certain measures to curb emissions by diesel vehicles. The choice of means as to how to deal with environmental issues fell within the State's margin of appreciation and the applicants had failed to show that in refusing to take the specific measures they had requested, the State had exceeded its discretionary power by failing to strike a fair balance between the interests of the individuals and that of the community as a whole: *manifestly ill-founded*.

FAMILY LIFE
Breaking off of relations between child and father with full parental rights following grandparents' refusal to return child after school holidays: *violation*.

AMANALACHIOAI - Romania (N° 4023/04)
Judgment 26.5.2009 [Section III]

Facts: The applicant's wife died in 1999. Their daughter, D., continued to live with her father. In January 2001 D. left with her father's consent to spend her holidays with her maternal grandparents, who then informed the applicant in February 2001 that they did not intend to return D. to him. He filed a criminal complaint against the grandparents. He also lodged an urgent application with the District Court seeking the immediate return of his daughter. An order was made in his favour and was upheld by the County Court. A number of unsuccessful attempts were made to enforce the order. The applicant attempted to fetch D. himself but became embroiled in a quarrel with the grandparents as a result of which D. was injured and required treatment for 17 days. The applicant then brought an action against the grandparents before the District Court seeking his daughter's return. The District Court upheld his action but the County Court rejected it on an appeal by the grandparents, finding that he could not offer his daughter the same material and psychological conditions as her grandparents, to whom the girl was very attached. His appeal was dismissed by the Court of Appeal, which found, moreover, that "for the time being" it was in the child's interest to continue living with her grandparents, observing that other proceedings were pending between the parties concerning the custody of the child. The Supreme Court of Justice dismissed an appeal by the applicant to have the decision set aside. The grandparents' action to obtain custody of the child was unsuccessful and the applicant was not deprived of his parental rights. He subsequently lodged a new urgent application to secure D.'s return but it was declared inadmissible. He was moreover ordered to pay maintenance contributions for his daughter.

Law: The decisions and all the proceedings complained of in connection with the grandparents' refusal to hand over the child had constituted an "interference" within the meaning of Article 8 § 2 of the Convention, since they had prevented the applicant from exercising his parental authority and right of

custody in respect of his daughter. A provision from the Family Code had been applied in the present case with the aim of protecting D.'s interests. The impugned measure had thus pursued a legitimate aim for the purposes of the second paragraph of Article 8, namely the protection of the rights and freedoms of others. As to the necessity of the interference, the interest of children required that family ties could only be severed in "very exceptional" circumstances and everything had to be done to preserve personal relationships and, if and when appropriate, to "rebuild" the family. In that connection it was noteworthy that all the domestic courts had agreed that the applicant was able to offer D. normal living conditions and that his affection for the child was sincere. However, in refusing to order D.'s return to the applicant, the domestic courts had based their decisions on the material conditions offered by the applicant and on his conduct, on the potential difficulty for the child to integrate into her new family and on D.'s integration into the environment of her grandparents to whom she was deeply attached. However, the fact that a child could be placed in a more beneficial environment for his or her upbringing did not by itself justify removal from the care of the child's biological parents. In the present case, the applicant, a civil servant, had permanent housing and normal material conditions, as the domestic courts had indeed observed. His educational and emotional abilities had not been called into question. As to the allegation that he had behaved aggressively, all the decisions had referred to a single incident which had not given rise to a criminal or specialised investigation to assess the applicant's conduct. In rejecting the applicant's request for the child's return, the domestic courts had found decisive the argument that D. had been very attached to her grandparents in recent years. The courts had thus taken the view that it was in D.'s best interest to remain for the time being in an environment in which she had recently been living and was settled. Such an argument could be understood in view of a child's capacity for adaptation and the fact that D. had been living with her grandparents from an early age. However, in the present case, the reasons given by the domestic courts to refuse D.'s return to her father did not correspond to the "very exceptional" circumstances that might be capable of justifying the severance of family ties. Whilst it could be accepted that a change in factual circumstances might exceptionally justify a decision concerning the care of a child, it had to be verified that the essential changes in question were not the result of action or inaction on the part of the State and that the competent authorities had made efforts to maintain the personal relationship and, where appropriate, to "rebuild" the family in due course.

In cases concerning the return of children, the appropriateness of a measure had to be judged by the swiftness of its implementation. When difficulties arose, usually as a result of a refusal by the person with whom the child was living to enforce a decision ordering the child's immediate return, it was for the competent authorities to take the appropriate measures to penalise this lack of cooperation and, whilst measures of coercion concerning children were not, in principle, desirable in this sensitive area, punitive action could not be ruled out in the event of manifestly unlawful conduct on the part of the person with whom the child was living. In the present case, the applicant's attempts to oblige the grandparents to enforce the urgent-application order through a bailiff and further criminal proceedings had proven fruitless, mainly because of the inactive attitude of the competent authorities. In addition, the final decision in the criminal proceedings had been given two and a half years after the filing of the complaint by the applicant against the grandparents, who were refusing to enforce a final judicial decision. Furthermore, the child protection authorities had not managed to cooperate effectively. As a result, by failing to act swiftly, the domestic authorities, by their conduct, had favoured D's integration into her new environment and, accordingly, had contributed decisively to the consolidation of a *de facto* situation that was contrary to the applicant's right under Article 8 of the Convention. Moreover, if domestic courts temporarily refused to ensure the return of a child to a father whose parental rights had not been limited, it was nevertheless important to take measures to strike and ensure a fair balance between the interest of the child and that of a parent who was entitled to exercise his parental rights. The State's obligations had not been confined to ensuring that the child was able to return to her father but extended all the preparatory measures that enabled such a result to be achieved. However, the domestic courts had completely failed to examine the possibility for the applicant to exercise his parental rights, of which he had not been deprived, in an effective manner. In this connection, it could only be deplored that, over such a long period of time, the authorities had shown absolutely no concern for the gradual weakening and even severance of the relationship between D. and her father, and more specifically for the lack of actual and effective contact between them. Thus, instead of ordering measures to sustain and improve, if appropriate, the relationship between the father and the child, the domestic courts had preferred to allow the passage of time to consolidate the situation, thus resulting, in view of the child's age and attitude, in the risk of a growing

and permanent alienation between them that could certainly not be regarded as being in the child's best interest. The domestic courts had simply endorsed a situation created by the authorities' lack of diligence in enforcing the decisions given upon the urgent-proceedings application.
It was also particularly regrettable that, since the applicant had retained the exercise of his parental rights and D.'s residence had only been temporarily fixed with her grandparents, the child had clearly not benefited from any psychological support to maintain and improve her relations with her father and to prepare her to return to live with him. Such a measure would have furthered the convergence of the applicant's interests with those of the child, instead of their interests being in conflict, which was the case. The Court took the view that the passiveness of the authorities was the cause of the severance in the relationship between the child and her father. Accordingly, it could not be claimed in the present case that the applicant's right to respect for his family life had been effectively protected, notwithstanding his legitimate aspirations to reunite his family, as provided for by Article 8 of the Convention.
Conclusion: violation (six votes to one).

Article 41 – EUR 20,000 in respect of non-pecuniary damage.The Court considered that it was in the best interest of the child for the competent domestic authorities to take the initiative and coordinate their activity to bring about the gradual re-establishment of the father-child relationship between the applicant and his daughter.

HOME
Inability of a cohabitant providing daily care to inherit tenancy: *inadmissible*.

KORELC - Slovenia (N° 28456/03)
Judgment 12.5.2009 [Section III]

(See Article 14 below).

ARTICLE 9

MANIFEST RELIGION OR BELIEF
Imposition of a fine on a Muslim for practising a religion not recognised by the State by praying with a group of other Muslims in a rented house: *violation*.

MASAEV - Moldova (N° 6303/05)
Judgment 12.5.2009 [Section IV]

Facts: The applicant, a Muslim, was the head of a non-governmental organisation that rented a private house. In 2004 a gathering of Muslims including the applicant was dispersed by the police whe praying on the premises. The applicant was subsequently found guilty of practising a religion not recognised by the State and ordered to pay a fine. His appeal was dismissed without reasons and without inviting him to attend the hearing.

Law: Any person manifesting a religion which was not recognised by the domestic law was automatically liable to sanctions in accordance with the Code of Administrative Offences. The Court did not contest the State's power to put in place a requirement for the registration of religious denominations in a manner compatible with Articles 9 and 11 of the Convention. However, it did not follow, as the Government appeared to argue, that it was compatible with the Convention to sanction individual members of an unregistered religious denomination for praying or otherwise manifesting their religious beliefs. To admit the contrary would amount to the exclusion of minority religious beliefs which were not formally registered with the State, which, in turn, would mean that the State could dictate what a person had to believe. The Court could not agree with such an approach and held that the limitation on the applicant's

right to freedom of religion provided by the Code of Administrative Offences had constituted an interference which had not been necessary in a democratic society.
Conclusion: violation (unanimously).

Article 41 – EUR 26 in respect of pecuniary damage and EUR 1,500 in respect of non-pecuniary damage.

ARTICLE 10

FREEDOM OF EXPRESSION
Persistent attempts by authorities to avoid compliance with court order requiring them to give unrestricted access to documents on former State Security Service: *violation*.

KENEDI - Hungary (N° 31475/05)
Judgment 26.5.2009 [Section II]

Facts: The applicant, a historian, asked the Ministry of the Interior for access to certain documents as he wished to publish a study on the functioning of the Hungarian State Security Service in the 1960s. After his request had been refused on the grounds that the documents were classified as State secrets the applicant obtained an order from a regional court for unrestricted access after successfully arguing that it was necessary for the purposes of his ongoing historical research. Following the failure of its appeal to the Supreme Court, the Ministry offered access on condition that the applicant signed a confidentiality undertaking. The applicant refused and instituted enforcement proceedings in October 2000. However, following repeated court applications and appeals by the Ministry on various grounds, the applicant had still not been given unrestricted access to all the documents concerned some eight and a half years later.

Law: The applicant's complaint that he had been prevented from publishing an objective study on the functioning of the State Security Service by the Ministry's prevarication fell to be examined under Article 10. The applicant had obtained a court order granting him access to the documents and, although a dispute had arisen over the extent of that access, the domestic courts had repeatedly found for the applicant in the ensuing enforcement proceedings and had fined the Ministry. In these circumstances, the authorities' obstinate reluctance to comply with the execution orders, which had also led to a finding by the Court of a violation of the "reasonable-time" requirement under Article 6 § 1 of the Convention, was in defiance of domestic law and tantamount to arbitrariness. Such a misuse of the power vested in the authorities could not be characterised as a measure "prescribed by law".
Conclusion: violation (unanimously).

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

FREEDOM OF EXPRESSION
Alleged failure of authorities to act to prevent murder of a journalist who had been convicted of insulting "Turkish identity": *communicated*.

FIRAT DINK and Others - Turkey (N° 2668/07, etc.)
[Section II]

The first applicant, Fırat Dink, was the publication director and editor-in-chief of a Turkish-Armenian weekly newspaper. The other applicants were members of his family.
In 2003-2004 the first applicant published a series of articles in which he set out his view on the question of the identity of Turkish citizens of Armenian origin. In one of the articles he wrote: "the clean blood, which will replace the blood poisoned by the 'Turk', is to be found in the noble vein connecting Armenians to Armenia, provided the Armenians are aware that it exists ...". Shortly afterwards, militants belonging to an ultranationalist group demonstrated in front of the newspaper's offices. Acting on a

criminal complaint by a member of this group, the public prosecutor's office brought proceedings against Fırat Dink under Article 301 of the Criminal Code (formerly Article 159), which punished denigration of "Turkish identity". Other members of this group were authorised by the court to join the proceedings as civil parties. The experts appointed by the court, after examining all the articles in question, concluded that the author's comments had not been directed against Turks but had concerned the Armenians' obsession about obtaining recognition of the events of 1915 as a genocide – an obsession that he had described as "poison" and regarded as being a source of weakness and time-wasting for Armenians. In 2005 Dink was given a suspended six-month prison sentence for "denigrating Turkish identity". The Court of Cassation upheld the judgment as to his guilt but quashed it as to the admission to the proceedings of the civil parties. The Court of Cassation, agreeing with the assessment of the experts appointed at first instance, dismissed an extraordinary appeal against the judgment that had been lodged by the public prosecutor.
In 2007 Fırat Dink was assassinated. The preliminary criminal investigation revealed that the suspected killer belonged to an ultranationalist group. It was subsequently established by the investigation that the local gendarmerie and police had been made aware, through their informants, of the preparation for the killing and had alerted the Istanbul police. To date, all the proceedings brought to establish liability on the part of the authorities have been dropped, with the exception of those against two gendarmes responsible for gathering information. The latter stated, however, before the criminal court that they had transmitted the information concerning the preparation for the killing to their superiors, who alone had been competent to take the appropriate measures, but that their superiors had not acted on that information.
Communicated under Articles 2, 10 and 13 of the Convention.

FREEDOM TO IMPART INFORMATION
Dissolution of municipal council for disseminating documents in non-official languages: *communicated*.

DEMIRBAŞ - Turkey (N° 1093/08)
[Section II]

The application concerns the dissolution of a municipal council, of which the applicants are former members, for disseminating publications in non-official languages. The decision by the municipal council about the provision of various municipal services in a number of languages did not itself indicate the languages to be used, but had been taken, according to the applicants, following a study which revealed the need to use Kurdish, Arabic, Assyrian and Armenian, in order to facilitate communication with the inhabitants, to provide them with better municipal services and to make it easier for them to participate in educational, cultural and artistic activities. The same study had apparently also revealed a need to use English and Russian to help tourists. Turkish remained the official language according to the Mayor.
Communicated under Articles 34, 10 and 6 of the Convention.

ARTICLE 14

DISCRIMINATION (Article 6 § 1)
Rule exempting judges, on account of their office, from legal costs when they are parties to proceedings: *inadmissible*.

GOUVEIA GOMES FERNANDES and FREITAS E COSTA - Portugal (N° 1529/08)
Partial decision 26.5.2009 [Section II]

Facts: In 1996 criminal proceedings were opened against a lawyer, H.P., and a judge, F.G., on suspicion of corruption. The discontinuance of the proceedings against F.G. was subsequently ordered and became final with a judgment of the Supreme Court. In 1998, E.R., head of news at the TV channel SIC and brother-in-law of F.G., published an article in which he commended the Supreme Court's decision and strongly criticised those whom he accused of waging war against it. The applicants had an article

published in response to that of E.R. F.G. brought an action for damages against the applicants, alleging in particular that the offending article, together with an interview given by the first applicant to a weekly newspaper, had impugned her reputation. She further claimed that, in her capacity as judge, she was exempted from any court courts related to her action. The court acknowledged that she had suffered damage to her reputation but pointed out, however, that she had already received reparation for the damage caused by the interview in question in the context of another set of proceedings that she had previously initiated. The only compensation now due concerned the damage caused by the offending article, which the court evaluated at 15,000 euros. Both the judge and the applicants appealed against that judgment. Invoking their right to a fair hearing, the applicants challenged the exemption from court costs granted to her, stating that this difference in treatment in relation to them had breached the principle of the equality of arms. They further alleged that the decision against them infringed Article 10 of the Convention. In a judgment of 20 June 2006 the Court of Appeal dismissed the applicants' appeal and partly upheld that of the judge. The Supreme Court dismissed an appeal on points of law lodged by the applicants. Their constitutional complaint was declared inadmissible.

Inadmissible – Article 6 § 1 – In the present case the Court was unable to find that the applicants' procedural position had been affected by the cost exemption granted to the other party, it not being very different from a situation where the other party has been granted legal aid: *manifestly ill-founded*.

Article 14 – In the present case it could not be considered that the applicants found themselves in the same situation as the other party, who was a judge. Portuguese law provided that judges should be afforded a special exemption from court costs when they were parties to proceedings brought in connection with their professional duties. The domestic courts in the present case took the view that the judge could be granted such an exemption, as the proceedings in question fell within the scope of Article 17 § 1 (g) of the regulations governing the judiciary. Even supposing that it had been possible to find that the opposing parties were in a comparable situation, the difference in treatment might also have been based on an objective and reasonable discrepancy, it being quite reasonable to provide for a separate system as regards the payment of court costs in respect of judges, who were likely to become parties, as a result of their judicial duties, to proceedings brought by dissatisfied litigants: *manifestly ill-founded*.

Article 10 – complaint communicated.

DISCRIMINATION (Article 8)
Exception causing inequality of treatment on grounds of birth outside marriage in view of Germany's special historical background: *violation*.

BRAUER - Germany (N° 3545/04)
Judgment 28.5.2009 [Section V]

Facts: The applicant, who was born in 1948, is the illegitimate child of Mr Schildgen and was recognised by her father a few months after birth. She lived in the former East Germany (GDR) until 1989 and he lived in West Germany (FRG). They regularly corresponded during that period and after German reunification she visited him. After her father's death, the applicant brought various actions before the domestic courts in order to assert her inheritance rights.
In 1998 she applied for a certificate of inheritance attesting that she was entitled to at least a 50% share of Mr Schildgen's estate. Her application was rejected at first instance on the ground that, in spite of the reform of the law of succession by the Inheritance Rights Equalisation Act, the first sentence of section 12(10)(2) of the Children Born Outside Marriage (Legal Status) Act 1969 remained in force. That provision stipulated that a child born outside marriage before 1 July 1949 was not a statutory heir. The Regional Court upheld the decision of the court below on the same grounds. The Court of Appeal set aside that judgment and remitted the case to the Regional Court, requesting it to establish whether the applicant was really Mr Schildgen's daughter and whether there were other heirs. If the applicant could be regarded as entitled to at least a 50% share of the estate, the Regional Court would have to examine the conformity with the Basic Law of the first sentence of section 12(10)(2) of the Children Born Outside

Marriage (Legal Status) Act. The Regional Court reiterated its previous decision, basing it on the same arguments. Even if it could be established to a degree of 99% that the applicant was Mr Schildgen's daughter and that there were no other known heirs, she was excluded from statutory inheritance under the first sentence of section 12(10)(2) of the Children Born Outside Marriage (Legal Status) Act. According to the Regional Court, that provision was not incompatible with the Basic Law in spite of German reunification, as the Federal Constitutional Court had indicated in a decision of 1996. The Court of Appeal again set aside the decision of the Regional Court and remitted the case to it, requesting it to establish whether there were any other heirs to the "second or third degree" and to re-examine the conformity with the Basic Law of the first sentence of section 12(10)(2) of the Children Born Outside Marriage (Legal Status) Act, in cases where the State was the sole statutory heir. The Regional Court reiterated its previous decisions, which it based on the same arguments. The Court of Appeal then dismissed the applicant's appeal on the ground that it was bound by the decisions of the Federal Constitutional Court in which it had considered that the first sentence of section 12(10)(2) of the Children Born Outside Marriage (Legal Status) Act was compliant with the Basic Law. The Federal Constitutional Court refused to admit a further appeal.

Law: The Government had not disputed the fact that the application of the relevant provisions of domestic law had created a situation in which a child born outside marriage before the cut-off date of 1 July 1949 was treated differently not only to children born within marriage but also to children born outside marriage both before – as concerned children covered by the law of the former GDR if the deceased father had been resident in GDR territory at the time of reunification – and after that cut-off date. It therefore had to be determined whether the alleged difference in treatment had been justified.

The member States of the Council of Europe now attached great importance to equality between children born in and out of wedlock. Very weighty reasons would accordingly have to be advanced before a difference of treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention. The aim pursued by the maintaining of the impugned provision, namely to ensure legal certainty and to protect the deceased and his family, was arguably legitimate. Moreover, as had been the case in other Contracting States, the German legislature had gradually created an equality of status for inheritance purposes between children born in and out of wedlock. After German reunification, in order to avoid any disadvantage for children born outside marriage in a different social context, they had been granted the same inheritance rights as those born within marriage, provided the deceased person had been living in the former GDR at the time of reunification. The legislature had nevertheless maintained the exception laid down in the first sentence of section 12(10)(2) of the Children Born Outside Marriage (Legal Status) Act, which excluded children born out of wedlock before 1 July 1949 from statutory inheritance, and whose constitutionality had been confirmed by the Federal Constitutional Court. While the maintaining of that exception by the legislature had reflected the state of German society at the time and there had been real practical and procedural difficulties in proving the paternity of children, that was no longer the case. Lastly, a new situation had been created with German reunification and the equalisation of legal status between children born in and out of wedlock across a large part of German territory. In particular, given the evolving European context in this sphere, the aspect of protecting the "legitimate expectation" of the deceased and their families had to be subordinate to the imperative of equal treatment between children born outside and within marriage.

As to whether the means employed were proportionate to the aim pursued, a further three considerations appeared decisive to the Court in the present case. First, the applicant's father had recognised her after birth and had always had regular contact with her despite the difficult circumstances linked to the existence of two separate German States. He had neither a wife nor any direct descendants, but merely heirs to the "third degree" whom he apparently did not know. The protection of "legitimate expectations" on the part of those more distant relatives could not therefore come into play. Secondly, the applicant had spent a large portion of her life in the former GDR, where she grew up in a social context in which children born outside and within marriage enjoyed equal status. However, she had been unable to derive any benefit from the rules providing for equal inheritance rights between children born in and out of wedlock, since her father had not been resident in the territory of the former GDR at the time of German reunification. While this difference in treatment may have been justified in the light of the social context in the former GDR, it had nevertheless had the effect of aggravating the existing inequality in relation to children born out of wedlock before 1 July 1949 whose father had been resident in the FRG. Lastly, the

application of the first sentence of section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act excluded the applicant completely from any statutory entitlement to the estate without affording her any financial compensation.
The Court could not find any ground on which such discrimination based on birth outside marriage could be justified today. Accordingly, there had not been a reasonable relationship of proportionality between the means employed and the aim pursued.
Conclusion: violation (unanimously)

Article 41 – question reserved.

DISCRIMINATION (Article 8)
Inability of a cohabitant providing daily care to inherit tenancy: *inadmissible*.

KORELC - Slovenia (N° 28456/03)
Judgment 12.5.2009 [Section III]

Facts: Since 1990 the applicant had lived with an 86-year-old man, A.Z., who was renting a one-room flat from the Ljubljana Municipality. He was listed on the lease contract as the person providing A.Z. with daily care who was therefore entitled to use the flat. Following A.Z.'s death, the applicant was ordered to vacate the flat, but he instituted proceedings in the domestic courts seeking the right to succeed to the tenancy. The domestic courts, however, rejected his request. They found that the applicant and A.Z. had not lived together in a long-lasting life community but rather in an economic community, which under the domestic law could not serve as a basis for the transfer of the tenancy.

Law: The applicant had lived in the flat since 1990 and had continued to live there after A.Z.'s death. The decisions of the domestic courts ordering his eviction – notwithstanding that at the date of the Court's judgment they had not yet been enforced – affected the enjoyment of his right to respect for his home. As to the alleged difference in treatment, the applicant had never submitted that he had been in a homosexual relationship with A.Z. or complained that he had been discriminated against on the basis of his sexual orientation. Even though he maintained that he had been unable to succeed to the tenancy because he and A.Z. had been of the same sex, the domestic courts ultimately dismissed the applicant's claim not because of his sex but rather because his relationship with A.Z. had been one of economic dependency. In addition, when dismissing the applicant's claim, the Constitutional Court expressly held that rejecting his request on the sole ground that the two men had been of the same sex would have been unconstitutional. Instead, that court expressly stated that a relationship of economic dependency could not be interpreted as a long-lasting life community irrespective of whether it was constituted of persons of the same or opposite sexes. Gender had therefore not been a decisive element in the rejection of the applicant's tenancy claim and, consequently, he had not been discriminated against on the ground of either his sexual orientation or his gender. The Court further held that the applicant's situation had not been comparable to that of a married or unmarried couple, a homosexual civil partnership or close family members, all of whom under the domestic law enjoyed the right to take over a tenancy after the death of the holder. Since it was primarily for the domestic courts to interpret domestic law, which concluded that the applicant's cohabitation with A.Z. amounted only to an economic community, and since the proceedings as a whole were fair, the difference in treatment to which the applicant had been subjected was not discriminatory: *manifestly ill-founded*.

The Court found a violation of Article 6 § 1 (length of proceedings) and Article 13 (effective remedy).

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

DISCRIMINATION (Article 8)
Refusal of request by mother's homosexual partner to adopt child: *communicated*.

GAS and DUBOIS - France (N° 25951/07)
[Section V]

This case concerns the denial of an application for the simple adoption of a child by the lesbian partner of the child's mother. The applicants argue that the reason given by the domestic courts based on the legal consequences of such an adoption, namely the removal of the mother's parental authority, constitutes an absolute obstacle to adoption only for same-sex couples since, contrary to persons of the opposite sex, they cannot get married and thereby benefit from the provisions of the Civil Code providing for the sharing of parental authority in the event of adoption by the married partner of a child's mother or father. *Communicated* under Articles 8 and 14 taken together.

ARTICLE 35

EXHAUSTION OF DOMESTIC REMEDY
Effectiveness of application to Real Property Commission set up in 2005 in the Turkish Republic of Northern Cyprus: *relinquishment in favour of the Grand Chamber*.

DEMOPOULOS and seven other cases - Turkey (N° 46113/99, etc.)
[Section III]

(See Article 1 of Protocol No. 1 below).

ARTICLE 37

Article 37 § 1 (b)

MATTER RESOLVED
Prisoner's request for dentures to be provided free of charge granted by prison authorities after some delay: *struck out*.

STOJANOVIĆ - Serbia (N° 34425/04)
Judgment 28.4.2009 [Section II]

Facts: While in his prison term the applicant, who had lost all his teeth, requested the authorities to provide him with dentures. The health inspectorate replied that he was not exempted from the obligation to cover 60% of the cost of the dentures, which would have amounted to approximately EUR 110. The applicant asked to be allowed to pay in instalments. Meanwhile, the applicant had experienced serious problems eating since he was unable to consume any solid food. He fainted on several occasions. In January 2007 he was informed that the prison would cover the full costs of his dentures through humanitarian aid, even though that had no statutory obligation to do so. In June 2007 he was provided with the dentures. In the meantime, the applicant's correspondence with the domestic authorities and the Court was systematically opened and stamped by the prison authorities.

Law: Article 37 § 1 (b) – The applicant's complaint about the authorities' initial refusal to provide him with dentures free of charge had been communicated to the respondent Government under Articles 3 and 8 of the Convention. However, the applicant had been provided with dentures free of charge in June 2007 and there was no indication that he had suffered any related health problems thereafter. There was no medical evidence to suggest that prior to obtaining the dentures he had been starved or had otherwise been

unable to receive proper sustenance. In such circumstances, and in the absence of any particular reasons relating to respect for human rights requiring continued examination of the case, the Court considered that the matter had been resolved.
Conclusion: struck out (six votes to one).

Article 8 – Pursuant to the Serbian Constitution and the Charter on Human and Minority Rights and Civic Freedoms, nobody's correspondence could be interfered with in the absence of a specific court decision to that effect. Given that no such decision had ever been taken in respect of the applicant, and that the applicable prison rules and regulations were vague in that regard, the Court concluded that the systematic opening of the applicant's correspondence had not been "in accordance with the law".
Conclusion: violation (unanimously).

Article 41 – Finding of a violation constituted sufficient just satisfaction.

Article 37 § 1 (c)

CONTINUED EXAMINATION NOT JUSTIFIED
Friendly settlement compliant with human rights even though most appropriate remedy in principle would have been new trial or resumption of proceedings at applicant's request: *struck out of the list*.

KAVAK - Turkey (N^{os} 34719/04 and 37472/05)
Decision 19.5.2009 [Section II]

The applicant was in prison serving a life sentence. After being arrested by security forces, he was taken into police custody. He was subsequently transferred to a different security police station. During the first police custody he was examined on two occasions without any signs of violence being detected on his body. Nor were any such signs found during a medical examination after his transfer. However, the applicant was examined again several days later in hospital. The report established that there were significant signs of injuries on his arms. In the doctor's opinion, a final report would have to be established after a neurological examination of the applicant. On the same day the applicant was interviewed by the public prosecutor, to whom he stated that he had been ill-treated by the police while in police custody. He was subsequently brought before a judge of the State Security Court to whom he repeated his statement. The judge remanded him in custody. The applicant filed a complaint with the public prosecutor against the officers responsible for his police custody, alleging that he had been ill-treated. The forensic medical institute draw up a report in which a panel of six doctors concluded, after examining him, that the injuries observed on his body could indicate that he had been subjected, as he alleged, to Palestinian hanging. The public prosecutor committed the two police officers to stand trial before the Assize Court and called for their conviction for acts of torture committed with a view to obtaining a confession. The officers were acquitted for insufficient evidence. The Court of Cassation quashed the trial-court judgment and declared the prosecution time-barred. In parallel the public prosecutor at the State Security Court brought criminal proceedings against the applicant for attempts to commit acts that were capable of jeopardising the indivisibility of national territory. The State Security Court found him guilty and sentenced him to death. Following a legislative amendment, his sentence was commuted to life imprisonment. The Court of Cassation upheld the trial court's judgment.

Struck out: The parties had reached a friendly settlement. It was therefore appropriate to put an end to the contentious proceedings. The Court thus started by examining the letters submitted by the parties in the context of their negotiation of a friendly settlement. Taking note of that settlement, the Court observed that neither the Convention nor the Rules of Court imposed any particular form as to the terms of a friendly settlement. It was sufficient for the Court to be persuaded that the settlement between the parties had been consistent with respect for human rights as defined in the Convention and the protocols thereto. In that connection, the present case mainly concerned ill-treatment, within the meaning of Article 3 of the Convention, that had allegedly been inflicted on the applicant during his police custody, and the fairness

of the proceedings under Article 6 of the Convention on account of the use of evidence obtained in conditions allegedly in breach of Article 3. The Court observed that it had already had occasion, in a considerable number of cases, to set out the extent of Contracting States' obligations in these areas. In view of the importance of the rights at stake and the seriousness of the facts, the Court deemed it necessary to point out that when it had found a violation of those provisions it had always declared that the most appropriate form of redress, provided that the applicant so requested, would be to hold a new trial in accordance with the requirements of Article 6 § 1. In the present case the Court considered that a re-trial or the re-opening of the proceedings, at the applicant's request, represented in principle an appropriate means of redress for the situation complained of. However, having regard to the foregoing, and in particular to the clear and substantial case-law on the question raised in the case, no particular circumstance affecting respect for human rights as defined in the Convention or the protocols thereto required the Court to continue its examination of the application. Lastly, the Court pointed out that, in accordance with Article 46 § 2 of the Convention, the Committee of Ministers had the power to supervise the execution only of final judgments. However, in the event that the Government did not comply with the terms of its undertakings as described in the present decision within three months after its notification, it remained possible for the application to be restored to the Court's list of cases in accordance with Article 37 § 2 of the Convention.

ARTICLE 41

JUST SATISFACTION
National authorities required to take initiative and to coordinate with a view to gradually to rebuilding relationship between applicant and his daughter.

AMANALACHIOAI - Romania (N° 4023/04)
Judgment 26.5.2009 [Section III]

(See Article 8 above).

ARTICLE 1 OF PROTOCOL No. 1

PEACEFUL ENJOYMENT OF POSSESSIONS
System applied in Turkish Republic of Northern Cyprus in respect of real property belonging to Greek Cypriots: *relinquishment in favour of the Grand Chamber*.

DEMOPOULOS and seven other cases - Turkey (N° 46113/99, etc.)
[Section III]

These are eight post-*Loizidou* test cases (see *Loizidou v. Turkey*, application no. 15318/89, judgment of 18 December 1996) that were communicated or re-communicated in 2008. Some 1,400 similar applications are pending.
The applicants are Greek-Cypriots and complain under Articles 8 and 14 of the Convention and Article 1 of Protocol No. 1 that, since the Turkish invasion of the northern part of Cyprus in 1974, the Turkish army has prevented them from gaining access to their homes and exercising their right to the peaceful enjoyment of their possessions.
The Chamber has relinquished jurisdiction in order to allow the Grand Chamber to rule on the effectiveness of an application to the Real Property Commission set up in 2005 in the Turkish Republic of Northern Cyprus which the respondent Government argue is a domestic remedy requiring exhaustion.

PEACEFUL ENJOYMENT OF POSSESSIONS
Depreciation of compensation for expropriation paid after delivery of final judgment: *communicated*.

YETİŞ and Others - Turkey (N° 40349/05)
[Section II]

The authorities decided to expropriate a plot of land. It served the applicant with the notice of expropriation and invited him to give up his property in return for the compensation fixed by a committee of experts. Finding the proposed amount insufficient, he refused to sign the notice. The authorities, having failed to reach an agreement with the applicant, who in the meantime had died, referred the matter to the District Court in order to have the compensation fixed by judicial decision and to proceed with the registration of the plot of land at the Land Registry in the name of the authorities, which had served notice on the applicant's heirs (the "applicants"). In order to decide on the amount of the expropriation compensation to be awarded to the applicants, the court took about six months for the first part of the proceedings (before cassation) and two years for the second part (after cassation). As the compensation was paid to the applicants only after the final judgment, the question of the depreciation of the sum in question arises.
This is the first case concerning the new expropriation procedure that has been in force in Turkey since April 2001. The Turkish authorities amended the legislation on expropriation following numerous violations found by the Court (in particular on account of the authorities' delay in paying supplementary compensation for expropriation).
Communicated under Article 1 of Protocol No. 1 and Article 6 of the Convention.

CONTROL OF USE OF PROPERTY
Confiscation of premises used in connection with offence linked to human-trafficking and exploiting vulnerable aliens: *inadmissible*.

TAS - Belgium (N° 44614/06)
Decision 12.5.2009 [Section II]

Criminal proceedings were brought against the applicant before the Criminal Court for having "taken advantage, either directly or through an intermediary, of the particularly vulnerable situation of numerous foreign nationals as a result of their administrative, illegal or precarious situation, by renting immovable property, rooms or other premises with the intention of making an abnormal profit". He was sentenced to one year's imprisonment and fined, and the confiscation of the property concerned, which belonged to the applicant and his wife, was ordered. The Court of Appeal raised his sentence to three years' imprisonment and a fine and ordered "the confiscation of the rooms and other premises that were rented out by the defendant to the foreign nationals listed in the case file". In so concluding, the Court of Appeal noted that the special confiscation provided for in Article 42 1° of the Criminal Code, while previously optional, had been rendered mandatory by Article 433 *terdecies* of the same Code. In order to determine the nature and rate of the penalty to be applied, the Court of Appeal took into consideration the seriousness and particularly heinous nature of the offence which reflected, on the part of the defendant, an inadmissible disregard for human values and dignity, the purely mercenary nature of his conduct, the length of time over which the offences had been committed, and the defendant's substantial criminal record. An appeal by the applicant to the Court of Cassation was dismissed.

Inadmissible: The impugned confiscation had without doubt constituted an interference with the applicant's peaceful enjoyment of his possessions. Further, the confiscation had concerned property that the courts had found to have been used illegally and had been ordered with the aim of preventing its use for the commission of other offences and the resulting prejudice for the community. Therefore, even though the measure had entailed deprivation of property, it fell within the definition of "control of the use of property" under the second paragraph of Article 1 of Protocol No. 1. Being provided for by law, that interference pursued the legitimate aim, in accordance with the general interest, of combating human trafficking and the exploitation of foreigners in a precarious situation. Where property that had been used

illegally was confiscated, the balance between that aim and the applicant's fundamental rights depended on numerous factors and in particular the attitude of the property owner. It was therefore appropriate to ascertain whether the Belgian authorities had given due consideration to the extent of the applicant's negligence or prudence, or at least to the relationship between his conduct and the offence in question. In addition, it was necessary to take into account the proceedings in the domestic legal system in order to assess whether they had afforded the applicant, in view of the severity of the penalty, an adequate opportunity to make submissions to the competent authorities, including if necessary to allege a breach of the law or the existence of arbitrary or unreasonable conduct. In this connection, it could be observed from the outset that Article 433 *terdecies*, paragraph 2, of the Criminal Code, rendered mandatory the confiscation of property used in the commission of an offence in cases referred to in certain other articles of the same Code, which covered offences such as those that had led to the applicant's conviction in the present case. In addition, the impugned confiscation had not been decided by virtue of the discretionary power of a customs authority, but was a penalty under the criminal law. In cases where confiscation was ordered as a penalty, the owner of the property in question had to be given the opportunity to claim his innocence, without which the fair balance between the protection of the right to the peaceful enjoyment of possessions and the requirements of the general interest would not be maintained. In the present case, proceedings had been brought against the applicant before the Liège Criminal Court for having "taken advantage, either directly or through an intermediary, of the particularly vulnerable situation of numerous foreign nationals as a result of their administrative, illegal or precarious situation, by renting immovable property, rooms or other premises with the intention of making an abnormal profit". In addition, the Court of Appeal had quite rightly not confined itself to an automatic application of Article 433 *terdecies* of the Criminal Code in the applicant's case but had given lengthy reasoning in its decision to uphold the conviction, stressing the applicant's highly reprehensible conduct. In order to determine the nature and severity of the penalty to be applied, the Court of Appeal had taken into consideration the seriousness and particularly heinous nature of the offence which reflected, on the part of the defendant, an inadmissible disregard for human values and dignity, the purely mercenary nature of his conduct, the length of time over which the offences had been committed, and the defendant's substantial criminal record. The Court of Appeal had then ordered the confiscation of the property which had been used for the commission of the offence, whilst limiting the measure, however, to the rooms and other premises that had been rented to the foreigners identified in the case file. Lastly, it had ordered the return of other property which had only been seized as real evidence for the purposes of the investigation.

In those circumstances, taking into account the margin of appreciation afforded to States in controlling "the use of property in accordance with the general interest", in particular in the context of a policy aimed at combating criminal activities, the interference with the applicant's right to the peaceful enjoyment of his possessions had not been disproportionate to the legitimate aim pursued: *manifestly ill-founded*.

Relinquishment in favour of the Grand Chamber

Article 30

DEMOPOULOS and seven other cases - Turkey (N° 46113/99, etc.)
[Section III]

(See Article 1 of Protocol No. 1 above).

Judgments having become final under Article 44 § 2 (c)[1]

Article 44 § 2 (c)

On 4 May 2009 the Panel of the Grand Chamber rejected requests for referral of the following judgments, which have consequently become final:

KIRAKOSYAN – Armenia (N° 31237/03)
MKHITARYAN – Armenia (N° 22390/05)
TADEVOSYAN – Armenia (N° 41698/04)
SACCOCCIA – Austria (N° 69917/01)
MARANGOS – Cyprus (N° 12846/05)
VAILLANT – France (N° 30609/04)
THEODORAKI and Others – Greece (N° 9368/06)
FRANKOWICZ – Poland (N° 53025/99)
BELASHEV – Russia (N° 28617/03)
BURDOV – Russia (II) (N° 33509/04)
MUMINOV – Russia (N° 42502/06)
UMAYEVA – Russia (N° 1200/03)
DEVECIOĞLU – Turkey (N° 17203/03)

[1] The list of judgments having become final pursuant to Article 44(2)(b) of the Convention has been discontinued. Please refer to the Court's database HUDOC which will indicate when a given judgment has become final.