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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Continuing situation linked to poor conditions of detention in police cells and remand prison: *violation*

Ogică v. Romania - 24708/03
Judgment 27.5.2010 [Section III]

Facts – In 2001 the applicant was remanded in custody after a criminal complaint was made against him. The detention measure was extended every thirty days until the proceedings were concluded. In 2002 the District Court sentenced him to a prison term for attempted fraud. In January 2003 the court of appeal upheld that judgment but reduced the length of the sentence. Observing that the prison term was due to end at midnight the same day, it ordered the applicant's release. The court's registry immediately made contact with the prison concerned. However, the secretariat was closed and there was no one there to receive a fax. Since the applicant could not be released simply on the basis of a telephone call, he did not leave prison until two days later. Before the European Court, he complained of the conditions of his pre-trial detention first in a police cell (with some interruptions while he was in hospital) and then in prison.

Law – Article 3: (a) *Conditions of the applicant's detention on the police premises* – The Court applied the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation) in cases where the Government alone had access to information capable of corroborating or refuting the applicant's allegations. The parties' submissions concerning the conditions of detention in question were diametrically opposed. However, the mere fact that the Government's version contradicted that provided by the applicant could not in itself lead the Court to dismiss the latter's allegations as unsubstantiated. The Government had provided no reasons or valid supporting documents. Furthermore, their version was not corroborated by the materials in the file, which, on the contrary, indicated beyond reasonable doubt that the applicant, over a period of several months, had been consistently subjected to conditions of detention which were largely as he alleged in his complaint concerning the police cells (overcrowding, insanitary conditions, lack of fresh air and natural light, etc.). Regard being had, moreover, to the materials provided by the European Committee for the Prevention of Torture (CPT), the Court could not find that the exercise time allowed to the applicant in a communal area measuring 24 sq. m. had been sufficient to compensate for the lack of space in his cell. In conclusion, the conditions of detention in the police cells had been such as to cause the applicant suffering beyond that inevitably associated with a prison sentence.

(b) *Conditions of detention in prison* – The Court pointed out that it had already found a violation of Article 3 in similar cases relating to the same establishment. There was no reason to reach a different conclusion in the present case. The allegations not contradicted by the parties and the information emanating from the CPT, among others, made it clear that the applicant had had only about one square metre of living space in his cell. With the exception of around thirty minutes' daily exercise outside, he had thus been confined to an overcrowded cell in poor hygiene conditions and without heating.

The applicant's overall conditions of detention (hygiene conditions, overcrowding, temperature of the cells, etc.) had remained similar despite his transfer from the police cells to prison, and were therefore to be considered as a continuing situation. While there was no indication that there had been any real intention to humiliate or debase the applicant, the absence of such intention did not mean there had been no violation of Article 3. The conditions of detention complained of, which the applicant had had to endure for a significant period of time, had subjected him to hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.

Conclusion: violation (unanimously).

Article 5 § 1: The final judgment of January 2003 had sentenced the applicant to a prison term equal to the term of detention he had already served. As soon as the judgment was delivered, the registry of the court of appeal had contacted the prison with

a view to the applicant's release. However, it had been unsuccessful. Emphasising that the registry had contacted the prison management during the day, the Court could not accept that the authorities in charge of a prison should fail, because of the secretariat's opening hours, to take the necessary steps to receive a faxed document required for a prisoner's release early on a Friday afternoon, knowing that the closure of the office meant that the person concerned would be detained for a further forty-eight hours. That length of time could in no sense be said to constitute the unavoidable minimum time needed to give effect to the order for a prisoner's release.

Conclusion: violation (unanimously).

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

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Elberte v. Latvia - 61243/08
[Section III]

(See Article 8 below, page 12)

ARTICLE 4

Forced labour

Receipt of benefits conditioned by obligation to take up "generally accepted" employment: *inadmissible*

Schuitemaker v. the Netherlands - 15906/08
Decision 4.5.2010 [Section III]

Facts – The applicant, a philosopher by profession, had been unemployed and in receipt of benefits since 1983. After a change in the legislation, she was informed that her eligibility for general welfare benefits was dependent on her obtaining and being willing to take up "generally accepted" employment and that non-compliance would lead to a reduction in her benefit payments. In her application to the European Court. She complained that under the new legislation she was required to obtain and accept any kind of work, irrespective of whether or not it was suitable, in breach of Article 4 of the Convention.

Law – Article 4 § 2: Where a State introduced a system of social security, it was fully entitled to lay down conditions for persons wishing to receive benefits. In particular, a condition to the effect that a person must make demonstrable efforts in order to obtain and take up generally accepted employment could not be considered unreasonable, nor could it be equated with compelling a person to perform forced or compulsory labour within the meaning of Article 4.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 5

Article 5 § 1

Lawful arrest or detention

Applicant's continued detention for two days without legal basis following final decision requiring his release: *violation*

Ogică v. Romania - 24708/03
Judgment 27.5.2010 [Section III]

(See Article 3 above, page 7)

ARTICLE 6

Article 6 § 1 (criminal)

Fair hearing

Surrender of suspect to fellow member State despite alleged risk of unfair trial: *inadmissible*

Stapleton v. Ireland - 56588/07
Decision 4.5.2010 [Section III]

Facts – This case concerned the scheme for the surrender of suspects and convicted persons established by the European Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member States. The scheme replaces extradition procedures between member States.

In 2005 the applicant was arrested in Ireland under a European Arrest Warrant that had been issued the previous year in the United Kingdom in respect of fraud offences he was alleged to have committed there between 1978 and 1982. The United Kingdom authorities maintained that they had only become aware of the applicant's whereabouts

in 2001 as he had been living overseas. The applicant opposed his surrender on the grounds that the delay of well over twenty years between the commission of the alleged offences and his arrest had created a real risk that he would not receive a fair trial. That argument was rejected by the Irish Supreme Court, which found, *inter alia*, that the applicant had a remedy for the delay in the United Kingdom courts and it would be demonstrably more efficient and appropriate for that issue to be dealt with there.

Law – Article 6: The facts of the applicant's case did not disclose substantial grounds for believing that there would be a real risk that the applicant would be exposed to a flagrant denial of his Article 6 rights in the United Kingdom, which, as a Contracting Party, had undertaken to abide by its Convention obligations and to secure to everyone within its jurisdiction the rights and freedoms defined therein. Delay in prosecuting a crime did not, necessarily and of itself, render criminal proceedings unfair.

The applicant's submission that all he should have been required to establish in the Irish courts was a real risk of unfairness in the United Kingdom, rather than a real risk of a "flagrant denial" of his rights, was rejected for three reasons. Firstly, such an approach would run counter to the principles that had been established in *Soering v. the United Kingdom* (no. 14038/88, 7 July 1989) and the Court's subsequent jurisprudence. Secondly, the Irish Supreme Court had rightly found that on the facts it would be more appropriate for the United Kingdom courts to hear and determine the applicant's complaints of unfairness. Thirdly, the applicant's submission that he was entitled to have his Convention right protected on the first relevant occasion (in this case before the Irish courts) was misplaced in view of the United Kingdom's status as a Contracting Party to the Convention. This was not a case involving non-derogable rights under Articles 2 and 3 of the Convention and a risk of onward expulsion to a non-Contracting State without a proper examination of the applicant's claim or any proper opportunity to apply to the European Court and request interim measures. The applicant had various remedies available in the United Kingdom courts in respect of any unfairness, such as an application at the outset for a stay on the grounds that he would not receive a fair trial. If such an application proved unsuccessful he could then apply to the European Court under Articles 6 and 34 of the Convention.

Finally, the applicant's submission that pre-trial detention in the United Kingdom would inevitably follow his surrender was neither complete nor convincing as he would have the immediate possibility of applying for bail and raising all relevant criteria.

Conclusion: inadmissible (manifestly ill-founded).

Order of examination of grounds of appeal: *inadmissible*

Cortina de Alcocer and de Alcocer Torra v. Spain - 33912/08
Decision 25.5.2010 [Section III]

Facts – In December 2000 the *Audiencia Provincial* found the applicants guilty of forgery of documents and fraud, but held that prosecution of the offences was time-barred. In March 2003 the Supreme Court ruled that the prosecution was not time-barred. Upholding the trial court's findings as to the applicants' guilt, it imposed prison sentences on them. The applicants lodged an *amparo* appeal, which was partly dismissed by the Constitutional Court in February 2008. In doing so the latter upheld the reasoning of the lower courts as to the existence of sufficient evidence that the offences in question had been committed. It then examined the question of limitation and found that there had been a breach of the right to a fair trial with regard to the right to liberty, and quashed the Supreme Court judgment. In the applicants' submission, the Constitutional Court, in ruling that the decision to convict them had been correct before finding that the prosecution was time-barred, had breached their rights under Article 6 § 1 of the Convention and their right to be presumed innocent.

Law – Article 6 § 1: *The order in which the complaints raised before the Constitutional Court were examined* – According to the Constitutional Court, the order of examination had been based on the same logical criterion it had adopted on previous occasions. Hence, it had started its consideration of the appeal with the complaint concerning the right to a fair trial. It had justified this choice on the grounds that, if the complaint were upheld, the proceedings would have had to be quashed and it would have been unnecessary to continue examining the *amparo* appeal. The Constitutional Court had given sufficient reasons for its reply, which could not be said to have been arbitrary, without foundation or liable to render the proceedings unfair. Nor could it be asserted

that the Constitutional Court would have reached a different conclusion had the order of examination of the complaints been reversed. Furthermore, the Constitutional Court had quashed the Supreme Court's judgment in its entirety. As the applicants had confined themselves to disputing an issue governed by the domestic legal arrangements of the respondent State, the Court wished to make it clear that the right to a fair trial did not encompass the right to have the grounds of appeal in a given case examined in a particular order.

Conclusion: inadmissible (manifestly ill-founded).

The Court also declared the complaint concerning the length of time taken by the Constitutional Court to consider the *amparo* appeal inadmissible for failure to exhaust domestic remedies. The complaint relating to the Supreme Court's interpretation of the application of the statute of limitations was declared inadmissible as manifestly ill-founded.

Lack of public hearing in summary administrative-offences proceedings: *communicated*

Marguč and Others v. Slovenia - 14889/08 et al.
[Section III]

The applicants were fined by the police for various road-traffic offences. They challenged the payment orders before the local courts, but their requests for judicial protection were refused in summary proceedings without a public hearing. Failure to pay the fines could result in a prison sentence.

Communicated under Article 6 § 1.

ARTICLE 7

Nullum crimen sine lege

Conviction under legislation introduced in 1993 for war crimes committed in Second World War: *no violation*

Kononov v. Latvia - 36376/04
Judgment 17.5.2010 [GC]

Facts – In July 1998 the applicant was charged with war crimes arising out of an incident that had occurred more than fifty years earlier during the Second World War, when he was a member of a Soviet commando unit of Red Partisans. The charges were brought under Article 68-3 of the 1961 Criminal Code of the Soviet Socialist Republic of Latvia, a provision dealing with war crimes that had been inserted by the Latvian Supreme Council on 6 April 1993, following Latvian independence. The Criminal Affairs Division of the Latvian Supreme Court found the applicant guilty of various war crimes and sentenced him to twenty-months' imprisonment in view of his age and infirmity. According to the facts as established by the Latvian courts, on 27 May 1944 he had led a unit of Red Partisans on a punitive expedition on the village of Mazie Bati (which was then under German administration) following reports that certain of its inhabitants had betrayed another group of Partisans to the Germans. The unit had entered the village dressed in German uniforms and, after finding rifles and grenades supplied by the Germans, had set fire to buildings and killed nine of the villagers, including three women, one in the final stages of pregnancy. None of those who died had been armed, or had attempted to escape or offered resistance. According to the applicant, the victims of the attack were collaborators who had delivered a group of Partisans into the hands of the Germans some three months earlier. His unit had been instructed by an *ad hoc* Partisan tribunal to capture those responsible so that they could be brought to trial, but he had not personally led the operation or entered the village.

In his application to the European Court, the applicant complained that the acts of which he had been accused had not, at the time of their commission, constituted an offence under either domestic or international law. He further maintained that in 1944, as a young soldier in a combat situation behind enemy lines, he could not have foreseen that his acts would constitute war crimes or that he would be prosecuted. In his submission, his conviction following Latvian independence in 1991 owed more to political expedience than to any real wish to fulfil international obligations to prosecute war criminals. In a judgment of 24 July 2008 a Chamber of the Court found, by four votes to three, that there had been a violation of Article 7 § 1 of the Convention (see Information Note no. 110).

Law – Article 7: The Court was not called upon to rule on the applicant's individual criminal responsibility as that was primarily a matter for the domestic courts. Its function was to examine whether, under the law as it stood on 27 May 1944, there had been a sufficiently clear legal basis for the applicant's convictions, whether their prosecution had become statute-barred in the interim, and

whether the offences of which the applicant was ultimately convicted had been defined with sufficient accessibility and foreseeability. Since the factual evidence was disputed, the Court began its analysis on the basis of the hypothesis that was most favourable to the applicant, namely that the villagers were not ordinary civilians, but "combatants" or "civilians who had participated in hostilities".

(a) *Legal basis for the crimes in 1944* – The applicant had been convicted under Article 68-3 of the 1961 Criminal Code, a provision that had been introduced by the Supreme Council on 6 April 1993. Although Article 68-3 gave examples of acts considered to be war crimes, it relied on "relevant legal conventions" for a precise definition. Accordingly, the applicant's conviction had been based on international rather than domestic law.

The Court reviewed the position under international law in 1944. It noted that, following an extensive period of codification going back to the mid-nineteenth century, the Charter of the International Military Tribunal of Nuremberg had provided a non-exhaustive definition of war crimes for which individual criminal responsibility was retained. There had been agreement in contemporary doctrine that international law, in particular the Hague Convention and Regulations 1907, had already defined war crimes and required individuals to be prosecuted, so that the Charter was not *ex post facto* criminal legislation. Throughout that period of codification, domestic criminal and military tribunals had been the primary mechanism for the enforcement of the laws and customs of war, with international prosecution being the exception. Accordingly, the international liability of the State based on treaties and conventions did not preclude the customary responsibility of States to prosecute and punish individuals for violations of the laws and customs of war. International and national law served as a basis for domestic prosecutions and liability. In particular, where national law did not provide for the specific characteristics of a war crime, the domestic court could rely on international law as a basis for its reasoning. Accordingly, the Court considered that by May 1944 war crimes had been defined as acts contrary to the laws and customs of war and international law had defined the basic principles underlying, and an extensive range of acts constituting, such crimes. States were at least permitted (if not required) to take steps to punish individuals for war crimes, including on the basis of command responsibility.

The Court went on to consider, in the light of the "two cardinal principles" of humanitarian law – the "protection of the civilian population and objects" and the "obligation to avoid unnecessary suffering to combatants" – whether there had been a sufficiently clear and contemporary legal basis for the *specific* war crimes of which the applicant had been convicted. These crimes had included the ill-treatment, wounding and killing of the villagers, their treacherous wounding and killing, the burning to death of a pregnant woman and attacks on undefended localities.

As to the first of these offences, having regard notably to Article 23(c) of the Hague Regulations 1907, the murder and ill-treatment of the villagers had violated the fundamental rule that an enemy rendered *hors de combat* – in this case not carrying arms – was protected. Such persons were not required to have a particular legal status or to have formally surrendered. As combatants, the villagers would also have been entitled to protection as prisoners of war under the control of the applicant and his unit and their subsequent ill-treatment and summary execution would have been contrary to the numerous rules and customs of war protecting prisoners of war. As regards the second offence, the domestic courts had reasonably relied on Article 23(b) of the Hague Regulations to found a separate conviction of treacherous wounding and killing for unlawfully inducing (by wearing German uniforms) the enemy to believe they were not under threat of attack. There had also been a plausible legal basis for convicting the applicant of the third offence (the burning to death of the expectant mother) given the special protection to which women had been entitled during war since as early as the Lieber Code 1863. Lastly, as regards the fourth offence, Article 25 of the Hague Regulations prohibited attacks against undefended localities except where "imperatively demanded by the necessities of war". There was nothing to suggest that that exception had applied in the applicant's case. Accordingly, the Court was satisfied that each of these offences had constituted a war crime. As the person who had organised, commanded and led the Partisan unit that had carried out the attack, the applicant had assumed command responsibility for those acts.

In conclusion, even assuming that the deceased villagers could be considered to have been "civilians who had participated in hostilities" or "combatants", there had been a sufficiently clear legal basis, having regard to the state of international law in 1944, for the applicant's conviction and punishment for war crimes as the commander of the unit responsible for the attack on Mazie Bati. If the villagers were

considered to have been "civilians", they would have been entitled to even greater protection.

(b) *Whether the charges were statute-barred* – A domestic prosecution for war crimes in 1944 would have required reference to international law, not only as regards the definition of such crimes, but also as regards the determination of any limitation period. Accordingly, any domestic limitation period was not applicable. The essential question, therefore, was whether at any point prior to the applicant's prosecution, such action had become statute-barred by international law. International law was silent on the subject in 1944 and had not fixed any limitation period since. It followed that the applicant's prosecution had not been statute-barred.

(c) *Foreseeability* – The international laws and customs of war were sufficient, of themselves, to found individual criminal responsibility in 1944, so the fact that they were not referred to in the domestic legislation at that time could not be decisive. They constituted detailed *lex specialis* regulations fixing the parameters of criminal conduct in a time of war and were primarily addressed to armed forces and, in particular, commanders. Given his position as a commanding military officer, the applicant could reasonably have been expected to take special care in assessing the risks the Mazie Bati operation entailed. Even the most cursory reflection would have indicated that the flagrantly unlawful ill-treatment and killing of the villagers risked constituting war crimes for which, as commander, he could be held individually and criminally accountable. The Court rejected the applicant's submission that his prosecution had been politically unforeseeable, as it was both legitimate and foreseeable for a successor State to bring criminal proceedings against those who had committed crimes under a former regime. Successor courts could not be criticised for applying and interpreting the legal provisions in force at the relevant time during the former regime in the light of both the principles governing a State subject to the rule of law and the core principles on which the Convention system was built, particularly where the right to life was at stake. Those principles were applicable to a change of regime of the nature which had taken place in Latvia following independence.

Accordingly, at the time they were committed, the applicant's acts had constituted offences defined with sufficient accessibility and foreseeability by the laws and customs of war.

Conclusion: no violation (fourteen votes to three).

ARTICLE 8

Private life

Refusal to make medication available to assist suicide of a mental patient: *admissible*

Haas v. Switzerland - 31322/07
Decision 20.5.2010 [Section I]

Facts – The applicant had been suffering from a serious bipolar affective disorder for about twenty years. Considering that his illness prevented him from living in dignity, he asked a Swiss private-law association to help him put an end to his life. The applicant asked several psychiatrists to prescribe him a lethal prescription drug, but to no avail. With the help of the association, he then sought permission from various authorities to purchase the drug from a chemist without a prescription, again to no avail. He appealed to the Federal Court against the decisions not to supply the drug, but his appeal was rejected in November 2006.

Law – Article 8: The applicant, a Swiss national who lived outside Switzerland during part of the proceedings, had applied to the Swiss authorities, via a Swiss private-law association, to supply him with a lethal drug without a prescription. The authorities had refused and he had taken the matter before the competent courts, which had rejected his appeals on the merits. At no time did the courts declare that they did not have territorial jurisdiction to hear the applicant's case. The questions raised by this application therefore fell within the jurisdiction of the respondent State for the purposes of Article 1 of the Convention and engaged its international responsibility. The Court had territorial jurisdiction to hear the application. In the light of the parties' submissions, the applicant's complaint raised complex issues of fact and law which could not be resolved at this stage in the examination of the application, but required examination on the merits.

Conclusion: admissible (majority).

Private and family life

Removal of tissue from deceased without knowledge or consent of family: *communicated*

Elberte v. Latvia - 61243/08
[Section III]

After the applicant's husband died in a car accident, his body was transferred to a forensic centre with a view to establishing the cause of death. Tissue was removed prior to burial. The applicant only became aware of this two years later, when the police opened an official inquiry into the illegal removal of organs and tissue from corpses by the forensic centre, allegedly for use by a German pharmaceutical company engaged in the manufacture of bioimplants. Under the terms of the agreement with the German company, tissue could be removed as long as the deceased had not objected during his lifetime and as long as his relatives did not object (although they were never contacted specifically about this issue). The police investigation was subsequently discontinued on the grounds that the applicable law provided for the "presumed consent" of the deceased's family.

Communicated under Articles 3 and 8, with separate questions concerning the applicant's victim status and the exhaustion of domestic remedies.

Family life

Order annulling adoption following the divorce of the adoptive parents: *violation*

Kurochkin v. Ukraine - 42276/08
Judgment 20.5.2010 [Section V]

Facts – The applicant and his wife adopted an orphan. The marriage subsequently broke down and the applicant brought divorce proceedings. The wife sought an annulment of the adoption on the grounds that the child had been violent towards her and that the applicant had refused to stop the attacks. Her application was contested by both the applicant and the child, who wished to continue to live together. Following the couple's divorce (and the applicant's remarriage) the domestic courts annulled the adoption and made an order for the child to be placed in care on the grounds that the applicant had failed to show that he was able to influence the boy positively and secure his normal personal development. The child nevertheless continued to live with the applicant, who was subsequently appointed the child's guardian by the authorities.

Law – Article 8: This was not a case of a parent being declared unfit to care for a child because of physical or mental illness or violent or abusive conduct. Instead, the reason given by the domestic courts for annulling the adoption was that the applicant lacked authority over the child and had failed to show that he could ensure its proper upbringing. That conclusion had been based on evidence that the child had been aggressive to the adoptive mother. However, she and the applicant had divorced, so there did not appear to be any reason why the annulment of the adoption order in her favour should also have necessitated the applicant's separation from the boy. The domestic courts' assertion that annulment could also be considered a sanction for the boy's behaviour did not appear to be a relevant reason for splitting up an established family unit. Furthermore, the domestic authorities did not appear to have carried out a careful assessment of the impact which the annulment of the adoption might have on the child's well-being or to have explored other less far-reaching alternatives that would be in line with the State's obligation to promote family unity. Instead, despite the fact that both the applicant and the boy had expressed the wish to remain together as a family, the authorities had laid the burden of proof on the applicant to show that he was able to influence and bring up the child properly. The boy had continued to live with the applicant after the orders annulling the adoption and requiring the child to be put in care were made and the child-welfare authority had subsequently appointed the applicant the child's guardian with responsibilities for his upbringing and development. These developments did not appear to support the domestic courts' findings that the applicant was incapable of ensuring the child's upbringing in a family environment. In sum, the findings of the domestic courts had not been supported by relevant and sufficient reasons such as to justify the interference with the applicant's family life.

Conclusion: violation (unanimously).

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

Correspondence

Proportionality and safeguards of legislation on interception of internal communications: *no violation*

Kennedy v. the United Kingdom - 26839/05
Judgment 18.5.2010 [Section IV]

Facts – The applicant was convicted of manslaughter and sentenced to a term of imprisonment. His case was controversial on account of missing and conflicting evidence. After being released from

prison in 1996, he started a business. He alleged that local calls to his telephone were not being put through to him and that he was receiving a number of time-wasting hoax calls. Suspecting that his business mail, telephone and email communications were being intercepted because of his high profile case and his subsequent involvement in campaigning against miscarriages of justice, the applicant complained to the Investigatory Powers Tribunal ("IPT"). He sought the prohibition of any communication interception by the intelligence agencies and the "destruction of any product of such interception". He also requested specific directions to ensure the fairness of the proceedings before the IPT, including an oral hearing in public, and a mutual inspection of witness statements and evidence between the parties. The IPT proceeded to examine the applicant's specific complaints in private. In 2005 it ruled that no determination had been made in his favour in respect of his complaints. This meant either that there had been no interception or that any interception which took place was lawful.

Law – Article 8

(a) *Existence of an "interference"* – In order to assess, in a particular case, whether an individual could claim an interference as a result of the mere existence of legislation permitting secret surveillance measures, the Court had to have regard to the availability of any remedies at the national level and the risk of secret surveillance measures being applied to him. Where there was no possibility of challenging the alleged application of secret surveillance measures at domestic level, widespread suspicion and concern among the general public that secret surveillance powers were being abused could not be said to be unjustified. In such cases, even where the actual risk of surveillance was low, there was a greater need for scrutiny by the Court. The applicant had failed to demonstrate a reasonable likelihood that there had been actual interception in his case. However, in the light of his allegations that any interception was taking place without lawful basis in order to intimidate him, it could not be excluded that secret surveillance measures had been applied to him or that, at the material time, he had been potentially at risk of being subjected to such measures.

(b) *Justification for the interference* – The interference in question had pursued the legitimate aims of protecting national security and the economic well-being of the country and preventing crime. In addition, it had been carried out on the basis of the Regulation of Investigatory Powers Act 2000 ("RIPA"), supplemented by the Interception of Communications Code of Practice. The Court was required to examine the proportionality of the RIPA legislation itself and the safeguards built into the system allowing for secret surveillance. In the circumstances, the lawfulness of the interference was closely related to the question whether the "necessity" test had been complied with in respect of the RIPA regime. The Court therefore examined the RIPA regime with reference to each of the safeguards and guarantees against abuse that had been outlined in *Weber and Saravia v. Germany* ((dec.), no. 54934/00, 29 June 2006, Information Note no. 88) and, where relevant, to its findings in respect of the previous legislation at issue in *Liberty and Others v. the United Kingdom* (no. 58243/00, 1 July 2008, Information Note no. 110).

(i) *Nature of the offences*: RIPA provided that interception could only take place where the Secretary of State believed that it was necessary in the interests of national security, for the purposes of preventing or detecting serious crime or for the purposes of safeguarding the economic well-being of the United Kingdom. The Court found this provision sufficiently clear, given that the condition of foreseeability did not require States to set out exhaustively by name the specific offences which may give rise to interception.

(ii) *Categories of persons targeted*: Unlike the *Liberty and Others* case, the present case concerned internal communications. Under RIPA, it was possible for the communications of any person in the United Kingdom to be intercepted. However, warrants were required clearly to specify the interception subject. The indiscriminate capturing of vast amounts of communications was not permitted. In the circumstances, no further clarification of the categories of persons liable to have their communications intercepted could reasonably be required.

(iii) *Duration of telephone tapping*: RIPA clearly stipulated the period after which an interception warrant would expire and the conditions under which a warrant could be renewed. The renewal or cancellation of interception warrants was under the systematic supervision of the Secretary of State. The overall duration of any interception measures depended on the complexity and duration of the investigation in question and, provided that adequate safeguards existed, it was not unreasonable to leave this matter to the discretion of the domestic authorities. The Court found the relevant domestic provisions sufficiently clear.

(iv) *Procedure for examining, using and storing data*: Interception warrants for internal communications related to one person or one set of premises only, thereby limiting the scope of the authorities' discretion to intercept and listen to private communications. Moreover, any captured data which were not necessary for any of the authorised purposes had to be destroyed.

(v) *Processing and communication of intercept material*: Domestic law strictly limited the number of persons to whom intercept material could be disclosed, imposing a requirement for the appropriate level of security clearance as well as a requirement to communicate data only so much as the individual needed to know, in particular, a summary only would be disclosed whenever sufficient. Intercept material, as well as copies and summaries, were to be handled and stored securely and to be inaccessible to those without the necessary security clearance. A strict procedure for security vetting was in place. The Court was thus satisfied that the provisions provided adequate safeguards for the protection of any data obtained.

(vi) *Destruction of intercept material*: The material was to be destroyed as soon as there were no longer any grounds for its retention. The necessity of such retention was to be reviewed at appropriate intervals.

(vii) *Supervision of the RIPA regime*: Apart from the periodic review of interception warrants and materials by intercepting agencies and, where appropriate, the Secretary of State, the Interception of Communications Commissioner established under RIPA was tasked with overseeing the general functioning of the surveillance regime and the authorisation of interception warrants in specific cases. The Commissioner was independent of the executive and the legislature and was a person who held or had held high judicial office. The obligation on intercepting agencies to keep records ensured that the Commissioner had effective access to details of surveillance activities undertaken. In addition, any person who suspected that his communications had been or were being intercepted could apply to the IPT, which was an independent and impartial body. The jurisdiction of the IPT did not depend on notification to the interception subject that there had been an interception of his communications. When the IPT found in the applicant's favour, it could quash any interception order, require destruction of intercepted material and order compensation. The publication of the IPT's legal rulings further enhanced the level of scrutiny over secret surveillance activities in the United Kingdom. Finally, the reports of the Commissioner scrutinised any errors which had occurred in the operation of the legislation. There was no evidence that any deliberate abuse of interception powers was taking place.

The domestic law on the interception of internal communications together with the clarifications brought by the publication of the Interception of Communications Code of Practice indicated with sufficient clarity the procedures for the authorisation and processing of interception warrants as well as the processing, communicating and destruction of intercept material collected. Having regard to the safeguards against abuse in the procedures as well as the more general safeguards offered by the supervision of the Commissioner and the review of the IPT, the impugned surveillance measures, in so far as they might have been applied to the applicant, had been justified under Article 8 § 2 of the Convention.

Conclusion: no violation (unanimously).

Article 6 § 1: The restrictions on the procedure before the IPT had not violated the applicant's right to a fair trial. In reaching this conclusion, the Court emphasised the breadth of access to the IPT enjoyed by those complaining about interception within the United Kingdom and the absence of any evidential burden to be overcome in order to lodge an application with the IPT. In order to ensure the efficacy of the secret surveillance regime, and bearing in mind the importance of such measures to the fight against terrorism and serious crime, the Court considered that the restrictions on the applicant's rights in the context of the proceedings before the IPT had been both necessary and proportionate and had not impaired the very essence of the applicant's Article 6 rights.

Conclusion: no violation (unanimously).

ARTICLE 9

Freedom of religion

Conviction of conscientious objector for refusing to perform military service: *case referred to the Grand Chamber*

Bayatyan v. Armenia - 23459/03
Judgment 27.10.2009 [Section III]

The applicant, a Jehovah's Witness, had refused to serve in the military on conscientious grounds. He was convicted of draft evasion and given a prison

sentence. In his application to the European Court, he complained that his conviction had violated his right to freedom of religion. In a judgment of 27 October 2009 (see Information Note no. 123) a Chamber of the Court held, by six votes to one, that there had been no violation of his rights as Article 9 could not be interpreted as guaranteeing a right to refuse military service on conscientious grounds. Even though, given Armenia's official commitment to recognising the right to conscientious objection, the applicant could have had a legitimate expectation that he would be allowed to perform civil service instead of serving a prison sentence, the authorities could not be regarded as having breached their Convention obligations by convicting him for his refusal to serve in the military.

On 10 May 2010 the case was referred to the Grand Chamber at the applicant's request.

Constitutional amendment prohibiting the building of minarets: *communicated*

Ouardiri v. Switzerland - 65840/09
Association « Ligue des musulmans de Suisse » and Others v. Switzerland - 66274/09
[Section I]

In the *Ouardiri* case the applicant is a private individual belonging to the Muslim faith who works for a foundation active in matters concerning Islamic issues and the rest of the world.

In the case of *Association "Ligue des musulmans de Suisse" and Others*, the applicants are three associations and a foundation whose activities all have the Muslim religion in common.

In July 2008 an initiative with the slogan "Stop building minarets", backed by 113,540 signatures and calling for an amendment to the Constitution, was submitted to the Federal Chancellery. In August 2008 the Federal Council (the Government) submitted a draft decree on the subject to the Federal Assembly. A message accompanying the draft decree pointed out the risks of violations of Articles 9 and 14 of the Convention. In June 2009 the Federal Assembly adopted a decree validating the initiative and submitting it to the vote of the people and the cantons, while at the same time stipulating that it would mean amending the Constitution, and recommending people to vote against it. The voting took place in November 2009. The provisional results show that 53.4 % of the voters voted in favour of the initiative and only four cantons voted against it.

Communicated under Article 9, Article 14 in conjunction with Article 9, and Articles 34 and 35 § 1.

ARTICLE 10

Freedom of expression

Dismissal of trade unionists for offensive and humiliating publication: *case referred to the Grand Chamber*

Aguilera Jiménez and Others v. Spain - 28389/06 et al.
Judgment 8.12.2009 [Section III]

The six applicants, who worked as delivery men for a company where they were also trade union leaders, were dismissed following the publication in the trade union's newsletter of a caricature and articles targeting the director of human resources and other employees. They challenged the decision to dismiss them. The employment tribunal found their dismissal justified because of the offensive nature of the publication, which had tarnished the honour and dignity of the persons concerned and overstepped the limits of freedom of expression. The appellate court upheld that decision in respect of four of the applicants, but found the dismissal of the other two employees unwarranted, for lack of evidence that they had been directly involved in the events, and the company was ordered to reinstate them or pay compensation. An appeal on points of law lodged by the applicants was dismissed by the Supreme Court and their *amparo* appeal to the Constitutional Court was declared inadmissible.

In a judgment of 8 December 2009, in which only the complaints of those applicants who had not been successful before the Spanish courts were declared admissible and examined on the merits, a Chamber of the Court found by six votes to one that there had been no violation of Article 10 of the Convention. It held that the Spanish courts had analysed in detail the events complained of, and had concluded that, on account of their seriousness and tone, the drawing and articles amounted to personal attacks that were offensive, intemperate, gratuitous and in no way necessary for the legitimate defence of the applicants' interests. The applicants had exceeded the acceptable limits of the right of criticism. In so finding, the courts had weighed up the competing interests under national law and their decisions

could not be considered unreasonable or arbitrary. The authorities had therefore not exceeded their discretion in penalising the applicants.

On 10 May 2010 the case was referred to the Grand Chamber at the applicants' request.

Conviction for publication of allegations insinuating that a Muslim professor had taken part in terrorist activities: *violation*

Brunet Lecomte and Lyon Mag' v. France - 17265/05
Judgment 6.5.2010 [Section V]

Facts – The applicants are the publication director and publisher of the news magazine Lyon Mag'. The October 2001 issue was entitled "Exclusive, SOFRES poll, Local Muslims and terrorism. Report: Should we be afraid of Lyons' Islamist networks?". Filling three-quarters of the magazine's cover page was a photograph of T. with the caption "T., one of the most influential Muslim leaders in Lyons". There was also an article about him ("The Ambiguous Mr T."). On a complaint by T., the criminal court found the publication defamatory but acquitted the applicants and dismissed T.'s civil suit on account of their good faith. The court of appeal set aside that judgment in 2003, finding that there had been public defamation of an individual. It ordered the first applicant to pay damages to T. and found the publishing company civilly liable. In 2004 the Court of Cassation dismissed an appeal on points of law lodged by the applicants.

Law – Article 10: The judgment against the applicants for defamation had constituted interference with the exercise of their right to freedom of expression. That interference had been prescribed by law and had pursued the aim of protecting the reputation or rights of others. The court of appeal had analysed the offending text but had not found the applicants' offers of proof to be pertinent. It had also rejected their defence of good faith. The Court took the view, however, that the offending passages and insinuations should have been examined in their context, namely the publication of a series of articles resulting from a three-week investigation into local Islamist networks. Moreover, T., as a lecturer and without being compared to a public figure, had exposed himself to press criticism by the publicity that he had given to some of his ideas or beliefs, and could therefore have expected a close examination of his statements. The numerous documents contained in the offer of proof and produced before the Court clearly showed the danger posed by his statements. In addition, the article had mainly concerned the ban on entry to France that had been imposed on him and his brother a few years earlier, based on duly cited information from the French intelligence service. The offending remarks were not therefore devoid of factual basis. Furthermore, in view of the quantity and seriousness of the sources consulted, the investigation carried out and the moderation and prudence shown in the article, the applicants had been acting in good faith. The offending remarks, published by a well-informed press medium, had not exceeded the admissible limits of criticism in such matters. Moreover, the authorities had only had limited discretion to assess the necessity of the penalty imposed. The offending articles, published shortly after the 11 September 2001 attacks, had contributed to a political debate of immediate interest, resituating it in the local context. Therefore, the applicants' interest in imparting and the public's interest in receiving information about a subject in the general interest, and its repercussions for the Lyons area as a whole, had prevailed over T.'s right to the protection of his reputation. Thus, the reasons put forward by the domestic courts in order to justify the judgment against the applicants had not been relevant or sufficient. Lastly, an amnesty in 2002 had terminated the criminal proceedings against the applicants. Only the civil proceedings had remained open, resulting in an award of EUR 2,500 in damages against both applicants jointly. In view of the acts for which they had been held liable, such a penalty had been disproportionate. The interference in the exercise by the applicants of their right to freedom of expression had not therefore been necessary in a democratic society.

Conclusion: violation (five votes to two).

Re-entry ban on American academic for controversial statements on Kurdish and Armenian issues: *violation*

Cox v. Turkey - 2933/03
Judgment 20.5.2010 [Section II]

Facts – The applicant, a US citizen, had worked in two Turkish universities in the 1980s. She was expelled and banned from re-entering the country in 1986 on account of statements she had made in front of students and colleagues that "Turks had assimilated Kurds" and that they "had expelled and massacred Armenians". She was also expelled on

two further occasions. In 1996 the applicant brought proceedings requesting that the ban be lifted, but her claim was dismissed.

Law – Article 10: Even though the right of a foreigner to enter or remain in a country was as such not guaranteed by the Convention, immigration controls were to be exercised consistently with Convention obligations. The applicant was precluded from re-entering the country on grounds of her controversial statements concerning Kurdish and Armenian issues, which continued to be the subject of heated debate, not only in Turkey, but also internationally. Opinions expressed on such issues by one side might offend the other, but a democratic society required tolerance and broad-mindedness in the face of controversial expressions. Moreover, when, as in the applicant's case, the interference with a Convention right consisted of a denial of re-entry to a country, the Court was empowered to examine the grounds for that ban. However, from the domestic courts' reasoning it was impossible to conclude how and why the applicant's views had been deemed harmful to Turkey's national security. Nor could it be accepted that "the situation complained of did not fall within the ambit of any of the applicant's fundamental rights". Bearing in mind that it had never been suggested that the applicant had committed an offence or shown that she had ever been engaged in any activities which could clearly be seen as harmful to Turkey, the reasons adduced by the domestic courts could not be regarded as sufficient and relevant justification for the interference with her right to freedom of expression.

Conclusion: violation (unanimously).

Article 41: EUR 12,000 in respect of non-pecuniary damage.

ARTICLE 34

Victim

Intervening domestic friendly settlement for payment of judgment debt following substantial delays in payment: *victim status upheld*

Düzdemir and Güner v. Turkey
- 25952/03 and 25966/03
Judgment 27.5.2010 [Section II]

Facts – The applicants obtained final judgment debts against their employer, a municipality, after being laid off. Several years later, after the applicants had complained to the European Court, the municipality entered into friendly-settlement agreements with them and paid the outstanding amounts. Notwithstanding those agreements, the applicants claimed compensation in the proceedings before the Court for pecuniary damage equal to the return on investment they would have received had they been paid promptly and for non-pecuniary damage incurred as a result of the delays in payment. The Government argued that the agreements had resolved the matter before the Court and that the applicants had therefore lost their victim status.

Law

(a) *Admissibility*: Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 – Although the friendly-settlement agreements with the municipality stipulated that the applicants waived any outstanding claims to compensation, rights and other credits against the payment of certain lump sums, they covered only claims under Article 1 of Protocol No. 1. The "matter" which had been resolved, therefore, was solely the "deprivation of property" complaint. The payment of the outstanding amounts had not remedied the applicants' complaint under Article 6 § 1 of the Convention concerning crucial employment issues caused by the authorities' protracted failure to execute the domestic judgments. Accordingly, the friendly-settlement agreements had deprived the applicants of victim status only in respect of the Article 1 of Protocol No. 1 complaint and the complaint under Article 6 § 1 was admissible.

Conclusion: admissible under Article 6 § 1 (unanimously); inadmissible under Article 1 of Protocol No. 1 (unanimously).

(b) *Merits*: Article 6 § 1 – The Court held that, by failing for several years to take the necessary measures to comply with final judicial decisions, the authorities had deprived the provisions of Article 6 § 1 of most of their useful effect.

Conclusion: violation (unanimously).

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

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ARTICLE 35

Article 35 § 3

Competence *ratione materiae*

Refusal to reopen civil proceedings following finding of Article 6 violation not based on relevant new grounds capable of giving rise to a fresh violation: *inadmissible*

Steck-Risch and Others v. Liechtenstein - 29061/08
Decision 11.5.2010 [Section V]

Facts – In a judgment of 19 May 2005 (application no. 63151/00) the European Court found a violation of the applicants' right to a fair trial in that they had not been afforded an opportunity to comment on their opponent's observations in proceedings for compensation before an administrative court. The Court declined, however, to make an award in respect of pecuniary damage as it found that there was no causal link between the violation found and the alleged damage and it was not called upon to speculate on what the outcome would have been if the proceedings had complied with the requirements of Article 6 § 1 of the Convention. In the absence of exceptional circumstances, the Court also refused the applicants' request for an order requiring the domestic proceedings to be reopened. The applicants subsequently lodged a request with the domestic courts to reopen the proceedings. In dismissing an appeal by the applicants against a refusal to grant that request, the Constitutional Court held that Liechtenstein law did not provide for the reopening of proceedings in such circumstances. Further, while it expressly accepted the European Court's finding of a violation, it considered that that finding had constituted sufficient redress in the circumstances of the case.

In a fresh application to the European Court, the applicants complained under Article 6 of the Convention that the domestic courts' decision not to reopen the compensation proceedings constituted a continuous violation of their right to a fair trial and of their right of access to court.

Law – Article 6 § 1: In order to determine its competence *ratione materiae*, the Court had to ascertain whether the applicants' new application contained relevant new information possibly entailing a fresh violation of Article 6, or whether it concerned only the execution of the initial application without raising any relevant new facts. The Court distinguished the present case from *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)*[1] on two counts. Firstly, whereas the Swiss Federal Court in the latter case had mainly relied on new grounds in deciding to dismiss a request to reopen the domestic proceedings, the Liechtenstein Constitutional Court in the applicants' case had dismissed a like request essentially because municipal law did not provide for the reopening of domestic proceedings following a finding by the European Court of a violation. The Constitutional Court had, moreover, expressly acknowledged the violation. Accordingly, its refusal to reopen the proceedings had not been based on relevant new grounds capable of giving rise to a fresh violation. As to the second distinguishing feature between the two cases, the Court noted that, unlike the position in *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)*, the Committee of Ministers in the applicants' case had not, when deciding to end its supervision of the execution of the judgment, been under the misapprehension that the applicants would be able to request the reopening of the domestic proceedings. While these considerations were not intended to detract from the importance of ensuring that domestic procedures were in place which allowed a case to be revisited in the light of a finding that Article 6 had been violated, the present application had to be rejected as being incompatible *ratione materiae* with the provisions of the Convention.

Conclusion: inadmissible (incompatible *ratione materiae*).

ARTICLE 37

Article 37 § 1

Continued examination not justified

Unilateral declaration affording adequate redress and announcing introduction of general remedial measures for length-of-proceedings complaints: *struck out*

Facondis v. Cyprus - 9095/08
Decision 27.5.2010 [Section I]

1. *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, 30 June 2009, Information Note no. 120.

Facts – In proceedings before the European Court concerning the length of civil proceedings before the domestic courts, the Government made a unilateral declaration in which they expressly acknowledged violations of Article 6 § 1 and Article 13 of the Convention and offered to pay the applicant EUR 17,000 in respect of damage and costs and expenses. The Government further indicated that a Bill was pending before the legislature that would provide remedies for length-of-hearing complaints in civil and administrative proceedings, including proceedings concluded before the legislation came into force. Courts hearing such complaints would have the power to award compensation and to make orders expediting the proceedings. Regulatory measures were also being introduced with a view to addressing the underlying problem of unreasonable delays. Lastly, the Cypriot Supreme Court was conducting a review of the rules of civil procedure and had proposed a series of practical measures to help speed up the system, including the accelerated transcription of court records, the computerisation of the judicial service and disciplinary measures against judges guilty of delays. In these circumstances, the Government requested the Court to strike out the application in accordance with Article 37 of the Convention.

Law – Article 37: In view of the clear acknowledgment of a breach of Articles 6 § 1 and 13 of the Convention, the entry into force of Law no. 2(I)/2010 establishing national remedies for complaints of a violation of the reasonable-time requirement, and the adequate financial compensation that had been afforded, the Court was satisfied that respect for human rights did not require it to continue with the examination of this part of the application.

Conclusion: struck out (unanimously).

ARTICLE 46

Execution of a judgment – Measures of a general character

Respondent State required to take general measures to put an end to unlawful occupation of land

Sarıca and Dilaver v. Turkey - 11765/05
Judgment 27.5.2010 [Section II]

(See Article 1 of Protocol No. 1 below, page 22)

ARTICLE 1 OF PROTOCOL No. 1

Peaceful enjoyment of possessions

Inability to recover possession of flat on account of service in military forces involved in war hostilities in the country: *violation*

Đokić v. Bosnia and Herzegovina - 6518/04
Judgment 27.5.2010 [Section IV]

Facts – During the 1980s, the applicant had worked as a lecturer at a military school based in Sarajevo and was allocated a military flat. In March 1992 he sought to buy the flat. However, even though he paid the purchase price in full, the local authorities refused to register his title to the property because the sale of military flats had temporarily been put on hold. At around the same time the war started in Bosnia and Herzegovina. The applicant's military school was transferred to Serbia and the applicant left Sarajevo to join the armed forces of the Federal Republic of Yugoslavia. After the war, the applicant tried to recover possession of the flat, but his request was refused since he was unable to prove that he had been a refugee or a displaced person as required under the relevant legislation. Even after a subsequent change in the law, a restriction remained in respect of persons seeking to recover possession of military flats who had served in the army of one of the successor states to the former Yugoslavia. The applicant's subsequent appeal to the Human Rights Commission was also rejected since the Commission held that his service in the forces of the Federal Republic of Yugoslavia had demonstrated his disloyalty to Bosnia and Herzegovina. Given the serious shortage in housing and the fact that the applicant was entitled to compensation, the interference with his property rights had been justified.

Law – Article 1 of Protocol No. 1: The Court was aware of the strong local opposition to those who had served in the military forces of the Federal Republic of Yugoslavia returning to their pre-war homes. This was due to their participation in military operations in Bosnia and Herzegovina, and in particular Sarajevo, which had been subjected to blockages, daily shelling and sniping throughout the war. However, there was no indication that the applicant had in any way participated in any military operations or war crimes in Bosnia and Herzegovina. He had been treated differently merely because of his service in those forces, which was indicative of his ethnic origin. As regards the

Government's argument relating to the shortage of housing and the need to accommodate destitute members of the local armed forces, the statistical data provided did not show that the free housing space had in fact been used to accommodate those deserving of protection. The figures simply confirmed that most military flats were allocated to war veterans, invalids and families of killed members of the local army, without indicating their housing situation or their income. Finally, neither the amount of compensation the applicant would be entitled to receive nor the refund calculated on the amount paid for the Sarajevo flat was reasonably related to the flat's market value. In such circumstances, the Court concluded that a fair balance between the applicant's property rights and the requirements of the public interest had not been struck.

Conclusion: violation (unanimously).

Article 41: EUR 60,000 in respect of pecuniary damage and EUR 5,000 in respect of non-pecuniary damage.

Possessions
Peaceful enjoyment of possessions

Eviction of an internally displaced person from State-owned accommodation after ten years' uninterrupted good-faith occupation: *violation*

Saghinadze and Others v. Georgia - 18768/05
Judgment 27.5.2010 [Section II]

Facts – The applicants were internally displaced persons (IDPs) who had fled Abkhazia (Georgia) in 1993, abandoning their homes and property there following the armed conflict of 1992-93. In 1994 the first applicant, a high-ranking official in the Abkhazian Ministry of the Interior, was offered the post of Head of the Investigative Department within the Georgian Ministry of the Interior. He and his family were subsequently settled in a cottage belonging to the Ministry that was intended to provide accommodation to exiled staff members. The first applicant and his family, along with eight other homeless relatives, started living in the cottage and using the adjacent plot of land where they grew vegetables and fruit, and kept poultry and small livestock. In 1998 the first applicant retired from the Ministry, which, in a letter to him and to the relevant local-government authorities, confirmed that he held legitimate possession of the cottage and adjacent premises, but that his possession was of a temporary nature and for an unspecified period of time. After the Rose Revolution in 2003, the first applicant was called out of retirement by the newly appointed Minister of the Interior and agreed to lead the investigation into a high-profile criminal case. According to him, the findings of the investigation proved inconvenient for certain high-ranking officials and the then Prosecutor General personally asked him not to pursue his inquiries. In 2004 that Prosecutor General was appointed Minister of the Interior and allegedly ousted the first applicant from office. In November 2004, in the first applicant's absence, a group of about sixty armed special-force agents wearing black balaclava-like masks broke into the cottage and, without any legal document authorising their actions, forcibly ousted the family members and relatives present. Police officers remained stationed in the cottage and on the adjoining plot of land after the eviction. The courts dismissed the first applicant's civil claims and criminal complaints. Subsequently the first applicant was convicted of various offences and sentenced to seven years in prison.

Law

Admissibility: Only the first applicant had pursued his complaints before the national judicial authorities. Consequently, the Court rejected the complaints of the rest of the applicants for failure to exhaust the domestic remedies available in Georgia.

Article 3: As regards the allegedly degrading manner in which the eviction had taken place, the first applicant had not been at home during the eviction and so could not claim personally to have been a victim of it.

Conclusion: inadmissible (incompatible *ratione personae*).

Article 1 of Protocol No. 1: (a) *Existence of a "possession"* – The first applicant had not been squatting the cottage as it had been offered to him by his employer, the Ministry of the Interior, which, in accordance with a ministerial order, had been authorised to use the cottage for the purpose of housing staff members displaced from Abkhazia. Even assuming that there had existed a more appropriate formal procedure for the transfer of the cottage to the first applicant, the authorities could not reasonably have been expected to follow up in detail every housing situation given there had been about 300,000 IDPs to care for at the time. More importantly, having regard to the authorities' manifest tolerance of the first applicant's exclusive, uninterrupted and open use of the cottage and the adjacent premises for more than ten years, such

possession maintained its good-faith character, even in the absence of a registered property title. Moreover, by adopting various legal acts, the State had confirmed the IDPs' rights in the housing sector and established solid guarantees for their protection. The most conspicuous and authoritative amongst these was the Internally Displaced Persons and Refugees Act of 28 June 1996, which recognised that an IDP's possession of a dwelling in good faith constituted a right of a pecuniary nature. Thus, it was not possible to evict an IDP against his or her will from an occupied dwelling without offering in exchange either similar accommodation or appropriate monetary compensation.

In sum, the first applicant had had a right to use the cottage as his accommodation and this right had a clear pecuniary dimension. It should therefore be regarded as a "possession" for the purposes of Article 1 of Protocol No. 1.

(b) *Existence of an interference and its justification* – It was not in dispute between the parties that there had been interference with the first applicant's right to the peaceful enjoyment of his possessions. The only lawful way for the Ministry of the Interior to have reclaimed the cottage from the first applicant would have been to bring adversarial proceedings in court. However, the eviction and dispossession had occurred in the absence of any court decision, pursuant to an oral order by the Minister of the Interior. In the subsequent court proceedings brought by the first applicant, the courts had failed to acknowledge that he had been in continuous good-faith possession of the cottage for over ten years and that his eviction and dispossession had been carried out unlawfully. They had likewise not afforded him the protection provided for in the relevant domestic laws concerning IDPs. The Supreme Court in particular had contradicted its own earlier case-law in which it had prevented a State agency from retrieving a State-owned dwelling from IDPs. In sum, the interference with the first applicant's peaceful enjoyment of his possessions had not been lawful, whilst the subsequent judicial review had been arbitrary and amounted to a denial of justice.

Conclusion: violation (six votes to one).

Article 8: The taking of the cottage, which had been the first applicant's home for more than ten years, had also constituted an unlawful interference with his right to respect for his home.

Conclusion: violation (unanimously).

Article 41: The most appropriate form of redress would be to have the cottage restored to the first applicant's possession pending the establishment of conditions which would allow his return, in safety and with dignity, to his place of habitual residence in Abkhazia, Georgia. Alternatively, should the return of the cottage prove impossible, the first applicant's claim could also be satisfied by providing him, as an internally displaced person, with other proper accommodation or reasonable compensation, the amount of which should be agreed on by the parties within six months from the date on which the judgment became final. Should the parties fail to reach agreement within that period, the Court reserved the right to fix the further procedure under Article 41 of the Convention, in order to determine itself the amount of such compensation. The Court also awarded the first applicant EUR 15,000 in respect of non-pecuniary damage.

Deprivation of property

De facto expropriation without payment of compensation: *violation*

Sarıca and Dilaver v. Turkey - 11765/05
Judgment 27.5.2010 [Section II]

Facts – In 1983 a landowner, on discovering that three plots of land belonging to him had been incorporated *de facto* in a military zone, requested that a formally valid expropriation order be issued. The authorities did not act on his request, but in 2001 they brought legal proceedings to have the land in question registered as Treasury property, without payment of compensation, claiming adverse possession based on twenty years' adverse possession. The owner of the land lodged a claim for damages seeking compensation for the damage caused by the *de facto* expropriation. In 2003 the district court found in favour of the applicants (the heirs of the owner, who had died in the meantime). The court ordered that the authorities pay the applicants compensation together with default interest at the statutory rate and that ownership of the land be transferred to the Treasury. The Court of Cassation upheld that judgment in 2004. The applicants subsequently requested the authorities to calculate the default interest on the basis of the maximum rate applicable to public debts. However, the compensation they eventually received at the end of 2004 was paid together with interest at the lower, statutory, rate.

Law – Article 1 of Protocol No. 1: There had been interference with the applicants' rights amounting to a deprivation of property. *De facto* expropriation

allowed the authorities to occupy immovable property and change its intended use irreversibly, so that it came to be considered as State property without any kind of formal declaratory act transferring ownership. In the absence of such an act the only means of legitimising the transfer of the occupied property and providing some degree of retrospective legal certainty was a judgment in which the competent court ordered the transfer of ownership after finding that the impugned occupation was unlawful and awarding damages to the claimants. This practice had the effect of obliging the persons concerned (who remained the owners of the property for legal purposes) to bring court proceedings against the administrative authorities, who until that point had never had to justify their action on any public interest grounds. In cases of formal expropriation the proceedings were brought by the expropriating authority, which in principle had to pay the court costs unless there was an out-of-court settlement. In all cases, a finding of *de facto* expropriation legally endorsed an unlawful situation knowingly created by the authorities and enabled the latter to benefit from their unlawful conduct. *De facto* expropriation put the individuals concerned at risk of unforeseeable and arbitrary outcomes. The procedure did not provide a sufficient degree of legal certainty and could not be considered as an alternative to formally valid expropriation. In the instant case the applicants' property had been expropriated *de facto*. In the absence of a formal act of expropriation, the outcome of the proceedings had not been foreseeable for the applicants, whose position with regard to the deprivation of their property had not been firmly established until the Court of Cassation upheld the transfer of ownership. Furthermore, the European Court could not accept that the maximum interest rate applicable to public debts should apply only to formal expropriation procedures and that a lower rate of interest should apply to unlawful expropriations, as this would encourage the authorities to carry out expropriations without any legal basis for financial reasons. Accordingly, the interference at issue had been incompatible with the principle of lawfulness and had thus breached the applicants' right to peaceful enjoyment of their possessions.

Conclusion: violation (unanimously).

Article 46: In view of the large number of applications it had received concerning the issue of *de facto* expropriations, the Court considered that the violations originated in a structural problem linked to the Turkish administrative authorities' extrajudicial practice of unlawfully appropriating property. General measures at national level were unquestionably called for in execution of the present judgment, and must take into consideration the large number of people affected. Hence, the State would need first and foremost to take steps aimed at preventing the unlawful occupation of immovable property, whether it was unlawful from the outset or was initially authorised and subsequently became unlawful. This might be achieved by authorising the occupation of such properties only where it was established that the expropriation project and decisions had been adopted in accordance with the rules laid down by law and that the necessary budgetary funds had been earmarked to ensure that the persons concerned received prompt and adequate compensation. In addition, the respondent State should discourage practices in breach of the rules on formally valid expropriations by adopting deterrent provisions and holding those responsible for such practices to account.

Article 41: EUR 1,800 jointly for non-pecuniary damage.

ARTICLE 3 OF PROTOCOL No. 1

Free expression of opinion of people
Vote

Automatic loss of right to vote as a result of partial guardianship order: *violation*

Alajos Kiss v. Hungary - 38832/06
Judgment 20.5.2010 [Section II]

Facts – The applicant, who had some years earlier been diagnosed with manic depression, was placed under partial guardianship in 2005 after a court found that, while he was able to take care of himself adequately, he was sometimes irresponsible with money and occasionally aggressive. Under section 14 of the Civil Code a partial guardianship order enables the court to limit the legal capacity – in particular, as regards financial matters – of persons with "diminished faculties". However, by virtue of Article 70(5) of the Hungarian Constitution, such an order also entails the automatic loss of the right to vote. The applicant was therefore prevented from voting in legislative elections in April 2006.

Law – Article 3 of Protocol No. 1: The Court accepted that the measure of disenfranchisement pursued a legitimate aim, namely to ensure that only citizens capable of assessing the consequences

of their decisions and making conscious and judicious decisions should participate in public affairs. It noted, however, that the restriction did not distinguish between persons under total guardianship and those under partial guardianship and affected a significant number of people. While it accepted that it was for the national legislature to decide on the procedure for assessing the fitness to vote of the mentally disabled, there was no evidence in the applicant's case that the Hungarian legislature had ever sought to weigh up the competing interests or to assess the proportionality of the restriction. The Court could not accept that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, fell within an acceptable margin of appreciation. The State had to have very weighty reasons when applying restrictions on fundamental rights to particularly vulnerable groups in society, such as the mentally disabled, who were at risk of legislative stereotyping, without an individualised evaluation of their capacities and needs. The applicant had lost his right to vote as a result of the imposition of an automatic, blanket restriction. It was questionable to treat people with intellectual or mental disabilities as a single class and the curtailment of their rights had to be subject to strict scrutiny. Accordingly, the indiscriminate removal of voting rights without an individualised judicial evaluation, solely on the grounds of mental disability necessitating partial guardianship, could not be considered compatible with the legitimate grounds for restricting the right to vote.

Conclusion: violation (unanimously).

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

RULE 39 OF THE RULES OF COURT

Interim measures

Expulsion despite interim measure

Mannai v. Italy - 9961/10

The applicant, a Tunisian national, was arrested in Austria on 20 May 2005 on the basis of an arrest warrant issued by the Italian authorities in connection with an investigation into international terrorism. He was deported to Italy on 20 July 2005 and sentenced to five years' imprisonment by a judgment delivered on 5 October 2006, according to which he was to be deported once he had served his sentence. On 19 February 2010 the European Court indicated to the Italian authorities that the applicant should not be expelled to Tunisia until further notice (interim measure under Rule 39 of the Rules of Court). Despite that indication the applicant was deported on 1 May 2010.

Link to the statement by the Secretary General of the Council of Europe (press release no. 403(2010))

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

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

Bayatyan v. Armenia - 23459/03
Judgment 27.10.2009 [Section III]

(See Article 9 above, page 15)

Aguilera Jiménez and Others v. Spain - 28389/06 et al.
Judgment 8.12.2009 [Section III]

(See Article 10 above, page 16)