CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

INFORMATION NOTE No. 1
on the case-law of the Court
November - December 1998

STATISTICAL INFORMATION

(i) Applications declared admissible:

Section I	2	
Section II	6	
Section III	8	
Section IV	9	
Total		25

(ii) Applications declared inadmissible:

Section I	- Chamber	3	
	- Committee	16	
Section II	- Chamber	8	
	- Committee	13	
Section III	- Chamber	5	
	- Committee	17	
Section IV	- Chamber	8	
	- Committee	49	
Total			119

Total number of decisions (not including partial decisions): 144

(iii) Applications communicated to Governments (Rule 54(3) of the Rules of Court):

Section I	4
Section II	17
Section III	7
Section IV	10

Total number of applications communicated: 38

ARTICLE 5

Article 5(3)

RELEASE PENDING TRIAL
Absence of grounds for detention on remand: *admissible*.

N.C. - Italy (Nº 24952/94)
Decision 15.12.98 [Section II]
(See Article 5(5), below).

Article 5(5)

COMPENSATION
Absence of right to compensation for unlawful detention on remand: *admissible*.

N.C. - Italy (Nº 24952/94)
Decision 15.12.98 [Section II]

The applicant, an engineer, was working as an adviser and representative for company X. Preliminary investigations were initiated against him on suspicion of abuse of power and corruption; he had commissioned the head of urban planning of the local authority as chief engineer for the building of a road and as co-director of works for the construction of a district detention centre. A warrant of arrest was issued on the ground that there was a serious risk that he would commit similar offences since he still held the same position in company X. and the works were still pending. The applicant was arrested on 3 November 1993 and detained on remand. On 30 November he requested his release, invoking the fact that he had resigned from his position in company X. The application was refused on 3 December, but on appeal the District Court found that there were no longer grounds for detaining him and accordingly ordered his release. The applicant's detention had lasted 47 days. He maintains that there were no grounds for his detention. Moreover, under Italian law he had no possibility of claiming compensation.
Admissible under Article 5(3) and 5(5).

ARTICLE 6

Article 6(1) [civil]

ACCESS TO COURT
Lack of jurisdiction of the courts to deal with cases concerning the restitution of property unlawfully nationalised: *partly admissible*.

CURUȚIU - Romania (Nº 29769/96)
Decision 8.12.98 [Section I]

Restitution to the applicants, ordered by the court of first instance, of their father's house, unlawfully nationalised in 1950. Application by the Principal State Prosecutor to have this decision set aside on the grounds that the ordinary courts were not competent to rule on the lawfulness of the nationalisation of immovable property or to order its restitution. Application granted by the Supreme Court.
Admissible under Article 6(1) and Article 1 of Protocol No. 1: the case is comparable in this regard to the Brumarescu case (Nº 28342/95), currently pending before the Grand Chamber.

ACCESS TO COURT
Failure to enforce a court decision: *communicated*.

PETROTOS - Greece (Nº 43597/98)
[Section II]

By two judgments in 1994 and 1996, two courts of appeal ordered a water supply company, a public-law corporation, to pay compensation to the applicant for having unlawfully deprived him of access to a stream providing water for his farmland. These judgments became final. The applicant complained that the company had refused to pay him the compensation due. The company was asked by the local authority to fulfil its obligation. The company informed the local authority that it was unable to pay the compensation as it did not have sufficient resources. The local authority contacted the company on several occasions, asking it to settle its debt, but to date the compensation has still not been paid. The applicant considers that the refusal to comply with the judgments delivered violates his right to the effective protection of the courts.
Communicated under Article 6(1).

ACCESS TO COURT
Dismissal of an appeal for failure to pay the amount ordered by the court of first instance: *admissible*.

GARCIA MANIBARDO - Spain (Nº 38695/97)
Decision 8.12.98 [Section IV]

Following civil proceedings initiated against her, the applicant was ordered to pay 18 million pesetas to the opposing party. Her appeal against the decision before the *Audiencia provincial* was dismissed on the grounds of her failure to pay the sum she had been ordered to pay by the court of first instance. This payment was an essential precondition for lodging an appeal. The applicant lodged an *amparo* appeal with the Constitutional Court, stressing that she had applied at first instance for legal aid, which could have exempted her from this requirement. Her *amparo* appeal was rejected. However, her application for legal aid was subsequently granted.
Admissible under Article 6(1) (fair trial).

Article 6(1) [criminal]

ACCESS TO COURT
Authorisation of the State prosecution service to initiate appeal proceedings: *admissible.*

MILLAN I TORNES - Andorra (Nº 35052/97)
Decision 17.11.98 [Section I]

In 1995, the applicant was found guilty of aggravated concealment (of the body of a murder victim) and sentenced to 6 years' imprisonment. He filed an appeal, but the judgment was confirmed by the Higher Court of Justice, Andorra having in the meantime ratified the Convention. The applicant then submitted a request to file an *empara* appeal before the Constitutional Court, which was rejected. He complains that the refusal by the State prosecution service deprived him of access to the Constitutional Court and maintains that the need for authorisation from the State prosecution service to initiate such appeal proceedings is contrary to Article 6 of the Convention since the State prosecution service acted as public prosecutor in the criminal proceedings against him.
Admissible under Article 6 (the question of the applicability of this provision is joined to the consideration of the merits of the case).

ACCESS TO COURT
Special procedure for Ministers applied to others: *hearing*.

COËME - Belgium (Nº 32492/96)
MAZY - Belgium (Nº 32547/96)
STALPORT - Belgium (Nº 32548/96)
HERMANUS - Belgium (Nº 33209/96)
JAVEAU - Belgium (Nº 33210/96)
[Section II]
(See under Fair hearing, below).

CRIMINAL CHARGE
Disciplinary fine: *inadmissible*.

BROWN - United Kingdom (Nº 38644/97)
Decision 24.11.98 [Section III]
(See Article 7, below).

CRIMINAL CHARGE
Concept of criminal charge – investigative measures prior to the bringing of charges: *inadmissible*.

PADIN GESTOSO - Spain (Nº 39519/98)
Decision 8.12.98 [Section IV]
(See Article 6(3)(a), below).

FAIR HEARING
Absence of legal basis for special procedure: *hearing*.

COËME - Belgium (Nº 32492/96)
MAZY - Belgium (Nº 32547/96)
STALPORT - Belgium (Nº 32548/96)
HERMANUS - Belgium (Nº 33209/96)
JAVEAU - Belgium (Nº 33210/96)
[Section II]

In 1989 criminal proceedings were instituted against the fifth applicant, who was suspected of fraud and corruption between 1981 and 1989 while acting as director of association "I". In 1994 the public prosecutor requested the Chamber of Representatives to lift the parliamentary immunity of the first applicant, who was involved in some of the illegal activities of association "I" while a Minister. According to S. 103 of the Constitution, only the Chamber of Representatives can decide whether a Minister may be prosecuted. It set up a special commission to carry out an investigation. The commission recommended that the applicant be committed for trial before the Court of Cassation, which has jurisdiction as the only instance to try a Minister. This recommendation was adopted by the Chamber. The other applicants were joined in the proceedings before the Court of Cassation, because of the connection

between the offences, although none of them is a Minister. The applicants complained that no law had ever been adopted regulating the procedure before the court in such cases. As a result, the court had to fix its own rules. The court refused to refer a preliminary question to the Arbitration Court, pointing out that it was applying the Code of Criminal Procedure to the case. It also refused to refer a preliminary question concerning the application of a new law (24 December 1993) extending the prescription for lesser crime from 3 to 5 years.
The applicants complain about the absence of a legal basis for the procedure (Article 6(1)). The first applicant also complains about the absence of any specification in Section 103 of the criminal offences with which a Minister could be charged and of the possible penalties in the provision (Article 7). Four of the applicants complain that they were dealt with under the special procedure applicable to Ministers, as a result of which they were deprived of a normal criminal trial and moreover did not have the benefit of the usual guarantees offered in "normal" criminal proceedings or in a procedure before the special parliamentary commission (Articles 6(1) and 14). Furthermore, no appeal was available. Some of the applicants complain about the law extending the prescription period, which applied to criminal proceedings commenced before it entered into force (Article 7). They also complain that they had less than three months to examine a file of 30,000 pages and of the refusal to refer the questions to the Arbitration Court (Article 6(1) and 3(b)). One of the applicants raises the problem of the use by the Court of Cassation of statements which he had given as a witness in 1994 before he was charged. Finally, another applicant complains of the length of the proceedings.
The Section decided to invite the parties to a hearing on the admissibility and merits of the case.

FAIR HEARING
Disadvantageous position of persons applying to the Court of Cassation (France) and wishing to be represented by a lawyer not attached to that court: *communicated*.

RICHEN - France (Nº 31520/96)
[Section III]
GAUCHER - France (Nº 34359/97)
[Section III]

The applicants, found guilty of driving offences, were sentenced to a fine and a driving ban. These sentences were confirmed on appeal. The applicants, represented by the lawyers who had represented them before the trial and appeal courts, filed an appeal on points of law before the Court of Cassation, which was rejected. They complain of the unfairness of the proceedings and in particular of the fact that they were placed at a disadvantage in relation to persons represented by the lawyers at the Court of Cassation in that the latter have a longer time in which to submit their pleadings.
Communicated under Article 6 (adversarial proceedings respecting the rights of the defence).

Article 6(3)(a)

CHARGED WITH A CRIMINAL OFFENCE
Concept of "charged with an offence" – investigative measures prior to the bringing of charges: *inadmissible*.

PADIN GESTOSO - Spain (Nº 39519/98)
Decision 8.12.98 [Section IV]

In 1989, following statements made by a "repentant criminal", P., the prosecuting authorities filed a complaint for drugs trafficking against several individuals, including the applicant. The investigating judge declared this complaint admissible and ordered certain investigative measures to be carried out, but contrary to the applicable legislative provisions, he did not inform the applicant of the admissibility of the complaint against him. In 1990, proceedings were initiated against various individuals, including the applicant, who was remanded in custody and held in solitary confinement for almost one month. A lawyer was officially assigned during this period. In 1992, the entire case file was handed over to the defence counsels of the 47 people charged (including the applicant). The applicant was sentenced to 9 years' imprisonment and a fine. His appeals against this judgment were rejected. The applicant complains of the unfairness of the proceedings in that he was not informed of the complaint against him and that he was made aware of it only ten months after it had been declared admissible, of the fact that his counsel had to wait almost two months before obtaining access to the documents pertaining to the proceedings, and of the fact that he was not given the opportunity to question the co-accused, P., during the proceedings, despite his requests to this effect.
Inadmissible under Article 6(1) and 6(3)(a): Until the order charging the applicant was issued and he was detained on remand, his situation was not directly affected by the investigations conducted by the investigating judge. The applicant can only be considered as a "person charged with a criminal offence" from the time of that order. However, he does not allege that this order was not served on him in time: manifestly ill-founded.
Inadmissible under Article 6(3)(b): The applicant does not deny that he was able to talk with the officially assigned counsel in order to prepare his defence and acknowledges that, after the solitary confinement measure had been lifted, he had access to the documents pertaining to the proceedings. Moreover, in 1992, the applicant's defence counsels had access to the entire case file, comprising over 80 volumes. As the investigations continued for several years, the applicant had sufficient time to prepare his defence after the order charging him had been served (in 1990). In addition, once the confidentiality of the investigations had been lifted, there is no evidence to suggest that he faced any obstacles in appointing or consulting a lawyer in order to prepare his defence: manifestly ill-founded.
Inadmissible under Article 6(3)(d): In general, these provisions require the accused to be given sufficient opportunity to challenge a statement given in evidence and to question the person who made the statement. In the case in point, the applicant had the opportunity to question P. during the public hearing and to refute the evidence he had given during the proceedings. Accordingly, the fact that the applicant was unable to question P. at an earlier stage in the proceedings did not affect those provisions: manifestly ill-founded.

Article 6(3)(b)

ADEQUATE TIME
Lack of time to examine extensive file: *hearing*.

COËME - Belgium (Nº 32492/96)
MAZY - Belgium (Nº 32547/96)
STALPORT - Belgium (Nº 32548/96)
HERMANUS - Belgium (Nº 33209/96)
JAVEAU - Belgium (Nº 33210/96)
[Section II]
(See Article 6(1) [criminal], above).

ADEQUATE TIME
Lack of time to examine the file: *inadmissible*.

PADIN GESTOSO - Spain (Nº 39519/98)
Decision 8.12.98 [Section IV]
(See Article 6(1)(a), above).

Article 6(3)(d)

EXAMINATION OF WITNESSES
Refusal to hear witnesses who had previously given evidence under letters of request: *inadmissible*.

A.E.D.L.G. - Spain (Nº 40180/98)
Decision 15.12.98 [Section IV]

The applicant, a Spanish national, was director of the Spanish Tourist Office (ONET) in Stockholm from 1982 to 1986. After his return to Spain and following a number of reminders from Swedish companies of debts owed to them by the ONET for the provision of services, proceedings were initiated against the applicant for forgery of a commercial document for the purpose of misappropriating public funds. A letter of request was issued by the investigating judge so that witnesses in Sweden could be heard; this letter of request included questions asked by the applicant. The latter was charged and the case sent before the *Audiencia Nacional*. Following adversarial proceedings, the applicant was found guilty and sentenced on the basis not only of the results of the letter of request but also of certain other evidence gathered in the course of the proceedings. The applicant's appeal on points of law and *amparo* appeal were rejected. The applicant complains of the refusal by the *Audiencia Nacional* to hear witnesses whose statements had previously been taken under the letter of request.
Inadmissible under Article 6(1) and 6(3)(d): It is not within the competence of the Court to substitute its own assessment of the facts and the evidence for that of the domestic courts. The Court's duty is to see whether the proceedings, taken as a whole, including the way in which evidence was presented, were fair or not.

Furthermore, the accused does not have an unlimited right to have witnesses called before a court. In principle, it is up to the domestic judge to decide on the need to call a witness. In the case in question, given that the Spanish courts based their conviction of the applicant on a number of pieces of evidence, the refusal by the *Audiencia Nacional* to hear witnesses from whom statements had previously been taken under a letter of request did not render the trial unfair: manifestly ill-founded.

EXAMINATION OF WITNESSES
Impossibility of questioning a co-accused earlier than the public hearing: *inadmissible*.

PADIN GESTOSO - Spain (Nº 39519/98)
Decision 8.12.98 [Section IV]
(See Article 6(1)(a), above).

ARTICLE 7

CRIMINAL OFFENCE
Disciplinary fine: *inadmissible*.

BROWN - United Kingdom (Nº 38644/97)
Decision 24.11.98 [Section III]

The applicant is a solicitor. He went into business with JDS who was to provide legal clerking services. JDS had just come out of prison where he had been detained for fraudulent acts; the applicant discovered it some time after the business had been set up. The practice soon faced great losses caused by JDS who had signed cheques for enormous sums of money forging the applicant's signature. Another solicitor bought the practice from the applicant for £10,000 without being informed by the latter of JDS's background. Disciplinary proceedings were eventually initiated against the applicant for serious professional misconduct. A £10,000 fine was imposed on him by the Solicitors Complaints Tribunal.
Inadmissible under Article 7: A fine which is punitive and deterrent rather than compensatory may suggest that the matter is "criminal" in nature if the penalty is sufficiently substantial. In the instant case, the fine is of such an amount that it can be regarded as having a punitive effect. However, it was imposed in respect of serious disciplinary offences and its level equalled the amount for which the applicant had sold the practice. In addition, there was neither an investigation into the applicant's means, which is a pre-requisite of criminal fines in domestic proceedings, nor involvement of the police or the prosecuting authorities in these proceedings. Thus, given the essential disciplinary character of the charges, it cannot be found that the severity of the penalty rendered the charges "criminal" in nature: incompatible *ratione materiae*.

NULLUM CRIMEN SINE LEGE
Absence of precise legal basis for charge: *hearing*.

COËME - Belgium (Nº 32492/96)
MAZY - Belgium (Nº 32547/96)
STALPORT - Belgium (Nº 32548/96)
HERMANUS - Belgium (Nº 33209/96)
JAVEAU - Belgium (Nº 33210/96)
[Section II]
(See Article 6(1) [criminal], above).

ARTICLE 8

PRIVATE LIFE
Disciplinary sanction imposed on a judge on account of his membership of a masonic lodge: *communicated*.

N.F. - Italy (Nº 37119/97)
[Section II]

The applicant, a judge, joined a masonic lodge. Disciplinary proceedings were initiated against judges who were Freemasons by the Minister of Justice and the public prosecutor at the Court of Cassation after a list had been provided by the Judicial Service Commission. The applicant was summoned before the disciplinary section of the Judicial Service Commission and was given a warning. His appeal to the Court of Cassation was dismissed.
Communicated under Articles 8, 9, 10 and 11, and under Article 14 in conjunction with these articles.

PRIVATE LIFE
Parent obliged to hide his homosexuality during meetings with his daughter: *admissible.*

SALGUEIRO DA SILVA MOUTA - Portugal (Nº 33290/96)
Decision 1.12.98 [Section IV]
(See Family life, below).

FAMILY LIFE
Expulsion of a foreigner having lived in France since the age of 7: *inadmissible*.

BENRACHID - France (Nº 39518/98)
Decision 8.12.98 [Section III].

The applicant, of Algerian origin, entered France at the age of 7 and lived there from 1970 until 1993, when he was expelled. An expulsion order was served on him by the Minister of the Interior following his conviction for armed robbery and the unlawful taking of a hostage. The administrative court rejected his appeal and the *Conseil d'Etat* confirmed that decision.
Inadmissible under Article 8*:* In accordance with the established case-law of the Convention organs, the Contracting Parties have a right to control the entry, residence and expulsion of non-nationals. This applies provided there is no interference with the right secured in Article 8. Given the age at which the applicant arrived in France and the fact that his family lives there, the expulsion order constituted an interference. However, he had performed his military service in Algeria and therefore had sufficient links with that country. Furthermore, this measure pursued the legitimate aims of defending public order and preventing crime; in view of the seriousness of the offences committed by the applicant, the measure was not disproportionate: manifestly ill-founded.

FAMILY LIFE
Refusal to grant custody to a parent living in a homosexual relationship: *admissible*.

SALGUEIRO DA SILVA MOUTA - Portugal (Nº 33290/96)
Decision 1.12.98 [Section IV].

The applicant married in 1983. A girl, M., was born to the couple in 1987. Since 1990, the applicant has been living in a homosexual relationship. In the divorce proceedings, the applicant and his spouse concluded an agreement whereby custody was granted to the mother, the applicant being awarded a right of access. However, M.'s mother refused him access and the applicant filed a request for custody to be awarded to him. The court acceded to this request in a judgment delivered in 1994 and M. lived with the applicant until 1995, when she was allegedly abducted by her mother (criminal proceedings are currently pending in this connection). His former wife appealed against this decision and the appeal court set aside the judgment, holding that, as a general rule, a young child should not be separated from its mother, but it also added that a homosexual environment could not be considered to be the healthiest for a child's development, given that this was an abnormal situation. Nevertheless, the court awarded a right of access to the applicant, who maintains that it is not being honoured as the whereabouts of M. are unknown. No appeal was filed against this decision. The applicant, relying on Article 8 in conjunction with Article 14, alleges that the appeal court awarded custody to M.'s mother on the basis of his homosexuality. He also claims that the appeal court's decision constitutes an unjustified interference with his right to respect for family life, and also with his right to respect for his private life in that it was specified that he must hide his homosexuality in his meetings with his daughter.
Admissible under Article 8 and Article 14 in conjunction with Article 8.

ARTICLE 9

FREEDOM OF RELIGION
Alleged interference by the State in the appointment of a Muslim religious leader: *hearing*.

SERIF - Greece (Nº 38178/97)
[Section II]

The State appointed T. to a vacant post of mufti (Muslim religious leader). Two Muslim members of parliament requested that the State, in accordance with the legislation in force, organise elections to fill, among others, the post held by T. In the absence of any reply, they decided to organise their own elections in the mosques, one Friday at the end of prayers. In the meantime, the President of the Republic passed a law amending the procedure for the appointment of muftis, who henceforth were to be appointed by presidential decree. On Friday 28 December 1990, the applicant was elected mufti by the worshippers present in the mosques and, together with other Muslims, he initiated proceedings challenging the lawfulness of T.'s appointment. These proceedings are still pending. One month later, a law was passed validating retroactively the new law on the appointment of muftis. In 1991, the prosecuting authorities initiated criminal proceedings against the applicant for usurping the functions of minister of a recognised religion and for wearing the vestments of that office without having the right to do so. Following a trial in which many witnesses were heard, the applicant was sentenced to 8 months' imprisonment. His conviction was confirmed on appeal and his sentence set at 6 months' imprisonment, convertible into a fine. His appeal on points of law was dismissed. The applicant complains of the unfairness of the proceedings, relying on Article 9, in that he was convicted despite the fact that Muslims have the right to elect their mufti, and on Article 10, as he maintains that his conviction was the result of statements he was alleged to have made.
The Section decided to invite the parties to a hearing on the admissibility and merits of the complaints under Articles 9 and 10.

ARTICLE 10

FREEDOM OF EXPRESSION
Conviction for defamation: *inadmissible*.

PEREE - Netherlands (Nº 34328/96)
Decision 17.11.98 [Section I]

The applicant sent a letter to an anti-discrimination organisation in which he compared it to the Nazi S.A. He was subsequently convicted of insult. He reiterated his utterances against the organisation on television and was then convicted of slander. Following his appeals to the Court of Appeal, he was finally imposed a suspended fine of NLG 500 for insult and a fine of NGL 1,000 (approximately 3,000 French francs) for slander.
Inadmissible under Article 10: The applicant's convictions of insult and slander interfered with his right to freedom of expression. The interference was prescribed by

law as the convictions were based on specific articles of the Dutch Criminal Code. The aim of the interference was the protection of the reputation of others, namely the anti-discrimination organisation. The applicant on two occasions drew a comparison between the organisation and the Nazi S.A. in response to critical remarks the organisation had made concerning a protest action against the planned housing of Yugoslav asylum seekers; he was imposed a suspended conditional fine and the payment of a fine for these utterances. Thus, having regard to the circumstances, the present interference was reasonable and proportionate to the aim pursued: manifestly ill-founded.

ARTICLE 11

FREEDOM OF ASSOCIATION
Disciplinary sanction against a judge on account of his membership of a masonic lodge: *communicated*.

N.F. - Italy (Nº 37119/97)
[Section II]
(See Article 8, above).

ARTICLE 14

DISCRIMINATION
Refusal to grant custody to a parent living in a homosexual relationship: *admissible*.

SALGUEIRO DA SILVA MOUTA - Portugal (Nº 33290/96)
Decision 1.12.98 [Section IV]
(See Article 8, above).

ARTICLE 1 OF PROTOCOL NO. 1

DEPRIVATION OF PROPERTY
Non-restitution of property unlawfully nationalised and failure to pay compensation: *partly admissible, partly inadmissible*.

CURUŢIU - Romania (Nº 29769/96)
Decision 8.12.98 (Section I)
(See Article 6(1), above).

APPENDIX

Articles of the European Convention of Human Rights and Protocols Nos. 1, 4, 6 and 7

Convention

Article 2	:	Right to life
Article 3	:	Prohibition of torture
Article 4	:	Prohibition of slavery and forced labour
Article 5	:	Right to liberty and security
Article 6	:	Right to a fair trial
Article 7	:	No punishment without law
Article 8	:	Right to respect for private and family life
Article 9	:	Freedom of thought, conscience and religion
Article 10	:	Freedom of expression
Article 11	:	Freedom of assembly and association
Article 12	:	Right to marry
Article 13	:	Right to an effective remedy
Article 14	:	Prohibition of discrimination
Article 34	:	Applications by person, non-governmental organisations or groups of individuals

Protocol No. 1

Article 1	:	Protection of property
Article 2	:	Right to education
Article 3	:	Right to free elections

Protocol No. 2

Article 1	:	Prohibition of imprisonment for debt
Article 2	:	Freedom of movement
Article 3	:	Prohibition of expulsion of nationals
Article 4	:	Prohibition of collective expulsion of aliens

Protocol No. 6

Article 1	:	Abolition of the death penalty

Protocol No. 7

Article 1	:	Procedural safeguards relating to expulsion of aliens
Article 2	:	Right to appeal in criminal matters
Article 3	:	Compensation for wrongful conviction
Article 4	:	Right not to be tried or punished twice
Article 5	:	Equality between spouses