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

Information Note on the Court's case-law

No. 113 November 2008

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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ARTICLE 2

USE OF FORCE
Serious injury caused by stray bullet fired from a police officer's gun during an operation to break up a demonstration: *violation*.

EVRIM ÖKTEM - Turkey (N° 9207/03)
Judgment 4.11.2008 [Section III]

Facts: According to the Turkish authorities, three plain-clothes police officers, one of whom was R.Ç., were on patrol in the vicinity of a school when they noticed some youths hanging a political banner on the school railings. They ordered them to stop, but to no avail. Instead, they were threatened with iron bars and sticks. The police fired warning shots in the air. The demonstrators dispersed down alleyways pursued by the police, who continued firing warning shots. It was then that R.Ç. noticed the applicant, who had been injured below the knee by a stray bullet. The applicant said that she just happened to have been passing by when the bullet hit her. R.Ç. immediately took her to hospital, where the bullet was found to have caused multiple fractures. Forensic tests identified R.Ç.'s service weapon as the weapon from which the shot had been fired. The final medical report confirmed that the applicant had sustained a bullet wound incapacitating her for 60 days.
The applicant's father lodged a criminal complaint against the police officer. When questioned, R.Ç. stated that when confronted with the demonstrators he had first requested reinforcements, but the demonstrators had rapidly become aggressive. He added that he had had to fire shots in the air in an effort to discourage them, and that he had also fired at the ground and a bullet had ricocheted and hit the applicant. Criminal proceedings were then instituted against R.Ç. for causing bodily harm with a firearm. The court acquitted him, considering that the applicant should not have continued to flee in spite of the warning shots. It considered that in view of the nature of the incident, the behaviour of the protestors and their refusal to comply, the defendant had been justified in using his weapon and had done so in accordance with the regulations. He had not used excessive force. The applicant appealed on points of law. The Court of Cassation quashed the impugned decision, on the grounds that it was incompatible with Law no. 4616, passed on 22 December 2000, which provided for the deferral of conviction in respect of certain offences committed before 23 April 1999. The Criminal Court re-examined the case and decided to defer pronouncement of the verdict. An objection by the applicant was dismissed.

Law: a) *The substantive aspect of Article 2* – The Court could not agree with the Government's argument that the impugned protest would have degenerated into an insurrection. Nothing in the case file indicated by what criminal behaviour the protestors might have endangered the lives of innocent bystanders present at the time of the police officers' intervention. It also found it difficult to understand how the police officers could have hoped to use their authority to control the situation satisfactorily when they were in an unmarked car and in plain clothes. As to the threats from iron bars and sticks and the purported attempt by one of the protestors to attack the police, these were uncorroborated claims unsupported by any judicial finding.
Even assuming that they did have good reason to fear for their lives, the police should not have gone so far as to upset the necessary balance between the aims and the means. In the absence of any clear escalation in the damage done or any serious threat to people's safety, it would surely have been preferable for them to wait for reinforcements better equipped to deal with such difficulties and thereby avoid unnecessarily provoking the crowd, bearing in mind that at the time they had no power of dissuasion other than their weapons. Instead, the three police officers had launched an impromptu operation on their own initiative, which had led to developments to which R.Ç. had reacted with the use of his weapon in a manner which was both uncontrolled and dangerous. That being so, the Court could not accept that the use of force in the present case had been based on the police officer's honest belief that he was under genuine threat from the few demonstrators in question, still less the applicant, who was 14 years old at the time. Nor, in all probability, had R.Ç.'s approach met the criteria laid down in the relevant Turkish regulations.

R.Ç. had enjoyed a great autonomy of action and taken unconsidered initiatives, which would probably not have been the case if he had had the benefit of proper training and instructions or, at least, if the department from which he had requested reinforcements had given him clear and adequate directives. If the situation had degenerated in that way, it was doubtless because at the relevant time the system in place did not afford clear guidelines and criteria governing the use of force in peacetime by police officers individually or in the course of pursuit operations. Taken together, these circumstances engaged the responsibility of the State, without it being able legitimately to rely on the difficult task incumbent on the police in modern societies, the unpredictability of human behaviour and the operational choices that must inevitably be made in terms of priorities and resources.
Conclusion: violation (unanimously).

b) *Procedural aspect of Article 2* – Notwithstanding the judicial delays, which in themselves contravened the positive obligations at issue in this case, it was sufficient for the Court to observe that the proceedings against the police officer had been discontinued under Law no. 4616, thus affording him de facto impunity. Far from being rigorous, the Turkish criminal system as applied in the present case had had no dissuasive effect capable of ensuring the effective prevention of the illegal acts complained of by the applicant.
Conclusion: violation (unanimously).

Article 41 – EUR 16,000 in respect of non-pecuniary damage.

ARTICLE 3

INHUMAN TREATMENT
Nature of threats of physical harm made by police interrogators in an attempt to secure information from a suspected child abductor regarding the missing child's whereabouts: *case referred to the Grand Chamber.*

GÄFGEN - Germany (N° 22978/05)
Judgment 30.6.2008 [Section V]

In a judgment delivered by a Chamber the Court held, by six votes to one, that the treatment to which the applicant had been subjected during his interrogation was inhuman. A police officer had threatened the applicant with physical violence in order to make him reveal an abducted child's whereabouts. The Court was satisfied however that the domestic courts had expressly and unequivocally acknowledged that the applicant's treatment by the police had violated Article 3. As the courts had afforded the applicant sufficient redress he could no longer claim to be a victim of a violation of Article 3.

In its Chamber judgment the Court moreover, by six votes to one, found no violation of the applicant's defence rights under Article 6. The trial court had decided to exclude the confessions and statements the applicant had made during the investigation as having been obtained under duress, but had ruled that the evidence obtained as a result of those confessions was admissible. In returning a guilty verdict, it had noted that, despite being informed at the beginning of his trial of his right to remain silent and the fact that none of his earlier statements could be used as evidence against him, the applicant had nevertheless again confessed to the abduction and killing of the boy. The trial court's findings of fact were essentially based on that confession, but were also supported by evidence secured as a result of his initial confession as well as by evidence obtained through police surveillance.

The Court noted *inter alia* that the domestic courts had refused to bar the use of evidence obtained as a result of the statements extracted from the applicant and that at least some of that evidence had been used to prove the veracity of his confession during the trial. The investigation authorities had secured the impugned evidence only as an indirect, not a direct, result of the applicant's confession. It followed that the use of that evidence did not render the trial automatically unfair, although it led to a strong presumption of unfairness. The trial court had had a discretion however to exclude evidence improperly

obtained and had weighed up all the interests involved in a thoroughly reasoned decision. In the particular circumstances of the case, including the police surveillance of the applicant, the evidence obtained as a result of his initial confession was only accessory in securing his conviction. Accordingly, his defence rights had not been compromised as a result.

The case was referred to the Grand Chamber at the applicant's request.

For further details, see Information Note no. 109.

INHUMAN OR DEGRADING TREATMENT
Moral suffering endured by members of a family as a result of the dismemberment and decapitation of their abducted relatives' bodies: *violation*.

KHADZHIALIYEV and Others - Russia (N° 3013/04)
Judgment 6.11.2008 [Section I]

Facts: The applicants were close relatives of two men who were forcibly abducted from the family home in a Chechen village by armed men in camouflage uniforms. Four days later human remains were found some ten kilometres away; the heads were missing and the bodies had been blown up by an explosive device. The remains were identified by the missing men's relatives, who recognised their distinctive hands and fingers and fragments of their clothing. The missing body parts have never been found and the investigating authorities have failed to identify those responsible for the killings. The applicants alleged, *inter alia*, that as a result of their relatives' abduction and killing and the State's failure to conduct a proper investigation, they had endured mental suffering in breach of Article 3 of the Convention.

Law: Article 3 – The Court found it established that the remains discovered four days after the abduction belonged to the missing men and that they had been kidnapped and killed by Russian servicemen. On the question whether the moral suffering endured by members of the missing men's families amounted to proscribed treatment, the Court noted that while a family member of a "disappeared person" could claim to be a victim of treatment contrary to Article 3, the same principle did not usually apply to situations where the person taken into custody had later been found dead. In the instant case, however, the missing men's corpses had been dismembered and decapitated. Their body parts, including their heads, had still not been found, so that the applicants had been unable to bury the bodies in a proper manner; this must have caused them profound and continuous anguish and distress. The moral suffering endured by the applicants had thus reached a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation.
Conclusion: violation (unanimously).

The Court also found violations of Article 2 (substantive and procedural limbs), Article 5, and Article 13 read in conjunction with Article 2.

Article 41 –EUR 3,000 in respect of pecuniary damage and EUR 50,000 in respect of non-pecuniary damage to the victims' parents jointly, and EUR 1,500 in respect of pecuniary damage and EUR 20,000 in respect of non-pecuniary damage to the infant son of one of the victims.

For further details of this case, please see Press Release no. 785.

INHUMAN OR DEGRADING TREATMENT
Statutory ban on returning the bodies of terrorists for burial: *admissible*.

SABANCHIYEVA and Others - Russia (N° 38450/05)
Decision 6.11.2008 [Section I]

Early in the morning of 13 October 2005 the law-enforcement agencies of the town of Nalchik were attacked by armed insurgents. The fighting continued into the following day and left more than 100 dead, the majority from the ranks of the assailants. The applicants are relatives of some of the deceased insurgents. The applicants, who took part in their identification, alleged that the bodies were kept in appalling conditions (piled up, naked and decomposing for want of adequate refrigeration). Under legislation introduced in Russia following the terrorist attack on the Nord-Ost Theatre in Moscow in October 2002 the bodies of terrorists were not handed over to their relatives and the place of burial was not disclosed. In April 2006, having established the involvement of the insurgents in the attack, the investigating authority terminated criminal proceedings against them because of their deaths. In June 2006, pursuant to the decision not to return the bodies of the deceased to their families, 95 corpses of the presumed terrorists were cremated. Some of the applicants contested before the Constitutional Court the legislation governing the interment of terrorists. In June 2007 the Constitutional Court ruled that the measure in question was justified, noting, *inter alia*, that the burial of terrorists could serve as propaganda for terrorist ideas and also cause offence to relatives of the victims, creating the preconditions for heightened interethnic and religious tension.
Admissible under Articles 3, 8 and 9, taken alone and in conjunction with Articles 13 and 14 of the Convention.

INHUMAN OR DEGRADING TREATMENT
Appalling conditions of storage of the bodies of the applicants' deceased relatives: *admissible*.

SABANCHIYEVA and Others - Russia (N° 38450/05)
Decision 6.11.2008 [Section I]

(See above).

INHUMAN OR DEGRADING TREATMENT
Failure to enforce Human Rights Chamber decisions ordering Bosnia and Herzegovina to protect the well-being and obtain the return of terrorist suspects detained in Guantánamo Bay: *inadmissible*.

BOUMEDIENE and Others - Bosnia and Herzegovina (N° 38703/06 and 5 other cases)
Decision 18.11.2008 [Section IV]

The applicants are Algerian citizens. Three of them are also citizens of Bosnia and Herzegovina (BIH). The applicants were arrested in October 2001 on suspicion of planning a terrorist attack. On 17 January 2002 the United States informed BIH that it was willing to take custody of the applicants. Later that day, the competent court ordered the applicants' release from pre-trial detention and the Human Rights Chamber ordered that all necessary steps be taken to prevent their forcible removal from the territory of BIH. The next day, the applicants were handed over to US forces operating as part of the UN peace-keeping operation. The applicants were taken to a US naval base at Guantánamo Bay. In October 2002 and April 2003 the Human Rights Chamber found numerous violations of the Convention and ordered BIH to, *inter alia*, use diplomatic channels and retain lawyers in order to protect the basic rights of the applicants and take all possible steps – including seeking assurances from the US via diplomatic contacts – to prevent the death penalty from being pronounced against and executed on the applicants. In one case the respondent State was additionally ordered to take all possible steps to obtain the release of the applicant and his return to BIH. In June 2004 the BIH prosecution authorities formally ended all investigations against the applicants with regard to any suspicion of terrorism. In July 2004 a

representative of the Ministry of Justice of BIH visited the four applicants. They all complained of inadequate medical attention. In October 2004 the applicants were declared "enemy combatants" by the US Combatant Status Review Tribunal. In February 2005 the Prime Minister of Bosnia and Herzegovina sought the return to BIH of the four applicants. The US Secretary of State replied that they continued to possess significant intelligence value and posed a continuing threat to US security interests. In 2005 and 2006 the competent US Administrative Review Boards recommended that the applicants' detention be continued. In April 2006 the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina (the legal successor to the Human Rights Chamber) held that the BIH authorities had failed to take all possible steps to protect the basic rights of the applicants and to prevent the death penalty from being pronounced against them. In September 2007 the US embassy in Sarajevo assured the Government of BIH that the US strictly adhered to international and domestic law provisions prohibiting cruel or degrading treatment and torture in its treatment of all detainees at Guantánamo Bay and that the US Department of Defence did not intend to seek the death penalty in the applicants' cases. In June 2008 the US Supreme Court held that the applicants had illegally been denied access to *habeas corpus.*

Inadmissible: The Court left open the question whether it had jurisdiction to deal with the instant case notwithstanding the fact that the applicants had been transferred to the custody of the US before the entry into force of the Convention in respect of BIH. It did not consider it necessary to examine whether the BIH authorities would have had an obligation under the Convention to intervene vis-à-vis the US authorities on behalf of the applicants even in the absence of domestic decisions ordering it to do so. In the instant case, the BIH authorities had made repeated interventions vis-à-vis the US, the first of which had been made only one week after the first decision of the Human Rights Chamber concerning this matter. They had clearly demonstrated their unequivocal commitment to repatriating the applicants and had also removed all internal obstacles to their return to BIH. Moreover, the BIH authorities had sent an official to visit the applicants at the detention centre at Guantánamo Bay. The BIH authorities had had to wait for seven months to receive preliminary instructions concerning access to Guantánamo Bay detainees and another six months before they had obtained an official invitation from the US authorities. Therefore, the responsibility for any delays could not be attributed to BIH. Neither could BIH be held responsible for not having access to some of the applicants or for not being able to focus more on their situation at the detention centre. Moreover, there was no indication that BIH had had in its possession any exculpatory evidence to submit to the Administrative Review Boards in support of the applicants' release. Lastly, the Court was aware of the finding of the domestic Human Rights Commission in this matter. However, taking into consideration subsequent developments and, in particular, the assurances obtained by the BIH authorities that the applicants would not be subjected to the death penalty, torture, violence or other forms of inhuman or degrading treatment or punishment, the Court concluded that BIH could be considered to have been taking all possible steps to the present date to protect the basic rights of the applicants, as required by the domestic decisions in issue: *manifestly ill-founded*.

ARTICLE 5

Article 5 § 1

PROCEDURE PRESCRIBED BY LAW
Confinement to ship of crew of a foreign vessel that had been arrested on the high seas: *case referred to the Grand Chamber*.

MEDVEDYEV and Others - France (N° 3394/03)
Judgment 10.7.2008 [Section V]

The applicants were crew members on a merchant ship flying the Cambodian flag which was intercepted at sea by the French authorities and redirected towards France as part of the international effort to combat drug trafficking.

The Court held unanimously that there had been a violation of Article 5 § 1, considering the manner in which the applicants had been deprived of their liberty unlawful. Although the Montego Bay Convention provided a legal basis for the interception and taking over of the ship by the French authorities, this did not mean that the impugned detention had been lawful. Furthermore, none of the legal instruments referred to regulated the conditions of deprivation of liberty on board ship, and the applicants' detention had not been placed under judicial supervision as required by the Court's case-law.
The Court also found by four votes to three that there had been no violation of Article 5 § 3. It noted that the applicants had been brought before a judge or other officer authorised by law to exercise judicial power only when they appeared before the liberties and detention judge (*juge des libertés et de la détention*) to be remanded in custody, that is to say after fifteen or sixteen days' deprivation of liberty. However, it considered that the duration of their deprivation of liberty was justified by the highly exceptional circumstances.

The case was referred to the Grand Chamber at the request of the parties.

For further details, see Information Note n° 110.

LAWFUL ARREST OR DETENTION
Transfer to a psychiatric hospital of a person under house arrest without the requisite court order: *violation*.

GULUB ATANASOV - Bulgaria (N° 73281/01)
Judgment 6.11.2008 [Section V]

Facts: In 1999 the applicant, who suffered from paranoid schizophrenia, was arrested and placed in pre-trial detention on suspicion of robbery and murder. By a court order of 6 July 2000 he was placed under house arrest owing to health problems that required surgery. Subsequently, the investigator responsible for the applicant's case ordered that he be placed in a psychiatric hospital from 8 August to 4 September 2000 with a view to conducting a fresh expert examination. In the ensuing expert report, eight out of eleven experts concluded that despite his mental illness the applicant had been of sound mind at all relevant times. The criminal proceedings against the applicant were eventually discontinued following his death in 2006.

Law: Article 5 § 1 – The applicant complained in substance that the 26 days he had spent in the psychiatric hospital had been based on an unlawful transfer order issued by the investigator rather than a court. At the outset, the Court was called upon to determine whether the alleged unlawfulness of the transfer order was solely relevant to the location, regime or conditions of the applicant's deprivation of liberty or whether it had had repercussions on the conformity with the requirements of Article 5. Despite the fact that the applicant's legal situation had remained unchanged, in practice the degree and nature of the restrictions on his liberty while in the psychiatric hospital must have been very different from those associated with house arrest. The Court therefore considered it appropriate to examine whether his transfer to and from the hospital had been ordered in conformity with domestic law. In this connection, it was established that under the Bulgarian Code of Criminal Procedure such transfers required a court order, which had never been made in the applicant's case so that the applicant's transfer from house arrest to the psychiatric hospital had been unlawful.
Conclusion: violation (unanimously).

The Court further found violations of Article 5 §§ 4 and 5 and no violation of Article 5 § 3 of the Convention.

Article 41 – EUR 2,000 in respect of non-pecuniary damage.

Article 5 § 3

BROUGHT PROMPTLY BEFORE JUDGE OR OTHER OFFICER
Period of 16 days' detention before detainees were brought before a judicial authority following the arrest of their vessel on the high seas: *case referred to the Grand Chamber*.

MEDVEDYEV and Others - France (N° 3394/03)
Judgment 10.7.2008 [Section V]

(See Article 5 § 1 above).

BROUGHT PROMPTLY BEFORE JUDGE OR OTHER OFFICER
Duration of police custody (three days and twenty-three hours): *violation*.

KANDZHOV - Bulgaria (N° 68294/01)
Judgment 6.11.2008 [Section V]

Facts: On 10 July 2000 the applicant was arrested for putting up two posters calling the Minister of Justice a "top idiot" and gathering signatures calling for the Minister's resignation. On 11 July 2000 the district prosecutor's office received a complaint from the Minister of Justice who requested that criminal proceedings be instituted against the applicant for insult and hooliganism. The same day a prosecutor ordered that the applicant be detained for 72 hours, pending a ruling by a district court on whether he should be placed in "pre-trial detention". He noted that proceedings had been instituted against the applicant on charges of insult and hooliganism and stated that there was a real risk that he would flee or re-offend. The applicant's counsel immediately appealed against the order to the regional prosecutor's office, but received no reply. On 14 July 2000 the district court decided to release the applicant on bail. In 2001 he was convicted of aggravated hooliganism. He was acquitted on appeal and his acquittal was upheld by the Supreme Court of Cassation.

Law: Article 5 § 1 – The applicant had been arrested and detained as the alleged perpetrator of two criminal offences: hooliganism and insult. In so far as the charge of insult was concerned, at the relevant time it was a privately prosecutable offence and could not attract a sentence of imprisonment. The levelling of charges of insult could not therefore have served as a basis for the applicant's detention between 11 and 14 July 2000. By making an order to this effect the prosecutor's office had blatantly ignored the clear and unambiguous provisions of domestic law. As regards the period immediately preceding the prosecutor's order, it was clear that the police had no power to conduct preliminary investigations in respect of privately prosecutable offences such as insult. The applicant's police detention on this basis had therefore also been unlawful. As regards the charge of hooliganism, the Supreme Court of Cassation had found that the applicant's actions had been entirely peaceful, had not obstructed any passers-by and had been hardly likely to provoke others to violence and, therefore, had not amounted to the constituent elements of the offence of hooliganism. Nor had the orders for the applicant's arrest and detention – which had not been reviewed by a court – contained anything which could be taken to suggest that the authorities could have reasonably believed that the conduct in which he had engaged had constituted hooliganism. It followed that the applicant's detention between 10 and 14 July 2000 had not constituted "lawful detention" effected "on reasonable suspicion" of his having committed an offence.
Conclusion: violation (unanimously).

Article 5 § 3 – The applicant had been brought before a judge 3 days and 23 hours after his arrest. In the circumstances, this did not appear prompt, as was required under Article 5 § 3. He had been arrested on charges of a minor, non-violent offence. He had already spent 24 hours in custody when the police invited the prosecutor in charge of the case to request the competent court to place the applicant in pre-trial detention. The prosecutor had ordered that he be detained for a further 72 hours, without giving any reasons why he considered it necessary, save for a stereotyped formula saying that there was a risk that he

might flee or re-offend. The matter had been brought before the district court only at the last possible moment, when the 72 hours had been about to expire. The Court could see no special difficulties or exceptional circumstances which would have prevented the authorities from bringing the applicant before a judge much sooner. This was particularly important in view of the dubious legal grounds for his detention.
Conclusion: violation (unanimously).

Article 10 – In gathering signatures calling for the resignation of the Minister of Justice and in displaying two posters making statements about the Minister, the applicant had been exercising his right to freedom of expression. His arrest and subsequent detention for doing so, quite apart from the opening of criminal proceedings against him, therefore amounted to an interference with the exercise of this right. The Court had already established that the applicant's arrest and detention were not "lawful" within the meaning of Article 5 § 1 (c). It followed that the applicant's arrest and detention had not been "prescribed by law" under Article 10 § 2. Furthermore, assuming that the measures taken against the applicant could be considered to have pursued the legitimate aims of preventing disorder and protecting the rights of others, they had clearly been disproportionate to those aims. Notwithstanding the peaceful character of the applicant's actions, the authorities had chosen to react vigorously and on the spot in order to silence him and shield the Minister of Justice from any public expression of criticism. However, the dominant position which the Government and its members occupied made it necessary for them – and for the authorities in general – to display restraint in resorting to criminal proceedings and the associated custodial measures, particularly where other means were available for replying to the unjustified attacks and criticisms of their adversaries.
Conclusion: violation (unanimously).

Article 41 – EUR 4,000 in respect of non-pecuniary damage.

ARTICLE 6

Article 6 § 1 [civil]

INDEPENDENT TRIBUNAL
Administrative and material dependence of military courts and their members *vis-à-vis* the Ministry of Defence: *violation*.

MIROSHNIK - Ukraine (N° 75804/01)
Judgment 27.11.2008 [Section V]

Facts: The applicant instituted proceedings in a regional military court against the Ministry of Defence contesting the lawfulness of his dismissal from the military and seeking compensation for damage. In 2001 the military court returned the applicant's claim for failure to indicate all the required particulars of the claim and to enclose any evidence in its support, as required by the legislation.

Law: Under domestic law, the judges of the military courts were military servicemen, and in that capacity they constituted a part of the staff of the Armed Forces subordinate to the Ministry of Defence. It was up to the Ministry of Defence to provide the judges of the military courts with appropriate flats or houses if they needed to improve their living conditions. Finally, Ministry of Defence entities tended to the financing, logistics and maintenance of the military courts on a practical level. This procedure for financing the military courts had been repealed in 2002. The above aspects of the status of the military courts and their judges, taken cumulatively, had given objective grounds for the applicant to doubt whether the military courts complied with the requirement of independence when dealing with his claim against the Ministry of Defence. The applicant had therefore not had an opportunity to present his case before an independent tribunal.
Conclusion: violation (unanimously).

Article 41 – EUR 2,000 in respect of non-pecuniary damage.

Article 6 § 1 [criminal]

ACCESS TO COURT
Inability of a parliamentarian to have his parliamentary immunity lifted to enable him to defend himself in criminal proceedings: *case referred to the Grand Chamber*.

KART - Turkey (N° 8917/05)
Judgment 8.7.2008 [Section II]

The applicant, an MP, was unable to waive his parliamentary immunity in order to defend his name in criminal proceedings brought against him in the course of his activities as a lawyer.
In its judgment the Chamber found by four votes to three that there had been a violation of Article 6 § 1, considering that the decision-making process concerning the lifting of his parliamentary immunity and the manner in which it was implemented could not be deemed compatible with the requirements of the proper administration of justice and had undermined the effectiveness of the applicant's right to a court to a degree that was disproportionate to the legitimate aim pursued.

The case was referred to the Grand Chamber at the Government's request.

For further details, see Information Note no. 110.

FAIR HEARING
Decision by criminal court to admit evidence obtained from information provided in confessions it had ruled inadmissible: *case referred to the Grand Chamber.*

GÄFGEN - Germany (N° 22978/05)
Judgment 30.6.2008 [Section V]

(See Article 3 above).

Article 6 § 3 (c)

DEFENCE THROUGH LEGAL ASSISTANCE
Use in evidence of confession to police of a minor who had been denied access to a lawyer: *violation*.

SALDUZ - Turkey (N° 36391/02)
Judgment 27.11.2008 [GC]

Facts: At the material time, Turkish law afforded suspected offenders a right of access to a lawyer from the moment they were taken into custody, unless they were accused of an offence falling within the jurisdiction of the state security courts. The applicant, a minor, was arrested on suspicion of aiding and abetting an illegal organisation, an offence triable by the state security courts. Without a lawyer being present, he gave a statement to the police admitting that he had taken part in an unlawful demonstration and written a slogan on a banner. Subsequently, on being brought before the prosecutor and the investigating judge, he sought to retract that statement, alleging it had been extracted under duress. The investigating judge remanded him in custody, at which point he was allowed to see a lawyer. He continued to deny his statement at trial, but the state security court found that his confession to the police was authentic and convicted him as charged. He was given a thirty-month prison sentence.

In its judgment of 26 April 2007, a Chamber of the European Court concluded that the fairness of the applicant's trial had not been prejudiced by his lack of legal assistance during his police custody.

Law: In order for the right to a fair trial under Article 6 § 1 to remain sufficiently practical and effective, access to a lawyer had to be provided, as a rule, from the first police interview of a suspect, unless it could be demonstrated that in the particular circumstances there were compelling reasons to restrict that right. Even where such compelling reasons did exist, the restriction should not unduly prejudice the rights of the defence, which would be the case where incriminating statements made during a police interview without access to a lawyer were used as a basis for a conviction. In the instant case, the justification given for denying the applicant access to a lawyer – namely that such access was by law systematically denied for offences falling within the jurisdiction of the state security courts – fell short of the requirements of Article 6. Moreover, the state security court had used the applicant's statement to the police as the main evidence on which to convict him, despite the fact that he denied its accuracy. Neither the assistance subsequently provided by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody. The applicant's age was also a material factor. As the significant number of relevant international law materials on the subject showed, access to a lawyer was of fundamental importance where the person in police custody was a minor. In sum, even though the applicant had had the opportunity to challenge the evidence against him at his trial and subsequently on appeal, the absence of a lawyer during his period in police custody had irretrievably affected his defence rights.
Conclusion: violation (unanimously).

Article 41 – EUR 2,000 in respect of non-pecuniary damage. Indication that retrial was most appropriate form of redress.

Article 6 § 3 (d)

EXAMINATION OF WITNESSES
Inability to question experts on whose expert opinion the court based its judgment: *violation*.

BALSYTE-LIDEIKIENE - Lithuania (N° 72596/01)
Judgment 4.11.2008 [Section II]

(See Article 10 below).

Article 6 § 3 (e)

FREE ASSISTANCE OF INTERPRETER
Inconsistencies in the Supreme Court's case-law on the payment of the interpreters' fees of convicted persons: *violation*.

IŞYAR - Bulgaria (N° 391/03)
Judgment 20.11.2008 [Section V]

Facts: The applicant, a Turkish national, is currently serving a prison sentence in Bulgaria for drug trafficking. In the course of the criminal proceedings against him, he was assisted by several interpreters remunerated by the investigating authorities and the courts. The District Court found him guilty as charged and sentenced him to 15 years' imprisonment and a fine. It also ordered him to pay all the costs incurred during the preliminary investigation and the examination of the case at first instance. An ordinary appeal and an appeal on points of law by the applicant were dismissed and the Supreme Court of Cassation ordered him to pay the interpretation costs incurred in the proceedings before it.

The applicant also complained of the poor conditions of detention in his prison, on account of overcrowding, a lack of organised activities for prisoners, deplorable standards of hygiene, lack of free access to the sanitary facilities at any time of the day and poor-quality food. .

Law: Article 6 § 3 (e) – The case revealed a certain inconsistency in the case-law of the Bulgarian Supreme Court of Cassation as to whether convicted criminals could be required to pay interpretation costs: in an identical case the same court had exempted the offender from paying interpretation costs. In the present case the manner in which the courts interpreted domestic law had resulted in the applicant being required to pay all the interpreting costs incurred in the criminal proceedings against him, which had deprived him of is right to the free assistance of an interpreter.
Conclusion: violation (unanimously).

Article 3 – The applicant's allegations concerning his conditions of detention were corroborated by other evidence in the Court's possession, and in particular by the report on the prison concerned drawn up by the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). In view of the cumulative effect of the poor conditions of detention, and bearing in mind the length of the applicant's detention and his particular circumstances, the applicant had been subjected to suffering beyond the inevitable level inherent in detention, which amounted to degrading treatment within the meaning of Article 3.
Conclusion: violation (unanimously).

Article 41 – EUR 31 in respect of pecuniary damage, EUR 5,000 in respect of non-pecuniary damage.

ARTICLE 8

PRIVATE LIFE
Keeping inaccurate police records and forwarding them to public authorities: *violation*.

CEMALETTİN CANLI - Turkey (N° 22427/04)
Judgment 18.11.2008 [Section II]

Facts: In 2003 while criminal proceedings were pending against the applicant, a police report entitled "information form on additional offences" was submitted to the trial court, mentioning two sets of criminal proceedings that had been brought against him in the past for membership of illegal organisations. However, in 1990, the applicant had been acquitted in the first criminal case and the second set of proceedings had been discontinued. The applicant complained to the prosecutor alleging that the failure of the police to include in their records the outcome of the earlier proceedings had violated his right to be presumed innocent. His complaint was dismissed and he was eventually acquitted of all charges.

Law: As to the applicability of Article 8, the Court reiterated that public information might fall within the scope of "private life" where it was systematically collected and stored in files held by the authorities. Such interpretation of the notion of "private life" was also in line with the Council of Europe's Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data. Moreover, the impugned report had characterised the applicant as a "member" of an illegal organisation, an allegation which was potentially damaging to his reputation. Since a person's right to the protection of his or her reputation forms a part of the right to respect for one's private life, Article 8 was found to be applicable to the circumstances of the applicant's case. The keeping of the inaccurate police report and its forwarding to the competent court constituted an interference with the applicant's right to respect for his private life. Under domestic law, the police were allowed to keep records and forward them to other authorities under certain conditions. However, the records needed to contain not only details of the charges made against the individuals, but also details of the outcome of any criminal proceedings relating to such accusations. In the applicant's case, not only was the information set out in the report false, but it

also omitted any mention of the applicant's acquittal or of the discontinuation of the second set of criminal proceedings. The failure to incorporate the information about the outcome of proceedings contravened the unambiguous requirements provided for under domestic law and removed a number of procedural safeguards for the protection of the applicant's rights under Article 8. Accordingly, the interference with the applicant's right to respect for his private life was not "in accordance with the law".
Conclusion: violation (unanimously).

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

PRIVATE LIFE
Insufficient redress in breach of privacy cases: *violations*.

ARMONAS - Lithuania (N° 36919/02)
BIRIUK - Lithuania (N° 23373/03)
Judgments 25.11.2008 [Section II]

Facts: In 2001 *Lietuvos Rytas*, Lithuania's biggest daily newspaper, published an article on its front page concerning an AIDS threat in a remote part of Lithuania. In particular, medical staff from the local hospital were cited as having confirmed that Mr Armonas and Ms Biriuk were HIV positive. Ms Biriuk, described as "notoriously promiscuous", was also said to have had two illegitimate children with Mr Armonas. Subsequently Mr Armonas and Ms Biriuk sued, separately, the newspaper for a breach of their right to privacy. In July 2001 and April 2002 the courts ruled in their favour, finding that the article was humiliating and that the newspaper had published information about Mr Armonas' and Ms Biriuk's private life without their consent or legitimate public interest. In both cases, however, the courts found that it had not been established that the information had been published intentionally. They therefore applied a statutory provision – Article 54 § 1 of the Law on the Provision of Information to the Public, which has since been repealed – which restricted the maximum award possible in the absence of such an intention to LTL 10,000 (approximately EUR 2,900).

Law: The applicants complained that, even though the domestic courts had held that their right to privacy had been seriously violated, they had been awarded derisory damages. In particular, they alleged that the low ceiling on non-pecuniary damages under Lithuanian law at the time protected the media from lawsuits concerning breaches of privacy. In both cases, the Court saw no reason to depart from the national courts' conclusions that there had been an interference with the applicants' right to privacy. In particular, the fact that Ms Biriuk and Mr Armonas lived in a village had increased the possibility that neighbours and immediate family would be aware of their illness, causing public humiliation and exclusion from village social life. Similarly, the Court agreed with the domestic courts' view that the article had not contributed to any debate of general interest to society. It was particularly concerned about the fact that, according to the newspaper, the information about Ms Biriuk's and Mr Armonas' illness had been confirmed by medical staff. It was crucial that domestic law safeguarded patient confidentiality and discouraged any disclosures of personal data, especially bearing in mind the negative impact of such disclosures on the willingness of others to take voluntary tests for HIV and seek appropriate treatment. In such cases of an outrageous abuse of press freedom, the severe legislative limitations on judicial discretion in redressing the damage suffered by the victim and therefore on deterring the recurrence of such abuses failed to provide the applicants with the protection of privacy they could have legitimately expected. Indeed, that view had since been endorsed as the ceiling on judicial awards of compensation had been repealed in July 2001 by the new Civil Code.
Conclusion: violations (six votes to one).

Article 41 – EUR 6,500 to each applicant in respect of non-pecuniary damage.

PRIVATE AND FAMILY LIFE
Statutory ban on returning bodies of terrorists for burial: *admissible*.

SABANCHIYEVA and Others - Russia (N° 38450/05)
Decision 6.11.2008 [Section I]

(See above, under Article 3).

FAMILY LIFE
Finding that child's removal was not wrongful for the purposes of the Hague Convention on the Civil Aspects of International Child Abduction: *violation.*

CARLSON - Switzerland (N° 49492/06)
Judgment 6.11.2008 [Section I]

Facts: The applicant is an American national and the father of C., who was born in 2004 of his union with a Swiss national. In 2005 the mother, who was living with her husband and son in the United States, travelled to Switzerland with the child and decided to stay there permanently. She instituted divorce proceedings before the District Court and requested interim measures for the duration of the divorce proceedings, in particular with a view to obtaining custody of the child. Relying on the Hague Convention on the Civil Aspects of International Child Abduction, the applicant asked the Swiss courts to order his son's return home. The President of the District Court ordered the applicant's wife to hand in the child's passport immediately and prohibited him from leaving Switzerland. At the same time he decided to join the proceedings concerning the child's return to those concerning the divorce. In 2006 the President of the District Court rejected the applicant's request, in particular because he was unable to produce evidence in support of his allegation that he had consented to the mother's temporary stay in Switzerland solely on the condition that she subsequently brought their son back to the United States. The judge therefore considered that the child's removal had not been wrongful for the purposes of Article 3 of the Hague Convention as the applicant had given his consent and there was insufficient evidence of any wrongdoing in the failure to return the child. The applicant appealed against that decision in the Court of Appeal, then in the Federal Court, but to no avail.

Law: The main issue in this case was the obligation to settle the matter of the child's return to the United States without delay, so it was appropriate to examine it from the angle of the "positive" obligations incumbent on the domestic courts under Article 8.
It was to be noted that Article 16 of the Hague Convention required that no decision be taken on the merits of rights of custody until the matter of the child's return had been determined. That meant that the District Court's decision to join the two proceedings was not only in contradiction with the provisions of the Hague Convention but also had the effect of prolonging the proceedings before the domestic courts to determine the matter of the child's return. Furthermore, the time lapse between the applicant's initial action and the decision of the President of the District Court had fallen short of the requirement of Article 11 of the Hague Convention that the authorities of the requested State should act "expeditiously" in proceedings for the return of children. Failure to reach a decision within six weeks could give rise to a request for a statement of the reasons for the delay. Also, in clear contradiction with the terms of Article 13 of the Hague Convention, the President of the District Court had reversed the burden of proof in requiring the applicant to "establish" that he had not "consented to or subsequently acquiesced in the removal or retention" of the child. The applicant had thus been placed at a clear disadvantage in the proceedings concerning the child's return. The Court of Appeal's correct application of the aforesaid Article 13 had not rectified the breach of the equality of arms at first instance as the information obtained thanks to the reversal of the burden of proof was not without relevance to the domestic courts' appraisal of the material circumstances.
Pointing out that, in such delicate matters as the removal of a child, a particularly high level of diligence and caution was needed, the Court was not convinced that C.'s best interests, in the form of a decision

concerning his immediate return to his familiar environment, had been taken into account by the Swiss courts, in conformity with the Hague Convention, when they had examined the request for his return. As these failings had not been corrected by the higher courts, the applicant's right to respect for his family life had not been effectively protected by the domestic courts.
Conclusion: violation (unanimously).

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

ARTICLE 9

MANIFEST RELIGION OR BELIEF
Alleged denigration by Government of religious movements classified as "sects": *no violation*.

LEELA FÖRDERKREIS E.V. and Others - Germany (N° 58911/00)
Judgment 6.11.2008 [Section V]

Facts: The applicants are three associations registered under German law. They are religious or meditation groups belonging to the Osho movement, formerly known as the Shree Rajneesh or Bhagwan movement, which emerged in Germany in the 1960s. In 1979 the German Government launched a campaign to draw attention to the potential dangers of such groups. The Government referred to them as "sects", "youth sects", "youth religions" and "psycho sects" and issued warnings that they were "destructive", "pseudo-religious" and "manipulated their members". In 1984 the applicant associations brought proceedings before the administrative courts in which they requested that the Government refrain from describing them in such negative terms. Following the dismissal of their claims, they brought a constitutional complaint. In 2002 the Federal Constitutional Court ruled that the terms "destructive" and "pseudo-religious", and the allegation that members of the movement were manipulated, infringed the requirement of neutrality in matters of religious and philosophical beliefs, as well as the principle of proportionality. It authorised the remaining terms, considering that the Government could provide the public with information about such associations.

Law: The Court assumed that the Government's information campaign had interfered with the applicants' right to manifest their religion or belief. In so far as the Basic Law assigned to the Government the duty of imparting information on subjects of public concern, that interference had been "prescribed by law" and pursued the "legitimate aims" of the protection of public safety and public order and the protection of the rights and freedoms of others. The Government's information campaign had aimed to warn citizens of phenomena which had been viewed as disturbing, namely the emergence of new religious movements and their attraction for young people, and to enable people to take care of themselves and not to land themselves or others in difficulties solely on account of lack of knowledge. Such a power of preventive intervention on the State's part was consistent with the Contracting Parties' positive obligations under Article 1 of the Convention. The campaign had not, however, in any way prohibited the applicant associations' freedom to manifest their religion or belief. Furthermore, the Constitutional Court had set certain limits by authorising some statements and not others. The authorised terms ("sects", "youth sects" and "psycho sects"), even if somewhat pejorative, had been used at the relevant time quite indiscriminately for any kind of non-mainstream religion. Moreover, the Government had refrained from further using the term "sect" in their information campaign following an expert recommendation issued in 1998. Therefore, the Government's statements, as delimited by the Constitutional Court, at least at the time they had been made, had not overstepped what a democratic State might regard as in the public interest. Accordingly, having regard to the margin of appreciation left to the national authorities and their duty to consider, within the limits of their jurisdiction, the interests of society as a whole, the interference with the applicant associations' right to manifest their religion or belief had been justified and had been proportionate to the aim pursued.
Conclusion: no violation (five votes to two).

MANIFEST RELIGION OR BELIEF
Obligation to remove turban for driving licence photograph: *inadmissible*.

MANN SINGH - France (N° 24479/07)
Decision 13.11.2008 [Section V]

The applicant is a practising Sikh. The Sikh religion requires its male followers to wear a turban at all times. In 2004 the prefecture refused twice to issue the applicant with a duplicate of his driving licence, which had been stolen, because the identity photos he supplied showed him wearing a turban. The applicant took various steps before the domestic courts with a view, in particular, to have the refusals set aside and seeking an order requiring the prefecture to issue the duplicate licence or pay a pecuniary penalty. He also made an urgent application to the court seeking a stay of execution of the impugned decisions.
Meanwhile, in December 2005 the Minister of Transport, Public Works, Tourism and the Sea sent prefects a circular concerning identity photographs for use on driving licences, stipulating that applications for driving licences or duplicate licences had to be accompanied by a photograph showing the person "bareheaded and facing forward". In December 2006 the *Conseil d'Etat* rejected an appeal for abuse of authority lodged by the applicant and the "United Sikhs" association against the December 2005 circular, taking the view that the impugned provisions, which were designed to minimise the risk of fraud or falsification of driving licences by enabling the holder to be identified with the maximum degree of certainty, were neither unsuited nor disproportionate to that aim. It added that the fact that photographs showing persons wearing head coverings had been tolerated in the past did not prevent a decision being taken to put an end to that policy in view of the increased incidence of falsification. Finally, it ruled that the specific instance of interference complained of with the tenets and rites of the Sikh religion had not been disproportionate to the aim pursued, bearing in mind, in particular, that the requirement for persons to remove head coverings for the purpose of having their photograph taken "bareheaded" was a sporadic one and did not imply that persons of the Sikh faith should be accorded special treatment.

Inadmissible: The impugned regulations, which required subjects to be shown "bareheaded" in identity photographs for use on driving licences, amounted to interference with exercise of the right to freedom of religion and conscience. The interference in question was prescribed by law and pursued at least one of the legitimate aims listed in the second paragraph of Article 9 of the Convention, namely ensuring public safety. While religious freedom was primarily a matter of individual conscience, it also implied freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shared. However, Article 9 did not protect every act motivated or inspired by a religion or belief. Furthermore, it did not always guarantee the right to behave in a manner governed by a religious belief and did not confer on people who did so the right to disregard rules that had proved to be justified.
In the present case the Court noted that identity photographs on driving licences which showed the subject bareheaded were needed by the authorities in charge of public safety and law and order, particularly in the context of checks carried out under the road traffic regulations, to enable them to identify the driver and verify that he or she was authorised to drive the vehicle concerned. It stressed that checks of that kind were necessary to ensure public safety within the meaning of Article 9 § 2.
The Court considered that the detailed arrangements for implementing such checks fell within the respondent State's margin of appreciation, especially since the requirement for persons to remove their turbans for that purpose or for the initial issuance of the licence was a sporadic one. It therefore held that the impugned interference had been justified in principle and proportionate to the aim pursued: *manifestly ill- founded*.

ARTICLE 10

FREEDOM OF EXPRESSION
Confiscation of a publication promoting ethnic hatred: *no violation*.

BALSYTE-LIDEIKIENE - Lithuania (N° 72596/01)
Judgment 4.11.2008 [Section II]

Facts: The applicant owned a publishing company, which issued calendars describing various historic dates from the perspective of the applicant and other authors. In March 2001 the domestic courts concluded that the "Lithuanian calendar 2000" promoted ethnic hatred. Their conclusions were based on several written expert opinions, which stated that the calendar contained xenophobic and offensive statements with regard to the Jewish, Polish and Russian population, and promoted territorial claims and national superiority vis-à-vis other ethnic groups. The applicant was issued with an administrative warning and the unsold copies of the publication were confiscated. The experts failed to appear in court and the court gave its decision on the basis of their written findings.

Law: Article 6 § 3 (d) – The general character of the legal provision infringed by the applicant together with the deterrent and punitive purpose of the penalty imposed sufficed to show that the offence in question was criminal in nature. The domestic courts had appointed experts to produce political science, bibliographical, psychological and historical reports in order to establish whether the impugned publication promoted ethnic hatred. When finding the applicant guilty, the courts had extensively quoted the expert opinions, which had a key place in the proceedings against her. However, she had not been given the opportunity to question the experts in order to subject their credibility to scrutiny or cast doubt on their conclusions. The refusal to entertain her request to have the experts examined in open court had therefore failed to meet the requirements of Article 6 of the Convention.
Conclusion: violation (six votes to one).

Article 10 – The administrative penalty and the confiscation of the publication, which were both aimed at protecting the reputation and rights of ethnic groups living in Lithuania, furthermore interfered with the applicant's right to freedom of expression. The Court took into account the Government's explanation that after the re-establishment of Lithuanian independence in 1990 the questions of territorial integrity and national minorities had been sensitive. The publication at issue had received negative reactions from some diplomatic representations and under international law Lithuania had an obligation to prohibit any advocacy of national hatred and to take measures to protect persons who might be subject to such threats as a result of their ethnic identity. The applicant had expressed aggressive nationalism and ethnocentrism and made statements inciting hatred against the Poles and the Jews which were capable of giving the Lithuanian authorities cause for serious concern. Even though the confiscation measure imposed on the applicant could be deemed relatively serious, she had not been given a fine, but only a warning, which was the mildest administrative punishment available. Having regard to the margin of appreciation left to the Contracting States in such circumstances, the Court concluded that the interference with the applicant's freedom of expression could reasonably have been considered necessary in a democratic society.
Conclusion: no violation (unanimously).

Article 41 – EUR 2,000 in respect of non-pecuniary damage.

FREEDOM OF EXPRESSION
Journalist's conviction for criminal defamation in respect of article in a satirical publication accusing, without good faith or a factual basis, an editor of populism and corruption: *no violation*.

MIHAIU - Romania (N° 42512/02)
Judgment 4.11.2008 [Section III]

Facts: The applicant published an article in a satirical weekly criticising the political character of the writings of D.T., the editor in chief of a daily newspaper. In it he described how D.T. deplored the zeal shown by the authorities when it came to the restitution of property that had belonged to representatives of the Romanian monarchy, compared with the inefficiency of restitution measures concerning the rest of the population. The photo illustrating the article showed a man's wrist wearing an expensive watch, which certain editors in chief had been offered by an industrial group at a press conference which D.T. had purportedly attended. When the applicant learnt that D.T. had not attended the press conference in question, a rectification was published in the following edition of the weekly.
D.T. brought criminal proceedings against the applicant for defamation, suing the applicant and his newspaper for damages. The applicant told the court that his assertions had been based on the statements of a newspaper director, S.R.S., who had attended the conference, and that he had also sought confirmation of D.T.'s presence from a press agency representative, but in vain, as the person had not been in Romania at the time. S.R.S. confirmed that he had stated that D.T. had been invited to the conference, but added that he had suggested that the applicant check whether he had actually attended. He also stated that when the article was published he had called the applicant to let him know that D.T. had not attended the conference. The applicant attended three hearings then had a lawyer represent him at subsequent hearings. He was acquitted of criminal defamation, for even though his affirmations had been defamatory and inaccurate, the court had deemed that there was no evidence in the case file that he had published the article with the intention of defaming the plaintiff. However, considering the negative image that had been given of D.T. and his newspaper, which was capable of undermining their credibility, the court sentenced the applicant, jointly and severally with his weekly publication, to pay the plaintiff the equivalent of about EUR 300 in respect of non-pecuniary damage. The parties appealed to the County Court. The applicant did not attend the hearings, but was represented by his lawyer, who presented written submissions. No evidence was adduced. Having regard to the content of the article, the circumstances of its publication and the author's position, the court found that there had been no negligence but that, on the contrary, the applicant had accepted the idea that he would be discrediting and compromising the person targeted by his inaccurate public affirmations. It found that there had been criminal defamation, ordered the applicant to pay a fine equivalent to EUR 300, and increased the damages to the equivalent of about EUR 1,300.

Law: Article 10 – The County Court's decision amounted to interference that was prescribed by law and pursued the legitimate aim of the protection of the reputation of others. The offending article was not simply part of a quarrel between journalists. It concerned a particularly topical matter of general interest in Romania, namely the independence of the press. Consequently, this was not a matter of corruption of senior civil servants, the activities of politicians or economic, social or other issues of interest to society, but of protecting the very role of the press as a "watchdog" in a democratic society. Examining the offending article as a whole, the Court noted that it contained factual allegations about D.T. Making such direct allegations about a specific person, stating his name and function, placed the applicant under obligation to provide a sufficient factual basis in the proceedings against him. However, as the allegations concerning D.T.'s presence at the conference and his receiving a watch were not corroborated by any evidence, the Court was not convinced by the applicant's argument that he had acted in good faith. On the contrary, in repeating statements made by third parties he should have shown greater rigour and particular caution before publishing the article. The photo illustrating the impugned article was likely to make readers believe that the article was based on fact and not open to doubt. As the applicant himself acknowledged, however, it was not a photo of D.T. Therefore, in the absence of good faith and of a basis in fact, and although the offending article was part of a broader and highly topical debate in Romania, the Court did not consider it possible to view the applicant's assertions as an example of the degree of exaggeration or provocation permitted in the exercise of press freedom. It therefore considers relevant and

sufficient the reasons given by the County Court for finding the applicant guilty of defaming D.T. and convicting him. As to the proportionality of the interference with freedom of expression, the sums the applicant had been ordered to pay were relatively small. Moreover, according to information submitted by the Government, neither the applicant nor the weekly newspaper had paid D.C. any the damages. In the light of the circumstances of the case, the applicant's conviction was not disproportionate to the legitimate aim pursued and the impugned interference could therefore be deemed necessary in a democratic society.
Conclusion: no violation (unanimously).

Article 6 – The applicant was convicted by the County Court without having been heard in person.
Conclusion: violation (six votes to one).

FREEDOM OF EXPRESSION
Criminal conviction and removal from office of a public prosecutor for abuse of authority and insulting the armed forces: *violation*.

KAYASU - Turkey (N° 64119/00 and 76292/01)
Judgment 13.11.2008 [Section II]

Facts: The applicant was a public prosecutor at the relevant time. In 1999, acting as a private citizen, he lodged a criminal complaint against former generals of the army who had been the main instigators of the military coup of 12 September 1980. No action was taken on the complaint and the case received a certain amount of press coverage. In 2000 the Supreme Council of Judges and Public Prosecutors imposed a disciplinary sanction on the applicant in the form of a reprimand, having found that the words used by the applicant in his complaint were liable to offend certain statesmen who had worked to secure the stability and viability of the State. The applicant appealed against that decision but was unsuccessful.
In the meantime, in his capacity as a public prosecutor the applicant had drawn up an indictment against Mr Kenan Evren, a former Chief of Staff and former President of Turkey who had been the main instigator of the military coup of 12 September 1980. In March 2000 the Ministry of Justice gave permission to prosecute the applicant for abuse of position on the ground that he had distributed copies of the indictment to the press and given statements to journalists he had received at his home. Furthermore, the Chief Public Prosecutor considered that the submissions filed by the applicant had amounted to an allegation of an offence and, on that account, took no further action on them by virtue of transitional Article 15 of the Constitution, which provided that the instigators of the 1980 coup were immune from prosecution.
The criminal proceedings against the applicant resulted in him being convicted by the Court of Cassation of abusing his position and causing offence to the armed forces. He was sentenced to suspended criminal fines. As to the charge of causing offence, the Turkish courts held that the indictment drawn up by the applicant had gone beyond the bounds of criticism and was directed at the armed forces as a whole, accusing them of being an institution that abused its power and had no hesitation in pointing its weapons at citizens and destroying the rule of law. They also found that by distributing the document in question to journalists, the applicant had sought to reach a wider audience, thereby demonstrating his intention to insult and offend the State's military forces.
From April 2000 the applicant was suspended from his post as a public prosecutor, and in February 2003 the Supreme Council of Judges and Public Prosecutors dismissed him from his post. His subsequent application to the Objections Committee, four of whose nine members had sat as members of the Supreme Council of Judges and Public Prosecutors that had given the decision against which he was appealing, was rejected in November 2003. The applicant was no longer entitled to practise law as a result of his dismissal from the legal service.

Law: Article 10 – The applicant had suffered interference which was prescribed by law and pursued legitimate aims for the purposes of paragraph 2 of Article 10: to safeguard the authority and impartiality of the judiciary (for the interference involving abuse of position), and protecting the reputation of others (for that involving insult). As to whether the interference had been necessary in a democratic society, it was worth noting that his special status as a public prosecutor gave the applicant an essential role to play

in the judiciary in the administration of justice. The Court had already had occasion to point out that public officials serving in the judiciary were to be expected to show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary were likely to be called into question. Any interference with the freedom of expression of a member of the legal service in a position such as the applicant's, however, called for close scrutiny by the Court.
In the present case the statements in question had been made in the particular context of a historical, political and legal debate concerning, among other things, the possibility of prosecuting the instigators of the *coup d'état* of 12 September 1980, and the Constitution, which had been adopted following a referendum in November 1982 and was still in force. This was unquestionably a matter of general interest, in which the applicant had intended to participate both as an ordinary citizen and as a public prosecutor. The content of the documents in question had been critical and accusatory towards the instigators of the coup. However, while the statements were acerbic and at times sarcastic, they could hardly be described as insulting. Furthermore, with regard to the fact that the applicant had made use of his position as a prosecutor in notifying the press, the fact that what was at stake in the present case went beyond the expression of a personal opinion had to be taken into account in weighing up the competing interests under the Convention.
Accordingly, the applicant's conviction for causing offence had not met any "pressing social need" capable of justifying such a restriction. It was the increased protection afforded to the armed forces by former Article 159 of the Criminal Code that undermined freedom of expression, not the generals' right as individuals to use the standard procedure available to anyone to complain if their honour or reputation had been attacked or they were subjected to insulting remarks.
Furthermore, the imposition of a criminal sanction of that nature on an official belonging to the national legal service would inevitably, by its very nature, have a chilling effect, not only on the official concerned but on the profession as a whole. For the public to have confidence in the administration of justice they must have confidence in the ability of judges and prosecutors to uphold effectively the principles of the rule of law. It followed that any chilling effect was an important factor to be considered in striking the appropriate balance between the right of a member of the legal service to freedom of expression and any other legitimate competing interest in the context of the proper administration of justice
The interference with the applicant's right to freedom of expression, in the form of a sanction for causing offence to the armed forces, as a result of which he had been permanently dismissed from his post as a prosecutor and prohibited from practising law, had been disproportionate to any legitimate aim pursued.
Conclusion: violation (unanimously).

Article 13 – The members of the Council of Judges that had been called upon to review the applicant's objection were unquestionably those who had reviewed his case and pronounced the impugned sanction. The decision to dismiss him had been examined by an appeals review board composed of nine members, four of whom had sat as members of the Council that had given the decision to which he objected. The impartiality of the bodies of the Supreme Council of Judges and Public Prosecutors that had been called upon to review the applicant's objection was therefore open to serious doubt, especially as the Council's Rules of Procedure provided for no means of guaranteeing the impartiality of its members when they sat on the appeals review board. The applicant had therefore not had a remedy in respect of his complaint under Article 10.
Conclusion: violation of Article 13 taken in conjunction with Article 10 (unanimously).

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

FREEDOM TO RECEIVE INFORMATION
Denial of information to an NGO about a pending constitutional review case: *admissible*.

TÁRSASÁG A SZABADSÁGJOGOKÉRT - Hungary (N° 37374/05)
Decision 13.11.2008 [Section II]

In March 2004 a Member of Parliament and other individuals lodged a complaint for a review of the constitutionality of amendments to the Criminal Code concerning drug-related offences. Several months

later the applicant association, an NGO active in the field of drug policy, requested the Constitutional Court to grant it access to the complaint pending before it. Having consulted the MP, the Constitutional Court refused its request explaining that complaints before it could be made available to outsiders only with the approval of the maker of the complaint. Subsequently, the applicant brought an action against the Constitutional Court requesting to oblige the respondent to give it access to the file, in accordance with the relevant provisions of the Data Act. The courts dismissed the applicant's action concluding that the data required was "personal" and could therefore not be accessed without the complainant's approval. The protection of such data could not, in the courts' view, be overridden by other lawful interests, including the accessibility of public information. Meanwhile, the Constitutional Court decided the constitutionality question and published in its decision a summary of the complaint in question.
Admissible under Article 10.

ARTICLE 11

FREEDOM OF ASSOCIATION
Ban on municipal workers founding a trade union and order setting aside with retroactive effect a collective bargaining agreement: *violations*.

DEMIR and BAYKARA - Turkey (N° 34503/97)
Judgment 12.11.2008 [GC]

Facts: The applicants are the president of the Tüm Bel Sen trade union and one of its members. Founded in 1990 by civil servants from various municipalities, the union's registered objective was to promote democratic trade unionism and thereby assist its members in their aspirations and claims. In 1993 the trade union entered into a collective agreement with a municipal council regulating all aspects of the working conditions of the council's employees, including salaries, benefits and welfare services. The trade union, considering that the council had failed to fulfil certain of its obligations – in particular financial – under the agreement, brought proceedings against it in the Turkish civil courts. It won its case in the District Court, which found in particular that although there were no express statutory provisions recognising a right for trade unions formed by civil servants to enter into collective agreements, this lacuna had to be filled by reference to international treaties such as the conventions of the International Labour Organisation (ILO) which had already been ratified by Turkey and which, by virtue of the Constitution, were directly applicable in domestic law. However, in December 1995 the Court of Cassation ruled that in the absence of specific legislation, the freedom to join a trade union and to bargain collectively could not be exercised. It indicated that, at the time the union was founded, the Turkish legislation in force did not permit civil servants to form trade unions. It concluded that Tüm Bel Sen had never had legal personality since its foundation, and therefore did not have the capacity to bring or defend court proceedings.
Following an audit of the Municipal Council's accounts by the Audit Court, the members of Tüm Bel Sen were obliged to reimburse the additional income they had received as a result of the defunct collective agreement.

Law: Article 11 – *The applicants' right, as municipal civil servants, to form trade unions*: The restrictions imposed on the three groups mentioned in Article 11, namely members of the armed forces, of the police or of the administration of the State, were to be construed strictly and therefore confined to the "exercise" of the rights in question. Such restrictions could not impair the very essence of the right to organise. It was moreover incumbent on the State concerned to show the legitimacy of any restrictions on the right to form trade unions. In addition, municipal civil servants, who are not engaged in the administration of the State as such, could not in principle be treated as "members of the administration of the State" and, accordingly, be subjected on that basis to a limitation of their right to organise and to form trade unions. Those considerations found support in the majority of the relevant international instruments and in the practice of European States. Consequently, "members of the administration of the State" could not be excluded from the scope of Article 11. At most the national authorities were entitled to impose "lawful

restrictions" on them, in accordance with Article 11 § 2. In the present case, however, the Government had failed to show how the nature of the duties performed by the applicants required them to be regarded as "members of the administration of the State" subject to such restrictions. The applicants could therefore legitimately rely on Article 11.
The combined effects of the authorities' action and inaction in the present case meant that it could be examined both in terms of interference by the respondent State with the applicants' exercise of their rights under Article 11 and in terms of failure by the authorities to honour their positive obligation to ensure that those rights were effectively secured. The Court chose to examine this part of the case from the standpoint of interference with the applicants' enjoyment of their rights, while at the same time taking the State's positive obligations into account.
In the present case it had not been shown that the absolute prohibition on forming trade unions imposed on civil servants by Turkish law, as it applied at the relevant time, met a pressing social need. At that time, the right of civil servants to form and join trade unions was already recognised by instruments of international law, both universal and regional. Their right of association was also generally recognised in all member States of the Council of Europe. ILO Convention No. 87, the fundamental text securing, internationally, the right of public officials to form trade unions, was already, by virtue of the Turkish Constitution, directly applicable in domestic law, and the State had confirmed by its subsequent practice (amending of Constitution and judicial decisions) its willingness to recognise the right of civil servants to organise. Turkey had also, in 2000, signed the two United Nations instruments recognising this right. However, in spite of these developments in international law, the Turkish authorities had not been able, at the relevant time, to secure to the applicants the right to form a trade union, mainly for two reasons. First, the Turkish legislature, after the ratification of ILO Convention No. 87 by Turkey in 1993, did not enact legislation to govern the practical application of that right until 2001. Secondly, during the transitional period, the Court of Cassation refused to follow the solution proposed by the District Court, which had been guided by developments in international law, and instead adopted a restrictive and formalistic interpretation of the domestic legislation concerning the forming of legal entities.
Thus, the combined effect of the restrictive interpretation by the Court of Cassation and the legislature's inaction between 1993 and 2001 had prevented the Turkish Government from fulfilling its obligation to secure to the applicants the enjoyment of their trade-union rights and this had not been "necessary in a democratic society".
Conclusion: violation (unanimously).

Annulment of a collective agreement which had been applied for the previous two years: The development of the Court's case-law as to the substance of the right of association enshrined in Article 11 was marked by two guiding principles: firstly, the Court took into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, allowing for its margin of appreciation; secondly, the Court did not accept restrictions that affected the essential elements of trade-union freedom, without which that freedom would become devoid of substance. These two principles were not contradictory but were correlated. This correlation implied that the Contracting State in question, whilst in principle being free to decide what measures it wished to take in order to ensure compliance with Article 11, was under an obligation to take account of the elements regarded as essential by the Court's case-law.
From the case-law as it stood, the following essential elements of the right of association could be established: the right to form and join a trade union, the prohibition of closed-shop agreements and the right for a trade union to seek to persuade the employer to hear what it had to say on behalf of its members. This list was not finite. On the contrary, it was subject to change to accommodate developments in labour relations. Limitations to rights thus had to be construed restrictively, in a manner which gave practical and effective protection to human rights.
Concerning the right to bargain collectively, the Court, reconsidering its case-law, found, having regard to developments in labour law, both international and national, and to the practice of Contracting States in this area, that the right to bargain collectively with an employer had, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention, it being understood that States remained free to organise their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants, except in very specific cases, should enjoy such rights, but without prejudice to the effects of

any "lawful restrictions" that might have to be imposed on "members of the administration of the State", a category to which the applicants in the present case did not, however, belong.
The Tüm Bel Sen trade union had, already at the relevant time, enjoyed the right to engage in collective bargaining with the employing authority. This right constituted one of the inherent elements in the right to engage in trade-union activities, as secured to that union by Article 11 of the Convention. The collective bargaining and the resulting collective agreement, which for a period of two years had governed all labour relations within the municipal council except for certain financial matters, had constituted, for the trade union concerned, an essential means to promote and secure the interests of its members. The absence of the legislation necessary to give effect to the provisions of the international labour conventions already ratified by Turkey, and the Court of Cassation's judgment of 6 December 1995 based on that absence, with the resulting de facto retroactive annulment of the collective agreement, constituted interference with the applicants' trade-union freedom.
Moreover, at the relevant time a number of elements showed that the refusal to accept that the applicants, as municipal civil servants, enjoyed the right to bargain collectively and thus to persuade the authority to enter into a collective agreement, had not corresponded to a "pressing social need". The right for civil servants to be able, in principle, to bargain collectively, was recognised by international legal instruments, both universal and regional, and by a majority of member States of the Council of Europe. In addition, Turkey had ratified ILO Convention No. 98, the principal instrument protecting, internationally, the right for workers to bargain collectively and enter into collective agreements – a right that was applicable to the applicants' trade union.
The Court concluded that the retroactive annulment of the collective agreement was not "necessary in a democratic society".
Conclusion: violation (unanimously).

Article 41 – EUR 20,000 in respect of non-pecuniary damage, to Ms Baykara, representing the Tüm Bel Sen trade union, to be handed over to the trade union; EUR 500 to Kemal Demir in respect of all heads of damage.

ARTICLE 13

EFFECTIVE REMEDY
Effectiveness of an appeal to the Judicial Service Commission: *violation*.

KAYASU - Turkey (N° 64119/00 and 76292/01)
Judgment 13.11.2008 [Section II]

(See Article 10 above).

ARTICLE 14

DISCRIMINATION (Article 1 of Protocol No. 1)
Absence of right to index-linking for pensioners resident in overseas countries which had no reciprocal arrangements with the United Kingdom: *no violation*.

CARSON and Others - United Kingdom (N° 42184/05)
Judgment 4.11.2008 [Section IV]

Facts: This case concerned allegedly discriminatory rules governing the entitlement to index-linking of the State pension. Under the rules, pensions were only index-linked if the recipient was ordinarily resident in the United Kingdom or in a country having a reciprocal agreement with the United Kingdom on the uprating of pensions. Those resident elsewhere continued to receive the basic State pension, but this was frozen at the rate payable on the date they left the United Kingdom. The 13 applicants had spent most of

their working lives in the United Kingdom, paying National Insurance contributions in full, before emigrating or returning to South Africa, Australia or Canada, none of which had a reciprocal agreement with the United Kingdom on pension uprating. Their pensions were accordingly frozen at the rate payable on the date of their departure. Considering this to be an unjustified difference in treatment, the first applicant sought judicial review of the decision not to index-link her pension. However, her application was dismissed in 2002 and ultimately on appeal before the House of Lords in 2005, *inter alia*, on the grounds that she was not in an analogous, or relevantly similar, situation to a pensioner resident in the United Kingdom or in a country where up-rating was available through a reciprocal agreement.

Law: (a) *Scope*: In the circumstances of the applicants' case, which involved the different application of the same pensions legislation to persons depending on their residence and presence abroad, ordinary residence, like domicile and nationality, was to be seen as an aspect of personal status falling within the scope of Article 14.

(b) *Analogous situation*: As to whether the applicants were in a relevantly similar position to pensioners entitled to index-linking, the Court noted that since the purpose of a Contracting State's social-security and pensions system was to provide a minimum standard of living for those resident within its territory, those residing outside that territory were not in a relevantly analogous situation. The Court was also hesitant to find an analogy between pensioners living in countries where uprating was available through a reciprocal agreement and those where it was not, as National Insurance contributions were only one part of the United Kingdom's complex system of taxation and the National Insurance Fund was just one of a number of sources of revenue used to pay for the United Kingdom's social security and national health systems. The applicants' payment of National Insurance contributions during their working lives in the United Kingdom was not therefore any more significant than the fact that they might have paid income tax or other taxes while domiciled there. Nor was it easy to compare the respective positions of residents in different States owing to differences in social-security provision, taxation, rates of inflation, interest and currency exchange.

(c) *Justification*: Any difference in treatment had, in any event, been objectively and reasonably justified. While there was some force in the applicants' argument that an elderly person's decision to move abroad might be driven by a number of factors, including the desire to be close to family members, place of residence was nonetheless a matter of choice. In that context, the same high level of protection against differences of treatment was not needed as with differences based on an inherent characteristic, such as gender or racial or ethnic origin. Moreover, the respondent State had taken steps through a series of leaflets to inform United Kingdom residents moving abroad about the absence of index-linking for pensions in certain countries. The pattern of reciprocal agreements was the result of history and perceptions in each country as to the perceived costs and benefits of such arrangements. They represented whatever the Contracting State had from time to time been able to negotiate without placing itself at an undue economic disadvantage and applied to provide reciprocity of social security cover across the board, not just in relation to pension uprating. Accordingly, the respondent State had not exceeded its very wide margin of appreciation to decide on matters of macro-economic policy by entering into such arrangements with certain countries but not others.
Conclusion: no violation (six votes to one).

DISCRIMINATION (Article 2 of Protocol No. 1)
Placement of Roma children in Roma-only classes owing to their poor command of the Croatian language: *case referred to the Grand Chamber*.

ORŠUŠ and Others - Croatia (N° 15766/03)
Judgment 17.7.2008 [Section I]

In a judgment delivered by a Chamber the Court held *inter alia* that neither Article 2 of Protocol No. 1 nor Article 14 of the Convention (taken in conjunction with the first-mentioned provision) had been

violated in the case of the applicants, 14 Croatian nationals of Roma origin. They claimed *inter alia* that the Roma-only curriculum in their schools had 30% less content than the official national curriculum.

In unanimously finding no violation of Article 2 of Protocol No. 1 the Court considered *inter alia* that the applicants had failed to provide sufficient evidence to support their claim.

In unanimously finding no violation of Article 14 in conjunction with Article 2 of Protocol No. 1 the Court observed *inter alia* that any difference in treatment of the applicants had been based on their language skills and that the placing of Roma children in separate classes was a method used in only four elementary schools in one particular region, owing to the high representation of Roma pupils there. The applicants' placement in separate classes had been a positive measure designed to assist them in acquiring the knowledge necessary for them to follow the national curriculum and had thus been based on their insufficient knowledge of the Croatian language and not on their race or ethnic origin.

The case was referred to the Grand Chamber at the applicants' request.

For further details, see Information Note no. 110.

DISCRIMINATION (Articles 9 and 12)
Requirement of certificate of approval for immigrants wishing to marry other than in the Church of England: *communicated*.

O'DONAGHUE and Others - United Kingdom (N° 34848/07)
[Section IV]

Under section 19 of the Asylum and Immigration Act 2004, persons subject to immigration control who wish to get married but are not willing or able to do so in the Church of England must apply to the Secretary of State for permission in the form of a certificate of approval, for which they must pay a fee. There is no exemption or possibility of waiver or reduction of this fee, which is currently GBP 295 (about EUR 330).
In 2007 the first and second applicants, who were practising Roman Catholics living in Northern Ireland where there is no Church of England, applied for a certificate of approval to allow them to marry. They requested exemption from the fee on the grounds that they were dependent on State benefits as they cared for their minor children and the first applicant's disabled parents and the second applicant, an asylum seeker from Nigeria, was not allowed to work under the terms of his temporary admission to the United Kingdom. They were told, however, that their application was invalid for failure to pay the prescribed fee.
In an opinion of 30 July 2008 in the case of *R. (on the application of Baiai and others) v. Secretary of State for the Home Department* [2008] UKHL 53., the House of Lords upheld a declaration by the courts below of incompatibility under the Human Rights Act 1998 as regards the discriminatory nature of the scheme and the impact it had on the affected individuals' right to marry. However, as the declaration of incompatibility is not binding, no financial compensation has been paid to persons affected by the regulations and the law remains in force. The applicants claim that more than 15,000 people have had to apply for a certificate under the scheme while others have been unable to apply because they cannot afford the fee.
Communicated under Articles 9 and 12 in conjunction with Article 14 with a question about the suitability of using the pilot judgment procedure, in view of the number of people affected by the certificate of approval requirement. Priority granted.

ARTICLE 34

VICTIM
Domestic redress for ill-treatment by police officers including express judicial condemnation, the officers' conviction and the exclusion of the applicant's confession: *case referred to the Grand Chamber*.

GÄFGEN - Germany (N° 22978/05)
Judgment 30.6.2008 [Section V]

(See Article 3 above).

ARTICLE 1 OF PROTOCOL No. 1

CONTROL OF THE USE OF PROPERTY
Forfeiture of applicant's lawfully possessed money for failure to report it to customs authorities: *violation*.

ISMAYILOV - Russia (N° 30352/03)
Judgment 6.11.2008 [Section I]

Facts: The applicant arrived in Moscow on a trip from Baku in possession of over USD 20,000 in cash, which he had acquired through the sale of an inherited flat. Even though under Russian law any amount exceeding USD 10,000 had to be reported to the customs authorities, the applicant failed to do so. The authorities found the money in his luggage, seized it and charged him with smuggling. He was eventually found guilty as charged and received a six-month suspended prison sentence. The money – which was considered to be physical evidence of the commission of the offence – was confiscated.

Law: The States have a legitimate interest and also a duty by virtue of various international treaties, such as the United Nations Convention against Transnational Organized Crime, to implement measures to detect and monitor the movement of cash across their borders, since large amounts of cash may be used for serious financial offences. However, the lawful origin of the applicant's money had not been in dispute. He had no criminal record nor was he suspected of money laundering, corruption or other serious financial offences. The criminal offence of which the applicant was found guilty consisted of failing to declare money which he was carrying in cash to the customs authorities. The mere act of bringing foreign currency in cash into Russia was not illegal under Russian law; rather, it only needed to be declared to the customs authorities. The amount confiscated was undoubtedly substantial for the applicant, for it represented the entire proceeds of the sale of his late mother's house in Baku. The harm the applicant might have caused to the authorities was minor: he had not avoided customs duties or any other levies or caused any other pecuniary damage to the State. Had the amount gone undetected, the Russian authorities would have only been deprived of the information that the money had entered Russia. Thus, the confiscation measure was not intended as pecuniary compensation for damage – as the State had not suffered any loss as a result of the applicant's failure to declare the money – but was deterrent and punitive in purpose. However, since the applicant had already been punished for the smuggling offence through the criminal conviction, the desired deterrent effect had therefore already been achieved. In such circumstances, the Court was not persuaded that the confiscation measure had been necessary. On the contrary, it was excessive and disproportionate and imposed an individual and excessive burden on the applicant.
Conclusion: violation (six votes to one).

Article 41 – EUR 20,000 in respect of pecuniary damage, EUR 5,000 in respect of non-pecuniary damage.

ARTICLE 2 OF PROTOCOL No. 1

RIGHT TO EDUCATION
Placement of Roma children in Roma-only classes owing to their poor command of the Croatian language: *case referred to the Grand Chamber*.

ORŠUŠ and Others - Croatia (N° 15766/03)
Judgment 17.7.2008 [Section I]

(See Article 14 above).

ARTICLE 3 OF PROTOCOL No. 1

FREE EXPRESSION OF OPINION OF PEOPLE
Election to parliament of representative of a national minority according to number of votes obtained at the territorial, not the national, level: *admissible*.

GROSARU - Romania (N° 78039/01)
Decision 25.11.2008 [Section III]

The applicant stood as a candidate in the 2000 general elections for one of the organisations representing Romania's Italian minority. The organisation presented the applicant's uninominal list in 19 of the country's 42 constituencies and won 21,263 votes at the national level. However, although the applicant won a total of 5,624 votes at the national level, the central electoral bureau awarded the seat to another member, who had stood on another uninominal list and won only 2,943 votes but in a single constituency. The applicant challenged that decision before the central electoral bureau, but his appeal was rejected on the grounds that seats were allocated on the basis, *inter alia*, of the order of the candidates on the organisation's winning list. The organisation was legally entitled to allocate its seats in the constituencies. Appeals against the decision which the applicant lodged with the bureau, the Constitutional Court and the High Court were rejected on the grounds that decisions of the central electoral bureau were final. The Parliament's validation committee dismissed another appeal by the applicant on the same grounds.

Admissible under Article 3 of Protocol 1 and Article 13 of the Convention.

STAND FOR ELECTION
Inability of persons with multiple nationality to stand as candidates in parliamentary elections: *violation*.

TĂNASE and CHIRTOACĂ - Moldova (N° 7/08)
Judgment 18.11.2008 [Section IV]

Facts: The applicants are both well-known Moldovan politicians: Mr Chirtoacă is the Vice-President of the Liberal Party and the Mayor of Chişinău; and, Mr Tănase the Vice-President of the Liberal Democratic Party and a member of the Chişinău Municipal Council. The Republic of Moldova is situated on territory which used to be part of Romania before World War II. That territory's population lost its Romanian citizenship after the territory's annexation by the Soviet Union in 1940. Following Moldova's declaration of independence in August 1991, a new law was adopted on Moldovan nationality. All those who had lived in the territory of the former Moldavian Soviet Socialist Republic before annexation were proclaimed citizens of Moldova. As descendants of those persons, both applicants obtained Moldovan nationality. In 1991 the Romanian Parliament also adopted a new law on citizenship: former Romanian nationals and their descendants who had lost their nationality before 1989 were allowed to re-acquire Romanian nationality. As in 2003 the restriction on Moldovan nationals holding other nationalities had been repealed, the applicants requested and obtained Romanian nationality. In 2008 the Moldovan

Parliament reformed the electoral legislation, notably by introducing a ban on those with dual or multiple nationality from becoming members of Parliament (Law no. 273). Other important amendments included the increasing of the electoral threshold and a ban on all forms of electoral blocks and coalitions. These amendments were enacted and entered into force in May 2008. The next general elections in Moldova will be held in the spring of 2009. It was estimated that, out of the total of 3,800,000 Moldovans, between 95,000 and 300,000 had obtained Romanian nationality between 1991 and 2001; in February 2007 some 800,000 Moldovans had applications pending for Romanian nationality. There also were approximately 120,000 Moldovans with Russian passports.

Law: *Admissibility* – Mr Chirtoacă had been quite clear in his statements to the press that he would actively participate in the elections, but, even if he was elected to parliament, he did not intend to cumulate the functions of Mayor and an MP. Therefore, he was not affected by Law no. 273 and could not claim to be a victim. Accordingly, the Court declared inadmissible the application in respect of Mr Chirtoacă. Mr Tănase, on the other hand, was directly affected by the new electoral law because, if elected, he would have to make the difficult choice between sitting as an MP and renouncing his dual nationality. Indeed, awareness of that difficult choice could have an adverse effect on the applicant's electoral campaign, both in terms of his personal investment and effort and in terms of the risk of losing votes with the electorate. His complaint was therefore declared admissible.

Merits – The ban preventing Moldovan nationals holding other nationalities from being elected to Parliament had interfered with Mr Tănase's right to stand as a candidate in free elections and to take his seat in Parliament if elected. A question could arise as to the overall lawfulness of the disputed restriction, given that there was an apparent inconsistency between the provisions of Law no. 273 and the European Convention on Nationality, which was part of the internal legal order and, as a duly ratified international instrument, took precedence over national legislation. However, it was not for the Court to resolve that perceived conflict of norms. The Court was prepared to accept the Government's submission that the impugned interference had pursued the legitimate aim of ensuring the loyalty of MPs to the State of Moldova. As regards the proportionality of the interference, Moldova was apparently the only European country which allowed individuals to have multiple nationalities but prohibited them from being elected to Parliament. However, in a democracy, loyalty to a State did not necessarily mean loyalty to the actual government of that State or to a particular political party. There were other methods available to the Moldovan Government to ensure loyalty of MPs to the nation, such as requiring them to take an oath. Such measures had been adopted by other European countries. Moreover, ECRI and the Venice Commission had underlined the incompatibility between certain provisions of the new electoral law and the undertakings Moldova had accepted when ratifying the Council of Europe's European Convention on Nationality, which in particular guaranteed to all those holding multiple nationality and residing on the territory of Moldova equal treatment with other Moldovans who hold exclusively Moldovan nationality. The Court was struck by the fact that in 2002 and 2003 the Moldovan Parliament had actually adopted legislation allowing Moldovans to hold dual nationality. At that time the authorities had not apparently had any concerns about the loyalty of those opting for dual nationality. Nor had the Government mentioned that the political rights of those who had decided to acquire another nationality would be impaired. Since 2003, and no doubt encouraged by the new policy, a large section of the Moldovan population had obtained dual or multiple nationality in the legitimate expectation that their existing political rights would not be curtailed. Since 2008 that sizeable proportion of the population of Moldova had not only found itself banned from actively participating in senior positions in the administration of the State, failing renunciation of an acquired additional nationality, but would also face limitation on its choice of representatives in the supreme forum of the country. While the Court's case-law had distinguished between the “active” and “passive” rights guaranteed by Article 3 of Protocol No. 1, it could not be overlooked that both of those aspects made up, mutually, the decisive components of the guarantee underlying that Article, namely the free expression of the people in the choice of the legislature. For that reason, it was essential to take a holistic approach to the impact which restrictions on either right might have on the securing of the aforesaid guarantee. In other words, there was an interdependence and the Court had to be vigilant so as to ensure that impediments to the right to be elected to parliament did not rebound negatively on citizens' rights to vote in accordance with their perception of which candidate would best promote their interests in Parliament. The possible negative consequences for the free

expression of the will of the people and the value of pluralism could not be discounted. In the specific context of Moldova's political evolution, the Court was not satisfied that Law no. 273 could be justified, particularly in view of the fact that such a far-reaching restriction had been introduced approximately a year or less before the general elections. Such practice was at odds with the recommendations by the Venice Commission concerning the crucial nature of the stability of the law for the credibility of the electoral process. Those in favour of the electoral reform had even categorically rejected the opposition's proposal to have the draft submitted to the Council of Europe for expertise. Nor had the Government reacted in any way to the unequivocal concern expressed by the Council of Europe. Therefore, the means employed by the Moldovan Government had been disproportionate to the aim pursued.
Conclusion: violation (unanimously).

Referral to the Grand Chamber

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

GÄFGEN - Germany (N° 22978/05)
Judgment 30.6.2008 [Section V]

(See Article 3 above).

KART - Turkey (N° 8917/05)
Judgment 8.7.2008 [Section II]

(See Article 6 § 1 [criminal] above).

MEDVEDYEV and Others - France (N° 3394/03)
Judgment 10.7.2008 [Section V]

(See Article 5 § 1 above).

ORŠUŠ and Others - Croatia (N° 15766/03)
Judgment 17.7.2008 [Section I]

(See Article 14 above).

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

The Panel of the Grand Chamber has rejected requests for referral of the following judgments, which have consequently become final:

XHERAJ – Albania (N° 37959/02)
ELEZI – Germany (N° 26771/03)
ASHUGHYAN – Armenia (N° 33268/03)
N.N. and T.A. – Belgium (N° 65097/01)
VAN INGEN – Belgium (N° 9987/03)
RODIĆ and 3 Others – Bosnia and Herzegovina (N° 22893/05)
KRAZTEV – Bulgaria (N° 29802/02)
ISMETA BAČIĆ – Croatia (N° 43595/06)
KRNIĆ – Croatia (N° 8854/04)
NIKOLAC – Croatia (N° 17117/06)
X. – Croatia (N° 11223/04)
MANEVSKI – Former Yugoslav Republic of Macedonia (N° 22742/02)
BLANDEAU – France (N° 9090/06)
ICHTIGIAROGLOU – Greece (N° 12045/06)
LAMBADARIDOU – Greece (N° 42150/06)
MEÏDANIS – Greece (N° 33977/06)
SOSSOADOUNO – Greece (N° 29845/06)
ZOURDOS and Others – Greece (N° 24898/06)
LAJOS KOVÁCS – Hungary (N° 8174/05)
DE PACE – Italy (N° 22728/03)
MATTEONI – Italy (N° 65687/01)
ĀDAMSONS – Latvia (N° 3669/03)
ORR – Norway (N° 31283/04)
BOBROWSKI – Poland (N° 64916/01)
KARPOW – Poland (N° 3429/03)
MIROSŁAV JABŁOŃSKI – Poland (N° 33985/05)
PANUSZ – Poland (N° 24322/02)
PRZEPAŁKOWSKI – Poland (N° 23759/02)
ROMAN WILCZYŃSKI – Poland (N° 35840/05)
SIENKIEWICZ – Poland (N° 25668/03)
CREȚU and Others – Romania (N° 34877/02)
DEAK – Romania and United Kingdom (N° 19055/05)
ELENA NEGULESCU – Romania (N° 25111/02)
MIȘCAREA PRODUCĂTORILOR AGRICOLI PENTRU DREPTURILE OMULUI – Romania (N° 34461/02)
MITREA – Romania (N° 26105/03)
PETREA – Romania (N° 4792/03)
SC MAROLOUX and JACOBS – Romania (N° 29419/02)
TEMEȘAN – Romania (N° 36293/02)
VITAN – Romania (N° 42084/02)

[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.

AKHIYADOVA – Russia (N° 32059/02)
ATABAYEVA and Others – Russia (N° 26064/02)
BELOTSERKOVETS – Russia (N° 34679/03)
BETAYEV and BETAYEVA – Russia (N° 37315/03)
CHEMBER – Russia (N° 7188/03)
ELMURZAYEV and Others – Russia (N° 3019/04)
GEKHAYEVA and Others – Russia (N° 1755/04)
IBRAGIMOV and Others – Russia (N° 34561/03)
ISIGOVA and Others – Russia (N° 6844/02)
ISMOILOV and Others – Russia (N° 2947/06)
KAPLANOVA – Russia (N° 7653/02)
MARTYNOVA – Russia (N° 57807/00)
MOROKO – Russia (N° 20937/07)
MUSAYEVA – Russia (N° 12703/02)
PETUKHOV – Russia (N° 40322/02)
RUSLAN UMAROV – Russia (N° 12712/02)
SANGARIYEVA and Others – Russia (N° 1839/04)
SELEZNEV – Russia (N° 15591/03)
SHULEPOV – Russia (N° 15435/03)
SUDARKOV – Russia (N° 3130/03)
UTSAYEVA and Others – Russia (N° 29133/03)
CVETKOVIĆ – Serbia (N° 17271/04)
ÇAMDERELI – Turkey (N° 28433/02)
DEMADES – Turkey (N° 16219/90)
KUŞ – Turkey (N° 27817/04)
SAKARYA – Turkey (N° 11912/04)
GAYEVSKAYA – Ukraine (N° 9165/05)
LESINA – Ukraine (N° 9510/03)