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

Information Note on the Court's case-law

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ARTICLE 2

POSITIVE OBLIGATIONS
Lack of adequate proceedings for examining hospital death: *case referred to the Grand Chamber*.

ŠILIH - Slovenia (71463/01)
Judgment 28.6.2007 [Section III]

In its Chamber judgment the Court held unanimously that there had been a violation of Article 2 on account of the lack of effective legal proceedings to establish the cause of and responsibility for the death of the applicants' son in hospital (for further details, see Press release 459).

The referral request had been made by the respondent Government.

POSITIVE OBLIGATIONS
Lack of independence of police force called upon to investigate allegations of security force collusion in the death of the applicant's husband: *violation*.

BRECKNELL - United Kingdom (N° 32457/04)
Judgment 27.11.2007 [Section IV]

Facts: The applicant's husband was one of three men killed in an attack carried out by loyalist gunmen at a bar in Northern Ireland in 1975. Although responsibility for the incident was subsequently claimed by an illegal loyalist paramilitary organisation, the police were initially unable to identify any individual suspect. In the late 1970s they finally arrested two people – Laurence McClure, a reserve officer in the Royal Ulster Constabulary (RUC), and Elizabeth Shields – who admitted to having driven three people from the scene on the night of the attack. However, they denied any involvement in the killings or knowledge of the identity of the killers. They were charged with failing to disclose information relating to an offence. However, in 1981 the Director of Public Prosecutions decided not to pursue the charges, *inter alia*, on account of the delay in bringing the case to trial, the unlikelihood of a custodial sentence and the lack of any reasonable prospect of securing a conviction.
In 1999 a former police officer called John Weir, who had himself served a prison sentence for murder in a separate case, made allegations of RUC and Ulster Defence Regiment collusion with loyalist paramilitaries in the 1970s. He gave the names of various people he accused of involvement in the attacks carried out at that time, including those of four people he alleged were responsible for the attack in which the applicant's husband had died. An Irish television channel broadcast a programme in which Weir repeated his allegations. These then became the subject of police investigations on both sides of the Irish border, although the investigation in Northern Ireland was of limited scope as it focused on determining whether the allegations were sufficiently credible to require a full investigation. After analysing copies of statements Weir had made to the Irish police and a journalist the RUC interviewed a number of people under caution. No charges were preferred, however, and it was decided that no final view could be taken until Weir himself had been interviewed, which at that point was impossible because his whereabouts could not be traced. In November 2001 the RUC became the Police Service of Northern Ireland (PSNI). Subsequently, the case was referred for further assessment, initially by the Serious Crime Review Team (SCRT) and then by the Historical Enquiry Team (HET). The HET finally succeeded in meeting with Weir, but he refused to make a statement or to give evidence in court. According to the Government, the review process was close to conclusion; there were no more realistic leads to follow up and there was insufficient evidence to mount a further prosecution.
The applicant complained that the investigation carried out following Weir's allegations in 1999 of RUC involvement in her husband's death did not meet the requirements of Article 2. In particular, she complained of a lack of independence on the part of the investigating authorities, of a lack of public scrutiny and access to the investigation materials, of unwarranted delays and of ineffectiveness.

Law: The Court rejected the Government's argument that a strict six-month time-limit had to be applied, rendering applications more than six months after the end of the original investigation out of time within the meaning of Article 35 § 1 of the Convention. As to whether a fresh investigation had been required, where there was a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities were under an obligation to take further investigative measures. The steps that it would be reasonable to take would vary considerably with the facts of the situation. The allegations made by Weir were serious, involving security force collusion in the systematic targeting of innocent civilians, and *prima facie* plausible, as they derived from a source who had been involved in such incidents and gave concrete details. The authorities had thus been under an obligation to verify the reliability of the information and the need for a full investigation and the Court's task was to verify whether the investigative measures carried out had complied with Article 2.

(i) *Independence*: The initial inquiries had been carried out by the RUC, which could not be regarded as sufficiently independent as its own officers had been heavily implicated by Weir's allegations. It was the RUC which had carried out the interviews with the persons named by Weir and been entrusted with the initial assessment of the credibility of his allegations. Although from November 2001 the conduct of the investigation had been taken over by the PSNI, which was institutionally distinct from its predecessor, and other bodies whose independence was not in doubt, this did not detract from the fact that for a considerable period the case had been under the responsibility and control of the RUC. In that respect, therefore, there had been a failure to comply with the requirements of Article 2.

(ii) *Accessibility to the family and public scrutiny*: This aspect of the procedural obligation did not require applicants to have access to police files, or copies of all documents during an ongoing inquiry, or for them to be consulted or informed about every step. The police appeared to have made efforts to meet with members of the family from about 2000 onwards and there was also correspondence between the police and the applicant's representatives. If only limited information had been passed on, it was not apparent that this had flowed from any obstructiveness or obfuscation rather than a lack of any concrete results. The applicant had not been excluded from the investigative process to such a degree as would infringe the minimum standard required under Article 2.

(iii) *Promptness and reasonable expedition*: The RUC had taken up the inquiries without undue delay and the absence of progress thereafter had largely been due to the lack of any strong leads and to difficulties in interviewing Weir, who had remained outside the jurisdiction, not to any wilful foot-dragging or prevarication. A further factor was the considerable number of other cases that were also being reviewed over this period. No breach of these requirements had been made out.

(iv) *Effectiveness*: There had not been any significant oversights or omissions. The key traceable witnesses had been interviewed, and the available evidence collected and reviewed. The apparent errors or shortcomings of the RUC identified by the applicant could not be regarded as rendering the investigative process inadequate when viewed as a whole. As to whether a further prosecution should have been brought against McClure and Shield, the Court noted that they were relatively minor participants in the events and the authorities could reasonably take the view that attempting to revive or upgrade the previous charges would be either doomed to failure or unduly oppressive and thus not assist materially in bringing to account those principally responsible for the death of the applicant's husband. Nor was it apparent that a prosecution against any other person would have had any prospect of success given Weir's refusal to make a statement or give evidence. There had not been any culpable disregard, discernable bad faith or lack of will on the part of the authorities.
Conclusion: violation on account of the RUC's lack of independence (unanimously).

Article 41 – EUR 5,000 in respect of non-pecuniary damage.

Note: The Court also found violations of Article 2 on identical grounds in judgments delivered on the same day in four other United Kingdom cases: *McCartney* (no. 34575/04), *McGrath* (no. 34651/04), *O'Dowd* (no. 34622/04) and *Reavey* (no. 34640/04).

USE OF FORCE
Use of potentially lethal gas in an operation to rescue over 900 hostages: *communicated*.

FINOGENOV and Others - Russia (N° 18299/03)
[Section I]

In October 2002 a group of Chechen guerrilla fighters took about 900 hostages in a Moscow theatre and held them at gunpoint for three days. With a view to rescuing the hostages, the Russian security forces dispersed an unknown gas through the theatre's ventilation system. The applicants, who were either hostages themselves or relatives of deceased hostages, alleged that the subsequent evacuation of the hostages was chaotic: they had been left lying outside on the ground in temperature of 3°C and many of them had died out of negligence (having been left lying on their backs and then suffocating on their vomit). There had not been enough ambulances or medical staff to accompany the victims to the hospitals, so they had been transported in ordinary buses. The prosecutor started a criminal investigation into the events. The applicants as injured parties enjoyed access to the materials in the case file, but were not allowed to make photocopies, disclose the information to third parties or contact the medical experts who had examined the bodies. Concluding that there had been no direct link between the gas used in the rescue operation and the death of the hostages, the prosecutor eventually refused to initiate a criminal investigation into the actions of the State authorities during the crisis although he continued the investigation in respect of the presumed terrorists. The applicants subsequently made repeated complaints about the inadequacy of the investigation into the conduct of the rescue operation and about the use of potentially lethal gas. However, their requests for the investigation to be reopened were to no avail. Some of the applicants filed civil actions against the State, but their claims were dismissed.
Communicated under Articles 2 (right to life), 3 (inhuman and degrading treatment) and 13 (effective investigation).

ARTICLE 3

EXPULSION
Detention of foreign nationals suspected of terrorist links on the basis of legislation subsequently declared incompatible with the Convention by the House of Lords: *relinquishment in favour of the Grand Chamber*.

A. and Others - United Kingdom (N° 3455/05)
[Section IV]

The application concerns eleven non-British nationals who were detained under special terrorism legislation. The reason for their detention without trial was that they were suspected international terrorists who were not British nationals and who could not be deported for fear that they would be subjected to treatment contrary to Article 3 in their countries of origin. The case raises issues notably under Articles 3, 5 and 14 of the Convention. (For more details, see Information Note no. 73.)

POSITIVE OBLIGATIONS
Lack of investigation into complaints about intimidation of a remand prisoner in solitary confinement: *violation*.

STEPULEAC - Moldova (N° 8207/06)
Judgment 6.11.2007 [Section IV]

(see Article 5 § 1 (c) below)

ARTICLE 5

Article 5 § 1

DEPRIVATION OF LIBERTY
Detention of foreign nationals suspected of terrorist links on the basis of legislation subsequently declared incompatible with the Convention by the House of Lords: *relinquishment in favour of the Grand Chamber*.

A. and Others - United Kingdom (N° 3455/05)
[Section IV]

(see Article 3 above)

LAWFUL ARREST OR DETENTION
Failure to notify a detention order within the time-limit prescribed by law: *violation*.

VOSKUIL - Netherlands (N° 64752/01)
Judgment 22.11.2007 [Section III]

(see Article 10 below)

Article 5 § 1 (c)

REASONABLE SUSPICION
Applicant's arrest and pre-trial detention without verifying whether the complaints against him were *prima facie* well-founded: *violation*.

STEPULEAC - Moldova (N° 8207/06)
Judgment 6.11.2007 [Section IV]

Facts: The applicant was a director of a private company which provided security services. He was first arrested in November 2005 following the opening of a criminal investigation into allegations by one of his employees of blackmail and threats of violence. He was detained in a remand centre of the investigating authority - a subdivision of the Ministry of Internal Affairs. His company's licence was revoked at the request of the Ministry of Internal Affairs, on the grounds that the company had breached the rules about guards wearing uniforms of certain colours and that the applicant had been involved in criminal activities. In December 2005 the applicant was released on bail. He told the media that he had been arrested as a result of efforts by the Ministry to monopolise the security services market by destroying competitors, including his company. Some days later, he was again arrested on the ground that two other persons had accused him of blackmail. The complaint was registered by the same officer as had registered the previous complaint against him. The applicant unsuccessfully appealed against his detention. He complained to the

Prosecutor General's Office that, in the absence of his lawyer, unidentified persons had come to his cell and put pressure on him to give up his business. However, he received no response. He also complained to no avail of poor detention conditions and a lack of medical assistance, claiming that he was suffering from bronchitis. In March 2006 he was transferred to a Ministry of Justice detention centre. In May 2006 he was released against an undertaking not to leave the city.

Law: Article 3 – The applicant had been detained for over three months without adequate medical assistance, sufficient food and heating, free access to tap water and a toilet or access to daylight for up to 22 hours a day. As regards the alleged intimidation of the applicant in his cell, the Court did not have sufficient evidence before it. However, the applicant had been detained in solitary confinement, where he felt particularly vulnerable, without a court order. Moreover, keeping an accused person in a detention centre under the same authority as the one prosecuting him (the Ministry of Internal Affairs) created the potential for abuse. Despite all this, the authorities had not taken any steps to properly investigate his complaints.
Conclusion: violations (unanimously).

Article 5 § 1 – As regards the applicant's first arrest, none of the courts examining the prosecutor's actions and requests for arrest had dealt with the issue of whether there had been a reasonable suspicion that the applicant had committed a crime, despite the applicant's claim that he was innocent. Given the lack of an explicit statement on this point in the domestic courts' decisions, the Court had to be particularly thorough in its own review. The only ground for the applicant's arrest and pre-trial detention was that the victim – the applicant's employee – had directly identified him as the perpetrator of a crime. However, he had not directly indicated the applicant's name in his complaint. It was unclear why the applicant had been considered an alleged perpetrator at the very start of the investigation and before further evidence could be obtained. He had never been accused of condoning illegal activities on his company's premises, which might have explained his arrest as a director of the company, but of personal participation in blackmail. The Government had stated that the victim had identified the applicant some time after lodging his complaint. However, they had submitted no supporting documents, despite the fact that identification procedures should be properly documented in accordance with the law. There were also reasons to doubt the victim's credibility. The conflict he had had with the company's administration gave further reasons to doubt his motives. However, the authorities had not verified the information he had provided. That lent support to the applicant's claim that the investigating authorities had not genuinely verified whether there were reasonable grounds for suspecting him of a crime, but had rather pursued his arrest, allegedly for private interests. It was noteworthy that the investigating authority had asked for and had obtained the withdrawal of the company's licence on the ground of the applicant's participation in illegal activities before any court had established his guilt.
As regards the applicant's second arrest, it was based on an alleged crime which had been committed during a period ending in September 2005. Had the applicant indeed committed the crime and had he wanted to pressure the victim or witnesses or destroy evidence, he would have had plenty of time to do so before his arrest in December 2005, and no evidence had been submitted to the Court of any such actions on the part of the applicant. Therefore, there had been no urgent need for an arrest in order to stop ongoing criminal activity. Instead of such verification, the applicant had been arrested the day the investigation had started. More disturbingly, it followed from the statements of the two alleged victims that one of the complaints had been fabricated and the investigating authority had not verified with him whether he had indeed made and signed that complaint, while the other was the result of the direct influence of the officer. Both complaints were therefore irrelevant for the purposes of determining the existence of a reasonable suspicion that the applicant had committed a crime.
The Court also found similarities between the applicant's two arrests. On each occasion the only ground for his arrest had been a complaint by an alleged victim; no other evidence to support a reasonable suspicion that the applicant had committed a crime had ever been submitted. All of the above had created a very troubling impression that the applicant had been deliberately targeted.
Conclusion: violations (unanimously).

Article 41 – EUR 12,000 for non-pecuniary damage.

Article 5 § 1 (e)

PERSONS OF UNSOUND MIND
Prolonged detention in an ordinary remand centre pending admission to a psychiatric hospital: *violation*.

MOCARSKA - Poland (N° 26917/05)
Judgment 6.11.2007 [Section IV]

Facts: In May 2005, following a knife attack on her sister, the applicant was arrested, charged with domestic violence and admitted to a detention centre. In October 2005, referring to the expert's opinion, a district court discontinued the proceedings against her on the ground that she could not be held criminally responsible, ordered her placement in a psychiatric hospital and prolonged her detention. The selected psychiatric hospital was unable to admit the applicant immediately due to a lack of resources and availability. In June 2006 the applicant was finally transferred from the detention centre to the hospital.

Law: The applicant's detention after the discontinuation of the proceedings against her had a legal basis in domestic law. However, the permissible length of detention pending transfer to a psychiatric hospital was not specified in any statutory or other provision. The Court had therefore to determine whether the continuation of provisional detention for eight months could be regarded as lawful. The domestic court had asked the psychiatric commission to indicate a hospital to which the applicant could be transferred only two months after the proceedings had been discontinued. It had taken the commission two more months to indicate a hospital for the applicant. Lastly, the applicant had had to wait more than three months before her admission to that hospital. During that time she had been detained in a regular detention centre. The Court accepted the Government's argument that it would be unrealistic and too rigid an approach to expect the authorities to ensure that a place was immediately available in a selected psychiatric hospital. However, an eight-month delay in the admission of the applicant to a psychiatric hospital and the beginning of her treatment had been obviously harmful to her and could not be regarded as acceptable. Therefore, a reasonable balance had not been struck between the competing interests. To hold otherwise would entail a serious weakening of the fundamental right to liberty to the detriment of the person concerned and thus impair the very essence of the right protected by Article 5 of the Convention.
Conclusion: violation (unanimously).

Article 5 § 1 (f)

EXTRADITION
Inconsistent interpretation of provisions applicable to detainees awaiting extradition: *violation*.

NASRULLOYEV - Russia (N° 656/06)
Judgment 11.10.2007 [Section I]

Facts: The applicant, a Tajikistani national, was charged by the Tajikistan Prosecutor General's Office with numerous criminal offences (notably manslaughter, kidnapping and participation in an armed group with a view to attacking Government institutions) allegedly committed during the 1992 to 1997 civil war in that country. On 13 August 2003 the applicant was arrested in Moscow and detained on the basis of a subsequent court order of 21 August 2003 with a view to being extradited to Tajikistan. The order contained no time-limit for the applicant's detention. The applicant on several occasions sought to be released from detention, but to no avail. Following the deputy prosecutor's request, on 1 July 2006 a court extended the applicant's detention by fourteen days. Several days later the Prosecutor General informed the applicant about the decision to extradite him to Tajikistan. The applicant appealed against that decision claiming that he was being prosecuted on political grounds and that he risked a death sentence if found guilty as charged. On 12 July 2006 the Court indicated to the Russian Government under Rule 39 of the Rules of Court not to extradite the applicant until further notice. Subsequently, on 21 August 2006 a court overturned the Prosecutor General's decision, at the same time ordering the applicant's release, since

the Tajikistan Government had not furnished necessary guarantees required under the Russian law. The Supreme Court upheld that decision.

Law: Article 5 § 1 (f) – The Court firstly examined whether the initial decision on the applicant's detention dated 21 August 2003 had been sufficient for holding him in custody for any period of time. The Court observed the inconsistent legal interpretation of domestic authorities on the issue of provisions of Russian law applicable to detainees awaiting extradition and concluded that they were neither precise nor foreseeable. They therefore fell short of the "quality of law" standard required under the Convention and the applicant's detention was consequently found to be unlawful: *violation*.

Article 5 § 4 – The Court observed that Articles 108 and 109 of the Russian Code of Criminal Procedure, regulating review of detention, provided that the prosecutor was to request the court extension of a custodial measure and that the detainee was allowed to take part in such proceedings and plead for his or her release. However, nothing in the wording of those provisions indicated that such proceedings could be taken on the initiative of the detainee, the prosecutor's application for an extension of a custodial measure being the required element for institution of such proceedings. In the present case such a review was initiated only once during the applicant's three-year-long detention. Consequently, during his time in detention the applicant did not have at his disposal a procedure through which he could have challenged the lawfulness of his detention in court: *violation*.

Article 41 – EUR 40,000 in respect of non-pecuniary damage.

Article 5 § 3

LENGTH OF PRE-TRIAL DETENTION

Failure by the Belgian judicial authorities to give any serious consideration to the question of alternatives to preventive detention: *violation*.

LELIEVRE - Belgium (N° 11287/03)
Judgment 8.11.2007 [Section I]

Facts : The applicant, an accomplice in the "Dutroux case", was arrested and charged in August 1996 with kidnapping and imprisoning a minor. He was placed in pre-trial detention and was subsequently also charged, among other things, with kidnapping six people, five of whom were minors and four of whom had died as a result, and with imprisoning three of them. The investigating authorities examined the matter of the applicant's continued detention on a monthly basis. From March 2001 onwards the applicant made several applications to be released, under Article 5 § 3 of the Convention. The trial opened at the beginning of March 2004. Four days of hearings were held every week and 459 witnesses were summoned. On 22 June 2004 the Assize Court sentenced the applicant to 25 years' imprisonment, for committing or aiding and abetting the following offences: false imprisonment with aggravating circumstances and abduction of female juveniles, trafficking ecstasy pills, conspiring to abduct female juveniles and involvement in various forms of trafficking (including drugs and human beings).

Law: The applicant's continued detention had been justified by the continuing existence of plausible reasons for suspecting him of having committed criminal offences. The other reasons given for refusing to release the applicant, including the risk that he would abscond and avoid appearing for trial, had remained throughout the proceedings, even though their relevance had varied considerably in intensity over time. Concerning the obligation of the authorities to consider alternatives to his continued pre-trial detention, the applicant had requested that such a possibility be given serious consideration and suggested alternative solutions (electronic surveillance and obligation to report to a police station several times a day), or at least suggested means of reducing the risk of his absconding. The Belgian courts had generally failed to respond to his proposals, however, and none had envisaged alternatives to pre-trial detention of its own motion. A judgment delivered in August 2003 had replied, without further explanation, that no alternative

measure could effectively make the applicant less dangerous. However, the proposals the applicant had made seemed to indicate willingness to provide guarantees that he would appear in court. Furthermore, the investigating authorities had the power to consider alternatives to pre-trial detention of their own motion and, more importantly, Belgian law left them considerable leeway to decide what type of alternative measure to apply, depending on the circumstances of the case. An applicant could not be blamed, therefore, for not specifying in advance which alternative solution he preferred. The question of alternative measures to the applicant's pre-trial detention had thus never been seriously examined by the judicial authorities. Yet the applicant had already been detained for almost five years when he first applied for his release, relying on Article 5 § 3 of the Convention. In short, the authorities had not produced "relevant and sufficient" justification for keeping the applicant in detention for seven years, ten months and eight days.
Lastly, as to whether the proceedings had been conducted with "special diligence", almost two years had passed between the transmission of the investigation file and the opening of the trial.
Conclusion: violation (six votes to one).

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

ARTICLE 6

Article 6 § 1 [civil]

RIGHT TO A COURT
Non-enforcement of a decision of the Human Rights Chamber: *violation*.

KARANOVIĆ - Bosnia and Herzegovina (N° 39462/03)
Judgment 20.11.2007 [Section IV]

Facts: In 1987 the applicant was granted an old-age pension from the pension fund of the former Socialist Republic of Bosnia and Herzegovina. In 1992 he left Sarajevo and moved to what is now known as Republika Srpska. He began receiving his pension from that entity. In 2000 the applicant returned to Sarajevo, which is part of the Federation of Bosnia and Herzegovina – the other entity within the country – and attempted to resume drawing his pension from that entity's pension fund ("the Federal Fund"). Pension legislation has not yet been harmonised between the two entities and pensions are generally lower in Republika Srpska than in the Federation of Bosnia and Herzegovina. As the applicant's request to be allowed to draw pension from the Federal Fund was unsuccessful he complained to the Human Rights Chamber for Bosnia and Herzegovina. In a decision of 10 January 2003 the Human Rights Chamber held that the applicant had been discriminated against in his enjoyment of his right to social security, as guaranteed by Article 9 of the International Covenant on Economic, Social and Cultural Rights. It ordered the Federation of Bosnia and Herzegovina to take appropriate legislative and administrative steps with a view to ending such discrimination and to pay the applicant the difference between the amount of pension he had in fact received and the amount he should have received from the Federal Fund. However, even though he obtained some remuneration from the Federal Fund, the applicant's pension continued to be paid by Republika Srpska.

Law: Article 6 § 1 – Four years had passed since the decision of the Human Rights Chamber had become final and the applicant had still not been compensated in full or transferred to the Federal Fund. Consequently, the essence of his right of access to a court had been impaired: *violation*.

Articles 46 and 41 – The Court held that Bosnia and Herzegovina was to secure the enforcement of the Human Rights Chamber's decision by transferring the applicant to the Federal Fund and paying him EUR 2,000. It also made a financial award in respect of non-pecuniary damage (EUR 1,500).

ACCESS TO COURT
Temporary suspension of courts in Chechnya owing to a counter-terrorist operation: *violation*.

KHAMIDOV - Russia (N° 72118/01)
Judgment 15.11.2007 [Section V]

Facts: The applicant and his brother owned land in a Chechen village, on which their houses and family business were located. In October 1999 the Russian Government launched a counter-terrorist operation in the Chechen Republic. Fearing possible attacks, the applicant and his relatives left the village. The police units moved onto their property and denied them access to the estate when they tried to return. The applicant and his family spent the winter in tents in a refugee camp, where living conditions were very poor. The applicant's infant nephew died of pneumonia while at the camp. In 2001 the courts in Chechnya became operational again. The applicant brought successful proceedings for an order for the eviction of the police units. However, although the judgment was made in February 2001 it was not enforced until June 2002. The applicant's claims for compensation were rejected as groundless.

Law: Article 8 and Article 1 of Protocol No. 1 – *Scope of examination under Article 1 of Protocol No. 1*: Since the applicant had lodged the application solely in his name, he could rely on that provision only in so far as his own possessions were concerned. His brother's house clearly did not constitute one of his possessions. The land and industrial premises had been formally assigned to the company which had been co-founded and was co-owned by the applicant and his brother and had its own legal personality. Although the applicant's brother had refused to participate in the proceedings before the Court, he had clearly supported the application, given that he had issued the applicant with a general power of attorney. In such circumstances, they did not appear to have competing interests which could create difficulties, and therefore the applicant could claim to be a "victim" of the alleged violations of Article 1 of Protocol No. 1 as regards the impugned measures taken in respect of the plot of land and industrial premises that had been transferred to the company.

Scope of examination under Article 8 of the Convention: Since the applicant and his brother had always lived as one family and their houses had been built very close together, the applicant's brother's house, as well as his own could be regarded as the applicant's "home" within the meaning of that Article.

Existence of interference: Where the State took an individual's property for a certain period of time, it was for the State to take appropriate steps to certify the state and condition of that property prior to, and to account for it after, the occupation. Having regard to the documentary evidence in its possession, the Court considered it established that, contrary to the findings of fact made by the domestic courts, the damage to the applicant's estate had been caused by the consolidated police units of the Ministry of the Interior, which had been stationed there. There had therefore been interference with the applicant's rights to respect for his home and the peaceful enjoyment of his possessions.

Compliance with lawfulness requirement: The Law on Suppression of Terrorism empowered State agents to access private property during the immediate pursuit of a suspect rather than to occupy it even for a short time. While vesting wide powers in State agents within the zone of the counter-terrorist operation and releasing them from any liability for damage caused to "other legally protected interests", the law in question did not define with sufficient clarity the scope of those powers or the manner of their exercise so as to afford adequate protection against arbitrariness. The provisions at issue, formulated in vague and general terms, could not serve as a sufficient legal basis for such a drastic interference. Moreover, in the judgment of February 2001, while ordering the eviction of the police units, the court had clearly held that the continuing occupation of the applicant's estate was in breach of national law. The occupation of the estate after the eviction order had therefore also been manifestly in breach of Russian law. The damage caused to the applicant's estate had no basis in domestic law either, given, in particular the military commander's order to preserve the applicant's property from destruction. In view of the above considerations and in the absence of an individualised decision or order challengeable in court and authorising the police units to occupy the estate and inflict damage on it, the interference with the

applicant's rights was not "lawful", within the meaning of Article 8 of the Convention and Article 1 of Protocol No. 1.
Conclusion: violation (unanimously).

Article 6 § 1 – *Access to court*: It was clear under domestic law that the applicant was only allowed to file his eviction claim in the place where his estate was located, i.e. Chechnya. The Russian authorities may have experienced certain difficulties in ensuring the proper functioning of the judicial system in Chechnya in view of the military action in the region. Nevertheless, they could have made an effort to authorise the applicant to file a claim in another region of Russia. The applicant had therefore effectively been deprived, between October 1999 and January 2001 when the Chechen courts had been out of operation, of an opportunity to seek the eviction of the police units. In the absence of any justification for this on the Government's part, the limitation imposed on the applicant's right of access to a court had impaired the very essence of his right and had clearly been disproportionate.
Conclusion: violation (unanimously).

Delayed enforcement of the judgment: The Court could not accept the Government's general reference to the counter-terrorist operation in the Chechen Republic as a sufficient reason to justify the lengthy non-enforcement of the judgment in the applicant's favour (over 15 months). This judgment had been given when the judicial system in Chechnya had started functioning again. The Government had advanced no argument capable of persuading the Court that they had in any way been objectively precluded from complying speedily with the judgment ordering the eviction of the police units, or that they had attempted to find a satisfactory solution that would have mitigated the detrimental effects of the non-enforcement on the applicant and his family, such as entry into a lease agreement with him or the like. The domestic authorities had thus defaulted in their obligation to secure the applicant's right to a court.
Conclusion: violation (unanimously).

Fairness of the compensation proceedings: The courts had considered that it had not been proven that the applicant's estate had been occupied and damaged by the police units, despite abundant evidence to the contrary (*inter alia*, letters from various public authorities acknowledging the occupation and the existence of damage) and the findings in the judgment of 2001 ordering their eviction. In the Court's view, the unreasonableness of that conclusion was so striking that the decisions of the domestic courts could only be described as grossly arbitrary. By reaching such a conclusion in the circumstances of the case, the domestic courts had in fact set an extreme and unattainable standard of proof for the applicant so that his claim could not, in any event, have had even the slightest prospect of success. The applicant had therefore been denied a fair hearing concerning his claim for compensation in respect of damage caused to his estate.
Conclusion: violation (unanimously).

Article 41 – EUR 157,000 in respect of pecuniary damage and EUR 15,000 in respect of non-pecuniary damage.

FAIR HEARING
Arbitrary findings of the domestic courts: *violation*.

KHAMIDOV - Russia (N° 72118/01)
Judgment 15.11.2007 [Section V]

(see above)

FAIR HEARING
Summary rejection of application for leave to appeal to the Court of Cassation: *case referred to the Grand Chamber*.

GOROU - Greece (n° 2) (N° 12686/03)
Judgment 14.6.2007 [Section I]

Facts: The applicant, a civil servant in the Ministry of Education, lodged a complaint and a civil claim against her hierarchical superior, alleging perjury and defamation. Before the European Court she complained that insufficient reasons had been given for the decision whereby the public prosecutor had rejected her application for leave to appeal on points of law. In addition, she complained of the length of the proceedings.

Law: The Court held by four votes to three that there had been no violation of Article 6 § 1 as regards the allegation that the proceedings had been unfair, and unanimously that there had been a violation of Article 6 § 1 as regards the length of the proceedings.

The case was accepted for referral to the Grand Chamber at the applicant's request.

FAIR HEARING
RIGHT TO A COURT
Supervisory review of final judgments and lack of impartiality of the Supreme Court; failure to enforce judgments and administrative decisions for the restitution of property: *violations*.

DRIZA - Albania (N° 33771/02)
Judgment 13.11.2007 [Section IV]
RAMADHI and five Others - Albania (N° 33222/02)
Judgment 13.11.2007 [Section IV]

(see Article 46 below)

PUBLIC HEARING
Lack of public hearing in proceedings for the imposition of preventive measures: *violation*.

BOCELLARI and RIZZA - Italy (N° 399/02)
Judgment 13.11.2007 [Section II]

Facts: Proceedings were brought against the first applicant for conspiracy. He was eventually acquitted. Suspecting him of being a member of a criminal organisation, the public prosecutor's department had brought parallel proceedings to ensure the application of the preventive measures provided for by law. The division of the court responsible for applying those measures ordered the seizure of numerous assets belonging to the applicants. The remainder of the proceedings were held in private, under a law which rules out any public hearings in such cases. The court ordered the applicant to be placed under police supervision and issued a four-year compulsory residence order against him. In addition, it ordered the confiscation of the assets seized earlier. The first applicant appealed. The Court of Appeal, sitting in chambers, partially modified the order and upheld the lower court's decision for the remainder. The first applicant lodged an appeal on points of law, which was dismissed by the Court of Cassation.

Law: The holding in chambers of proceedings aimed at applying preventive measures, both at first instance and on appeal, was expressly provided for by law and parties had no possibility of requesting or obtaining a public hearing. Higher interests, such as protecting the private life of minors or third parties indirectly concerned by a financial investigation, had sometimes to be taken into account in proceedings of this type. Furthermore, proceedings aimed mainly at verifying finances and movements of capital could

be highly technical. However, it was important not to lose sight of what was at stake in preventive procedures or of the effects they could have on the personal situations of the people involved. These procedures were aimed at the confiscation of assets and capital, and could therefore directly and significantly affect a person's financial situation. With so much at stake, it could not be said that public scrutiny was not a necessary condition to guarantee the rights of the interested parties. The Court considered it essential that litigants in proceedings for the application of preventive measures should be offered at least the opportunity to request a public hearing before the specialised sections of the ordinary and appeal courts.
Conclusion: violation (unanimously).

Article 41 – Non-pecuniary damage: finding of a violation sufficient.

Article 6 § 1 [criminal]

APPLICABILITY
Proceedings resulting in the demolition of a house built without planning permission: *Article 6 applicable*.

HAMER - Belgium (N° 21861/03)
Judgment 27.11.2007 [Section II]

Facts: In 1967 the applicant's parents built a holiday home on a piece of land without planning permission. When the applicant's mother died, the deed concerning the partition of the estate with her father expressly mentioned the existence of the building and was registered by the authorities, who charged a registration fee. When the applicant's father died the notarial deed of partition expressly mentioned the house as a holiday home and the applicant paid the corresponding inheritance tax. Every year she paid an advance on tax payable on immovable property and the property tax payable on a second home. The partly government-controlled water supply company connected the house to the mains without any reaction from the authorities. Not until 1994 did the police draw up two reports, one concerning the felling of trees on the property in violation of forestry regulations, and one for building a house without planning permission in a woodland area where no planning permission could be granted. In 1999 the applicant was summoned by the public prosecutor for having a weekend home that had been built without permission, and for felling about fifty pine trees in violation of the Forestry Decree. The Criminal Court acquitted the applicant. The prosecuting authorities appealed and the Court of Appeal upheld the judgment in so far as it acquitted the applicant on the tree-felling count. However, it found her guilty of keeping a house built without authorisation, by virtue of a decree on the organisation of regional development. Noting that the proceedings had taken longer than was reasonable, the Court of Appeal simply declared the applicant guilty and ordered her to restore the site to its original state, which meant demolishing the house. The applicant lodged an appeal on points of law, but to no avail. The Court of Cassation did not consider having to restore the site to its original state as a penalty but as a civil measure. The house was demolished pursuant to an enforcement order.

Law: Article 6 § 1 (reasonable time) – The fact that the Court of Appeal had pronounced a simple declaration of guilt against the applicant in view of the excessive length of the proceedings did not make her any less a "victim" in so far as that court had ordered her at the same time to restore the site to its original state.
Article 6 was applicable under its criminal limb as the demolition measure could be considered a "penalty" for the purposes of the Convention.
While the length of the proceedings on the merits did not appear unreasonable (they had taken a little over three and a half years for three levels of jurisdiction), the police report noting the unlawful nature of the construction marked the time from which the applicant had been "accused" within the meaning of the case-law and from which the reasonable time ran. The proceedings had therefore taken between 8 and 9 years for three levels of jurisdiction, including 5 years at the investigation stage, although the case had not been a particularly complex one.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 1 – The construction at issue had existed for twenty-seven years before the domestic authorities had reported the offence. Reporting infringements of spatial planning legislation was irrefutably the responsibility of the authorities, as was making the requisite resources available to do so. The Court was even able to consider that the authorities had been aware of the existence of the construction at issue as the corresponding taxes had been paid. In short, the authorities had tolerated the situation for twenty-seven years and there had been no change for another ten years after the offence had been reported. After such a long period of time, the applicant's proprietary interest in using her holiday home had been sufficiently great and established to constitute a substantive interest and, therefore, a "possession", and she had had a "legitimate expectation" that she could go on using her property. The interference with the applicant's right to the peaceful enjoyment of her property that resulted from the demolition of her house by order of the authorities had been provided for by law and pursued the aim of controlling the use of property in accordance with the general interest, by bringing the property concerned into conformity with a land-use plan establishing a woodland area on which no building could be authorised.
Concerning the proportionality of the interference, the Court pointed out that the environment had a value, and that economic imperatives and even certain fundamental rights, such as property rights, should not take precedence over environmental considerations, particularly when the State had passed laws on the subject. The public authorities then had a responsibility to take the necessary steps at the proper time to ensure that the environmental protection measures they had decided to implement were not rendered ineffectual. Restrictions on property rights were therefore permissible, provided, of course, that a reasonable balance was struck between the individual and collective interests involved.
The disputed measure had pursued the legitimate aim of protecting a woodland area where no building was permitted. The owners of the holiday home had been able to enjoy it in peace for a total uninterrupted period of thirty-seven years. The official documents, the taxes paid and the work done indicated that the authorities knew or should have known about the existence of the house for a long time, and once the offence had been reported, they had let another five years go by before prosecuting, thereby helping to perpetuate a situation which could only be prejudicial to the protection of the woodland area the law was meant to protect.
However, there was no provision in Belgian law for regularising a building erected in such a woodland area. The offence was not subject to limitation under Belgian law and the authorities were free to decide at any time to enforce the law. No measure other than restoring the site to its original state had seemed appropriate because of the undeniable interference with the integrity of a woodland area where no building was permitted. Furthermore, unlike the position in cases where there was implicit consent on the part of the authorities, this house had been built without any official authorisation. For those reasons the interference had not been disproportionate.
Conclusion: no violation (unanimously).

Article 41 – EUR 5,000 in respect of non-pecuniary damage.

FAIR HEARING
Criminal proceedings where evidence was obtained through a covert operation: *relinquishment in favour of the Grand Chamber*.

BYKOV - Russia (N° 4378/02)
[Section I]

The application concerns criminal proceedings where evidence was obtained though a covert operation, allegedly in violation of domestic law. The police intercepted and recorded a conversation between the applicant and a third party. The case raises issues under Articles 6 and 8. For more details, see the decision on admissibility (7.9.2006) in the Court's on-line data base HUDOC.

PUBLIC HEARING
Authorities' failure to provide regular transportation and information to the public at a trial held in a remote prison: *violation*.

HUMMATOV - Azerbaijan (Nos 9852/03 and 13413/04)
Judgment 29.11.2007 [Section III]

Facts: In 1996 the applicant was convicted of high treason and use of armed forces against the State and sentenced to death. His sentence was commuted to life imprisonment. Given Azerbaijan's undertaking to the Council of Europe to either release or retry political prisoners, the court of appeal decided to grant the applicant's request for a new investigation and a public hearing. The hearings took place in a high security prison where the applicant was detained. Access to hearings was severely restricted as permission had to be obtained first from the presiding judge and then the prison authorities. Observers who were granted access were subjected to a body search before entering the prison courtroom. In 2003 a court of appeal upheld the applicant's conviction and sentenced him to life imprisonment. His cassation appeal was rejected. In 2004 he was issued with a presidential pardon and released.

Law: Article 6 § 1 – The general public had not formally been excluded from the trial and various hearings had been attended by a number of people, although it was not clear if this was the case at each hearing. The Government had not provided evidence to prove that the public and media had been informed about the time and place of the hearings and adjourned hearings or been given instructions on how to reach the prison and on the conditions of access. The prison was located far from the capital and any inhabited area and was not easily accessible. There was no regular public transport or shuttle bus service to the prison. The fact that it had been necessary to arrange costly means of transport to a remote destination, as opposed to attending the court of appeal's courtroom in Baku, had clearly been a disincentive for those wishing to attend the applicant's trial. Moreover, the Government had not proved that free access to all members of the public was guaranteed at all hearings in the prison. In sum, the court of appeal had failed to adopt adequate compensatory measures to counterbalance the detrimental effect of the closed area of the prison on the public character of the applicant's trial. The authorities had given no justification, such as a security risk, for such a lack of publicity. Therefore, the applicant had not had a public hearing.
Conclusion: violation (unanimously).

Article 3 – The applicant had contracted tuberculosis and other serious diseases in prison. The medical care provided to him had been inadequate.
Conclusion: violation (unanimously).

The Court also found a violation of Article 13 (no effective remedy for his Article 3 grievance).

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

Article 6 § 3

RIGHTS OF THE DEFENCE
Inability of an accused to elect summary form of trial: *inadmissible*.

HANY - Italy (N° 17543/05)
Decision 6.11.2007 [Section II]

Proceedings for murder and carrying a prohibited weapon were brought against the applicant following the death of an Egyptian fellow countryman from a stab wound to the abdomen in the building where the applicant lived. The order to remand the applicant – who had travelled to Egypt in the meantime – in custody was impossible to enforce as he was nowhere to be found at his home or at his place of work. He

was declared a "fugitive" (*latitante*) and all notice was accordingly served on his officially assigned defence counsel. The applicant did not attend the preliminary hearing. He was committed for trial. When he was arrested a few months later the applicant was remanded in custody. He appointed a counsel of his choice, who applied, in vain, to reopen the time-limit within which summary proceedings had to be requested, which had expired since the preliminary hearing. The applicant subsequently pleaded not guilty, alleging that he had acted in self-defence. The trial court sentenced him to imprisonment.
Appealing on points of law, the applicant submitted that the authorities had declared him "untraceable" and "a fugitive" without taking into account the fact that the police had questioned his fellow tenant, Z, who had told them that the applicant had gone to Cairo, given them the Egyptian telephone number from which the applicant had called him and told them it was probably that of his family. The applicant alleged that the authorities had failed to follow the procedure for serving notice abroad and to try to contact him in Egypt, depriving him of the possibility of attending the preliminary hearing, where he could have asked the judge to be tried summarily. The Court of Cassation dismissed the appeal.

Inadmissible: The applicant complained that the fact that notice of the preliminary hearing had been served on his lawyer alone had prevented him from applying for summary proceedings within the time allowed. Summary trial undeniably offered certain advantages to the accused: if convicted, he would be given a considerably reduced sentence, and the prosecutor could not appeal against convictions that did not alter the legal classification of the offence. However, the Contracting States were not required by the Convention to provide for such simplified procedures. The application being inadmissible for the reasons set out below, the Court left open the question whether, where such procedures did exist, the principles of a fair trial meant not depriving a defendant arbitrarily of the possibility of requesting their application.
Attempts by the Italian authorities to notify the applicant of the date of the preliminary hearing had failed, as they did not have his address in Egypt. The police had only a telephone number in Egypt which he had left with a third party. The positive obligations linked to the notion of a fair trial did not require the State to effect a search abroad based on such a vague piece of information. As he had never denied delivering the fatal stab wound, the applicant should have expected an investigation to be opened. By leaving Italy without leaving a forwarding address, he had exposed himself to the risks resulting from the inability to serve him with documents concerning the preliminary investigations. In view of these particular circumstances, the authorities' failure to contact the applicant at the Egyptian telephone number a third party had supplied to the police and/or the refusal to reopen the time allowed for requesting a summary trial had not infringed the rights of the defence: *manifestly ill-founded*.

Article 6 § 3 (b)

ADEQUATE TIME AND FACILITIES
Applicant allowed only a few hours, without contact with the outside world, for the preparation of his defence: *violation*.

GALSTYAN - Armenia (N° 26986/03)
Judgment 15.11.2007 [Section III]

Facts: In April 2003, while on his way home from a demonstration by some 30,000 people (mostly women) that had been organised to protest against the Government and the conduct of the presidential elections, the applicant was arrested for "obstructing traffic and behaving in an anti-social way at a demonstration" and taken to the local police station for questioning. He argued that he and most of the other men present had not participated in the demonstration; but were there to support and protect the women and prevent trouble from breaking out. At the police station the applicant was charged with "minor hooliganism". He signed the relevant police record certifying that he had been made aware of his rights to legal representation and added "I do not wish to have a lawyer". The applicant alleged that he had initially refused to sign the record and requested a lawyer, but had been kept at the police station for five-and-a-half hours, during which time police officers had pressured him into signing the record and refusing legal assistance. At 11 p.m. that day he was presented before a judge,. After a brief hearing the

judge sentenced him to three days' administrative detention for "obstruction of street traffic" and "making a loud noise". The applicant alleged, and the Government did not explicitly dispute, that the record of the hearing had been drafted at some point after the hearing and that in reality there had been no clerk present and the hearing had not been recorded. According to the applicant, the hearing had lasted only about five minutes and been held in the judge's office. Only the judge and applicant (with the accompanying police officer) were present. The Government contested the applicant's allegations in this respect. According to the court records, the hearing was held in public with the participation of the judge, a clerk and the applicant; the applicant was kept at the police station for only two hours and taken to the judge at 7.30 p.m; the police had explained to him his right to have a lawyer; and the applicant had signed the record voluntarily, without objections. The applicant subsequently complained to a local human rights NGO that police officers had persuaded him to sign the document refusing a lawyer. The NGO's request to have criminal proceedings brought against the police officers and judge was rejected by the prosecutor.

Law: Article 6 § 1 – The fact that the only evidence in the proceedings was the witness testimony of an arresting police officer was not in itself contrary to Article 6, because the applicant – even if only at a very brief hearing – had been able to make submissions in defence of his position. Although none of the arresting police officers had been called and examined in court, the applicant had not asked for them to be called. As to the applicant's allegation that the trial judge was politically biased, although the period surrounding the presidential election of 2003 had seen increased political sensitivity, it was not possible to conclude from that alone that the trial judge was personally biased. Nor was there sufficient evidence to conclude that the hearing in question was not held in public as the applicant had cited only the alleged time and location of the hearing in support of his allegation: *no violation*.

Article 6 § 3 (b) – The mere fact that the applicant had signed a paper stating that he did not wish to have a lawyer did not mean that he did not need adequate time and facilities to prepare himself effectively for trial. Nor did the applicant's failure to lodge any specific requests during the short pre-trial period necessarily imply that no further time was needed to enable him – in adequate conditions – to properly assess the charge against him and consider his defence. Nothing suggested that his decision to sign the police record pursued any other purpose than to confirm that he was familiar with it and aware of his rights and the charge against him. The parties could not agree on the exact length of the pre-trial period but it had clearly not lasted more than a few hours. During that time the applicant had either been in transit to the court or was being held at the police station without contact with the outside world. Furthermore, during his short stay at the police station, he was also questioned and searched. The Court doubted that the circumstances in which the applicant's trial was conducted enabled him to familiarise himself properly with and to assess adequately the charge and evidence against him, or to develop a viable legal strategy for his defence: *violation*.

Article 6 § 3 (c) – All the materials before the Court indicated that the applicant had expressly waived his right to be represented by a lawyer both before and during the court hearing. There was no evidence to support his allegation that he had been "tricked" into refusing a lawyer. Noting that the applicant was accused of a minor offence and the maximum possible sentence could not have exceeded 15 days' detention; mandatory legal representation was not required in the interests of justice: *no violation*.

Article 11 – The interference with the applicant's right of freedom of association was prescribed by law and pursued a legitimate aim, the prevention of disorder. As to whether it was necessary in a democratic society, the Court reiterated that freedom to take part in a peaceful assembly was of such importance that a person could not be subjected to a sanction – even one at the lower end of the scale of disciplinary penalties – for participation in a demonstration which had not been prohibited, so long as he or she had not committed a reprehensible act. The applicant had been subjected to three days' deprivation of liberty for "obstruction of street traffic" and "making a loud noise". It was apparent from the police report that the street where the demonstration took place had been packed with people and the Government did not dispute that the traffic had been suspended by the traffic police prior to the demonstration. Nor had the authorities made any attempt to disperse the participants on account of the unlawful obstruction of traffic. It followed that the offence of "obstructing street traffic" of which the applicant was found guilty consisted merely of his physical presence at a demonstration in a street where the flow of traffic had

already been suspended. As to the "loud noise" he had made, there was no suggestion that it involved any obscenity or incitement to violence and it was hard to imagine a huge political demonstration of people expressing their opinions not generating a certain amount of noise. Accordingly, the applicant had been sanctioned merely for being present and proactive at the demonstration: *violation*.

Article 2 of Protocol No. 7 – The review procedure prescribed by domestic law did not provide a clear and accessible right to appeal and lacked any clearly-defined procedure or time-limits and any consistent application in practice: *violation*.

(This is the first in a series of cases dealing with the imposition of administrative sanctions on persons found guilty of participation in demonstrations or other minor offences in Armenia.)

Article 6 § 3 (c)

DEFENCE THROUGH LEGAL ASSISTANCE
Interception of a private telephone conversation between an accused taking part in a hearing by videoconference and his lawyer: *violation*.

ZAGARIA - Italy (N° 58295/00)
Judgment 27.11.2007 [Section II]

Facts: A law enacted in Italy in 1998 authorises defendants, in certain cases, to follow their trial at a distance, over a video link between the place of detention and the court room where the proceedings are being held. The accused can confer with his counsel in the courtroom over a special telephone line designed to guarantee the confidentiality of conversations between defendants and their lawyers.
In the applicant's case, during an Assize Court hearing the supervisor in the videoconference room had listened to and transcribed the telephone conversation between the applicant and his lawyer; the lawyer was in the hearing room, while the applicant followed the proceedings by videoconference from his place of detention. The applicant's lawyer learnt of the interception almost eleven months later. The proceedings brought against the supervisor who made the transcription were discontinued. As a result no disciplinary action was taken.
Better sound-proofed telephone booths were installed in prisons. The applicant complained to the Strasbourg Court that he had not been able to communicate with his lawyer in private.

Law: Articles 6 § 3 (c) and 6 § 1 taken together – In eavesdropping on the applicant's telephone conversation with his lawyer, the supervisor had breached the confidentiality principle enshrined in Italian law. No valid justification for such conduct had been given by the Government, who had simply submitted that the eavesdropping had been "accidental". That being so, the Court could not find that the eavesdropping and the transcription of the conversation in a confidential report addressed to the prison management had been "absolutely necessary".
The Court pointed out that the possibility for a defendant to give confidential instructions to his counsel at the time when his case was being discussed and evidence adduced before the trial court was an essential feature of a fair trial.
The intercepted conversation did not appear to have any direct bearing on the merits of the charges or the strategy of the defence and the applicant and his counsel had not found out about it until over ten months later, but at that time the proceedings against the applicant were still pending. Considering the State's failure to take firm measures against the supervisor, the criminal charges against whom had been dropped and against whom no disciplinary action had been taken, the applicant had no guarantee that it had not happened on other occasions. It was not unreasonable, therefore, for the applicant to fear that other conversations might be intercepted, which might have made him reluctant to discuss issues likely to be of use to the prosecution.
Conclusion: violation (unanimously).

Article 41 – Non-pecuniary damage – finding of a violation sufficient.

See also *Marcello Viola v. Italy* judgment, no. 45106/04, 5 October 2006, Information Note no. 90.

ARTICLE 7

Article 7 § 1

NULLUM CRIMEN SINE LEGE
Conviction in the absence of agreed limitations on the exclusive economic zones of two States: *communicated*.

PLESHKOV - Romania (N° 1660/03)
[Section III]

The applicant complained that he had been given a suspended prison sentence for entering Romania's exclusive economic zone and fishing there during a prohibition. He considered his conviction, in the absence of any agreement delimiting the respective exclusive economic zones of Bulgaria and Romania, to be contrary to the Convention and the United Nations Convention on the Law of the Sea. He also considered the confiscation of his boat and the tools and equipment on board to be in breach of Article 1 of Protocol No. 1.
Communicated under Article 7 of the Convention and Article 1 of Protocol No. 1.

ARTICLE 8

PRIVATE LIFE
Interception and recording of conversation through a covert operation: *relinquishment in favour of the Grand Chamber*.

BYKOV - Russia (N° 4378/02)
[Section I]

(see Article 6 "Criminal" above)

PRIVATE LIFE
Failure by the domestic courts to protect the applicant's reputation in defamation proceedings following the publication of a letter accusing him of acts tantamount to a criminal offence: *violation*.

PFEIFER - Austria (N° 12556/03)
Judgment 15.11.2007 [Section I]

Facts: The applicant published a commentary that was strongly critical of a professor who had written an article alleging that the Jews had declared war on Germany in 1933 and trivialising the crimes of the Nazi regime. Some five years later, the professor was prosecuted under the National Socialism Prohibition Act on account of the article. He committed suicide shortly before his trial. Subsequently, the chief editor of a right-wing magazine, *Zur Zeit*, addressed a letter to subscribers asking for financial support and claiming that a group of anti-fascists was trying to damage it by means of disinformation in the media and by instituting criminal proceedings and civil actions. The letter repeated an allegation the magazine had already made in an earlier article that the applicant was a member of a "hunting association" that had

driven the professor to his death. The domestic courts acquitted the chief editor of defamation charges on the grounds that the letter contained a value judgment which had a sufficient factual basis.

Law: The complaint was that the State had failed to protect the applicant's reputation from interference by third parties. Article 8 was applicable as, even in the context of a public debate, a person's reputation formed part of his or her personal identity and psychological integrity and so fell within the scope of his or her "private life". The domestic courts had considered the impugned statement to be a value judgement with a sufficient factual basis to avoid being defamatory. The Court was not convinced by that assessment, as the statement clearly established a causal link between the applicant's actions and the professor's suicide. Such a link was not a matter of speculation, but a fact susceptible of proof and no evidence of its existence had been offered. Further, while it was true that even statements that shocked or offended were protected by the right to freedom of expression, the statement here had overstepped acceptable limits by accusing the applicant of acts tantamount to criminal behaviour in that it was alleged that he had ultimately driven the professor to suicide.
Further, even if the statement were to be understood as a value judgment, it lacked a sufficient factual basis. The use of the expression "a member of a hunting association" implied that the applicant had been acting in cooperation with others with the aim of persecuting and attacking the professor. There was no indication, however, that the applicant, who had merely written one article at the very beginning of a series of events, had acted in such a manner or with such an intention and his article had not transgressed the limits of acceptable criticism. The Court was therefore not convinced that the reasons advanced by the domestic courts for protecting freedom of expression outweighed the applicant's right to protection of his reputation.
Conclusion: violation (five votes to two).

Article 41 – EUR 5,000 for non-pecuniary damage.

PRIVATE LIFE
Receipt of unsolicited pornographic messages by e-mail and prosecutor's decision not to institute criminal proceedings: *interference, inadmissible*.

MUSCIO - Italy (N° 31358/03)
Decision 13.11.2007 [Section II]

The applicant, the president of a Catholic parents' association, brought proceedings against a person or persons unknown because of obscene messages he had received by e-mail. The prosecuting authorities discontinued the proceedings because there had been no defamation, fraud or unlawful use of the applicant's personal data, and the applicant could not rely on the Article of the Criminal Code outlawing the circulation of obscene pictures as, although pornographic, the content of the offending e-mails was not obscene. The e-mails the applicant received had been sent to Internet addresses selected at random. It was impossible to identify the sender as he had concealed his e-mail address. The applicant complained that he had had no legal means of refusing to receive the offending e-mails.

Inadmissible: The applicant had received pornographic e-mails that had offended his moral convictions. The Court considered that receiving unwanted or offensive communications amounted to an interference with a person's right to respect for his private life. Once connected to the Internet, users of electronic mail systems no longer enjoyed effective protection of their privacy, exposing themselves to what were often unwanted messages, images and information. That drawback could be partly avoided by installing electronic "filters".
The legal proceedings brought by the applicant had never had any chance of success, the sender of the offending messages having concealed his e-mail address. It was a fact that the efforts of Internet service providers in various countries to combat "spam" encountered objective difficulties which were not always technically surmountable.
That being so, the Court could not find that the State should have made additional efforts to discharge the positive obligations it might have had under Article 8.

Furthermore, Internet access providers operated under the terms of agreements concluded with State authorities and under their supervision. The applicant could therefore have lodged a civil claim for damages, which might have led to the award of financial compensation even if it had proved impossible to identify the sender of the offending e-mails: *manifestly ill-founded.*

See also *K.U. v. Finland*, no. 2872/02, decision of 27 June 2006, Information Note no. 88.

PRIVATE AND FAMILY LIFE
Prohibition under domestic law on the use of ova and sperm from donors for *in vitro* fertilisation: *admissible*.

HALLER and Others - Austria (N° 57813/00)
Decision 15.11.2007 [Section I]

The applicants are two couples who suffer from sterility and wish to make use of medically assisted procreation for conceiving a child. Given their medical conditions, in the case of the first couple only *in vitro* fertilisation with the use of sperm from a donor and in the case of the second couple *in vitro* fertilisation using ova from donors would have any chance of success. However, the Artificial Procreation Act prohibits the use of ova and sperm from donors for *in vitro* fertilisation. The first and third applicants unsuccessfully challenged the Act before the Constitutional Court, which found the impugned provisions justified, as the legislation was aimed at avoiding the forming of unusual personal relations and the risk of exploitation of women.
Admissible under Article 8, taken alone and in conjunction with Article 14.

ARTICLE 9

MANIFEST RELIGION OR BELIEF
Ban on exercising the ministry unlawfully imposed on a foreign evangelical pastor when his residence permit was renewed: *violation*.

PERRY - Latvia (N° 30273/03)
Judgment 8.11.2007 [Section III]

Facts: In 1997 the applicant, an American national and evangelical pastor, settled in Latvia and founded a religious community there. He lived in Latvia by virtue of temporary residence permits issued "in connection with his pedagogical activities" and "for the purpose of religious activities". In 2000, however, he was refused a new temporary permit on the strength of a legal provision according to which no residence permit could be issued to a person "actively involved in a totalitarian or terrorist organisation" or belonging to a "secret organisation working against the State". Shortly thereafter he was issued with a residence permit which no longer authorised him to carry on religious activities in public. He was accordingly obliged to give up his post as pastor of his parish and become an ordinary parishioner. The courts dismissed all appeals by the applicant, citing letters from the Bureau for the Protection of the Constitution alleging that he had "no theological training", that there was "negative operational information" about him and that his personal acquaintances were "potentially dangerous for the State". In 2004 he was once again issued with a residence permit "for the purpose of religious activities".

Law: Withdrawal of the authorisation to organise public activities of a religious nature when renewing a residence permit constituted a typical example of "interference" within the meaning of Article 9. It was true that the applicant had been able to continue to take part in the spiritual life of his parish as an ordinary member. But he was a minister of the faith, and taking part in the religious life of the community in that capacity was a particular manifestation of religion which also fell under the protection of Article 9. It was clear from the facts that there had been no conflict between him and his communities in the United States

or in Latvia concerning his role as a pastor. Responsibility for the dispute therefore lay squarely with the Latvian authorities. The impugned decision had been based on a provision of the legislation on aliens that concerned the refusal of residence permits in general, not in connection with a particular activity. Accordingly, while that provision could indeed be a basis for refusing the applicant a residence permit, it could not be used to issue him with a residence permit subject to conditions restricting his rights in Latvia. No provision of the Latvian legislation in force at the material time authorised the Citizenship and Immigration Directorate to use the renewal of a residence permit as a pretext to prohibit a foreign national from engaging in religious activities on Latvian soil. The interference with the applicant's right to freedom of religion was therefore not "prescribed by law".
Conclusion: violation (unanimously).

Article 41 – The finding of a violation was sufficient just satisfaction for the non-pecuniary damage sustained.

ARTICLE 10

FREEDOM OF EXPRESSION
Detention of a journalist with a view to compelling him to disclose his source of information: *violation*.

VOSKUIL - Netherlands (N° 64752/01)
Judgment 22.11.2007 [Section III]

Facts: In 2000 the applicant, a journalist, published an article which contained quotations of an unnamed policeman compromising the methods used in a criminal investigation against certain persons. The court of appeal ordered the applicant to reveal the identity of his source in the interests of the accused and the integrity of the police and judicial authorities. When the applicant failed to comply, the court ordered his immediate detention. More than two weeks later, in the light of the results of an internal police investigation, the court considered the applicant's statements implausible and lifted the order for his detention. The criminal proceedings against the accused were brought to a conclusion.

Law: Article 10 – The interference with the applicant's right to freedom of expression was based in domestic law and pursued the "legitimate aim" of preventing crime. However, the protection of a journalist's sources was one of the basic conditions for freedom of the press, as reflected in various international instruments including the Council of Europe's Committee of Ministers Recommendation No. R (2000) 7. Without such protection, sources might be deterred from assisting the press in informing the public on matters of public interest and, as a result, the vital public-watchdog role of the press might be undermined. The order to disclose a source could be justified only by an overriding requirement in the public interest. The reasons for the applicant being required to identify his source were, firstly, to ensure a fair trial for the individuals accused of arms trafficking and, secondly, to protect the integrity of the police. The Court found the first reason irrelevant. Whatever the potential significance to the criminal proceedings of the information which the court of appeal had attempted to extract from the applicant, it had not been prevented from considering the merits of the charges against the three accused. Indeed, the applicant's alleged information had been substituted with evidence from other witnesses. As for the second reason, the Court was not in a position to establish whether or not there was any truth in the allegations published by the applicant. It took the view that, in any case, in a democratic state governed by the rule of law, the use of improper methods by a public authority was precisely the kind of issue about which the public had the right to be informed. The Court was struck by the lengths to which the authorities had been prepared to go to learn the identity of the source. Such far-reaching measures could but discourage those who had true and accurate information relating to wrongdoing from coming forward in the future and sharing their knowledge with the press. In conclusion, the Government's interest in knowing the identity of the applicant's source had not been sufficient to override the applicant's interest in concealing it.
Conclusion: violation (unanimously).

Article 5 § 1 – Domestic law provided for notification in writing of the detention order within twenty-four hours. The applicant was not notified of the order until some three days later. Therefore, his detention had not complied with "a procedure prescribed by law".
Conclusion: violation (unanimously).

FREEDOM OF EXPRESSION
Search and seizure operations carried out at the home and office of a journalist suspected of corruption of a European Union official: *violation*.

TILLACK - Belgium (N° 20477/05)
Judgment 27.11.2007 [Section II]

Facts: The applicant, a German journalist, was assigned to Brussels at the material time to cover European Union policy and the activities of the European institutions.
His newspaper published two articles he had written based on information from confidential documents from the European Anti-Fraud Office (OLAF). The first article reported the allegations of a European civil servant concerning irregularities in the European institutions, while the second concerned the internal investigations OLAF carried out into those allegations.
Suspecting the applicant of having bribed a civil servant to disclose confidential information concerning investigations in progress in the European institutions, OLAF opened an investigation to identify the informant. When the investigation failed to unmask the official at the origin of the leaks, OLAF lodged a complaint against the applicant with the Belgian judicial authorities, which opened an investigation against a person or persons unknown for breach of professional confidence and bribery involving a civil servant.
The applicant's home and workplace were searched; almost all the applicant's working papers and tools were seized and placed under seal (sixteen crates of papers, two boxes of files, two computers, four mobile phones and a metal cabinet). The applicant requested that his belongings be returned, but to no avail.
In the meantime, the applicant had lodged a complaint with the European Ombudsman. The Ombudsman submitted a special report to the European Parliament in which he concluded that the suspicion of bribery by the applicant had been based on mere rumours spread by another journalist and not by Members of the European Parliament as OLAF had suggested. The Ombudsman concluded in his recommendation that OLAF should acknowledge that it had made incorrect and misleading statements in its submissions to the Ombudsman.

Law: The Court reiterated the importance, for press freedom in a democratic society, of protecting journalistic sources.
The searches in this case had amounted to interference with the applicant's right to freedom of expression. The interference had been provided for in the Belgian Code of Criminal Procedure and pursued the legitimate aim of preventing disorder and crime, as well as preventing the disclosure of information received in confidence and protecting the reputation of others.
As to whether the interference had been "necessary in a democratic society", it was evident that, at the time when the searches took place, their purpose had been to identify the source of the information reported by the applicant in his articles. As OLAF's internal investigation had failed to produce the desired result and the suspicion of bribery by the applicant was based on mere rumour, there had been no overriding public interest to justify such measures. The measures had therefore impinged on the protection of journalistic sources.
Journalists' right not to reveal their sources could not be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but was part and parcel of the right to information, to be treated with the utmost caution. Even more so in the applicant's case, where he had been under suspicion because of vague, uncorroborated rumours, as subsequently confirmed by the fact that he had not been charged. The amount of property seized also had to be taken into account. That

being so, although the reasons given by the Belgian courts were "relevant", they could not be considered "sufficient" to justify the impugned searches
Conclusion: violation (unanimously).

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

FREEDOM OF EXPRESSION
Conviction for defamation of a mayor: *violation*.

LEPOJIĆ - Serbia (N° 13909/05)
Judgment 6.11.2007 [Section II]

Facts: In 2002 the applicant, who was the president of a local branch of the Demo-Christian Party in Serbia, published an article in the local newspaper entitled "A Despotic Mayor". In his article, the applicant argued firstly that, because the mayor had been expelled from his political party, he was no longer allowed to remain in office. He further accused the mayor of committing "legal infractions amounting to crimes" and stated that the mayor was "nearly insanely" spending municipality money on sponsorships and gala lunches. In subsequent criminal proceedings instituted by the mayor, the applicant was convicted of defamation and sentenced to a suspended fine. The court found that the applicant had failed to prove the truth of the statements in question and had had no reasonable grounds to believe that they were true. The term "nearly insane" also implied that the mayor had a mental illness. The mayor then brought a separate civil action in damages, as a result of which the applicant was ordered to pay him significant compensation (approximately EUR 1,800).

Law: The applicant had clearly written the impugned article in the run-up to an election and in his capacity as a politician. The target of the applicant's criticism was the mayor, himself a public figure, and the word "nearly insane" was obviously not used to describe the mayor's mental state but rather to explain the manner in which he had allegedly been spending local taxpayers' money. Although the applicant's article contained some strong language, it was not a gratuitous personal attack and had focused on issues of public interest rather than the mayor's private life. The reasoning of the criminal and civil courts, in ruling against the applicant, was not "sufficient", given the amount of compensation and costs awarded (equivalent to approximately eight months wages in Serbia at the relevant time) and the suspended fine which could, under certain circumstances, have been converted into a prison term.
Conclusion: violation (five votes to two).

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

See also *Filipović v. Serbia* (27935/05), which was delivered on 20 November 2007 and raises similar issues.

ARTICLE 11

FREEDOM OF PEACEFUL ASSEMBLY
Imposition of administrative detention for participating in a peaceful demonstration: *violation*.

GALSTYAN - Armenia (N° 26986/03)
Judgment 15.11.2007 [Section III]

(see Article 6 § 3 (b) above)

ARTICLE 13

EFFECTIVE REMEDY
Applicants' inability to enforce awards of compensation by courts or administrative bodies in the absence of adequate procedures and statutory framework: *violations*.

DRIZA - Albania (N° 33771/02)
Judgment 13.11.2007 [Section IV]
RAMADHI and five Others - Albania (N° 33222/02)
Judgment 13.11.2007 [Section IV]

(see Article 46 below)

EFFECTIVE REMEDY
Effectiveness of investigation into hostage rescue-operation casualties: *communicated*.

FINOGENOV and Others - Russia (N° 18299/03)
[Section I]

(see Article 2 above)

ARTICLE 14

DISCRIMINATION (Article 1 of Protocol No. 1)
Applicant's inability to be affiliated to the farmers' social-security scheme on account of his nationality: *violation*.

LUCZAK - Poland (N° 77782/01)
Judgment 27.11.2007 [Section IV]

Facts: The applicant, a French national residing as a self-employed farmer in Poland, asked to be affiliated to the farmers' social security fund. The competent authorities denied his request because the domestic law regulating the issue provided that only Polish nationals could be admitted to the farmer's social security scheme. As a result, the applicant had no social security cover in the event of sickness, occupational injury or invalidity. The relevant legislation was subsequently amended in connection with Poland's accession to the European Union.

Law: The Farmers Social Security Act 1990 had established a difference in treatment in respect of admission to the farmers' scheme on the basis of nationality. The applicant could claim to be in a relevantly similar situation to Polish nationals in this respect, since he was permanently resident in Poland, had previously been affiliated to the general social security scheme and had contributed as a taxpayer to the funding of the farmers' scheme. Even though the applicant had apparently been entitled to a one-off compensation payment in the event of a serious occupational injury, he had nonetheless been deprived of illness and invalidity payments as well as the right to continue making pension contributions. The Government submitted that the obvious difference in treatment between Polish nationals and foreigners was due to the need to protect the underdeveloped and economically inefficient agricultural sector in Poland. However, the Court noted that even legislation in this sphere had to be in accordance with Article 14 of the Convention. In the present case, the Government had failed to present any convincing explanation of how the general interest was served by refusing the applicant's admission to the farmers' scheme during the period in question.
Conclusion: violation (unanimously).

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

DISCRIMINATION (Article 2 of Protocol No. 1)
Placement of Roma gypsy children in "special" schools: *violation*.

D.H. and Others - Czech Republic (N° 57325/00)
Judgment 13.11.2007 [GC]

Facts: The applicants are 18 Czech nationals of Roma origin. The case concerns their placement in special schools because, they allege, of their Roma origins. Between 1996 and 1999 the applicants, then still minors, were placed in special schools for children with intellectual deficiencies, unable to attend ordinary schools. According to the applicable schools legislation, the decision to place a child in a special school was taken by the head teacher on the basis of the results of tests to measure the child's intellectual capacity carried out in an educational psychology centre, and was subject to the consent of the child's legal guardian. The case file shows that the applicants' parents had consented to and, in some instances, expressly requested their children's placement in a special school. The decisions on placement were then taken by the head teachers of the special schools concerned after referring to the recommendations of the educational psychology centres where the applicants had undergone psychological tests. The written decision concerning the placement was sent to the children's parents. It contained instructions on the right to appeal, a right which none of the applicants exercised.
Disputing the reliability of the tests and arguing that their parents had not been adequately informed of the consequences of consenting to their placement, 14 of the applicants asked the Education Authority to reconsider, outside the formal appeal procedure, the administrative decisions to place them in special schools. The Education Authority found the impugned decisions to be in compliance with the legislation. At the same time, relying on Articles 3 and 14 of the Convention and Article 2 of Protocol No. 1, among other provisions, 12 of the applicants lodged constitutional appeals in which they complained of *de facto* discrimination in the general functioning of the special education system, and of not having been adequately informed of the consequences of their placement in special schools. They submitted that their placement in special schools was a general practice that resulted in segregation and racial discrimination, reflected in the existence side by side of two separately organised educational systems, namely special schools for the Roma and "ordinary" primary schools for the majority of the population. The Constitutional Court dismissed the appeals, partly on the ground that it had no jurisdiction to hear them and partly on the ground that they were manifestly unfounded.

Law: *Preliminary objection of non-exhaustion rejected* – The Government submitted that the applicants had failed to exhaust domestic remedies. The Czech Constitutional Court had decided to disregard that omission. It would therefore be unduly formalistic to require the applicants to exercise a remedy which even the highest court of the country concerned had not obliged them to use.

Merits – The Chamber had held by six votes to one that there had been no violation of Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1. In its view, the Czech Government had succeeded in establishing that the system of special schools had not been introduced solely to cater for Roma children and that considerable efforts had been made in those schools to help certain categories of pupils to acquire a basic education. The Chamber had observed that the rules governing children's placement in special schools did not refer to the pupils' ethnic origin, but pursued the legitimate aim of adapting the education system to the needs, aptitudes and disabilities of the children.
The Grand Chamber noted first of all that as a result of their turbulent history and constant uprooting the Roma had become a specific type of disadvantaged and vulnerable minority and, as such, required special protection, including in the field of education.

Presumption of indirect discrimination: The applicants submitted that by being placed in special schools they had, without objective and reasonable justification, been treated less favourably than non-Roma children in a comparable situation and that this amounted to "indirect" discrimination. They had produced statistical evidence based on information supplied by the head teachers showing that more than half the

pupils placed in the local special schools were Roma children, whereas Roma children accounted for only 2.26% of the city's primary school children.
The Grand Chamber accepted, in the absence of official national statistics on pupils' ethnic origin, that the statistics submitted by the applicants might not be entirely reliable. It nevertheless considered that these figures revealed a dominant trend that had been confirmed by both the respondent State and independent supervisory bodies. In their reports submitted in accordance with Article 25 § 1 of the Council of Europe's Framework Convention for the Protection of National Minorities, the Czech authorities had admitted that in 1999 Roma pupils made up between 80% and 90% of the total number of pupils in some special schools and that in 2004 "large numbers" of Roma children were still being placed in special schools. According to a report published by ECRI (the European Commission against Racism and Intolerance) in 2000, Roma children were "vastly over-represented" in special schools. Even though the exact percentage of Roma children in special schools at the material time remained difficult to establish, their number was disproportionately high, and Roma pupils formed a majority of the pupils in special schools. Despite being couched in neutral terms, the relevant statutory provisions had therefore had, *de facto*, considerably more impact on Roma children than on non-Roma children.
In these circumstances, the evidence submitted by the applicants could be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination, in a sphere where it was not necessary to prove any discriminatory intent on the part of the relevant authorities. The burden of proof therefore lay with the Government to show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin.

Objective and reasonable justification: The Court accepted that the Czech authorities' decision to retain the special-school system was motivated by the desire to find a solution for children with special educational needs. However, it shared the disquiet of the other Council of Europe institutions who had expressed concerns about the more basic curriculum followed in these schools and, in particular, the segregation the system caused.
As to the tests used to evaluate the children's intellectual capacities, all the children who were examined sat the same tests, irrespective of their ethnic origin. The Czech authorities themselves had acknowledged in 1999 that "Romany children with average or above-average intellect" were often placed in such schools on the basis of the results of psychological tests and that the tests were conceived for the majority population and did not take Roma specifics into consideration. In addition, various independent bodies of the Council of Europe (the Advisory Committee on the Framework Convention for the Protection of National Minorities, ECRI and the Commissioner for Human Rights) had expressed doubts over the appropriateness of the tests. The Court considered that there was a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them. In those circumstances, the tests in question could not serve as justification for the impugned difference in treatment.
As regards parental consent, which was the decisive factor according to the Government, the Court was not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent to placement in special schools. In view of the fundamental importance of the prohibition of racial discrimination, the Grand Chamber considered that, even assuming the conditions for waiving a right guaranteed by the Convention were satisfied, no waiver of the right not to be subjected to racial discrimination could be accepted.
In conclusion, the Czech Republic was not alone in having encountered difficulties in providing schooling for Roma children: other European States had had similar difficulties. Unlike some countries, the Czech Republic had sought to tackle the problem. However, the schooling arrangements for Roma children were not attended by safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class. Furthermore, as a result of the arrangements the applicants had been placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a result, they had received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate later into the ordinary schools and develop the skills that would facilitate life among the majority population.

In these circumstances and while recognising the efforts made by the Czech authorities to ensure that Roma children received schooling, and the difficulties they had encountered, the Court was not satisfied that the difference in treatment between Roma children and non-Roma children was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued. As it had been established that the relevant legislation as applied at the material time had had a disproportionately prejudicial effect on the Roma community, the applicants as members of that community had necessarily suffered the same discriminatory treatment.
Conclusion: violation (thirteen votes to four).

Article 41 – EUR 4,000 to each applicant in respect of non-pecuniary damage. The applicants submitted that general measures had to be taken at the national level to remove any hindrance to the exercise of their rights. However, the impugned legislation had been repealed and the Committee of Ministers had recently made recommendations to the member States on the education of Roma/Gypsy children in Europe.

ARTICLE 34

VICTIM
Compensation for the length of bankruptcy proceedings and the civil and political disqualifications resulting from the bankruptcy order: *inadmissible*.

ESPOSITO - Italy (N° 35771/03)
Judgment 27.11.2007 [Section II]

The applicant was declared bankrupt in 1991. The bankruptcy proceedings had not yet been terminated in 2007. In 2003 the applicant lodged an appeal under the Pinto Act. He pointed out that bankruptcy proceedings entailed the deprivation of a number of civil and personal rights, namely restrictions on the right to respect for one's correspondence and freedom of movement, inability to open a current account or dispose of one's possessions, as well as the "ignominy" of having one's name placed on the bankruptcy register and loss of the right to vote or to stand for election. The Italian court found a violation of Article 6 § 1 of the Convention and awarded the applicant EUR 14,000 in respect of the non-pecuniary damage sustained as a result of the length of the bankruptcy proceedings and the impact thereof on his social respectability and his dignity, and the resulting legal restrictions.

Consequences of the excessive length of bankruptcy proceedings on the applicant's rights under Articles 6 and 8 of the Convention and Articles 1 of Protocol No. 1 and 2 of Protocol No. 4 – The applicant had exhausted the remedies open to him under the Pinto Act. The domestic court had found a violation of Article 6 § 1 and awarded him damages for the excessive length of the bankruptcy proceedings and the resulting legal restrictions. The applicant had thus received 70% of the sum he might have obtained in Strasbourg.
That being so, the applicant had, in substance, secured the Italian authorities' acknowledgment of the violations complained of and, having regard to the criteria which emerge from the Court's case-law, the redress obtained for the violations concerned could be considered appropriate and sufficient. The applicant could no longer claim to be a victim of the alleged violations of Articles 6 (right to take legal action) and 8 of the Convention and Articles 1 of Protocol No. 1 and 2 of Protocol No. 4: incompatible *ratione personae*.

ARTICLE 35

Article 35 § 1

EXHAUSTION OF DOMESTIC REMEDY
Applicants not required by highest national court to exhaust the remedies the respondent Government alleged they should have used: *preliminary objection dismissed*.

D.H. and Others - Czech Republic (N° 57325/00)
Judgment 13.11.2007 [GC]

(see Article 14 above)

SIX MONTH PERIOD
Government's argument that no new obligation to investigate unlawful killings arose as more than six months had passed since the original investigation had ended: *preliminary objection dismissed*.

BRECKNELL - United Kingdom (N° 32457/04)
Judgment 27.11.2007 [Section IV]

(see Article 2 above)

ARTICLE 38

Article 38 § 1 (a)

FURNISH ALL NECESSARY FACILITIES
Government's refusal to disclose documents from ongoing investigations into the disappearance of the applicant's relatives in Chechnya during military operations: *failure to comply with Article 38*.

KUKAYEV - Russia (N° 29361/02)
Judgment 15.11.2007 [Section V]
KHAMILA ISAYEVA - Russia (N° 6846/02)
Judgment 15.11.2007 [Section I]

Facts: In both these cases the applicants had lodged applications with the European Court complaining of the disappearance and death or presumed death of close relatives during Russian military operations in Chechnya. Although criminal investigations had been launched, they were still pending several years later and there had been no prosecutions. Following the communication of the case, the Government were repeatedly asked for copies of the criminal investigation files. However, as in a number of other recent cases involving Russia, they declined to produce certain documents on the grounds that their disclosure would violate Article 161 of the Russian Code of Criminal Procedure as the documents concerned contained information of a military nature or personal data on witnesses and other participants in the criminal proceedings.

Law: Article 38 § 1 (a) – The Government had on several occasions been asked to submit copies of the investigation files, which the Court considered contained evidence that was crucial to the establishment of the facts. The reasons cited by the Government for refusing to disclose the relevant documents were inadequate and did not justify the withholding of the key information requested.
Conclusion: failure to comply (unanimously).

Other provisions – In *Kukayev*, the Court found violations of Articles 2 and 3 (substantive and procedural limbs) and of Article 13 (in conjunction with Article 2). In *Khamila Isayeva*, it found violations of Articles 2 (substantive and procedural limbs), 3, 5 and 13 (in conjunction with Article 2). The applicants were awarded sums in respect of pecuniary and non-pecuniary damage.

* * *

For further details on these cases, see Press Release nos. 788 (*Kukayev*) and 786 (*Khamila Isayeva*).

See also, for previous failures to comply with Article 38: *Shamayev and Others v. Georgia and Russia* (no. 36378/02), reported in Information Note no. 74; *Imakayeva v. Russia* (no. 7615/02) – Information Note no. 91; *Baysayeva v. Russia* (no. 74237/01) – Information Note no. 96; *Akhmadova and Sadulayeva v. Russia* (no. 40464/02) Information Note no. 97; and *Bitiyeva and X v. Russia* (nos. 57953/00 and 37392/03) Information Note no. 98.

ARTICLE 46

EXECUTION OF A JUDGMENT
MEASURES OF GENERAL CHARACTER
Applicants' inability to enforce judgments or administrative decisions for the restitution of property and/or payment of compensation owing to systemic failings in domestic legal order: *indication of appropriate statutory, administrative and budgetary measures*.

DRIZA - Albania (N° 33771/02)
Judgment 13.11.2007 [Section IV]
RAMADHI and five Others - Albania (N° 33222/02)
Judgment 13.11.2007 [Section IV]

Facts: These two cases concerned the applicants' inability to enforce awards under the Property Restitution and Compensation Act 1993 ("the Property Act") in respect of land that had been expropriated from their fathers under the former Communist regime.

In *Driza*, the applicant obtained a court order declaring the nationalisation of his father's property unlawful and ordering restitution. As the authorities were unable to return the original property, the applicant was allocated two other plots of land in lieu in a decision that was upheld by a property restitution and compensation commission. The applicant was, however, unable to take possession because the plots were occupied by third parties. Two sets of proceedings were then brought challenging the applicant's title to the plots. In the first set, the applicant's claims to the smaller plot were dismissed by the Supreme Court-Joint Colleges following a successful application by the occupier for supervisory review of a final and binding judgment of the Administrative Division of the Supreme Court upholding the commission's decision. In the second set of proceedings, the Civil Division of the Supreme Court upheld an order of the district court setting aside the commission's decision in its entirety on the grounds that it had exceeded its jurisdiction. The applicant was awarded compensation but this has not been paid.

In *Ramadhi and 5 Others*, the applicants obtained orders from a property restitution and compensation commission, *inter alia*, for the return of a plot of land and the payment of compensation. Although they were able to recover possession of the plot of land, they received no compensation. The applicants subsequently lodged a further application in respect of another plot of land. Although after an appeal to a district court three of the applicants ultimately succeeded in obtaining a land commission ruling upholding the validity of their title, the plots were nonetheless transferred to third parties by the local authorities.

Law: Article 6 § 1 – *Driza*: The applicant had complained that the annulment under the supervisory review procedure of a final judgment was contrary to the principle of legal certainty, that the Supreme Court-Joint Colleges was not impartial and that the authorities had failed to enforce final judgments.
(a) *Legal certainty*: By granting leave to have a final judgment reviewed and allowing the introduction of parallel sets of proceedings, the Supreme Court had set at naught an entire judicial process which had ended in a final and enforceable judicial decision that was *res judicata*.
(b) *Impartiality*: The supervisory-review proceedings had been instituted at the request of the President of the Supreme Court, who had already ruled against the applicant on the same matter. The President was also a member of the composition of the Supreme Court which had examined that request and decided on the merits to quash the final judgment given in the applicant's favour. This practice was incompatible with the principle of "subjective impartiality", since no one could act as both plaintiff and judge. The objective impartiality of the Supreme Court-Joint Colleges also appeared open to doubt in that three of the judges who had already ruled on the case were called upon to decide the request for leave and, subsequently, the merits of the case, while another three judges had also had to decide on a matter on which they had already expressed their opinions.
(c) *Non-enforcement of final judgments*: The problem of the non-enforcement of final judgments in restitution of property cases clearly persisted in Albania notwithstanding indications previously given by the Court. The authorities' failure to take the necessary measures to comply with the Supreme Court's judgments had deprived the provisions of Article 6 § 1 of all useful effect.
Conclusion: violations (unanimously).

Ramadhi and 5 Others – Non-enforcement of a final judgment: The land commission had ultimately upheld the title of three of the applicants to three specific plots of land after being ordered by the district court to reconsider their claims. However, by then the land had passed into the ownership of third parties. The three applicants' property rights were thus far from being determined and the State authorities had failed to enforce the district court's judgment.
Conclusion: violation (unanimously).

Article 13 – *Driza*: The Government had failed to establish an adequate procedure for dealing with compensation claims when the original property could not be returned to the owner. In particular, they had not set up the appropriate bodies or adopted maps for use in valuing properties. It was unlikely that a system would be put in place imminently or soon enough to enable the settlement of the dispute related to the determination of the applicants' rights.
Conclusion: violation (Article 13 in conjunction with Article 1 of Protocol No. 1 – unanimously).

Ramadhi and 5 Others: Irrespective of whether the final decision to be executed took the form of a court judgment or a decision by an administrative authority, domestic law as well as the Convention provided that it was to be enforced. However, no steps had been taken to enforce the commission's decisions in the applicants' favour. There was no legislation governing the enforcement of the commission's decisions, in particular, no statutory time-limit for appealing against such decisions and no specific remedies to secure their enforcement. The determination of the appropriate form and manner of compensation had been left to the Council of Ministers, which had yet to adopt any detailed rules and methods. The decisions in the applicants' favour had remained unenforced for upwards of 11 years and the Government had not submitted any evidence that relevant measures were imminent.
Conclusion: violation (Article 13 in conjunction with Article 6 § 1 – unanimously).

Article 1 of Protocol No. 1 – *Both cases*: The authorities' failure over a number of years to enforce the judgments and/or decisions in the applicants' favour amounted to an interference with their right to the peaceful enjoyment of their possessions for which the Government had not produced any satisfactory explanation. A lack of funds could not justify a failure to enforce a final and binding judgment debt owed by the State.
Conclusion: violations (unanimously).

Article 46 – *Both cases*: The shortcomings noted in the Albanian legal system meant that an entire category of individuals had been and still were being deprived of their right to the peaceful enjoyment of

their property through the non-enforcement of court judgments and commission decisions awarding them compensation. There were already dozens of identical applications before the Court. The escalating number of applications was an aggravating factor as regards the State's responsibility under the Convention and also a threat for the future effectiveness of the Convention system.
Albania was therefore called upon to remove all obstacles to the award of compensation under the Property Act by ensuring, as a matter of urgency, that appropriate statutory, administrative and budgetary measures were taken, including the adoption of property valuation plans and the designation of adequate funds.

Article 41 – *Driza*: Concerning the smaller plot of land, Albania was to return to the applicant a 1,650 sq. m. plot of land plus EUR 50,000 or, failing such restitution, to pay EUR 280,000 in respect of pecuniary and non-pecuniary damage. It was also to pay the applicant EUR 500,000 in respect of pecuniary and non-pecuniary damage concerning the larger plot.

Ramadhi and 5 Others: Albania was to return a 30,500 sq. m. plot to the first three applicants and pay them, jointly, EUR 25,000 in respect of pecuniary and non-pecuniary damage. Failing such restitution, it was to pay them EUR 120,000 in respect of pecuniary and non-pecuniary damage. With regard to a 5,500 sq. m. plot plus shops, the applicants were awarded EUR 64,000 jointly in respect of pecuniary and non-pecuniary damage.

EXECUTION OF A JUDGMENT
MEASURES OF GENERAL CHARACTER
Need for general measures not demonstrated in view of repeal of impugned legislation and the recommendations of the Committee of Ministers: *request dismissed*.

D.H. and Others - Czech Republic (N° 57325/00)
Judgment 13.11.2007 [GC]

(see Article 14 above)

EXECUTION OF A JUDGMENT
INDIVIDUAL MEASURES
Enforcement of the Human Rights Chamber's decision: *transferring the applicant to the federal pension fund and paying him EUR 2,000*.

KARANOVIĆ - Bosnia and Herzegovina (N° 39462/03)
Judgment 20.11.2007 [Section IV]

(see Article 6 § 1 above)

ARTICLE 1 OF PROTOCOL No. 1

POSSESSIONS
Holiday home whose destruction was only ordered several decades later after it was discovered that it had been built without planning permission: *Article 1 of Protocol No. 1 applicable*.

HAMER - Belgium (N° 21861/03)
Judgment 27.11.2007 [Section II]

(see Article 6 § 1 above)

PEACEFUL ENJOYMENT OF POSSESSIONS
Refusal to expropriate privately-owned land used as public property: *violation*.

BUGAJNY - Poland (N° 22531/05)
Judgment 6.11.2007 [Section IV]

Facts: The applicants' company owns some land in Poznań. In 1995 the company asked the local municipality to decide on the division of the land with a view to building a housing estate. As a result, a number of plots were designated for the construction of roads. Subsequently, the company asked for the plots to be expropriated in exchange for compensation. The authorities refused, on the ground that the roads were "private" and that the land on which they were built therefore had to remain the property of the applicants' company. The administrative and civil courts upheld that refusal.

Law: Having concluded that a constitutional complaint would not have been an effective remedy in their case, the Court considered that the measures complained of – bearing costs of construction and maintenance of roads, accepting the public use of the land – significantly reduced the effective exercise of the applicants' ownership and that they therefore constituted interference with their property rights. Such interference had had a legal basis, namely the Land Administration Act 1997 and corresponded to the general interest of the community in that it had pursued the legitimate aim of protecting the municipal budget. However, the applicants had not only had to bear the costs of building and maintaining the roads on the company's land but had also had to accept its use as public property. The roads built on the estate continued to serve both the general public and the housing estate which the applicants had developed and were open both to public and private transport of all kinds. Furthermore, it would never be possible to use the land for anything other than roads and the obligation to maintain them was not subject to any time-limit. The Court therefore found that a fair balance had not been struck between general and individual interests and that the applicants had had to bear an excessive individual burden.
Conclusion: violation (unanimously).

Article 41: EUR 247,000 (jointly) in respect of pecuniary damage.

PEACEFUL ENJOYMENT OF POSSESSIONS
Unlawful occupation and damage caused to the applicant's estate by police units involved in a military operation in Chechnya: *violation*.

KHAMIDOV - Russia (N° 72118/01)
Judgment 15.11.2007 [Section V]

(see Article 6 § 1 "Access to court" above)

PEACEFUL ENJOYMENT OF POSSESSIONS
Applicant's inability to be affiliated to the farmers' social-security scheme on account of his nationality: *violation*.

LUCZAK - Poland (N° 77782/01)
Judgment 27.11.2007 [Section IV]

(see Article 14 above)

DEPRIVATION OF PROPERTY
Expropriation without compensation owing to a wide interpretation of the legislation on restitution: *violation*.

KALINOVA - Bulgaria (N° 45116/98)
Judgment 8.11.2007 [Section V]

Facts: The applicant bought a house which had been expropriated, along with the land it was built on, under the Spatial and Urban Planning Act. Following the entry into force of the restitution laws, the former owners of the house applied for the expropriation decision to be set aside. The application was dismissed by administrative decree, then by the Regional Court, which found that the requisite conditions for the annulment of the expropriation set out in the restitution laws were not fulfilled in this particular case. That ruling was confirmed by a final judgment of the Supreme Court. The former owners also brought proceedings against the applicant to have the sale declared null and void under Section 7 of the Law on restitution of title to nationalised real estate. The Regional Court then the Supreme Court found that the sale was null and void because it had contravened the applicable regulation. Section 7 of the above-mentioned law was not in fact applicable to this case, so the request had to be examined in the light of the general rules governing the validity of contracts. The court found that the disputed sale had been carried out in breach of the decree on State property in force at the time, which prohibited the sale of buildings of fewer than three stories on land meant for medium-height and tall buildings. The former owners of the house then requested the reopening of the initial proceedings to have the expropriation set aside. The Regional Court annulled the expropriation of the house and part of the land and ordered their restitution to the former owners. That judgment became final following the Supreme Administrative Court's dismissal of an appeal on points of law lodged by the municipality. The applicant left the house. By order of the mayor, she was assigned a municipal flat for which she paid a monthly rent. The price paid for her house had not yet been refunded to her. She did not seek reimbursement from the municipal authorities, considering that the amount paid at the time of the sale had become derisory because of depreciation.

Law: The annulment of the applicant's title to her home was part of the process of restitution of nationalised or expropriated property, so the present application had to be examined in the light of the *Velikovi and Others v. Bulgaria* judgment (Information Note no. 95). The applicant had been the owner of a property. The cancellation of her title by a judicial decision had deprived her of her property in application of the relevant legislative and regulatory provisions. Considering the special, transitional nature of that period of economic and political changes, the interference had not lacked clarity and foreseeability. Lastly, it had pursued a legitimate aim in the public interest. As to whether the deprivation of property had struck a fair balance, it was necessary to determine whether the case clearly fell within the scope of the legitimate aims of the law on restitution and to consider the hardship the applicant had suffered. Section 7 of the law on restitution of nationalised real estate had in principle been the only legal provision under which property could be taken away from third parties who had acquired it and given back to its former owners. However, that provision could not have applied, as the disputed house had not been expropriated in conformity with the laws referred to in the text concerned. The domestic courts had nevertheless managed to arrive at the same result by applying the ordinary law on nullity. The aim of social justice pursued by the laws on restitution was less important in this case, as the former owners of the house had been expropriated by virtue of an urban planning law and had received full compensation at the time of the expropriation. Annulling the applicant's title did not, therefore, fall clearly within the scope of the legitimate aims of the law on restitution. This was a case in which the legislation concerned had been construed extensively. Furthermore, the applicant had acquired the house through the procedure applicable at the time and, in finding the sale null and void, the domestic courts had found no abuse or irregularity on her part or any substantive irregularity but a formal disregard of urban planning regulations. Striking a fair balance required the applicant to receive compensation reasonably in proportion with the value of the property at the time. The applicant had received none, however. She could have obtained the reimbursement of the purchase price, but the sum concerned had become derisory. Nor had she been entitled to the special compensation available to people who had lost their property as a result of the law on restitution. As to the possibility of obtaining compensation based on the

State's liability for tortious damage, there was no provision in domestic law governing the liability of the State in the particular case of people whose ownership title had been annulled because of negligence on the part of the authorities. It was true that the applicant had been assigned subsidised rental accommodation. In view, however, of the total lack of compensation for the loss of her property, that alone did not constitute adequate compensation. The applicant, whose good faith when she acquired the house had not been disputed, had been deprived of her property by an extensive application of the law on restitution, with no compensation. This had placed her in a less favourable situation than people who had acquired their property by illegal means or by abuse of their position. The authorities' failure to establish clear limits consistent with the proportionality principle between the different situations obtaining had led to a situation of legal uncertainty and upset the fair balance between the general interest pursued by the laws on restitution and the protection of individual rights.
Conclusion: violation (unanimously).

Article 41 – question reserved.

DEPRIVATION OF PROPERTY
Transfer of land ownership to tenants and compensation determined in disregard of the market value of the land: *violation*.

URBÁRSKA OBEC TRENČIANSKE BISKUPICE - Slovakia (N° 74258/01)
Judgment 27.11.2007 [Section IV]

Facts: The applicant was an association of land owners. Under the communist regime in former Czechoslovakia owners of land were in most cases obliged to put it at the disposal of State-owned or cooperative agricultural farms or, as in the applicant's case, of garden colonies consisting of individual gardeners. They formally remained owners of the land but had no practical possibility of availing themselves of that property. In the context of Czechoslovakia's transition to a market-oriented economy following the fall of the communist regime, the Parliament adopted, in 1991 and 1997, legislation which provided for the compulsory lease of land by private owners to members of garden colonies. The tenants became entitled to acquire ownership of the land in question, whereas the owners obtained the right to claim either different land of a comparable surface area and quality or pecuniary compensation.
In 2003 the garden colony exploiting the applicant's land obtained a transfer of ownership to the individual gardeners. The applicant's appeals were dismissed. The applicant association received land in compensation. The authorities considered that though the surface of the compensatory land was smaller, it was an arable land of high quality and therefore it had a higher value. However, while determining this compensation pursuant to the law, the authorities took into account the value of the applicants' original land as of the date when the garden colony first occupied it – in 1982. At that time, the land in question was derelict.

Law: *Transfer of ownership of the land*: In pursuit of its economic and social policies after the country's transition to a democratic society and a market-oriented economy, the State was entitled to protect through relevant legislation the interests of the individual gardeners. The transfer of ownership complained of was therefore in the public interest. Both the value of the applicant's property in 1982 and the value of the land it had obtained in compensation in 2003 had been established pursuant to a regulation which disregarded the actual market value of the land at the time of transfer. However, the value of real property in Slovakia had significantly increased from the beginning of the 1990s. Thus, the applicant's land had been valued at about SKK 6 per sq.m., which was less than three per cent of the market value of the property in 2003 (about 300 per sq.m.). That valuation had served as a basis for the selection of the land which the applicant association was to receive in compensation. Although the value of the compensatory land was higher than determined under the relevant regulation, it amounted to only about one-third of the general value of the land which had been transferred to the gardeners. Furthermore, the applicant had received only 1.4 hectares of land in compensation for 2.5 hectares of its original plot. The land transferred to the tenants had considerable development potential while the land given to the applicant association did not. Although the value of the applicant's land had increased as a result of the

work and investment of the tenants, that was to a certain extent counterbalanced by the fact that the tenants had been able for a considerable period of time to derive benefit from the land they did not own. It was also relevant that, initially, the land had been put at the disposal of the gardeners temporarily and free of charge. It was only in the 1990s that the legislation had changed and had obliged the gardeners to pay rent to the owners. Only 0.22% of the agricultural land in Slovakia had been affected by the legislation at issue. There was no indication that, in general, the gardeners belonged to a socially weak or particularly vulnerable part of the population. There would also be greater legal certainty if the market value of the land was taken into account when determining the compensation payable. In view of the above considerations, the Court was not persuaded that the declared public interest was sufficiently broad and compelling to justify the substantial difference between the real value of the applicant's land and the land it had obtained in compensation. As a consequence, the applicant association had had to bear a disproportionate burden contrary to its right to the peaceful enjoyment of its possessions.

Compulsory letting of the land: The rent which the gardeners had paid to the applicant association had been calculated at the rate of SKK 0.3 per sq.m., at a time when the property tax charged on the land had amounted to SKK 0.44 per sq.m. That fact alone was indicative of the particularly low compensation which the applicant association had received for letting out its land to the gardeners. In addition, a private company had stated that land in the area could be let out for at least SKK 20 per sq.m. a year. The Court found no justification for setting such a low level of rent, which bore no relation to the actual value of the land. Therefore, the compulsory letting of the applicant association's land on the basis of the rental terms set out in the applicable statutory provisions was incompatible with the applicant's right to the peaceful enjoyment of its possessions.
Conclusion: violations (unanimously).

CONTROL OF THE USE OF PROPERTY
Compulsory lease of agricultural land at a disproportionately low price: *violation*.

URBÁRSKA OBEC TRENČIANSKE BISKUPICE - Slovakia (N° 74258/01)
Judgment 27.11.2007 [Section IV]

(see above)

CONTROL OF THE USE OF PROPERTY
Order for the demolition of a holiday home built in woodlands to which a ban on building applied: *no violation*.

HAMER - Belgium (N° 21861/03)
Judgment 27.11.2007 [Section II]

(see Article 6 § 1 above)

ARTICLE 3 OF PROTOCOL No. 1

FREE EXPRESSION OF OPINION OF PEOPLE
Irregularities in an election campaign: *inadmissible*.

PARTIJA «JAUNIE DEMOKRĀTI» and PARTIJA «MŪSU ZEME» - Latvia (N° 10547/07 ; N° 34049/07)
Decision 29.11.2007 [Section III]

The Central Electoral Commission took the decision to announce the final results of the 2006 parliamentary elections, in which seven out of nineteen lists won seats in Parliament. Having failed to reach the threshold of 5% of the votes, the applicants' lists were not among them. They asked the Cassation Division of the Supreme Court to set the above-mentioned decision aside; the second applicant also asked the court to declare the elections unfair and invalidate them. In a judgment delivered following an adversarial hearing, the Cassation Division of the Supreme Court, ruling at first and last instance, joined the appeals and dismissed them. It confirmed the applicants' factual allegations and found that some of the advertising of two political parties had been financed by corporations whose managers had direct links with the parties concerned; the cost of the advertising was part of their electoral expenditure; that spending had been well in excess of the legal maximum; this was a clear violation of the law on political party funding. However, it found that the infringement was not serious enough to be able to speak of deformation of the will of the people; the press had discussed the matter in the run-up to the elections, so it had been widely known to the public. That being so, there was no reason to doubt the fairness of the elections in general and to invalidate the results. Concerning the policy of the national broadcasting corporation, it noted that the time-slots for free air time were assigned by drawing lots, and that the second applicant's allegations – that only parties already represented in Parliament or which had the support of 4% of the electorate according to the opinion polls had been invited to take part in television debates, while the other parties had only been offered free air time in off-peak viewing slots – were unfounded. Lastly, it rejected the complaint concerning the 5% election threshold. The judgment was combined with a decision drawing the attention of the Cabinet of Ministers to the shortcomings it had identified and to the need to introduce effective machinery to ensure the integrity of the electoral process. The court stressed that in a modern democratic State elections should not depend directly on party finances.

Inadmissible: (a) *Impact of the irregularities identified on the fairness of the elections* – Only two of the nineteen parties in the lists were known to have infringed the law on election funding and their transgressions had been widely publicised. Concerning the nature of the offence, namely bypassing and exceeding the limits fixed by law for election expenses, no matter how much advertising there was in a party's or a candidate's election campaign, that was not the only factor that influenced the voters' choice. There were also political, economic, sociological and psychological factors, for example, which made it difficult, if not impossible, to determine the exact impact of excess advertising on the number of votes obtained by a given party or candidate. The reasoning of the Cassation Division of the Supreme Court was well-balanced and the criterion of seriousness it had introduced was by no means unreasonable. There was therefore no reason to challenge its approach, which consisted in limiting the invalidation of elections to exceptional and particularly serious cases where the will of the people was genuinely flouted by a violation. Furthermore, the applicants had taken part in adversarial proceedings in which they had been able to present all the arguments they deemed necessary to defend their interests. In examining the appeal, therefore, the Cassation Division of the Supreme Court had not overstepped the margin of appreciation open to it, the findings announced in its judgment were neither arbitrary nor unreasonable, and there had accordingly been no appearance of an interference with the free expression of the people in the choice of the legislature: *manifestly ill-founded*.

(b) *The 5% threshold* – The Court had no authority to determine the constitutionality of a domestic electoral law. Furthermore, all electoral systems sought to fulfil objectives which were sometimes scarcely compatible: on the one hand, to reflect fairly faithfully the opinions of the people and, on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will. It followed that all votes need not necessarily have equal weight as regards the outcome, nor all candidates have equal chances of winning; no electoral system could eliminate wasted votes. Thresholds for parliamentary representation should be considered in the light of the particularly wide margin of appreciation the Contracting States enjoyed. The threshold of 5% could not be considered contrary to the requirements of Article 3 of Protocol No. 1 in so far as it favoured currents of thought which were sufficiently representative and helped to avoid excessive fragmentation of Parliament: *manifestly ill-founded*.

c) *Conduct of the national broadcasting corporation* – Article 3 of Protocol No. 1 did not guarantee the right of a political party to air-time on the radio or television in the run-up to elections. It was true that problems could arise in exceptional circumstances, if in an election period, for example, one political party was refused air-time when other parties were not. However, the second applicant had not demonstrated the existence of such particular circumstances: *manifestly ill-founded.*

STAND FOR ELECTION
Ancillary penalty of removal from office imposed on Member of Parliament on the dissolution of his party: *violation*.

SOBACI - Turkey (N° 26733/02)
Judgment 29.11.2007 [Section III]

Facts: The applicant was elected to the Grand National Assembly, on a list presented by the *Fazilet Partisi*. The Constitutional Court ordered the dissolution of his party, based on the words and actions of a number of its members, including the applicant. It considered that, for the purposes of the Constitution, the party had become a centre of activities contrary to the principle of secularism and that its dissolution was justified by a pressing social need. The party had based its political programme on the issue of the Islamic headscarf. Its members stirred up popular hatred against the authorities at their public appearances, stating that the ban on the wearing of headscarves in schools and administrative buildings amounted to persecution and an attack on people's rights and freedoms. The court decided, as an ancillary penalty, to remove the applicant and another MP from parliamentary office. It banned them and three more party members, for a period of five years, from being founders, members, administrators or auditors of any other political party.

Law: The purpose of the disputed measure had been to preserve the secular nature of the political system, with the legitimate aims of preventing disorder and protecting the rights and freedoms of others. As to whether it had been proportional to the aims pursued, the Court had to take into account the provisions of the Constitution concerning the dissolution of a political party, in so far as the applicant's removal from parliamentary office had been the consequence of the dissolution of the Fazilet party. In the version in force at the material time, the Article of the Constitution concerned was very broad in scope. The party could be held accountable for all the actions and words of its members and, as a result, considered as a centre of activities contrary to the Constitution and dissolved. No distinction was made between different degrees of involvement in the activities concerned. However, the Court noted with interest the constitutional amendment whereby a political party could be considered a centre of activities contrary to the Constitution only if its leaders and members engaged intensively in such activities and the party authorities approved or condoned the situation. In addition, the amendment gave the Constitutional Court the power to impose a penalty less severe than outright dissolution of the party, namely depriving it of public funding. As a result, resorting to removal from parliamentary office would no doubt become less frequent. These changes thus strengthened the position of MPs. Removal from parliamentary office was en extremely serious penalty. The applicant's removal from office could not be considered proportionate to the legitimate aims pursued. Accordingly, the disputed measure had impaired the very essence of his

right to be elected and to serve his term of office, as well as the sovereign power of the electorate who had elected him.
Conclusion: violation (unanimously).

Article 41 – Non-pecuniary damage: finding of a violation sufficient.

ARTICLE 2 OF PROTOCOL No. 4

Article 2 § 1

FREEDOM TO CHOOSE RESIDENCE
Geographical restrictions on the residence of an asylum-seeker pending a final decision on his request: *inadmissible*.

OMWENYEKE - Germany (N° 44294/04)
Decision 20.11.2007 [Section V]

The applicant, a Nigerian national, entered Germany in 1998 and requested asylum. He was issued a provisional residence permit and directed to reside and remain within the city of Wolfsburg pending the decision on his asylum request. However, the applicant left Wolfsburg on several occasions without permission by the competent authorities and was subsequently convicted and fined for disregarding the territorial restrictions on his residence. In 2001, following his marriage to a German national, the applicant was granted a residence permit and was no longer subject to restrictions of movement.

Inadmissible: Article 2 of Protocol No. 4 secures freedom of movement only to persons "lawfully within a territory of the State". As the former European Commission of Human Rights had stated in its case-law, pending proceedings to determine whether or not they were entitled to a residence permit under domestic law, foreigners provisionally admitted to a certain district of the territory of a State could only be regarded as "lawfully" in the territory as long as they complied with the conditions to which their admission and stay were subjected. Since the applicant had repeatedly left the district he had been ordered to remain in without the necessary permission from the authorities, he had not been "lawfully" within the territory of Germany at that moment and could therefore not rely on the right to liberty of movement under Article 2 of Protocol No. 4: *manifestly ill-founded*.

ARTICLE 2 OF PROTOCOL No. 7

RIGHT TO APPEAL IN CRIMINAL MATTERS
No clear and accessible right to appeal against a sentence to administrative detention: *violation*.

GALSTYAN - Armenia (N° 26986/03)
Judgment 15.11.2007 [Section III]

(see Article 6 § 3 (b) above)

ARTICLE 4 OF PROTOCOL No. 7

NE BIS IN IDEM
Applicant prosecuted twice for the same offence: *case referred to the Grand Chamber*.

SERGEY ZOLOTUKHIN - Russia (14939/03)
Judgment 7.6.2007 [Section I]

The applicant complained that, after he had already served three days' detention for committing disorderly acts, he had been re-detained and tried again for the same offence. In its Chamber judgment the Court found unanimously that the applicant had been tried and prosecuted twice concerning an offence for which he had already been convicted and served a term of detention. Accordingly, there had been a violation of Article 4 of Protocol No. 7.

The referral request had been made by the respondent Government.

Other judgments delivered in November

The list of "other" judgments rendered during the month in question (i.e. judgments which have not been reported in the form of a summary) has been discontinued. Please refer to the Court's Internet page: http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law+information/Lists+of+judgments/ for alphabetical and chronological lists of all judgments as well as for a list of all Grand Chamber judgments.

Referral to the Grand Chamber

Article 43 § 2

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

GOROU - Greece/ (n° 2) (N° 12686/03)
Judgment 14.6.2007 [Section I]

(see Article 6 § 1 "Civil", "Fair hearing" above)

SERGEY ZOLOTUKHIN - Russia (N° 14939/03)
Judgment 7.6.2007 [Section I]

(see Article 4 of Protocol No. 7 above)

ŠILIH - Slovenia (N° 71463/01)
Judgment 28.6.2007 [Section III]

(see Article 2 above)

Relinquishment in favour of the Grand Chamber

Article 30

A. and Others - United Kingdom (N° 3455/05)
[Section IV]

(see Article 3 and Article 5 § 1 above)

BYKOV – Russia (N° 4378/02)
[Section I]

(see Article 6 § 1 “Criminal” and Article 8 “Private life” above)

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

Article 44 § 2 (c)

On 12 November 2007 the Panel of the Grand Chamber rejected requests for referral of the following judgments, which have consequently become final:

Akhmadova and Sadulayeva v. Russia (40464/02) – Section I, judgment of 10 May 2007
Amato v. Turkey (58771/00) – Section III, judgment of 3 May 2007
Atici v. Turkey (19735/02) – Section II, judgment of 10 May 2007
Ayrapetyan v. Russia (21198/05) – Section I, judgment of 14 June 2007
Bakonyi v. Hungary (45311/05) – Section II, judgment of 3 May 2007
Dika v. the former Yugoslav Republic of Macedonia (13270/02) – Section V, judgment of 31 May 2007
Dupuis and Others v. France (1914/02) – Section III, judgment of 7 June 2007
G. M. v. Italy (56293/00) – Section II, judgment of 5 July 2007
Gallucci v. Italy (10756/02) – Section II, judgment of 12 June 2007
Gładczak v. Poland (14255/02) – Section IV, judgment of 31 May 2007
Gorodnichev v. Russia (52058/99) – Section I, judgment of 24 May 2007
Gregori v. Italy (62265/00) – Section II, judgment of 5 July 2007
Hachette Filipacchi Associés v. France (71111/01) – Section I, judgment of 14 June 2007
Hélioplán Kft. v. Hungary (30077/03) – Section II, judgment of 3 May 2007
Hürriyet Yilmaz v. Turkey (17721/02) – Section II, judgment of 5 June 2007
Inci (Nasiroğlu) v. Turkey (69911/01) – Section III, judgment of 14 June 2007
Ivanov v. Bulgaria (67189/01) – Section V, judgment of 24 May 2007
Kansiz v. Turkey (74433/01) – Section IV, judgment of 22 May 2007
Kizir and Others v. Turkey (117/02) – Section II, judgment of 26 June 2007
Kovalev v. Russia (78145/01) – Section I, judgment of 10 May 2007
Kuznetsova v. Russia (67579/01) – Section I, judgment of 7 June 2007
Leonidopoulos v. Greece (17930/05) – Section I, judgment of 31 May 2007
Lysenko v. Ukraine (18219/02) – Section V, judgment of 7 June 2007
Macko and Kozubal v. Slovakia (64054/00 and 64071/00) – Section IV, judgment of 19 June 2007
Malahov v. Moldova (32268/02) – Section IV, judgment of 7 June 2007
Mikadze v. Russia (52697/99) –Section I, judgment of 7 June 2007
Mishketkul and Others v. Russia (36911/02) – Section I, judgment of 24 May 2007
Murillo Espinosa v. Spain (37938/03) – Section V, judgment of 7 June 2007
OAO Plodovaya Kompaniya v. Russia (1641/02) – Section I, judgment of 7 June 2007
OOO PTK « Merkuriy » v. Russia (3790/05) – Section I, judgment of 14 June 2007
Paudicio v. Italy (77606/01) – Section II, judgment of 24 May 2007
Peca v. Greece (14846/05) – Section I, judgment of 21 June 2007
Pititto v. Italy (19321/03) – Section II, judgment of 12 June 2007
Radchikov v. Russia (65582/01) – Section V, judgment of 24 May 2007
Riihikallio and Others v. Finland (25072/02) – Section IV, judgment of 31 May 2007
Rozhkov v. Russia (64140/00) – Section V, judgment of 19 July 2007
Salt Hiper, S.A. v. Spain (25779/03) – Section V, judgment of 7 June 2007
Smirnov v. Russia (71362/01) – Section I, judgment of 7 June 2007
Sociedade Agrícola Herdade da Palma S. A. v. Portugal (31677/04) – Section II, judgment of 10 July 2007

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

Solovyev v. Russia (2708/02) – Section I, judgment of 24 May 2007
Sova v. Ukraine (36678/03) – Section V, judgment of 21 June 2007
Thomas Makris v. Greece (23009/05) – Section I, judgment of 21 June 2007
Tuleshov and Others v. Russia (32718/02) – Section V, judgment of 24 May 2007
Yeşil and Sevim v. Turkey (34738/04) – Section II, judgment of 5 June 2007

Statistical information[1]

Judgments delivered	November	2007
Grand Chamber	1	10(12)
Section I	21(22)	309(338)
Section II	53(73)	293(394)
Section III	32	231(256)
Section IV	55	309(342)
Section V	26(38)	197(221)
former Sections	0	30(32)
Total	**188(221)**	**1379(1595)**

Judgments delivered in November 2007					
	Merits	Friendly settlements	Struck out	Other	Total
Grand Chamber	1	0	0	0	1
Section I	21(22)	0	0	0	21(22)
Section II	53(73)	0	0	0	53(73)
Section III	32	0	0	0	32
Section IV	49	2	4	0	55
Section V	26(38)	0	0	0	26(38)
former Section I	0	0	0	0	0
former Section II	0	0	0	0	0
former Section III	0	0	0	0	0
former Section IV	0	0	0	0	0
Total	**182(215)**	**2**	**4**	**0**	**188(221)**

Judgments delivered in 2007					
	Merits	Friendly settlements	Struck out	Other	Total
Grand Chamber	10(12)	0	0	0	10(12)
Section I	294(322)	1	10	4(5)	309(338)
Section II	291(392)	1	0	1	293(394)
Section III	221(246)	3	3	4	231(256)
Section IV	276(285)	21(45)	8	4	309(342)
Section V	194(218)	2	1	0	197(221)
former Section I	0	0	0	1	1
former Section II	23(25)	0	0	2	25(27)
former Section III	4	0	0	0	4
former Section IV	0	0	0	0	0
Total	**1313(1504)**	**28(52)**	**22**	**16(17)**	**1379(1595)**

1. The statistical information is provisional. A judgment or decision may concern more than one application: the number of applications is given in brackets.

Decisions adopted		**November**	**2007**
I. Applications declared admissible			
Grand Chamber		0	0
Section I		10	55(62)
Section II		1	23
Section III		2	12
Section IV		0	14(16)
Section V		2	15(17)
Total		**15**	**119(130)**
II. Applications declared inadmissible			
Grand Chamber		0	1
Section I	- Chamber	5	47
	- Committee	697	5074
Section II	- Chamber	14	126
	- Committee	407	3247
Section III	- Chamber	6(7)	82(83)
	- Committee	658	4502
Section IV	- Chamber	3	743
	- Committee	448	4466
Section V	- Chamber	7(9)	107(118)
	- Committee	603	5510
Total		**2848(2851)**	**23905(23917)**
III. Applications struck off			
Grand Chamber		0	1
Section I	- Chamber	11	118
	- Committee	6	108
Section II	- Chamber	11(12)	124(126)
	- Committee	3	80
Section III	- Chamber	15	107
	- Committee	22	80
Section IV	- Chamber	17	165
	- Committee	13	67
Section V	- Chamber	13	82
	- Committee	18	132
Total		**129(130)**	**1064(1066)**
Total number of decisions		**2992(2996)**	**25088(25113)**

1. Not including partial decisions.

Applications communicated	**November**	**2007**
Section I	94	724
Section II	107	866
Section III	42	696
Section IV	80	476
Section V	41	387
Total number of applications communicated	**364**	**3149**