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COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law

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ARTICLE 2

Positive obligations
Use of force

Bombing of residential buildings by Russian military jets during Chechen war, with loss of civilian life: *violation*

Kerimova and Others v. Russia - 17170/04 et al.
Khamzayev and Others v. Russia - 1503/02
Judgments 3.5.2011 [Section I]

Facts – These two cases concern two aerial strikes in 1999 by Russian military aircraft on a town in Chechnya which resulted in civilian casualties. In the first attack, a bomb hit a block of flats in which Ms Kerimova lived with her family, killing her brother and husband and wounding her and her three minor children. In the second attack, the bombing resulted in the deaths of six people and injuries to sixteen others, including three of the applicants, and in the destruction or damage of forty houses.

In the proceedings before the European Court, the applicants complained that, as a result of the aerial attacks on the town, their family members had died, their lives had been put at risk and their houses and other property had been severely damaged. The Government denied that the first attack had been carried out by federal forces but acknowledged that the second attack had been and had resulted in human casualties and the destruction of property. They argued, however, that pinpoint aerial strikes had been necessary to enable the federal forces to regain control of the town and to suppress the criminal activity of illegal armed groups who were offering active and organised resistance, had fortified the town and were preparing for long-term defence. They maintained that using land troops would have led to considerable losses among federal servicemen.

Law – Article 2: *Obligation to protect the right to life* – The Court found it established on the evidence before it that Russian federal forces had carried out both aerial strikes. It was therefore for the State to account for the use of lethal force on both occasions and to demonstrate it had been used in pursuit of one of the aims set out in paragraph 2 of Article 2 and was absolutely necessary and therefore strictly proportionate to that aim. In that connection, the Court noted at the outset that the Government had provided only general information on the situation and had not furnished any details concerning the planning and control of the aerial strikes. They had also failed to submit relevant documents such as copies of plans of the operations, orders and reports. Indeed, certain documents of direct relevance had been destroyed within a few months or at most a year of the attacks, far too short a period to be acceptable on a matter of this importance.

The Court said that it might be prepared to accept that, faced with well-equipped extremists armed with large-yield weaponry and conducting large-scale military actions against federal forces, the Russian authorities had had no choice but to carry out aerial attacks and that their actions were in pursuit of one or more of the aims set out in paragraph 2 (a) and (c) of Article 2. However, it was not convinced from the materials before it that the necessary degree of care had been exercised to avoid or minimise, to the greatest extent possible, the risk of loss of life. The military's insistent denial for a period of several years that the attacks had taken place or been planned had to cast doubt on the Government's argument that pinpoint aerial strikes had been duly organised. No detailed explanation had been given as to whether information regarding the use of residential buildings for long-term defence and the presence of fighters there had been verified. The authorities did not appear to have taken any meaningful steps to inform civilians of the impending attacks or to secure their evacuation. The Court was not satisfied, on the evidence, that local residents had, as the Government alleged, been informed by leaflets and local mass-media of possible aerial strikes and artillery shelling, but even assuming they had been, such measures could hardly be regarded as adequate in a situation where the authorities knew they would be prevented from leaving by illegal fighters who intended to use them as human shields. While the Court accepted that the evacuation of inhabitants in such a situation might have been particularly difficult, the Government had not demonstrated that the authorities had taken any steps to assure their safety, such as attempting to organise a safe exit or negotiating their evacuation with the fighters. The Court was also struck by the decision to use large calibre high-explosive fragmentation bombs. The use of such weapons in a populated area was impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society. In sum, the bombing with indiscriminate weapons of a residential quarter inhabited by civilians was manifestly disproportionate.

Conclusion: violation (unanimously).

The Court also found procedural violations of Article 2 on account of the authorities' failure to

conduct an effective investigation into the circumstances of the two attacks and violations of Article 8 (damage to the applicants' homes) and of Article 1 of Protocol No. 1 (damage to property).

Article 41: Awards ranging from EUR 4,500 to EUR 35,450 in respect of pecuniary damage, and from EUR 10,000 to EUR 120,000 in respect of non-pecuniary damage.

(See also *Isayeva and Others v. Russia*, no. 57947/00, and *Isayeva v. Russia*, no. 57950/00, both 24 February 2005, Information Note no. 72)

Effective investigation

Lack of effective investigation into the death of a young man during the events in Romania related to the overthrow of the Head of State in December 1989: *violation*

Association 21 December 1989 and Others v. Romania - 33810/07 and 18817/08
Judgment 24.5.2011 [Section III]

Facts – This case stemmed from the crackdown on anti-government demonstrations throughout Romania in December 1989, around the time when the then Head of State, Nicolae Ceauşescu, was overthrown. In the 1990s various investigations into the events were opened by military prosecutors. The main one, under file no. 97/P/1990, began in July 1990. The first applicant, the association 21 December 1989, is an association that supports the interests of victims (those who were injured and relatives of the deceased) in the criminal proceedings being conducted by the public prosecutor's office at the High Court of Cassation and Justice. These proceedings concern killings, gunshot wounds, and the ill-treatment and confinement of several thousand people in various Romanian towns and cities. The second applicant, Mr Mărieş, took part in the anti-government demonstrations in Bucharest in December 1989 and in subsequent demonstrations until 1990. The last two applicants, Mr and Mrs Vlase, are the parents of a young man who died aged nineteen during the crackdown in Braşov in December 1989.

Law – Article 2 (death of Mr and Mrs Vlase's son): An investigation had been opened immediately and the criminal proceedings had been pending for over twenty years. As the European Convention on Human Rights had not entered into force in respect of Romania until 20 June 1994 the Court could examine that investigation only in relation to the period subsequent to that date. In 1994 the case was pending before military prosecutors who were, like the majority of the defendants, military personnel bound by the principle of subordination to hierarchy. Furthermore, no investigative act concerning the death of the applicants' son had been performed for a total of ten years, apparently without justification. Similarly, shortcomings and causes of delay had been identified, including a lack of prompt notification to the injured parties of discontinuance decisions, or a "lack of cooperation" on the part of the institutions involved in the December 1989 crackdown. The deliberate withholding of evidence cast doubt on the actual capacity of the investigations to establish the facts. Similarly, the "secret" or "absolute secret" classification of essential information from the investigation was likely to impede the work of the judicial bodies responsible for it and was not justified in the present case. In addition, concerning the obligation to associate the victim's relatives with the proceedings, no justification had been given for the total failure to give the applicants any information about the investigation until July 1999, despite their numerous requests. It was only in February 2010, twenty years after the events, that essential information from the investigation, previously covered by a "secret" or "absolute secret" classification, had been made available to the applicants or any other injured party. Thus the applicants' interest in participating in the investigation, like the public's interest in having a sufficient right of scrutiny, had not been adequately protected. Without underestimating the undeniable complexity of the case, the political and social issues referred to by the Romanian authorities in their arguments could not in themselves justify either the length of the investigation or the manner in which it had been conducted over a significant period of time, without those concerned or the public being informed of its progress. On the contrary, its importance for Romanian society should have encouraged the authorities to deal with the case promptly and without needless delays, in order to avoid any appearance of impunity for certain acts. In the case of a widespread use of lethal force against civilians during anti-government demonstrations preceding the transition from a totalitarian to a more democratic regime, the Court could not regard an investigation as effective when it ended with the prosecution of those responsible becoming statute barred as a result of the authorities' own inactivity. Therefore the national authorities had not acted with the requisite degree of diligence for the purposes of Article 2 of the Convention.

Conclusion: violation (unanimously).

Article 8 (second applicant): Two intelligence notes and a summary report concerning the second applicant, drawn up in 1990 and classified as "secret", confirmed that he had been subject to surveillance measures in that year. Those documents had been kept by the Romanian intelligence services at least until 2006, when he had obtained copies. The Court had previously found, in the *Rotaru v. Romania* judgment,[1] that the Romanian legislation concerning the gathering and archiving of information did not provide the safeguards necessary for the protection of individuals' private lives. Nor did it indicate with reasonable clarity the scope and manner of exercise of the discretion conferred on the public authorities in such matters. The execution of that judgment was still pending before the Committee of Ministers of the Council of Europe. In addition, as the Court had already found in 2007, despite amendments to the Code of Criminal Procedure in 2003 and 2006, it still appeared possible for surveillance measures to be ordered in cases of presumed breaches of national security. The absence of sufficient guarantees in domestic law to ensure that intelligence obtained through secret surveillance was deleted when it was no longer needed for the aim pursued had thus had the result that the information on the second applicant gathered in 1990 by the intelligence services was still being kept by them sixteen years later in 2006. Moreover, with the lack of safeguards in the relevant domestic law, he ran a serious risk of having his telephone calls intercepted.

Conclusion: violation (unanimously).

Article 46: The finding of a violation of Article 2 on account of the lack of an effective investigation related to a wide-scale problem, given that many hundreds of people were involved as injured parties in the impugned criminal proceedings. In addition, more than a hundred applications similar to the present case were pending before the Court and could give rise in the future to new judgments finding a violation of the Convention. Thus, general measures at domestic level would unquestionably be necessary in the context of the execution of the present judgment. Romania would have to put an end to the situation that had led to the finding of a violation of Article 2 in the present case, on account of the right of the numerous persons affected to have an effective investigation – a right that was not extinguished by the time-bar on criminal liability – also having regard to the importance for Romanian society to know the truth about the events of December 1989. In those circumstances, the Court did not find it necessary to adjourn the examination of similar cases pending before it while waiting for Romania to take the necessary measures. The fact of continuing to examine similar cases would serve as a regularly reminder to Romania of its obligation arising from the present judgment.

Article 41: EUR 15,000 each to the third and fourth applicants and EUR 6,000 to the second applicant, all in respect of non-pecuniary damage.

1. *Rotaru v. Romania* [GC], no. 28341/95, 4 May 2000, Information Note no. 18.

ARTICLE 3

Inhuman or degrading treatment

Lack of access to prenatal genetic tests resulting in inability to have an abortion on grounds of foetal abnormality: *violation*

R.R. v. Poland - 27617/04
Judgment 26.5.2011 [Section IV]

Facts – Following an ultrasound scan performed during the eighteenth week of pregnancy, the applicant was informed of a possible foetal malformation. She immediately expressed her wish to have an abortion if the diagnosis was confirmed. It was recommended she undergo a genetic examination by way of amniocentesis, but it was not until the twenty-third week of pregnancy, after her own doctor and a series of other doctors had repeatedly refused to refer her, that the examination took place. She again unsuccessfully requested an abortion. However, by the time, two weeks later, she received the results confirming that the foetus was suffering from Turner Syndrome, it was too late for her to have an abortion.[2] Although unsuccessful in an attempt to have the doctors prosecuted, the applicant was awarded compensation in civil proceedings both for the doctors' failure to perform the genetic tests on time and for their failure to make any record of their refusals to refer her.

Law – Article 3: The applicant had repeatedly tried to obtain access to genetic testing which would confirm or dispel the diagnosis of a possible malformation. However, the determination of whether

2. Under Polish law an abortion on grounds of foetal abnormality is possible only during the first twenty-four weeks of pregnancy.

she should have access to genetic testing, as recommended by the doctors, was flawed by procrastination, confusion and a failure to provide her with proper counselling and information. It was undisputed that only genetic tests were able to establish objectively whether the initial diagnosis was correct. It was never argued or shown that genetic testing as such was unavailable for lack of equipment, medical expertise or funding. The domestic legislation unequivocally imposed an obligation on the State in cases of suspicion of genetic disorder or development problems to ensure unimpeded access to prenatal information and testing. It also imposed a general obligation on doctors to give patients all the necessary information on their cases and afforded patients the right to obtain comprehensive information on their health. There had thus been an array of unequivocal legal provisions in force at the relevant time specifying the State's positive obligations towards pregnant women regarding access to information about their own health and the foetus's health.

The applicant had been in a situation of great vulnerability. As a result of the procrastination of the health professionals she had had to endure six weeks of painful uncertainty concerning the health of her foetus, despite the medical staff's legal obligation to properly acknowledge or address her concerns. No regard was had to the temporal aspect of the applicant's predicament and she eventually obtained the results of the tests when it was already too late for her to make an informed decision on whether to continue the pregnancy or to have recourse to legal abortion. The applicant had thus been humiliated and, in the Court's view, her suffering had reached the minimum threshold of severity under Article 3.

Conclusion: violation (six votes to one)

Article 8: Polish law as applied in the applicant's case did not contain any effective mechanisms which would have enabled the applicant to seek access to a diagnostic service, which was decisive for the possibility of exercising her right to take an informed decision as to whether to seek legal abortion. Consequently, the practical implementation of the domestic law came into a striking discordance with the theoretical right to a lawful abortion in Poland and the authorities in the applicant's case had failed to comply with their positive obligations to secure her effective respect for her private life.

Conclusion: violation (six votes to one).

Article 41: EUR 45,000 in respect of non-pecuniary damage.

ARTICLE 5

Article 5 § 1 (b)

Secure fulfilment of obligation prescribed by law

Outer purpose of arrest different from the real one: *violation*

Khodorkovskiy v. Russia - 5829/04
Judgment 31.5.2011 [Section I]

Facts – The applicant was a board member and the major shareholder of the Yukos oil company and one of the richest men in Russia. He was also politically active in that he announced he would allocate significant funds to support opposition parties. In 2003 certain members of the Yukos management were arrested in connection with the privatisation of another company called Apatit. In July 2003 the applicant was interviewed as a witness in that case. In October 2003, while the applicant was on a business trip to eastern Russia, an investigator summoned him to appear in Moscow as a witness at noon the following day. The applicant's staff informed the investigator that the applicant would not be able to attend as he was away on a business trip and was not due to return for a few days, but the chief investigator ordered his enforced attendance for questioning. The following day a group of armed law-enforcement officers approached the applicant's aeroplane on an airstrip in Novosibirsk, apprehended him and flew him to Moscow, where he was questioned by the investigator as a witness. Immediately afterwards, the applicant was informed that he was being charged with a number of economic crimes relating to the privatisation of Apatit. In 2005 he was convicted and sentenced to eight years' imprisonment.

Law – Article 3: In response to the applicant's complaint that he had been placed in a metal cage during the court hearings, the Court noted that the practice of placing a criminal defendant in a "special compartment" in a court room existed in several European countries. However, the applicant was accused of non-violent crimes and had no previous criminal record and there was no evidence that he was predisposed to violence. His trial was covered by almost all major national and international mass media, so he had been permanently exposed to the public in such a setting. Such security arrangements, given their cumulative effect, had in the applicant's case been excessive and

could reasonably have been perceived by the applicant and the public as humiliating. (See also *Ashot Harutyunyan v. Armenia*, no. 34334/04, 15 June 2010, Information Note no. 131)

Conclusion: violation (unanimously).

The Court also found a violation of Article 3 in respect of the conditions in one of the facilities in which the applicant had been held pending trial.

Article 5 § 1 (b): The applicant's arrest had had a basis in domestic law, which permitted the apprehension of a witness who failed to attend for questioning without good reason. However, any deprivation of liberty had to protect individuals from arbitrariness and was only acceptable if the obligation prescribed by law could not be fulfilled by alternative means. Although, formally speaking, the applicant had failed to attend for questioning and therefore had an unfulfilled obligation *vis-à-vis* the State, the Court was unable to accept that this was sufficient reason for bringing him forcibly to Moscow the following morning and for doing so in the manner chosen. First of all, it was unclear why the investigator was not prepared to wait for the applicant to return to Moscow three days later, given that the investigation had already lasted several months and that the applicant's previous behaviour had not given rise to any legitimate fear that he would evade questioning on his return. Furthermore, the applicant was arrested like a dangerous criminal rather than a simple witness and immediately after questioning him the investigator lodged a nine-page application requesting his detention. Such a line of events suggested that the investigator had in fact been prepared for such a development and wanted to charge the applicant, not simply question him as a witness. Given that an arrest might be unlawful if its outer purpose differed from the real one, the applicant's apprehension in Novosibirsk had been contrary to Article 5 § 1 (b).

Conclusion: violation (unanimously).

Article 5 § 1 (c): The applicant had complained that the hearings in which the detention orders were made were not held in public and that the decisions were not properly reasoned. As to the first part of the complaint, even though the Convention itself did not expressly require that hearings on the lawfulness of pre-trial detention be held in public, the domestic law did contain such a requirement. However, not each and every disregard of domestic formalities automatically entailed a breach of the Convention. Even if the domestic courts had erred in their interpretation of domestic law and held the impugned proceedings *in camera* for no good reason, this had not amounted to a gross or obvious irregularity invalidating the proceedings. As to the second part of the complaint, the detention orders contained some reasoning and could not be characterised as arbitrary.

Conclusion: no violation (unanimously).

Article 5 § 3: In the first detention order against the applicant the domestic courts relied on three particular risks: the risk of absconding, interfering with the course of the investigation or continuing his criminal activity. Even though some of these were rather loose presumptions, the fact that the applicant was one of the richest people in the country and, unofficially, a politically influential person could not be disregarded. However, while the reasons adduced by the domestic courts may have been sufficient to justify some of the period of the applicant's detention, the Court was not convinced that they were sufficient to justify the whole period. Firstly, two subsequent detention orders contained the same reasons as the initial order, even though the applicant's personal situation had evolved in that he had ceased to exercise managerial functions within the Yukos group and had surrendered his travel documents to the investigator. The detention order dated 20 May 2004 and the subsequent decision confirming that order were not supported by any reasons for continuing detention whatsoever. Those extensions of the applicant's detention had therefore been unjustified. Finally the domestic courts had relied on material obtained in violation of the lawyer-client privilege and had never seriously considered alternative, less intruding measures.

Conclusion: violation (unanimously).

Article 18: The whole structure of the Convention rested on the general assumption that public authorities in the member States act in good faith. While any public policy or an individual measure might have a "hidden agenda" and while the presumption of good faith was rebuttable, an applicant alleging that his rights and freedoms were limited for an improper reason had to show convincingly that the real aim of the authorities was not the same as that proclaimed (or as could be reasonably inferred from the context). A mere suspicion that the authorities had used their powers for some other purpose than those defined in the Convention was not sufficient to prove a violation of Article 18; instead a very exacting standard of proof was applied. That standard had not been met in the applicant's case.

In that connection, the Court noted that it was open to anyone in the applicant's position as a rich, influential and potentially serious political opponent to make allegations about "improper motives". However, the fact that a suspect's political opponents or business competitors might directly or indirectly benefit from his detention should not prevent the authorities from prosecuting if there were serious charges against him. In other words, high political status did not grant immunity. For its part, the Court was persuaded that the charges against the applicant amounted to a "reasonable suspicion" within the meaning of Article 5 § 1 (c) of the Convention. The fact that suspicion as to the real intent of the authorities had prompted several European national courts to find against the Russian authorities in proceedings involving Yukos was not sufficient for the European Court to conclude that the whole legal machinery of the respondent State had been *ab initio* misused and that from beginning to end the authorities had been acting in bad faith and blatant disregard of the Convention. That was a very serious claim which required incontrovertible and direct proof that was absent from the applicant's case.

Conclusion: no violation (unanimously).

Article 46: The applicant had requested individual measures, such as directions to the Government not to keep him in a cage during any subsequent proceedings and to allow international observers to visit him in prison and investigate the conditions of his incarceration. However, that request did not belong to any of the categories of situation in which specific Article 46 measures were, exceptionally, ordered (for example, to put an end to a systemic problem, to discontinue a continuous situation or to indicate the remedy required when the nature of the violation left no real choice). The applicant had not requested the Court to indicate to the Government how past violations should be remedied but rather asked the Court to prevent future possible violations of the same kind. However, the Court's primary role was to examine facts, not to make assumptions for the future, especially where those assumptions would depend on a multitude of factors and therefore be speculative. Accordingly, there was no need to indicate any specific measure in the applicant's case other than the payment of the just-satisfaction award; the determination of other measures was left to the discretion of the Committee of Ministers of the Council of Europe.

The Court also found violations of Article 5 § 4 of the Convention on account of numerous procedural irregularities concerning the review of his detention as well as the speediness of that review.

Article 41: EUR 10,000 in respect of non-pecuniary damage.

Article 5 § 3

Length of pre-trial detention

Multiple periods of pre-trial detention:
relinquishment in favour of the Grand Chamber

Idalov v. Russia - 5826/03
[Section I]

In June 1999 the applicant was charged with abduction. Two years later he was committed to stand trial in a district court. In October 2002 the district court made an order for his pre-trial detention. It subsequently renewed that order for successive three-month periods until he was tried and convicted of various drugs and firearms related offences in November 2003. The applicant successfully appealed against his conviction of the drugs offences, but his other convictions were upheld. His original fifteen-year prison sentence was reduced to ten years. In his application to the European Court, he complains about the conditions and length of his pre-trial detention, the alleged failure of the domestic authorities to speedily examine his appeals against the detention orders and to ensure his participation in the appeal proceedings, the length of the criminal proceedings and alleged interference with his correspondence. The case raises issues under Articles 3, 5, 6 and 8 of the Convention.

ARTICLE 6

Article 6 § 1 (civil)

Access to court

Retrospective application of a change in the case-law to proceedings already under way:
no violation

Legrand v. France - 23228/08
Judgment 26.5.2011 [Section V]

Facts – Two sets of legal proceedings in succession were brought against a doctor who had performed plastic surgery on the first applicant following which

she picked up a severe nosocomial infection. She brought criminal proceedings, but in a judgment of December 2000 the Criminal Court acquitted the doctor of unintentionally causing injury. The first applicant appealed but subsequently withdrew her appeal, whereupon the judgment became final. In June 2002 she and her husband (the second applicant) brought a civil action for damages against the doctor in the *tribunal de grande instance*. Their claim was dismissed in a judgment of November 2003. In June 2006, however, the court of appeal ordered the doctor to pay the applicants compensation. The doctor appealed on points of law, relying on a judgment delivered by the Court of Cassation in another case in July 2006. In a judgment of October 2007 the Court of Cassation quashed the judgment of the court of appeal on the basis of the departure from precedent, thus definitively depriving the applicants of any compensation.

Law – Article 6 § 1: The applicants could not rely on a right definitively acquired in their favour because the judgment of the court of appeal awarding them compensation was in any event subject to appeal in accordance with the statutory procedures and time-limits. Indeed, the doctor had appealed following a departure from precedent favourable to him by the Court of Cassation in another case. The new legal requirements applicable since that departure from precedent, which had been decided in plenary (the most authoritative bench of the Court of Cassation), following conflicting decisions that had been delivered by various divisions of that court since 2004, had been well known to all the parties when the doctor had lodged his appeal on points of law. There had therefore been no uncertainty regarding the legal position when the Court of Cassation had given its ruling. Regarding the impact of the Court of Cassation's decision, this had been a matter of application of the domestic law. In any event, the judgment of the Court of Cassation had not had the effect of depriving the applicants – even retrospectively – of their right of access to a court. It had not called into question the initial complaint lodged with the criminal court, but merely observed that they should have submitted to that court all the grounds capable of justifying their request for compensation for their loss. From that point of view, their decision to withdraw the appeal in the criminal proceedings and to sue the doctor in civil proceedings had been a personal procedural choice, and it had been primarily for the domestic courts to judge the consequences of that in the light of the aforementioned requirements. Accordingly, there had been no infringement of the applicants' right to a fair hearing, in particular their right of access to a court.

Conclusion: no violation (unanimously).

Fair hearing

Introduction of legislation effectively deciding outcome of pending litigation against the State: *violation*

Maggio and Others v. Italy - 46286/09 et al.
Judgment 31.5.2011 [Section II]

Facts – The applicants, who were Italian nationals, lived and worked for many years in Switzerland before retiring to Italy. On their return to Italy the Istituto Nazionale della Previdenza Sociale ("INPS"), an Italian welfare body, decided to readjust their pension claims to take into account the low contributions they had paid while working in Switzerland (where contributions came to 8% of salary, as opposed to 32.7% in Italy). The applicants brought proceedings to contest this method of calculating their pension rights, but their claims were dismissed following the introduction of Law no. 296 of December 2006, which effectively endorsed the INPS' interpretation of the relevant legislation. Under this method the first applicant received approximately 60% of the pension he would have received without the re-adjustment being made in respect of his Swiss contributions.

In their applications to the European Court, the applicants complained that Law no. 296/2006 had modified the method used to calculate their pension calculations retrospectively while the proceedings to decide their claims were still pending before the domestic courts. The first applicant further alleged that this legislative intervention had discriminated against him, as a claimant whose proceedings were not yet finalised, as opposed to others whose more favourable pension treatment had already been liquidated before the entry into force of the new law. He also complained under Article 1 of Protocol No. 1 of the reduction in his pension as a result of the new law.

Law – Article 6 § 1: The principle of the rule of law and the notion of a fair trial enshrined in Article 6 preclude, except for compelling public-interest reasons, interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute. Any reasons adduced to justify such measures are to be treated with the greatest possible degree of circumspection.

The enactment of Law no. 296/2006 had had the effect of definitively modifying the outcome of the pending litigation, to which the State was a party, by endorsing the State's position to the applicants' detriment. The Court therefore had to determine whether there was any compelling general interest capable of justifying the measure. Financial considerations could not by themselves warrant the legislature substituting itself for the courts in order to settle disputes. Nor could the professed aim of reinforcing the INPS' interpretation of the law serve as justification when such interpretation was subjective and partial and had been had been rejected by a majority of the domestic courts, including the Court of Cassation. Lastly, while re-establishing an equilibrium in the pension system by removing any advantages enjoyed by individuals who had worked in Switzerland and paid lower contributions was a reason of general interest, the Court was not persuaded that it was compelling enough to overcome the dangers inherent in the use of retrospective legislation. In conclusion, there had been no compelling reason to justify the State's decisive intervention in the outcome of proceedings to which it was a party.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 1: The first applicant had lost considerably less than half his pension. This constituted a reasonable and commensurate reduction rather than the total deprivation of his entitlement. Furthermore, since he had paid lower contributions when working in Switzerland than he would have had to pay in Italy, he had had the opportunity to enjoy more substantial earnings at the time. The reduction had only had the effect of equalizing a state of affairs and avoiding unjustified advantages (resulting from the decision to retire in Italy) for the first applicant and other persons in his position. Against this background, bearing in mind the State's wide margin of appreciation in regulating the pension system and the fact that the first applicant had lost only part of his pension, he had not had to bear an individual and excessive burden.

Conclusion: no violation (unanimously).

Article 14 in conjunction with Article 6: In creating a scheme of benefits it was sometimes necessary to use cut-off points that applied to large groups of people and which might to a certain extent appear arbitrary. That was an inevitable consequence of introducing new regulations to replace previous schemes. Bearing in mind the wide margin of appreciation afforded to States in this sphere, the cut-off date under Law no. 296/2006 could be deemed reasonably and objectively justified. The fact that that date arose out of legislation enacted while the first applicant's proceedings were still pending did not alter that conclusion for the purposes of Article 14.

Conclusion: no violation (unanimously).

Article 41: EUR 20,000 to the first applicant and EUR 50,000 each to the other applicants in respect of pecuniary damage; EUR 12,000 to each applicant in respect of non-pecuniary damage.

Article 6 § 1 (criminal)

Public Hearing
Oral hearing

Lack of hearing in summary administrative-offences proceedings: *inadmissible*

Suhadolc v. Slovenia - 57655/08
Decision 17.5.2011 [Section V]

Facts – The applicant was stopped by police and breathalysed after being caught speeding by a laser device. In accordance with a summary procedure introduced by the Minor Offences Act 2002, he was given a copy of the police officers' report together with a written notice indicating that he would be charged with speeding and driving under the influence of alcohol and inviting him to submit a written statement in reply within five days. He did so, denying the charges. The police subsequently found the case proved and fined him 100,000 Slovenian tolars (SIT) (approximately EUR 400), issued him with seven penalty points and ordered him to pay costs. An application by the applicant for judicial review was dismissed by a local court as unsubstantiated. In his application to the European Court, the applicant complained, *inter alia*, that there had been no oral or public court hearing of his case.

Law – Article 6 § 1: The Court reiterated that an oral hearing may not be required in criminal cases where there are no issues of credibility or contested facts which necessitate an oral presentation of evidence or cross-examination of witnesses and where the accused is given an adequate opportunity to put forward his case in writing and to challenge the evidence against him.

The applicant's case concerned regulatory offences of speeding and driving under the influence of alcohol which, as such, did not belong to the traditional categories of criminal law. His case was

dealt with under a summary procedure providing for certain administrative penalties, such as fines and penalty points, to be imposed by the administrative authorities, with the possibility of judicial review. The domestic courts dealing with requests for judicial review had full jurisdiction to entertain questions of fact and law. Under the terms of the legislation as applied by the domestic courts in practice, a judge could hold an oral hearing and examine witnesses if the administrative authority had failed to establish the facts sufficiently or when a request for judicial review was upheld on the basis of the file and the judge had to rule on the matter in ordinary judicial proceedings. That system, which left the decision to hold an oral hearing to the judge's discretion, was not *per se* incompatible with the guarantees enshrined in Article 6 and was aimed at expediting the processing of minor offences and lowering the judicial workload.

The applicant had been able to deny that he had committed the offences and to submit factual and legal arguments, both in his written reply to the charges in the procedure before the police and more importantly in his application for judicial review. The points raised in the judicial-review proceedings – which essentially related to general objections to the police's statutory power to impose a fine and to the reliability of the speed measurements – did not give rise to any issue of credibility which would require the oral presentation of evidence or cross-examination of witnesses. Moreover, the applicant had not asked to be heard orally or to examine witnesses. There was therefore force in the Government's argument that the domestic court had been able to resolve the case adequately on the basis of the file. In these circumstances and having regard to the minor character of the offences in question, the Court found that there were special features in the applicant's case that justified the absence of an oral hearing and, by extension, the lack of a public hearing.

Conclusion: inadmissible (manifestly ill-founded).

Article 6 § 2

Applicability
Presumption of innocence

Statements made by ministers before Parliament concerning a prominent figure who had been convicted at first instance and had appealed: *violation*

Konstas v. Greece - 53466/07
Judgment 24.5.2011 [Section I]

Facts – The applicant was a professor at Panteion University in Athens, and its President from 1990 to 1995. In 1996 he was appointed acting Minister for the Press and then from 1997 to 1999 Minister Plenipotentiary representing Greece at the Council of Europe. In 1998 criminal proceedings were brought against a number of members of the University's teaching staff who had been its President or Vice-President in the period 1992 to 1998. In 2007 the Athens Assize Court sentenced the applicant, together with nine others, to 14 years' imprisonment for misappropriation of public funds, fraud against the State and misrepresentation. The applicant immediately appealed and the execution of his sentence was stayed. Five days later, during a debate in Parliament, the Deputy Minister of Finance referred to the proceedings in question and, addressing the Socialist Party MPs, castigated the "Panteion crooks", asking "Didn't you appoint them acting Ministers for the Press, Ministers Plenipotentiary at the Council of Europe, when the Panteion scandals were coming to light?", and added in particular "You even steal from each other". In July 2007, also during a debate in Parliament, the Prime Minister referred to the present case as an "unprecedented scandal of deliberate and planned embezzlement of 8 million euros for the benefit of those involved, to the detriment of Panteion University". In February 2008 the Minister of Justice stated in Parliament, addressing the opposition MPs: "Remember the Panteion scandal. The Greek courts boldly and resolutely convicted all those you were always protecting."

The criminal case is still pending before the Athens Court of Appeal.

Law – Article 6 § 2

(a) *Admissibility* – The remedy under Article 57 of the Civil Code, which provided for the possibility of compensation in the event of an infringement of personality rights, could not have provided full redress for the breach of the right to be presumed innocent, which was a procedural safeguard among the features of a fair trial.

(b) *Merits* – The offending remarks had been uttered after the applicant's conviction at first instance and while his appeal was pending. If the presumption of innocence ceased to be applied on appeal simply because the first-instance proceedings had led to the defendant's conviction, that would run counter to the role of the appeal proceedings, in which the appeal court had to examine

the decision referred to it in both fact and law. The presumption of innocence principle would thus be rendered inapplicable in proceedings where an appellant sought a fresh determination of his case and the quashing of his conviction at first instance. Article 6 § 2 did not, however, prevent the competent authorities from referring to a conviction at first instance where the proceedings were continuing on appeal, but any such reference had to be made with the appropriate reserve required by respect for the presumption of innocence. In view of the applicant's involvement in this case, with its wide media coverage in Greece, and given his status and the posts he had held in the past, the ministers' remarks related to him to a degree that was sufficient to render him identifiable.

(i) *Prime Minister's remarks*: In using the words "unprecedented scandal", the Prime Minister had made only a general reference to the subject matter of the case and that could not be regarded as an attempt to prejudge the Court of Appeal's verdict.

Conclusion: no violation (unanimously).

(ii) *Remarks of the Deputy Finance Minister and Minister of Justice*: As regards the unequivocal and casual words of the Deputy Minister of Finance ("crooks" and "you even steal from each other"), they were, by contrast, likely to make the public believe that the applicant was unquestionably guilty and seemed to prejudge the judgment of the Court of Appeal. As to the Minister of Justice's remarks, according to which the Greek courts had "boldly and resolutely" convicted those involved in the case, they were liable to give the impression that this Minister was satisfied with the applicant's conviction at first instance and was encouraging the Court of Appeal to uphold that judgment. Regard being had, in particular, to the particular function of the Minister of Justice, representing the political authority with responsibility for the proper functioning of the courts, the words he had used seemed to prejudge the Court of Appeal's judgment. Contrary to the argument of the Greek Government, the passage of time between the making of those remarks and the future judgment of the Court of Appeal was not a crucial factor in determining whether or not there had been a breach of the right to be presumed innocent. To accept that argument would lead to an unreasonable conclusion, namely that the longer the criminal proceedings, the more any disregard of the presumption of innocence at an earlier stage of the same proceedings could be minimised. In conclusion, the remarks of the Deputy Minister of Finance and the Minister of Justice had gone far beyond a mere reference to the applicant's conviction at first instance. The Court paid particular attention to the fact that the remarks had been made by high-ranking politicians and even, in the case of the Minister of Justice, by a person of authority who was supposed, on account of his position, to show particular restraint when commenting on judicial decisions.

Conclusion: violation (unanimously).

The Court also found a violation of Article 13 of the Convention.

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

ARTICLE 8

Applicability
Private life

Absence of any legal requirement for newspapers to give advance notice before publishing details of a person's private life: *no violation*

Mosley v. the United Kingdom - 48009/08
Judgment 10.5.2011 [Section IV]

Facts – A national weekly newspaper published a front page article, including intimate photographs, taken from secretly recorded video footage about the alleged "Nazi" sexual activities of the applicant, a well-known figure in the International Automobile Federation and Formula One. An extract of the video and still images were published on the newspaper's website and reproduced on the Internet. The applicant sued the publisher for breach of confidence and invasion of privacy and claimed damages. In addition, he sought an injunction to restrain the newspaper from making available on its website the edited video footage. Shortly afterwards the newspaper published a second series of articles on the same subject. The High Court refused to grant the injunction on the ground that the material was no longer private as it had been published extensively in print and on the Internet. In the subsequent privacy proceedings it found that the published articles and images had breached the applicant's right to privacy as they had no Nazi connotations and therefore there had been no public interest or justification for

their publication. The applicant was awarded damages of 60,000 pounds sterling (GBP) and GBP 420,000 costs. Despite the monetary compensation he was awarded he complained that he remained a victim of a violation of his right to privacy in that he had effectively been denied the opportunity to seek an interim injunction owing to the absence of any legal requirement for the newspaper to give advance notice of publication.

Law – Article 8

(a) *Admissibility* – As to the Government's arguments that the applicant was no longer a victim of any violation as he had been awarded damages and, in any event, had failed to exhaust domestic remedies, the Court found that no sum of money awarded after disclosure of the impugned material and none of the remedies relied upon by the Government (an appeal against the judge's ruling on exemplary damages, a claim to an account of profits and a complaint under the Data Protection Act) could afford a remedy for the specific complaint that there was no legal requirement in the United Kingdom for the media to give advance warning before publishing details of a person's private life.

Conclusion: admissible (unanimously).

(b) *Merits* – Since the domestic courts had found no Nazi element in the applicant's sexual activities they had concluded that there was no public interest or justification in the publication of the impugned articles and had awarded the applicant damages for the violation of his privacy. The newspaper had not appealed against the judgment. The Court therefore considered that the publications in question had resulted in a flagrant and unjustified invasion of the applicant's private life. Given that the applicant had obtained a finding in his favour before the domestic courts, the Court confined its assessment to the general framework in place in the domestic legal system for balancing rights of privacy and freedom of expression having regard to the margin of appreciation accorded to the State and to the clarity and potential effectiveness of the measure called for by the applicant.

It was clear that the domestic authorities had been obliged under the Convention not only to refrain from interfering with the applicant's private life, but also to ensure the effective protection of that right. The right to private life was protected in the national legal system by a number of measures: self-regulation of the press, a civil claim in damages and an application for an interim injunction restraining publication. In its earlier case-law, the Court had implicitly accepted that *ex post facto* damages following a defamatory publication provided an adequate remedy for violations of the right to private life arising from newspaper publications of private information.

The issue in the present case was whether, notwithstanding that past approach, the specific measure called for by the applicant – a legally binding pre-notification rule – had been required in order to discharge the State's obligation. The implications for freedom of expression of such a rule were not limited to the sensationalist reporting at issue in the applicant's case but extended to political reporting and serious investigative journalism and the introduction of restrictions on the latter type of journalism required careful scrutiny. The States enjoyed a certain margin of appreciation in respect of measures to protect people's right to private life in respect of freedom of expression and the parliamentary committee inquiry on privacy issues that had recently been held in the United Kingdom, with the participation of various interested parties including the applicant himself, had rejected the need for a pre-notification requirement. Although a number of member States required the consent of the subject before private material was disclosed, the Court was not persuaded that the need for consent in some States could be taken to constitute evidence of a European consensus as far as a pre-notification requirement was concerned. The applicant had not cited a single jurisdiction in which such a requirement existed, nor had he pointed to any international legal instruments obliging States to put in place such a requirement. Finally, the United Kingdom system fully reflected the resolutions of the Parliamentary Assembly of the Council of Europe on media and privacy. The respondent State's margin of appreciation in the present case was thus a wide one.

As to the clarity of any pre-notification requirement, the concept of "private life" was sufficiently well understood for newspapers and reporters to be able to identify when a publication could infringe the right to respect for private life. A satisfactory definition of those who would be subject to the obligation could also be found in domestic law. However, the effectiveness of a pre-notification obligation was disputable.

Firstly, any such option would require some form of "public interest" exception, so that a newspaper could opt not to give advance notice of publication if it believed it could subsequently defend its decision on public-interest grounds. In order to prevent a serious chilling effect on freedom of expression, "public interest" for this purpose could not be nar-

rowly defined and a reasonable belief that such an interest was at stake would have to be sufficient to justify non-notification. In the applicant's case, given that the reporter and the editor had believed that the sexual activities they were disclosing had Nazi overtones, and so were of public interest, they could have chosen not to notify the applicant, even if a legal pre-notification requirement had been in place.

Secondly, any pre-notification requirement would only be as strong as the sanctions imposed for failure to observe it. In this connection, particular care had to be taken when examining constraints which might operate as a form of censorship prior to publication. Although punitive fines and criminal sanctions might be effective in encouraging compliance with pre-notification, they would run the risk of being incompatible with the requirements of Article 10 of the Convention. They would have a chilling effect on journalism in political and investigative reporting, both of which attracted a high level of protection under the Convention.

Although the dissemination of such information about the private lives of those in the public eye was generally for the purposes of entertainment rather than education, it undoubtedly benefited from the protection of Article 10. The Article 10 protection afforded to publications might cede to the requirements of Article 8 where the information was of a private and intimate nature and there was no public interest in its dissemination. However, having looked beyond the facts of the applicant's case, and having had regard to the chilling effect to which a pre-notification requirement risked giving rise, to the doubts about its effectiveness and to the wide margin of appreciation afforded to the United Kingdom in that area, the Court concluded that Article 8 did not require a legally binding pre-notification requirement.

Conclusion: no violation (unanimously).

Private life

Retention of information obtained through undercover surveillance: *violation*

Association 21 December 1989 and Others v. Romania - 33810/07 and 18817/08
Judgment 24.5.2011 [Section III]

(See Article 2 above, page 8)

Private and family life

Unjustified refusal to recognise the adoption of an adult by his uncle, a monk: *violation*

Négrépontis-Giannisis v. Greece - 56759/08
Judgment 3.5.2011 [Section I]

Facts – In 1984 an American court made an order for the adoption of the applicant – a student in the United States at the time – by his uncle, an Orthodox monk who had been ordained a bishop and with whom the applicant was living. The applicant returned to Greece in 1985 and his adoptive father in 1996. The latter died in 1998. In 1999 a Greek court of first instance, following an application by the applicant, held that the American adoption order was not contrary to public policy or *contra bonos mores*, and declared it final and legally enforceable in Greece. In 2001 the applicant obtained a decision from the prefect authorising him to add his adoptive father's surname to his original surname. In 2000 and 2001 members of his adoptive father's family brought legal proceedings challenging the recognition of the adoption. In 2002 the court of first instance dismissed their claims, taking the view that adoption by a monk was not prohibited under Greek law. However, the court of appeal overturned that decision in 2003 on the ground that monks were prohibited from performing legal acts, such as adoption, which related to secular activities, as this was incompatible with monastic life and contrary to the principles of Greek public policy. In 2006 a bench of the Court of Cassation dismissed an appeal on points of law by the applicant, stressing that the adoption order had implications in terms of inheritance rights, and referred to the full court the question whether adoption by a monk was contrary to Greek public policy. In a judgment given in 2008 the full court answered that question in the affirmative.

Law – Article 8: The Court acknowledged the existence of family life between the applicant and his adoptive father, observing that the American judicial authorities had issued a decision designed to produce effects in the daily life of the applicant and his family. The refusal of the Greek courts to recognise the adoption had undoubtedly amounted to interference with the applicant's private and family life. The interference had been in accordance with the law and had pursued the legitimate aim of preventing disorder and protecting public morals. Nevertheless, the Court attached considerable

importance to the nature of the rules on which the full Court of Cassation had based its finding that adoption by a monk was contrary to public policy. The rules in question were all ecclesiastical in nature and dated back to the seventh and ninth centuries, whereas the current legislation expressly recognised the right of monks to marry. Moreover, the adoption order had been made after that legislation had been enacted. Lastly, the adoption order had been made in 1984, when the applicant was already an adult, and had been in place for twenty-four years before the Court of Cassation judgments had brought it to an end. Furthermore, the parties had not adduced any evidence to show that the adoptive relationship between the applicant and his adoptive father had been called into question before the question of inheritance arose. Accordingly, the grounds cited by the Court of Cassation for refusing to recognise the applicant's adoption had not corresponded to a pressing social need. The refusal had therefore not been proportionate to the legitimate aim pursued since it had resulted in the negation of the applicant's adoptive status.

Conclusion: violation (unanimously).

Article 8 in conjunction with Article 14: A difference in treatment of an adoptive child compared with a biological child was discriminatory if it had no objective and reasonable justification. Since 1982, monks had been allowed to marry and found a family and the law laying down that rule had been enacted before the applicant's adoption. Thus, a biological child born to the bishop at the time of the applicant's adoption could not have been deprived of his or her filial rights (with all that entailed in terms of inheritance rights), of the right to a name or of the right, ultimately, to live in society with an identity other than that resulting from the refusal to recognise the adoption.

Conclusion: violation (unanimously).

The Court also held unanimously that there had been a violation of Article 6 § 1 on account of the refusal by the Greek courts to recognise the order made by the American courts as being enforceable. It further found a violation of Article 1 of Protocol No. 1 on the ground that the refusal by the Court of Cassation to recognise the applicant's adoptive status and, consequently, his inheritance rights, had amounted to disproportionate interference with his right to the peaceful enjoyment of his possessions.

Article 41: Reserved.

ARTICLE 9

Manifest religion or belief

Disciplinary proceedings brought as a result of employees' refusals, on account of religious beliefs, to perform duties concerning same-sex couples: *communicated*

Ladele and McFarlane v. the United Kingdom - 51671/10 and 36516/10
[Section IV]

The first applicant is a Christian and sincerely believes that same sex civil partnerships, which she describes as "marriage in all but name", are contrary to God's law. She was employed by a local authority as a Registrar of Births, Marriages and Deaths. Following the introduction of the Civil Partnership Act 2004, which provides for the legal registration of civil partnerships between two people of the same sex, the authority decided to designate all its registrars also as Civil Partnership Registrars without affording them any possibility of opting out (as some other authorities had done). When the first applicant refused to agree to have her contract amended to include an obligation to perform civil-partnership ceremonies, it commenced disciplinary proceedings against her. She was found to be in breach of its equality policy and warned that she risked dismissal unless she agreed to the change. She brought court proceedings complaining of religious discrimination and harassment, but these were ultimately dismissed after the Court of Appeal found that her desire to have her religious views respected should not be allowed to override the local authority's concern to ensure that all its registrars manifest equal respect to both the homosexual and heterosexual communities.

The second applicant is a practising Christian and holds a deep and genuine belief that homosexual activity is sinful and that he should do nothing which directly endorses such activity. From 2003 to 2008 he worked as a counsellor for a national organisation which provides a confidential sex therapy and relationship counselling service. Although he started a course on pyscho-sexual therapy in 2007, he was unwilling, because of his religious beliefs, to commit to providing such therapy to same-sex couples. In 2008 he was dismissed summarily for gross misconduct on the grounds that he had said that he would comply with the organisation's policies and provide sexual counselling to same-sex couples when, in fact, he

had no intention of doing so and could not be trusted to perform his role in compliance with the organisation's Equal Opportunities Policies. The applicant's appeals were dismissed in so far as they related to complaints of discrimination and unfair dismissal.

Communicated under Article 9, alone or in conjunction with Article 14, and under Articles 13 (first applicant) and 6 (second applicant).

ARTICLE 10

Freedom of expression

Absence of safeguards in domestic law for journalists using publishing materials obtained from the Internet: *violation*

Editorial Board of Pravoye Delo and Shtekel v. Ukraine - 33014/05
Judgment 5.5.2011 [Section V]

Facts – The first applicant was the editorial board and the second applicant the editor-in-chief of a newspaper. In 2003 the newspaper published an anonymous letter it had downloaded from a news website and which had allegedly been written by a member of the secret services. The letter contained allegations that senior officials of the Ukrainian security service had engaged in unlawful and corrupt activities and had links to organised crime. The newspaper provided reference to the source of the information and published a comment by the editorial board indicating that the information in the letter might be false and inviting the public to comment. A claim was then lodged against the applicants by a person who claimed that he had been defamed by the information contained in the letter. The applicants were held jointly liable and ordered to pay damages. The first applicant was also ordered to publish a retraction and the second applicant an apology.

Law – Article 10

(a) *Order requiring an apology*: While the domestic law provided that injured parties in defamation cases were entitled to demand the retraction of untrue and defamatory statements and compensation for damage, the order requiring the second applicant to publish an official apology was not specifically provided for. Nor was there any evidence that the Ukrainian courts had been inclined to give such a broad interpretation to the applicable legislation. Neither the domestic courts nor the Government had provided any explanation for such an obvious departure from the relevant domestic rules. Moreover, domestic judicial practice subsequent to the events at issue had noted that the imposition of an obligation to apologise in defamation cases might run counter to the Constitutional guarantee of freedom of expression. Accordingly, the order requiring the second applicant to issue and apology had not been prescribed by law.

Conclusion: violation (unanimously).

(b) *Absence of safeguards in Ukrainian law for journalists publishing materials obtained from the Internet*: Ukrainian law granted journalists immunity from civil liability for the verbatim reproduction of material published in the press. This was generally in conformity with the Court's approach to journalists' freedom to disseminate statements made by others. However, no such immunity existed for journalists reproducing material from Internet sources not registered pursuant to the domestic legislation. Further, no regulations had been put in place governing the State registration of Internet media, the status of Internet-based media in general or the use of information obtained from the Internet. The Court accepted that the Internet was a distinct information tool from the printed media and that the risk of harm posed by the content and by communications on the Internet was much higher than that posed by the press. Consequently, the policies governing the reproduction of material from the printed media and the Internet might be different. Nevertheless, given the role played by the Internet in the context of professional media activities and its importance for the exercise of freedom of expression, the absence of a sufficient legal framework at the domestic level allowing journalists to use information obtained from the Internet without fear of incurring sanctions might seriously hinder the exercise of the vital function of the press as a "public watchdog" and might itself give rise to an unjustified interference with freedom of the press. Given the lack of adequate safeguards in the domestic law for journalists using information obtained from the Internet, the applicants had been unable to foresee to the appropriate degree the consequences which the impugned publication might entail.

Conclusion: violation (unanimously).

Article 41: EUR 6,000 to the second applicant in respect of non-pecuniary damage.

ARTICLE 18

Restrictions for unauthorised purposes

Allegedly politically and economically motivated criminal proceedings against applicant: *no violation*

Khodorkovskiy v. Russia - 5829/04
Judgment 31.5.2011 [Section I]

(See Article 5 § 1 (b) above, page 10)

ARTICLE 34

Victim

Intervening domestic award in respect of length-of-proceedings complaint: *loss of victim status*

Vidaković v. Serbia - 16231/07
Decision 24.5.2011 [Section II]

Facts – The applicant lodged a complaint with the Constitutional Court about the length of civil proceedings he had brought in respect of a road-traffic accident. The complaint was upheld and the Constitutional Court ordered the courts concerned to bring the impugned proceedings to a conclusion as soon as possible. It also declared that the applicant was entitled to compensation in respect of the non-pecuniary damage he had suffered as a result of the delays. The Commission for Compensation offered to pay the equivalent of EUR 500, which the applicant refused.

Law – Article 34: The Court reiterated that an applicant's status as a "victim" depends on whether the domestic authorities acknowledged, either expressly or in substance, the alleged infringement of the Convention and, if necessary, provided appropriate redress. The Constitutional Court's finding that the applicant's right to a determination of his claim within a reasonable time had been violated had acknowledged the breach complained of thus effectively satisfying the first of these two conditions. As to the second – whether the redress afforded was adequate and sufficient – the Court noted that in length-of-proceedings cases, States which, like Serbia, had opted for a remedy designed both to expedite proceedings and afford compensation were free to award amounts which – while lower than those awarded by the Court – were not unreasonable.

Although the actual sum awarded to the applicant was lower than awarded for comparable delays in the European Court's case-law, it could nevertheless be considered reasonable, having regard to the duration of the proceedings, the value of the award judged in the light of the local standard of living, and the fact that the award was made and paid more promptly than if the matter fell to be decided by the European Court under Article 41 of the Convention. It was also of relevance that the applicant's claim had been repeatedly considered at two instances and, crucially, that the impugned proceedings had been concluded less than two months from the date of the Constitutional Court's decision.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 37

Article 37 § 1

Striking out applications
Continued examination not justified

Unilateral declaration made during Article 41 procedure and affording equitable amount in compensation: *struck out*

Megadat.com SRL v. Moldova - 21151/04
Judgment 17.5.2011 (just satisfaction – striking out) [Section III]

Facts – In a judgment of 8 April 2008 (see Information Note no. 107), the Court held that a ruling by the national telecommunications regulatory authority that the applicant company's licences to operate as an Internet service provider were invalid had violated the company's right to the peaceful enjoyment of its possessions under Article 1 of Protocol No. 1 to the Convention. The question of just satisfaction was reserved. In August 2010, after failing to reach a friendly settlement with the applicant company, the Government issued a unilateral declaration in which it undertook to pay EUR 120,000 in respect of damage and EUR 10,000 in respect of costs and expenses. The applicant company considered the amount too low and asked the Court to continue to examine the case.

Law – Article 37 § 1: The Court could, under certain circumstances, strike out all or part of an

application on the basis of a unilateral declaration by a respondent Government even if the applicant wished the examination of the case to be continued. Moreover, there was nothing to prevent a respondent State from filing a unilateral declaration relating, as in the instant case, to the reserved Article 41 procedure.

The material before the Court indicated that the bulk of its claimed pecuniary losses did not derive from an activity that had come into existence prior to the withdrawal of the licences, but from plans that had never gone further than anticipation. The applicant company would have needed new licences for the implementation of the business plan that formed the basis of its claim and it was a matter of conjecture whether it would have been able to obtain such licences and, if so, how long it would have taken. That being so, the applicant company's anticipated income could not be considered a legally protected interest of sufficient certainty to be compensatable. Its claims in respect of non-pecuniary damage and of costs and expenses were excessive. In the light of these considerations and to the amount of compensation offered by the Government, which appeared equitable, the Court was satisfied that respect for human rights as defined in the Convention and Protocols did not require it to continue the examination of the case.

Conclusion: struck out (unanimously).

ARTICLE 46

Measures of a general character

Respondent State required to introduce effective legal remedies, conforming to the principles laid down in the Court's case-law, for the excessive length of civil, administrative and criminal proceedings

Dimitrov and Hamanov v. Bulgaria - 48059/06 and 2708/09
Finger v. Bulgaria - 37346/05
Judgments 10.5.2011 [Section IV]

Facts – In the *Dimitrov and Hamanov* case the applicants complained of the length of criminal proceedings and of the lack of an effective domestic remedy. The applicant in the *Finger* case made like complaints, but in respect of civil proceedings.

Law – In both cases the Court found a violation of Article 6 § 1 on account of the length of the proceedings and a violation of Article 13 owing to the lack of an effective remedy in respect of the delays.

Article 46: The Court noted that it had previously found breaches of Article 6 § 1 in some 130 length-of-proceedings cases concerning Bulgaria (more than 80 in respect of criminal proceedings and almost 50 in respect of civil proceedings). Some 700 further applications containing length-of-proceedings complaints were pending. These statistics indicated a systemic problem. While new legislative and organisational measures had been introduced between 2006 and 2010, it was too soon to assess their impact. The problem could not, therefore, yet be regarded as having been fully resolved.

In the *Dimitrov and Hamanov* case the Court reiterated that there had been no mechanism available to compensate victims of excessively long criminal proceedings, or a remedy allowing a reduction of sentence on account of accumulated delays. The procedure introduced in 2003[1] and abolished in 2010 suffered from limitations: as an acceleratory remedy it was unable to prevent further delay or delay resulting from repeated referrals of cases back to the pre-trial stage, which was a major problem in Bulgarian criminal cases; as a compensatory remedy, it was unable to make up for delays accrued before its introduction in June 2003. While the Court welcomed the possibility for the Supreme Judicial Council inspectorate to check whether judges, prosecutors and investigators had processed the cases assigned to them without delay, such mechanisms could not be regarded as an effective remedy because they did not give the individuals concerned a personal right to compel the State to exercise its supervisory powers.

The *Finger* case highlighted deficiencies in civil cases. For instance, the right introduced in March 2008 to ask the court to set a time-limit did not apply to delays in proceedings before the two supreme courts and there were doubts about its ability to secure the acceleration of proceedings in a number of other situations. In any event, even if operated effectively, without a concurrent remedy providing compensation for undue delays in proceedings that had already been completed, it could not solve the problem of unreasonable delay.

1. The procedure was introduced in June 2003 under Article 239a of the 1974 Code of Criminal Procedure and was superseded in April 2006 by Articles 368-69 of the 2005 Code of Criminal Procedure. It was abolished on 28 May 2010.

In both cases there had been a clear need for the introduction of an acceleratory remedy and a remedy providing compensation, including for past delays. The Committee of Ministers of the Council of Europe had very recently invited the Bulgarian authorities to complete as soon as possible the reform in order to introduce a compensatory remedy in length-of-proceedings cases.

In view of the foregoing, Bulgaria was required in *Dimitrov and Hamanov* to introduce a remedy or combination of remedies in respect of unreasonably long criminal proceedings and in *Finger* to introduce a compensatory remedy in respect of unreasonably long civil proceedings. These remedies had to conform to the Court's principles and became available within twelve months from the date the Court's judgments in the applicants' cases became final. The Court would continue to process similar cases pending the implementation of the relevant measures by Bulgaria.

Article 41: EUR 6,400 to Mr Dimitrov, EUR 600 to Mr Hamanov and EUR 1,200 to Ms Finger in respect of non-pecuniary damage.

Respondent State required to take all necessary measures to secure effective investigation into events linked to overthrow of Romanian Head of State in December 1989

Association 21 December 1989 and Others v. Romania - 33810/07 and 18817/08
Judgment 24.5.2011 [Section III]

(See Article 2 above, page 8)

Individual measures

Request for individual measures to prevent future similar violations: *no individual measures indicated*

Khodorkovskiy v. Russia - 5829/04
Judgment 31.5.2011 [Section I]

(See Article 5 § 1 (b) above, page 10)

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

Idalov v. Russia - 5826/03
[Section I]

(See Article 5 § 3 above, page 12)

RECENT COURT PUBLICATIONS

1. Index to the Information Notes 2010

The Index to the Information Notes on the Court's case-law 2010 has now been published on the Court's website (and can be accessed via the Hudoc portal). Users can use this Index to search for cases of jurisprudential interest summarised in the eleven issues of the Information Note published in 2010. Searches can be made by Convention article, keyword, applicant name or, for the first time this year, respondent State. Hyperlinks to the Information Notes concerned have also been added for ease of access.

2. Case-law reports by the Research Division

Three reports on the case-law of the Court, prepared by the Research Division of the Registry on its own authority, are now available on the Court's website (<www.echr.coe.int> / Case-law / Case-law analysis / Research reports) on the themes of freedom of religion, cultural rights and the role of the public prosecutor. Further reports are planned for the future.

- Overview of the Court's case-law on freedom of religion (in French only)
- Cultural rights in the case-law of the European Court of Human Rights
- The role of public prosecutor outside the criminal law field in the case-law of the European Court of Human Rights