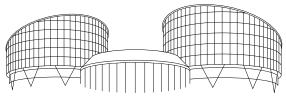

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law

No. 146 November 2011

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ARTICLE 2

Positive obligations

Failure to provide effective treatment to a prisoner suffering from multidrug-resistant tuberculosis: *violation*

Makharadze and Sikharulidze v. Georgia - 35254/07
Judgment 22.11.2011 [Section III]

Facts – The first applicant died of pulmonary tuberculosis in January 2009 while serving a prison sentence for drugs offences. The second applicant is his widow.

The first applicant, who had been suffering from tuberculosis for a number of years, was arrested in March 2006 and detained pending trial. He appealed against his detention on health grounds but his appeal was dismissed. A few days later, following a drastic deterioration in his condition, he was transferred to the prison hospital where he was given conventional, first line anti-tuberculosis medication. In May/June 2006 he was diagnosed as suffering from a form of multidrug-resistant tuberculosis. In July 2006 he was convicted and given a seven-year prison sentence. He was examined by medical experts from the National Forensic Office who confirmed the diagnosis and said that he was gravely ill and required treatment in a specialist hospital. He was not transferred, however. In July 2008 a request for his prison sentence to be suspended on account of his condition and the lack of effective medication in prison was dismissed. The applicant subsequently began two hunger strikes, the first in protest at the authorities' failure to comply with a court order for an additional medical examination and the second at their failure to follow a medical recommendation for his treatment with second-line drugs in specialist facilities.

In November 2008 the European Court issued an interim measure under Rule 39 of its Rules requiring Georgia to transfer the first applicant to a specialised hospital capable of dispensing appropriate anti-tuberculosis treatment. The Government refused as it considered such a measure unnecessary, as the first applicant had already been transferred to a new prison hospital whose medical services were allegedly comparable if not superior to those of a civil tuberculosis hospital.

Law – Article 2: The first applicant had not contracted tuberculosis in prison and the evidence did not suggest that the mutation of the bacillus to the multi-drug resistant form had occurred there either. He could not be said to have been left unattended as he had spent only a few days in prison before being transferred to the prison medical facilities where he was examined regularly by doctors and received conventional anti-tuberculosis treatment and a suitable diet. The core issue of the case was, therefore, not the absence of medical care in general, but rather the alleged lack of adequate treatment for a very particular type of disease – multi-drug resistant tuberculosis – which caused the first applicant's death.

Effective treatment of multi-drug resistant tuberculosis depended on the existence of at least three basic factors, namely access to early and accurate diagnostic tests, the availability of all classes of second-line drug and clinicians with special proficiency in treating the multi-drug resistant strain. The treatment given to the first applicant had been deficient on all three counts. It had taken the authorities over a year after becoming aware that the bacillus was resistant to conventional first-line drugs to conduct the susceptibility tests needed to establish a diagnosis and an individualised medication regimen. Then, although the tests established the sensitivity of the mycobacterium to two second-line drugs, the prescribed treatment did not start for another seven months, apparently because of a shortage of the drugs in the country. Lastly, the

medical staff supervising his treatment in the prison hospitals did not, at the material time, possess the requisite expertise in the management of multi-drug resistant tuberculosis (a specific training programme was introduced shortly after his death).

As regards the impact of the first applicant's hunger strikes on his condition, although satisfied that the first applicant had been continually warned that he risked a deterioration in his health, the Court could not discern from the medical file whether the specialists had ever attempted to find out whether his conduct might have been conditioned by the drugs he was taking. In any event, the main reason for the hunger strikes had been the authorities' failure to conduct the additional medical examination that had been ordered and to implement a medical recommendation for his transfer to one of the two specialist hospitals in Georgia. Nor had the domestic courts properly addressed the first applicant's request for conditional release pending treatment. Instead, they had simply turned a blind eye to the exceptional gravity of his condition. Lastly, despite the fact that the first applicant had died in a prison hospital, a public institution directly engaging the State's responsibility, the issue of the individual responsibility of the clinicians in charge of his treatment had not been subjected to an independent, impartial and comprehensive inquiry. The State had thus also failed to sufficiently account for his death.

In sum, even if some of the aforementioned deficiencies would not alone have been sufficient for a finding of inadequate discharge by the State of its positive obligation to protect the first applicant's health and life in prison, their coexistence and cumulative effect was more than enough.

Conclusion: violation (unanimously).

Article 34: Under the interim measure indicated by the Court, the Government had been required to place the first applicant, who at the time was detained in the prison hospital, in a specialised medical establishment capable of dispensing appropriate anti-tuberculosis treatment. Although that measure did not necessarily require the applicant's transfer to a civil hospital, it did require treatment in a medical establishment, whether civil or penal, specialised in the treatment of tuberculosis. As already established, the prison hospital did not possess the necessary equipment or drugs, and the medical staff did not possess the skills needed to treat multi-drug resistant tuberculosis. The Government were or should have been aware of these serious deficiencies, as the medical experts had repeatedly denounced the inadequacy of the treatment the first applicant was receiving in prison. Nor had there been any objective impediment preventing compliance with the measure as two civil hospitals specialised in the treatment of multi-drug resistant tuberculosis were in service at the time. Indeed, the Court was of the opinion that the authorities might even have a direct Convention obligation to resort to the civil sector when a detainee's condition was critical and no comparable specialised medical assistance was available in the prison sector.

Conclusion: violation (unanimously).

Article 41: EUR 15,000 to the second applicant in respect of non-pecuniary damage.

ARTICLE 3

Inhuman or degrading treatment

Sterilisation of Roma woman without her informed consent: *violation*

V.C. v. Slovakia - 18968/07
Judgment 8.11.2011 [Section IV]

Facts – In 2000 the applicant, a Roma woman, was sterilised in a public hospital during the delivery of her second child by Caesarean section. The sterilisation consisted of severing and sealing her Fallopian tubes in order to prevent fertilisation. The applicant's delivery record contained a clear reference to her ethnic origin together with a request for sterilisation along with her signature. However, the applicant claimed that she had not understood the term "sterilisation", and that she had signed the request while in labour and after being told by the hospital staff that if she fell pregnant again either she or the child might die. According to the applicant, during her stay in the hospital she had been put in a room with other Roma women and they were not allowed to use the same bathrooms or toilets as non-Roma women. The applicant unsuccessfully sought redress in civil proceedings, arguing that her sterilisation had been in violation of national legislation and international human-rights standards and that she had not been duly informed about the procedure, its consequences or alternative solutions. Her consequent constitutional complaint was also dismissed.

Law – Article 3: Sterilisation constituted a major interference with a person's reproductive health status and bore upon many aspects of the individ-

ual's personal integrity including his or her physical and mental well-being and emotional, spiritual and family life. Without the consent of a mentally competent adult patient, it was incompatible with the requirement of respect for human freedom and dignity. Moreover, generally recognised international standards laid down that sterilisation may be carried out only subject to prior informed consent, save for exceptional emergency situations.[1] The applicant had been sterilised in a public hospital immediately after giving birth via Caesarean section since the doctors considered that a future pregnancy would put her and the baby's life at risk. However, as had been confirmed by one of the doctors, there had been no medical emergency involving imminent risk of irreparable damage to her life. Since she was a mentally competent adult patient, her informed consent was a prerequisite for such procedure, even assuming it to have been "necessary" from a medical point of view. The applicant was asked to give her consent in writing when already in labour, without being fully informed about her health status, the proposed procedure or the alternatives. Asking for her consent in such a delicate position clearly did not permit her to take a decision of her own free will, after consideration of all the implications or consultation with her partner. The paternalistic manner in which the hospital staff had acted had left the applicant with no option but to agree to the procedure the doctors considered appropriate. Consequently, the sterilisation procedure, including the manner in which the applicant was required to agree to it, must have aroused in her feelings of fear, anguish and inferiority. It had also resulted in lasting suffering, since due to her infertility, she had ended up divorced from her husband and ostracised from the Roma community. Although there had been no indication that the medical staff had intended to ill-treat her, their gross disregard for her right to autonomy and choice as a patient had subjected her to treatment contrary to Article 3 of the Convention.

Conclusion: violation (unanimously).

Article 8: Numerous international bodies, such as the European Commission against Racism and Intolerance (ECRI), CEDAW and the Council of Europe Commissioner for Human Rights, had noted the problem of sterilisation of Roma women in Slovakia and called for adequate safeguards to be put in place. In order to explain the reference to the applicant's Roma origin in her medical record, the Government had submitted that such an entry had been necessary since Roma patients frequently neglected social and health care and therefore required special attention. Even if this were accepted, the Court could not but note a certain mindset on the part of the medical staff as to the manner in which the medical situation of a Roma woman should be managed. Despite the fact that the domestic legislation in force at the material time required patients' consent prior to sterilisation, in the applicant's case those provisions had not provided appropriate safeguards and had resulted in a medical intervention of a particularly serious nature being carried out without her informed consent. Consequently, the absence of safeguards giving special consideration to the reproductive health of the applicant as a Roma woman had constituted a failure by the respondent State to comply with its positive obligation to secure the right to respect for her private and family life. Specific measures aimed at the elimination of such procedural shortcomings had been enacted in 2004, only after the relevant facts of the applicant's case had occurred, and could therefore have no bearing on her situation.

Conclusion: violation (unanimously).

The Court further found unanimously that there had been no violation of the procedural aspect of Article 3 or of Article 13 in conjunction with Articles 3, 8 or 12.

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

Inadequate conditions of detention aggravated by failure to comply with earlier ruling of European Court: *violation*

Ivanțoc and Others v. Moldova and Russia - 23687/05
Judgment 15.11.2011 [Section IV]

Facts – This was a follow-up case to the Court's judgment in *Ilaşcu and Others v. Moldova and Russia*[2] in 2004 in which the Grand Chamber held, *inter alia*, that the first and second applicants' continued detention in the separatist "Moldovan

1. See, for example, the Council of Europe Convention on Human Rights and Biomedicine, the World Health Organisation's Declaration on the Promotion of Patients' Rights in Europe and General Recommendation No. 24 of the UN Committee on the Elimination of Discrimination against Women (CEDAW).

2. *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, 8 July 2004, Information Note no. 66.

Republic of Transdniestria" (the "MRT") since December 1993 violated Articles 3 and 5 § 1 (a) of the Convention and engaged the responsibility of both Moldova and the Russian Federation. Despite a requirement in that judgment for both States to take every measure to secure the men's immediate release, the conditions in which the two men were detained had remained unchanged and it was not until almost three years later, in June 2007, that they were released.

Law – (a) *Admissibility*

(i) *Competence* ratione materiae – In response to the respondent Governments' contention that it was the Committee of Ministers, not the Court, which was competent to monitor the execution of the Court's judgments, the Court reiterated that the Committee of Ministers' supervisory powers under Article 46 were not encroached on where the Court had to deal with relevant new information in the context of a fresh application. Nor was it unusual for the Court to examine a second application concerning a continuing violation of a Convention right that had been found to have been violated during an earlier period.

While acknowledging that, in principle, it had no jurisdiction to review the general and/or individual measures, if any, adopted by the respondent States to secure the applicants' rights which had been found to have been violated in *Ilaşcu*, the Court could nevertheless take account of subsequent factual developments communicated by the parties which were likely to have a bearing on the potential responsibility of the respondent Governments in respect of alleged Convention violations after 8 July 2004. It was immaterial here that the first and second applicants' detention beyond that date was not new detention but a continuation of the detention the Court had found to be contrary to Article 5 in *Ilaşcu*, since the Court had itself suggested in *Ilaşcu* that a further assessment of compliance with Article 5 could be made if the detention continued. For its part, the Committee of Ministers had decided to suspend the examination of the *Ilaşcu* case pending final determination of the present application by the Court. The question of the prolongation of the applicants' detention beyond 8 July 2004 thus fell within the Court's jurisdiction. Were that not the case, not only would this matter escape all scrutiny under the Convention, but the applicants would be deprived of any just satisfaction that might be awarded to them in respect of that period.

Conclusion: preliminary objection dismissed (six votes to one).

(ii) *Competence* ratione personae – The respondent Governments' objection that the applicants did not come within their jurisdiction was joined to the merits.

(b) *Merits*

(i) *Complaints against Moldova* – Articles 3, 5, 8 and 13: The Court had held in *Ilaşcu* that Moldova did not exercise authority over that part of its territory under the effective control of the "MRT" so that its responsibility could not be engaged under Article 1 of the Convention on account of a wrongful act within the meaning of international law. However, Moldova still had a positive obligation under Article 1 to take diplomatic, economic, judicial or other measures in its power and in accordance with international law to secure the applicants' Convention rights. The Court therefore had to ascertain whether Moldova had discharged its positive obligations for the period beginning on 8 July 2004, bearing in mind there was little Moldova could do to re-establish its authority over Transdniestrian territory when confronted with a regime sustained militarily, politically and economically by the Russian Federation. The Court notes that even after 8 July 2004, Moldova never ceased to protest about the Russian Federation's active support for the "MRT" separatist regime, and had continued to deploy its efforts to recover control over the Transdniestrian territory. As regards the applicants' situation, following the *Ilaşcu* judgment the Moldovan authorities had systematically raised, with both the Transdniestrian leaders and the Russian Federation, the questions of the applicants' release and of respect for their Convention rights. They had also continually sought the assistance of other States and international organisations. As to other possible measures, no new fact or argument had been put forward to alter the Court's conclusion in *Ilaşcu* that any judicial investigation in respect of persons living in Transdniestria would be ineffectual. In the light of these considerations, Moldova had discharged its positive obligations to secure the applicants' Convention rights and its objection regarding its lack of effective control in Transdniestria and consequent limited responsibility under the Convention was therefore upheld.

Conclusion: no violation (six votes to one).

(ii) *Complaints against Russia* – Article 1: Even after the Court's judgment in *Ilaşcu*, and at least until the applicants' release in June 2007, Russia had continued to enjoy a close relationship with the "MRT", providing political, financial and economic support to the separatist regime. The Rus-

sian army was also, at the date of the applicants' release, still stationed on Moldovan territory, in breach of Russia's undertakings to withdraw completely and of Moldovan legislation. The Russian Federation had continued to do nothing to prevent the alleged Convention violations committed after 8 July 2004 or to put an end to the situation brought about by its agents. The applicants had, therefore, continued to be within the "jurisdiction" of Russia until their release.

Conclusion: preliminary objection dismissed (six votes to one).

Article 3: The conditions of detention had not changed after the *Ilaşcu* judgment. The two men had been held in solitary confinement amounting to almost complete social isolation and were allowed only a one-hour walk a day. They lacked natural light in their cells, appropriate and regular medical treatment, and a suitable diet. They had no contact with their lawyers, limited contact with their closest relatives and their correspondence was censored. Such treatment must have caused them pain and suffering, both physical and mental. The Committee for the Prevention of Torture (CPT) of the Council of Europe had found that their prolonged solitary confinement was indefensible. Taken as a whole, the conditions in which the two men were detained between 8 July 2004 and their release in June 2007 amounted to inhuman and degrading treatment. That violation was aggravated by the fact that the detention in question had occurred after the Court's judgment of 8 July 2004 requiring their immediate release.

Conclusion: violation (six votes to one).

In respect of the first and second applicants, the Court also found a continuing violation of Article 5 aggravated by the failure to comply with the judgment in *Ilaşcu* requiring their immediate release, and a violation of Article 13, owing to the absence of an effective remedy in respect of their unlawful detention. Lastly, it found a violation of Article 8 owing to the lack of any legal basis or justification for restrictions that had been imposed on the rights of the third and fourth applicants, who were close relatives of the two imprisoned men, to correspond with and visit them.

Article 41: EUR 60,000 each to the first and second applicants in respect of pecuniary and non-pecuniary damage in view of the extreme seriousness of the violations; EUR 20,000 each to the third and fourth applicants in respect of pecuniary and non-pecuniary damage.

Degrading treatment

Prisoner held in foul smelling cell in disciplinary wing, 23 hours a day for 28 days: *violation*

Plathey v. France - 48337/09
Judgment 10.11.2011 [Section V]

Facts – The applicant, a prisoner, appeared before the disciplinary board following a search of his cell. He was ordered to spend forty-five days in a disciplinary cell, that is, until 22 February 2009, having regard to the four days he had spent in detention. The applicant was placed in a cell that had recently been set on fire and now had a nauseous smell. He unsuccessfully appealed against the disciplinary board's decision.

Law – Article 3: The applicant had been detained for twenty-eight days, twenty-three hours per day, in the disciplinary block in a cell which had been burnt out a week earlier. He had been detained there on account of an alleged lack of cell space despite the fact that a senator who had visited the cell on 26 January 2009, twenty-five days after the fire and seventeen days after the applicant had been put in it, had noted a "suffocatingly strong smell" and the prison governor had said in a letter of 17 February 2009 that no prisoners could be put in it. There had been eight doctor's visits during the period in which the applicant had been in the cell without any request being made for a change of cell. Although the applicant had not asked the prison authorities to put him in another cell on grounds of the poor quality of the air in the one he was in, he had referred to the problem in his appeals against his detention in a disciplinary cell. Moreover, the administrative authorities had been well aware of the situation. The applicant had undeniably been very badly affected by the fact that his cell had been burnt out shortly before he was put in it and a strong burning smell had lingered several weeks after the fire. Accordingly, the applicant's conditions of detention had diminished his human dignity and amounted to degrading treatment.

Conclusion: violation (unanimously).

Article 13 in conjunction with Article 3: The applicant was unable to have his conditions of detention reviewed by a judge before the end of the disciplinary measure because the administrative court had given a ruling on 10 February 2009 only on the lawfulness of the decision to place him in the cell. The possibility available to prisoners held in

a disciplinary cell to lodge an urgent application on grounds of a breach of a fundamental freedom (*recours en référé-liberté*) had been introduced into the Code of Criminal Procedure by the Prison Act of November 2009, well after the applicant had served his disciplinary sentence.

Conclusion: violation (unanimously).

Article 41: EUR 9,000 in respect of non-pecuniary damage.

ARTICLE 5

Article 5 § 1 (b)

Non-compliance with court order

Detention for failure to comply with court order which the applicant was never informed about: *violation*

Beiere v. Latvia - 30954/05
Judgment 29.11.2011 [Section III]

Facts – After a municipality official lodged a defamation claim against the applicant, criminal proceedings were instituted against her and a lawyer was appointed to represent her, although she claims she was never informed of that appointment. After hearing representations from the prosecutor and the applicant's lawyer and noting that the applicant had refused to submit to a residential psychiatric examination voluntarily, a judge ordered her placement in a psychiatric hospital. Several days later the applicant was escorted by the police to the hospital, where she was for the first time informed of the existence of the court order. Her appeal against the order was unsuccessful and she was kept in the hospital for about twenty days. The criminal proceedings against her were ultimately discontinued in view of her mental incapacity.

Law – Article 5 § 1 (b): The Government had argued that the applicant's detention had been justified by her failure to comply with a lawful court order. The Court noted, however, that the applicant was informed of the existence of a court order only after she had been brought to the psychiatric hospital and was therefore never given a chance to comply voluntarily. Moreover, while it remained unclear whether the applicant had been aware of the criminal charges against her, she was never informed that a lawyer had been appointed to represent her and did not meet him. The domestic court had ordered the applicant's detention in her absence, without summoning her to a hearing or informing her that a hearing would take place. In such circumstances, the domestic proceedings had not offered the applicant sufficient protection against a potentially arbitrary deprivation of her liberty and the detention order issued in those proceedings could not be regarded as a "lawful order of a court" within the meaning of Article 5 § 1 (b).

Conclusion: violation (unanimously).

Article 41: EUR 9,000 in respect of non-pecuniary damage.

Article 5 § 1 (e)

Persons of unsound mind

Preventive detention in prison of person allegedly of unsound mind: *violation*

O.H. v. Germany - 4646/08
Judgment 24.11.2011 [Section V]

(See Article 46 below, page 24)

ARTICLE 6

Article 6 § 1 (civil)

Applicability
Civil rights and obligations
Tribunal established by law

Alleged lack of impartiality where same bench heard successive applications concerning a request for a stay of execution: *Article 6 applicable; no violation*

Central Mediterranean Development Corporation Limited v. Malta (no. 2) - 18544/08
Judgment 22.11.2011 [Section IV]

Facts – In February 2005 the Court of Appeal, sitting in a three-judge formation, upheld a decision at first instance requiring the applicant company to execute certain works. On 3 November 2005 the same three judges of the Court of Appeal rejected a request by the applicant company for a stay of execution. On 14 December 2005, still in the same composition, it refused a request by the applicant company to reconsider its decision con-

cerning a stay. In their application to the European Court, the applicant company complained of a lack of impartiality in that the bench which heard its request for reconsideration was identical to that which had refused a stay.

Law – Article 6 § 1

(a) *Admissibility* – The request for a stay of execution of the Court of Appeal's judgment constituted a corollary of the execution phase of that judgment which was an integral part of the proceedings determining civil rights and obligations and therefore engaged the protection of Article 6. That conclusion was reinforced by the Grand Chamber's judgment in *Micallef v. Malta*[1] which confirmed the applicability of Article 6 to preliminary or interim proceedings, such as cases of injunctive relief, provided certain conditions were fulfilled, namely (a) that the right at stake in both the main and the injunction proceedings were "civil" within the autonomous meaning of Article 6 and (b) following scrutiny of the nature, object and purpose of the interim measure, and its effects on the right in question, it could be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it was in force. Article 6 was therefore applicable to the stay of execution proceedings.

Conclusion: admissible (unanimously).

(b) *Merits* – It had not been shown or argued that the Court of Appeal held or manifested any personal convictions such as to cast doubt on its subjective impartiality.

As to objective impartiality, the Court had previously held that it was not prima facie incompatible with the requirements of Article 6 for a judge involved in a decision on the merits subsequently to be involved in the examination of the admissibility of an appeal against that decision.[2] The assessment of whether a judge's participation in different stages of a civil case complied with the impartiality requirement was to be made on a case-to-case basis, regard being had to the circumstances of the individual case and, importantly, to the characteristics of the relevant rules of civil procedure applied. It was appropriate to examine whether there was a close link between the issues successively examined by the Court of Appeal on the two occasions at issue.[3] The question determined by the Court of Appeal on 14 December 2005 was not the same as that it had determined on 3 November 2005 as, in the former decision it had examined the substance of the applicant company's request for a stay of execution, whereas in the latter it had had to determine whether the applicant company's request for reconsideration was compatible with domestic law and procedure. Only if it had found that it was could it have gone on to examine the merits of the request, a phase which never materialised. Thus, the scope of its examination in December could be considered tantamount to an assessment of admissibility and was not the same or intrinsically linked to the merits of the original request for a stay. In particular, when deciding the applicant company's request for reconsideration, the Court of Appeal was not called upon to assess and determine whether, for example, sitting as a bench, it had correctly applied the relevant domestic law to the applicant's case or whether or not it had committed an error of legal interpretation or application in its previous decision. There was no link between the substantive issues determined in the two decisions such as to cast doubt on the impartiality of that court. The applicant company's fears as to the impartiality of the Court of Appeal could not, therefore, be said to have been objectively justified.

Conclusion: no violation (unanimously).

1. *Micallef v. Malta* [GC], no. 17056/06, 15 October 2009, Information Note no. 123.
2. *Warsicka v. Poland*, no. 2065/03, 16 January 2007, Information Note no. 93.
3. *Indra v. Slovakia*, no. 46845/99, 1 February 2005.

Fair hearing

Lack of procedural safeguards in proceedings divesting the applicant of legal capacity: *violation*

X and Y v. Croatia - 5193/09
Judgment 3.11.2011 [Section I]

Facts – The applicants were a mother and daughter who had lived together until 2006 when the mother (the first applicant) was placed in a care home for the elderly due to old age and illness. In 2008 the social-welfare centre appointed the first applicant's niece as guardian *ad litem* and initiated proceedings with a view to divesting the first applicant of her legal capacity. A psychiatric report, based on medical records from 2002 and an interview, concluded that the first applicant was unable to take care of herself, her rights or interests. Although the second applicant contested the niece's appointment as guardian and the psychiatric report, and submitted a power of attorney to represent her mother, she was not informed of the court hearing dates. In August 2008 the court divested the first

applicant of her legal capacity on the basis of the available information and the psychiatric report. That decision was never served on the applicants.

In September 2008 the social-welfare centre appointed a guardian *ad litem* for the second applicant and initiated proceedings for her to be divested of her legal capacity too, on the grounds that she was suffering from muscular dystrophy and mental-health problems and was incapable of looking after herself. She was also alleged to be overly protective of her mother, having constantly complained about the care provided to her in the home and strongly opposed the proceedings in which her mother had been divested of her legal capacity. A psychiatric report was drawn up on the basis of a one-hour telephone conversation with the second applicant. She was also heard by the domestic court dealing with her case. At the time the European Court gave its judgment, the proceedings were still pending.

Law – Article 6 § 1: The first applicant was never notified of the proceedings concerning her legal capacity; she was neither summoned by the court to give evidence nor seen by the judge conducting the proceedings. She was therefore unable to participate personally in the proceedings in any way. Even though the proceedings had been conducted in line with the domestic law, the Court considered that judges adopting decisions with serious consequences for a person's private life, such as those resulting in individuals being divested of their legal capacity, should in principle have personal contact with the individuals concerned. Any decision based on the assessment of a person's mental health should also be supported by relevant medical evidence. However, at the end of the day, it was the judge, not a psychiatrist, who needed to assess all the relevant facts and decide whether such an extreme measure was necessary in the individual case. The psychiatrist who drew up the medical report had seen the first applicant only once and concluded that she was gravely ill, bedridden and entirely dependent on the help of others. In the Court's view, it would still have been preferable for the judge conducting the proceedings to have verified whether those conclusions were arbitrary, and to hear the witnesses and doctor involved. Furthermore, the domestic authorities had attached no weight to the second applicant's submissions concerning her mother's condition, even though they contained important arguments. The power of attorney authorising the second applicant to represent the first applicant in the proceedings was also disregarded, despite being legally valid. Moreover, the court decision divesting her of her legal capacity was never served on the first applicant, which had effectively prevented her from using any remedies. As regards the reasons adduced by the domestic court for its decision, the Court could not but observe that in order to ensure proper care for the ill and elderly, the State authorities had at their disposal much less intrusive measures than divesting them of legal capacity. In conclusion, the first applicant was deprived of adequate procedural safeguards in proceedings resulting in a decision adversely affecting her private life.

Conclusion: violation (unanimously).

Article 8: The mere institution of proceedings to divest individuals of their legal capacity had serious consequences for their private life, such as the appointment of a special guardian and their being subjected to psychiatric and other assessments. The guardian appointed for the second applicant was given a wide range of powers, including the power to represent her in all her personal affairs, and to take care of her person, rights, obligations and well-being. The institution of those proceedings therefore constituted an interference with her private life. Under the domestic law, a State authority wishing to institute proceedings to divest a person of his or her legal capacity had to be able to provide convincing evidence that the person in question was unable to care for his or her own needs or posed a risk to the rights and interests of others. In the second applicant's case, the social-welfare centre had not relied on any such specific facts. The general nature of their assertions raised doubts as to the lawfulness of their request. As to her personal circumstances, the second applicant had been hospitalised twice in mental institutions, but had been discharged on the grounds that she had recovered and was responding positively to therapy. Conversely, the negative psychiatric report drawn up during the court proceedings was based only on a telephone conversation with a psychiatrist who had never treated her before. In her statement before the domestic court, the second applicant had explained that she lived alone and took care of all her needs, paid all her bills, had medical check ups and organised her social life. The Court saw no indication that she had caused any specific damage to her own interests or those of others that would justify divesting her of her legal capacity. In sum, the institution of the proceedings failed to observe the procedure and requirements prescribed by law, did not pursue a legitimate aim and was not necessary in a democratic society.

Conclusion: violation (unanimously).

Article 41: Finding of a violation constituted sufficient just satisfaction of any non-pecuniary

damage sustained by the first applicant in view of possibility of having domestic proceedings re-opened; EUR 2,000 in respect of non-pecuniary damage to the second applicant.

(See also *Shtukaturov v. Russia*, no. 44009/05, 27 March 2008, Information Note no. 106)

Article 6 § 3

Rights of defence

Criminal trial of a prominent Yukos board member: *admissible*

Khodorkovskiy v. Russia - 11082/06
Decision 8.11.2011 [Section I]

The applicant was a board member and one of the major shareholders of the Yukos oil company. In 2003 he was charged with various counts of business fraud and tax evasion. He alleges that during the criminal proceedings against him, his lawyers were at times searched when leaving his remand prison and documents were seized from them. Their offices were also searched on several occasions and disciplinary proceedings were instituted against them. The applicant's defence team was given some six months to prepare their case, the investigation file for which contained some 55,000 pages. During that time the applicant did not receive his own copy, but was only permitted to read the documents in the presence of the investigator. When the trial started, the applicant's case was joined with another two co-accused. At the hearings, the applicant was held in a metal cage and was allowed to communicate with his lawyers only with the authorisation of the trial judge. In February 2005 the same court, presided over by the same judge, gave judgment in the case of another senior manager in the Yukos group. The applicant's lawyers subsequently sought recusal of the presiding judge, but their request was not granted. The applicant was ultimately sentenced to eight years' imprisonment. He was sent to serve his prison sentence in Siberia, some 6,000 kilometres from Moscow, as a result of which family visits have been infrequent. His lawyers' visits have been restricted by the stringent prison regime and his foreign lawyers representing him before the European Court were refused entry visas.

Admissible under Article 6 § 1 (impartiality), Article 6 § 2 (presumption of innocence), Article 6 §§ 1 and 3 (b), (c) and (d) (rights of defence), Article 7 (unforeseeability of law), Article 8 (respect for family life), Article 18 (alleged political motivation for prosecution) and Article 34 of the Convention, and under Article 1 of Protocol No. 1 (property rights).

(See also *Khodorkovskiy v. Russia*, no. 5829/04, 31 May 2011, Information Note no. 141; and *Lebedev v. Russia* (dec.), no. 13772/05, 27 May 2010)

ARTICLE 8

Private life

Unwarranted institution of proceedings to divest applicant of legal capacity: *violation*

X and Y v. Croatia - 5193/09
Judgment 3.11.2011 [Section I]

(See Article 6 § 1 above, page 13)

Private and family life

Prohibition under domestic law on the use of ova and sperm from donors for *in vitro* fertilisation: *no violation*

S.H. and Others v. Austria - 57813/00
Judgment 3.11.2011 [GC]

Facts – The applicants were two married couples. As they were infertile, they sought to have recourse to medically assisted procreation. The only means by which they could have a child of which one of them was the genetic parent was *in vitro* fertilisation (IVF) using sperm from a donor (in the case of the first couple) or eggs (in the case of the second couple). Both methods were illegal under the Austrian Artificial Procreation Act, which prohibited the use of sperm from a donor for IVF treatment and egg donation in general. That Act did, however, allow other methods of assisted procreation, in particular IVF using eggs and sperm from persons married to each other or living together as man and wife (homologous procreation techniques) and, in exceptional circumstances, sperm donation for *in utero* fertilisation. The applicants lodged an application with the Constitutional Court, which held that there had been an interference with their right to respect for their family

life, but that this was justified because it was designed to preclude both the creation of unusual family relationships (a child with two mothers, one the biological mother and the other a "surrogate" mother) and the exploitation of women.

In its judgment of 1 April 2010 the Chamber found a violation of Article 14 of the Convention in conjunction with Article 8 both in respect of the female applicants and the male applicants (see Information Note no. 129).

Law – Article 8: The right of a couple to conceive a child and to make use of medically assisted procreation for that purpose was protected by Article 8, as such a choice was a form of expression of private and family life. Accordingly, that provision was applicable to the present case. The Court noted that the applicants had been denied medically assisted procreation as a result of the operation of a legal provision that they had unsuccessfully challenged before the domestic courts. The Court examined their complaint from the standpoint of an interference with the exercise of their right to use techniques of artificial procreation. The impugned measure was prescribed by law and pursued the legitimate aims of the protection of health or morals and the protection of the rights and freedoms of others. Since the judgment of the Constitutional Court, many developments in medical science had taken place to which a number of Contracting States had responded in their legislation. However, the Court was not required to determine whether or not the prohibition of gamete donation was now justified under the Convention, but whether that measure was justified at the time when the Austrian Constitutional Court had examined the case. There was now a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of *in vitro* fertilisation, which reflected an emerging European consensus. That consensus was not, however, based on settled and long-standing principles established in the law of the member States but rather reflected a stage of development within a particularly dynamic field of law and did not decisively narrow the margin of appreciation of the State. Since the use of IVF treatment had given rise then and continued to give rise today to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touched on areas where there was not yet clear common ground amongst the member States, the Court considered that the margin of appreciation to be afforded to the respondent State must be a wide one.

(a) *Egg donation* – In an area as sensitive as that of artificial procreation, concerns based on moral considerations or on social acceptability of the techniques in question must be taken seriously. However, these were not in themselves sufficient reasons for a complete ban on a specific artificial procreation technique such as egg donation. Notwithstanding the wide margin of appreciation afforded to the Contracting States, the legal framework devised for this purpose must be shaped in a coherent manner which allowed the different legitimate interests involved to be adequately taken into account. The Austrian legislature had not completely ruled out artificial procreation as it had allowed the use of homologous techniques. Austrian law was based on the idea that medically assisted procreation had to remain as close as possible to natural conception in order to avoid possible conflicts between biological and genetic mothers in the wider sense. In doing so, the legislature had tried to reconcile the wish to make medically assisted procreation available and the existing unease among large sections of society as to the role and possibilities of modern reproductive medicine. Furthermore, the Austrian legislature had established specific safeguards and precautions under the Artificial Procreation Act, namely, reserving the use of artificial procreation techniques to specialised medical doctors who had particular knowledge and experience in this field and were themselves bound by the ethical rules of their profession, and statutorily prohibiting the remuneration of gamete donation. Those measures were intended to prevent potential risks of eugenic selection and their abuse and to prevent the risk of exploitation of women in vulnerable situations as ovum donors. With regard to the concerns about creating relationships in which the social circumstances deviated from the biological ones, the institution of adoption had evolved over time and now provided a satisfactory legal framework for such relationships. Similarly, a legal framework satisfactorily regulating the problems arising from ovum donation could also have been adopted. However, the splitting of motherhood between a genetic mother and the one bearing the child differed significantly from adoptive parent-child relations and had added a new aspect to the issue. The central question in terms of Article 8 of the Convention was not whether a different solution might have been adopted by the legislature that would arguably have struck a fairer balance, but whether, in striking the balance at the point at which it had, the Austrian legislature had exceeded the margin of appreciation afforded to it under that Article. In determining that question, the Court

attached some importance to the fact that there was no sufficiently established European consensus as to whether egg donation for *in vitro* fertilisation should be allowed. The prohibition of egg donation by the Austrian legislature was therefore compatible with Article 8.

(b) *Sperm donation* – The same considerations were relevant for the prohibition of sperm donation. The fact that the Austrian legislature had enacted an Artificial Procreation Act prohibiting sperm and egg donation for the purposes of *in vitro* fertilisation without at the same time proscribing sperm donation for *in vivo* fertilisation, which was a technique which had been tolerated for a long time and had become commonly accepted by society, was a matter of significance in the balancing of the respective interests and could not be considered solely in the context of the efficient policing of the prohibitions. It showed, rather, the careful and cautious approach adopted by the Austrian legislature in seeking to reconcile social realities with its approach of principle in this field. In that connection there was no prohibition under Austrian law on going abroad to seek treatment for infertility that used artificial procreation techniques not allowed in Austria and in the event of successful treatment the Civil Code contained clear rules on paternity and maternity that respected the wishes of the parents.

(c) *Conclusion* – Neither in respect of the prohibition of egg donation for the purposes of artificial procreation nor in respect of the prohibition of sperm donation for *in vitro* fertilisation under section 3 of the Artificial Procreation Act had the Austrian legislature exceeded the margin of appreciation afforded to it at the relevant time.

The Austrian Parliament had not thus far undertaken a thorough review of the rules governing artificial procreation, taking into account the relevant dynamic developments in science and society. The Austrian Constitutional Court had observed that medical science at the time and the consensus existing in society were subject to developments that the legislature would have to take into account in future. Although the Court had concluded that there had been no violation of Article 8 in the present case, it observed that the area in question, in which the law appeared to be continuously evolving and which was subject to particularly dynamic scientific and legal developments, needed to be kept under constant review by the Contracting States.

Conclusion: no violation (thirteen votes to four).

Family life

Conviction with absolute discharge for assisting illegal immigrant: *no violation*

Mallah v. France - 29681/08
Judgment 10.11.2011 [Section V]

Facts – The applicant is a Moroccan national who has been lawfully resident in France for more than thirty years, together with his wife and their five children. In August 2003 his daughter married B.A., a Moroccan national who lived in Morocco. They applied for B.A. to be allowed to join his wife in France under the rules on family reunion. In December 2005 B.A. entered France lawfully on a three-month visa and stayed with his father-in-law, the applicant. In March 2006, after the visa had expired, B.A. remained in France with his wife, who was now pregnant. In April 2006 the border police received an anonymous letter reporting the presence of an illegal immigrant at the applicant's home. The police subsequently carried out a search as part of a preliminary investigation by the public prosecutor, and took B.A. and the applicant into custody. After refusing a settlement proposed under the agreed penalty scheme, the applicant was summoned by the public prosecutor to appear before the criminal court in July 2006 for facilitating the unauthorised residence of an alien. In August 2006 B.A. and his wife applied for family reunion. On 30 August 2006 the public prosecutor informed the applicant that he had decided to discontinue the proceedings against him. He found that the applicant's alleged offence of facilitating the unauthorised residence of his son-in-law no longer appeared to be made out, in view of the new information brought to his attention concerning B.A.'s immigration status. However, in September 2006 the criminal court, ruling on the basis of the public prosecutor's summons of July 2006, found the applicant guilty of facilitating the unauthorised residence of an alien. In the same judgment the court granted the applicant an absolute discharge because the effects of the offence had ceased. In October 2006 the application by B.A. and his wife for family reunion was granted. In April 2007 the court of appeal upheld the criminal court's judgment, finding that the applicant's conduct had been guided solely by generosity towards his son-in-law. The applicant appealed to the Court of Cassation, arguing that the judgment amounted to a violation of Article 8 of the Convention. In December 2007 the Court of Cassation dismissed his appeal.

Law – Article 8

(a) *Applicability* – Given that the son-in-law was living in the applicant's family home – the fact forming the subject matter of the case – that he had been married to the applicant's daughter for two years and that the couple had applied to the authorities for family reunion and were expecting a child, the existence of a family tie between the applicant and his son-in-law was established.

Conclusion: admissible (unanimously).

(b) *Merits* – After noting that the applicant had taken in his son-in-law despite being aware that he was an illegal immigrant, the domestic courts had found him guilty of facilitating the unauthorised residence of an alien, although it had granted an absolute discharge. The applicant's conviction had amounted to interference within the meaning of Article 8; the interference had been in accordance with the law and had pursued a legitimate aim, namely the prevention of disorder or crime.

In making it an offence to assist aliens in unlawfully entering, moving about and remaining in France, the legislature had intended to tackle illegal immigration and organised networks such as smugglers. Statutory provision was made for immunity from prosecution for an illegal immigrant's closest family members, namely ascendants, descendants, brothers, sisters and spouse or cohabitee in a *de facto* marital relationship. However, the applicant had not fallen into the category of relatives to whom the law referred and had therefore not been entitled to immunity from prosecution. Since the offence had been made out in accordance with the law, which, moreover, was sufficiently clear and foreseeable in its application, the domestic courts could not have reached any other decision than to find the applicant guilty. However, taking into account the special circumstances of the present case and the applicant's conduct, which had been guided solely by generosity, the courts had granted him an absolute discharge when convicting him. Accordingly, the authorities had struck a fair balance between the various competing interests, namely the need to prevent disorder and crime and the need to protect the applicant's right to respect for his family life. The measure taken against him had therefore not interfered disproportionately with his right to respect for his family life. Furthermore, it had had only limited consequences in terms of his criminal record.

Conclusion: no violation (six votes to one).

Positive obligations

Absence of safeguards giving special consideration to the reproductive health of a Roma woman: *violation*

V.C. v. Slovakia - 18968/07
Judgment 8.11.2011 [Section IV]

(See Article 3 above, page 8)

ARTICLE 9

Manifest religion or belief

Conviction of a Jehovah's Witness for refusal to perform his military service and absence of an alternative form of service: *violation*

Erçep v. Turkey - 43965/04
Judgment 22.11.2011 [Section II]

Facts – The applicant was a Jehovah's Witness and refused to perform his military service. Under the relevant legislation, persons who failed to report for duty when called for military service were regarded as deserters. Each time a new call-up period began, criminal proceedings for failure to report for duty were brought against him (over twenty-five sets of proceedings from 1998 onwards). He was sentenced to several terms of imprisonment. In 2004 the military court decided to impose an aggregate sentence of seven months and fifteen days' imprisonment. After serving five months in prison, the applicant was released on licence.

Law – Article 9: The applicant was a member of the Jehovah's Witnesses, a religious group whose beliefs included opposition to military service, irrespective of any requirement to carry weapons. The applicant's objections had therefore been motivated by genuinely held religious beliefs which were in serious and insurmountable conflict with his obligations in that regard. The system of compulsory military service applicable in Turkey imposed obligations on citizens that were liable to have serious consequences for conscientious objectors. It made no provision for exemption on grounds of conscience and resulted in heavy criminal penalties for persons who, like the applicant, refused to perform their military service. Hence, the interference complained of stemmed not just from the fact that the applicant had been convicted on numerous occasions, but also from the absence of any alter-

native form of service. Conscientious objectors had no option but to refuse to enrol in the army if they wished to remain true to their beliefs. In doing so they laid themselves open to a kind of "civil death" because of the numerous prosecutions which the authorities invariably brought against them and the cumulative effects of the resulting criminal convictions, the continuing cycle of prosecutions and prison sentences and the possibility of facing prosecution for the rest of their lives. Such a system failed to strike a fair balance between the interests of society as a whole and those of conscientious objectors. Accordingly, the penalties imposed on the applicant, without any allowances being made for the dictates of his conscience and beliefs, could not be regarded as a measure necessary in a democratic society.

Conclusion: violation (unanimously).

Article 46: The violation of the applicant's rights had its origins in a structural problem linked to the inadequacy of the existing legal framework governing the status of conscientious objectors and to the absence of an alternative form of service. A reform of the law, which was necessary in order to prevent further similar violations of the Convention, combined with the introduction of an alternative form of service, might constitute an appropriate means of redress by which to put an end to the violation found.

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

ARTICLE 10

Freedom of expression

Ban on television or radio advertising by animal-protection organisation on grounds that its objectives were "wholly or mainly of a political nature": *relinquishment in favour of the Grand Chamber*

Animal Defenders International v. the United Kingdom - 48876/08
[Section IV]

The applicant is a non-governmental organisation based in the United Kingdom which campaigns against the use of animals in commerce, science and leisure, and seeks to achieve changes in the law and public policy and to influence public and parliamentary opinion to that end. In 2005 it began a campaign directed against the keeping and exhibition of primates and their use in television advertising. As part of the campaign, it wished to screen a 20-second television advertisement. However, the Broadcast Advertising Clearance Centre (BACC) declined to clear the advertisement on the grounds that the applicant was precluded by the Communications Act 2003 from advertising on radio or television since its objectives were "wholly or mainly of a political nature".[1] The applicant unsuccessfully challenged the prohibition on political advertising on television and radio in the High Court. In a decision of 12 March 2008[2] the House of Lords unanimously dismissed the applicant's appeal after finding that a blanket ban was necessary to avoid the risk of advertisements by organisations with objectionable goals and that a less restrictive prohibition would have been difficult to regulate fairly, objectively and coherently and would have accorded excessive discretion to officials. Other means of communication apart from television and radio had been available to the applicant.

In its application to the European Court, the applicant complains under Article 10 of the Convention that, as a result of the prohibition on political advertising, it was unjustifiably denied the opportunity to advertise on television or radio.

ARTICLE 13

Effective remedy

Lack of suspensive effect of remedy for challenging a deportation order: *case referred to the Grand Chamber*

De Souza Ribeiro v. France - 22689/07
Judgment 30.6.2011 [Section V]

The applicant was a Brazilian national. Relying on Articles 8 and 13 of the Convention, he complained that he had been deported to Brazil and separated from his family and that he had had no opportunity to challenge the lawfulness of the removal order against him before it was executed.

1. By virtue of section 321(2) of the Communications Act 2003 an advertisement will contravene the prohibition on political advertising on radio and television, *inter alia*, if it is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature. Section 321(7) provides an exception for public-service advertisements and party-political and party-election broadcasts of certain political parties.
2. *R (On The Application of Animal Defenders International) v Secretary of State For Culture, Media and Sport* [2008] UKHL 15.

In a judgment of 30 June 2011 a Chamber of the Court unanimously found the complaint under Article 8 inadmissible for lack of victim status, because the administrative court had acknowledged the unlawful nature of the measure that had resulted in the applicant being deported to Brazil, and the applicant had subsequently been able to return to France, where he had eventually been issued with a renewable residence permit. As to the non-suspensive effect of the remedy for challenging the lawfulness of the removal order, in view of the wide margin of appreciation the States enjoyed in such matters, the Court found by four votes to three that there had been no violation of Article 13 in conjunction with Article 8 on the grounds that the consequences of interference with the rights guaranteed under Article 8 were in principle reversible, as demonstrated in this case, where the family ties had not been lastingly broken following the applicant's expulsion as he had managed to return to France some time later.

On 28 November 2011 the case was referred to the Grand Chamber at the applicant's request.

ARTICLE 14

Discrimination (Article 1 of Protocol No. 1)

Difference in treatment of legitimate and illegitimate children for succession purposes: *case referred to the Grand Chamber*

Fabris v. France - 16574/08
Judgment 21.07.2011 [Section V]

The applicant was born in 1943 of a relationship between his father and a married woman who already had two children born of her marriage. In 1970 Mr and Mrs M. – the applicant's mother and her husband – made an *inter vivos* division of their property (*donation-partage*) between their two legitimate children, retaining a life interest in the property until their death. Mr M. died in 1981 and Mrs M. in 1994. In 1983 the *tribunal de grande instance* had declared the applicant to be the illegitimate child of Mrs M. In 1998 the applicant brought an action against the legitimate children in the *tribunal de grande instance*, seeking an abatement of the division so that he could claim his share in his mother's estate. At that time, the Law of 3 January 1972 provided that children born of adultery could claim only half the share in the estate of their father or mother to which a legitimate child was entitled. After the Court had ruled against France in 2000 in the case of *Mazurek v. France*,[1] France amended its legislation by a Law of 3 December 2001 to grant children born of adultery identical inheritance rights to legitimate children. In a judgment of September 2004, the *tribunal de grande instance* declared the applicant's action admissible and found in his favour on the merits. Following an appeal by the legitimate children, the court of appeal set the lower court's judgment aside. The applicant unsuccessfully appealed to the Court of Cassation.

In a judgment of 21 July 2011 a Chamber of the Court held, by five votes to two, that there had been no violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 on the ground that the national courts, in applying the transitional provisions of the Laws of 1972 and 2001, had correctly balanced the long-standing established rights of Mr and Mrs M.'s legitimate children against the pecuniary interests of the applicant. Thus, according to the court of appeal and the Court of Cassation, at the time when the applicant had brought his action for abatement of the distribution of the estate, in 1998, there had been a pre-existing established legal situation since 1970. In excluding challenges to *inter vivos* gifts granted prior to the coming into force of the Law of 1972, the legislature had sought to guarantee the legal certainty required by such gifts under the provisions of section 14 of the Law of 3 January 1972 which prohibited challenges to *inter vivos* gifts granted prior to that Law, which had not been repealed by the Law of 3 December 2001.

On 28 November 2011 the case was referred to the Grand Chamber at the applicant's request.

ARTICLE 34

Victim

Unity of interests of applicant company and respondent Government: *inadmissible*

Transpetrol, a.s., v. Slovakia - 28502/08
Decision 15.11.2011 [Section III]

Facts – The applicant is a joint-stock company traiding in oil. The application concerns the fairness of proceedings before the Constitutional Court regarding the ownership of shares in the company. At the material time, the State had a majority share-

1. *Mazurek v. France*, no. 34406/97, 1 February 2000, Information Note no. 15.

holding in the company. The company is now wholly owned by the State.

Law – Article 34: The Court had first to examine whether the applicant company had standing in the proceedings before it. The applicant company had features of both a "governmental" and a "non-governmental organisation". On the one hand, it was a commercial joint-stock company operating exclusively under the private-law regime, governed by the Commercial Code, with no privileges or special rights or rules concerning enforcement of judgments against it. It was subject to the jurisdiction of the ordinary courts and did not participate in the exercise of any governmental power. In the past, it had been partly owned by private entities. On the other hand, however, the State had always been a majority shareholder and at present was the sole shareholder of the applicant company. On account of its strategic importance for the national economy the applicant company used to be excluded by law from privatisation. It had been recognised in the domestic law as having the character of a "natural monopoly" and had an unrivalled market position in Slovakia. However, rather than weighing those elements against each other, the Court was of the opinion that the decisive considerations for the determination of the applicant company's *locus standi* lay in the assessment of the overall procedural and substantive context of the application and of its underlying facts. The question of ownership of shares in the applicant company primarily concerned the rights and interests of other shareholders rather than the rights and interests of the applicant company itself. The Court found no indication that the application strived to further interests other than those that were concurrently interests of the State. In particular, the State had joined the applicant company as an intervener for the defendant in separate proceedings involving the determination of essentially the same issues as those in the proceedings contested in the instant application. The Government had also sought to challenge the judgment of the Constitutional Court at issue in the instant case in two applications the Ministry of the Economy had lodged with the Court, which had been declared inadmissible as incompatible *ratione personae*. The Government had been represented in those applications by the same lawyer as the applicant company in the instant case. Those circumstances reflected the unity of interests of the applicant company and the Government.

Conclusion: inadmissible (incompatible *ratione personae*).

Lack of clear and specific instructions by alleged victims to their representative: *inadmissible*

Pană and Others v. Romania - 3240/03
Decision 15/11/2011 [Section III]

Facts – The thirteen applicants are individual shareholders in the International Bank of Religions (*Banca Internațională a Religiilor* – BIR), and also a company, Investar International Holding. Following a petition in June 2000 by the National Bank of Romania, the county court declared BIR insolvent in July 2000 and decided to commence proceedings for its compulsory liquidation. The court dismissed objections lodged by seven shareholders as inadmissible, finding that they lacked *locus standi*. Appeals by BIR and the Procurator General were unsuccessful. In 2000 BIR's shareholders referred the matter to the anti-corruption committees of the Senate and the Parliament. In September 2004 the report by the committees stated that BIR's collapse had resulted from a series of illegal operations by the Government, the National Bank and the judges dealing with the case. Relying in particular on the report's conclusions, BIR shareholders lodged some thirty criminal complaints against various persons, alleging that the bank's compulsory liquidation had been fraudulent and complaining about the manner in which it had been conducted. They applied to join the proceedings as civil parties. However, their actions were unsuccessful.

Law – Article 34

(a) *The application in respect of the BIR shareholders being represented* – The twelve individual applicants and the applicant company had applied to the Court in due form in December 2002, in their own names. In a memorial appended to the application forms, signed by six of the thirteen applicants, they had stated that they were representing the 2,188 BIR shareholders and applying to the Court on their behalf. However, the memorial had not been accompanied by any authority form. In addition, the list had not included either the particulars of the shareholders referred to, as required by Rule 47 of the Rules of Court, or their signatures confirming the institution of proceedings, which would have given the Court an unequivocal indication of their intention to apply to it in their own names. Moreover, letters sent to the Court in December 2004 by Mr Pană, claiming to be the representative of the bank's shareholders, revealed discrepancies in the treatment and number of the shareholders.

Furthermore, the power of attorney granted for the purpose of the present application to the first applicant, Mr Pană, in March 2006 by the BIR board and signed by its chairman could not be taken into account. Although it contained a reference to having been granted "to represent the interests of the bank's shareholders", it was likewise not accompanied by a list of the shareholders concerned, with their particulars and signatures.

As regards the decision of the general meeting of the bank's shareholders dated July 2004, by which Mr Pană had been appointed to represent the shareholders before international bodies such as the European Court, the decision in question referred to the participation of an unspecified number of shareholders possessing 65.94% of the bank's capital. In that connection, a letter from the applicants' lawyer indicated that at the general meeting in February 2006 only 298 (13.6%) of the 2,188 shareholders had been present. Besides the question of the formal requirements, including quorum, for the adoption of decisions by a general meeting of shareholders of a company in liquidation and the question of the scope of such decisions, the Court did not have sufficient information to establish unequivocally that all the persons whose names were listed in the table, apart from the thirteen applicants who had lodged applications in due form, intended to apply to it in their own name.

The Court considered it essential for representatives to be able to show that they had received specific and explicit instructions from alleged victims within the meaning of Article 34 of the Convention. There was no indication in the case file that it had been impossible for the shareholders in question to comply with this simple yet crucial procedural requirement to submit a duly completed application together with a power of attorney. The letter sent to the Court in December 2004 by Mr Pană could not be regarded as an objective and insurmountable obstacle but reflected a perfectly normal situation in the life of a limited company, namely that there could be differences of opinion among its shareholders, which might become more serious in the event of the company's liquidation.

Conclusion: inadmissible (incompatible *ratione personae*).

(b) *The remainder of the application* – The proceedings complained of had concerned only the bank in liquidation as a corporate entity, and not the applicants in their personal capacity. In that connection, the Court had always been mindful of the separate legal personality of companies, authorising the piercing of the "corporate veil" only in exceptional circumstances. In the present case, however, the bank in question had been able to take part in proceedings before the domestic courts, even after the procedure for its compulsory liquidation had commenced. The applicants had not shown that they were majority shareholders in the bank. In any event, not even the fact of holding a substantial portion of the shares was sufficient in principle for the applicants to qualify as "victims" within the meaning of Article 34. They should in addition have a personal interest in the subject-matter of the application, relating in particular to an infringement of their rights as shareholders. The applicants had not complained of a violation of their rights as shareholders of the bank in liquidation, such as the right to attend the general meeting and to vote. Nor had they alleged any damage other than that sustained by the bank in which they were shareholders, whereas the bank itself had not yet lodged a valid application with the Court relating to the facts of the case. The fact that the BIR board had granted Mr Pană a power of attorney in March 2006 to represent the interests of the bank's shareholders before the Court could not be accepted in place of a proper application on behalf of the bank.

Conclusion: inadmissible (incompatible *ratione personae*).

Hinder the exercise of the right of petition

Failure to comply with interim measure requiring prisoner's placement in specialised medical establishment: *violation*

Makharadze and Sikharulidze v. Georgia - 35254/07
Judgment 22.11.2011 [Section III]

(See Article 2 above, page 7)

ARTICLE 35

Article 35 § 1

Effective domestic remedy – "The former Yugoslav Republic of Macedonia"

Length-of-proceedings complaint with the Supreme Court under the 2006 Courts Act, as amended: *effective remedy*

Adži-Spirkoska and Others v. "the former Yugoslav Republic of Macedonia" - 38914/05 and 17879/05
Decision 3.11.2011 [Section I]

Facts – In 2000 the first four applicants instituted proceedings for the restitution of land. The proceedings were still pending when the European Court gave its decision. The fifth applicant brought a civil action against his former employer in 2001 and her proceedings were also ongoing. However, in 2010 he complained to the Supreme Court under the 2006 Courts Act, as amended, about the length of the proceedings in his case. In February 2011 the Supreme Court found a violation of his right to a hearing within a reasonable time, ordered the competent court to decide his case within six months and awarded him around EUR 2,000 in respect of non-pecuniary damage. In the proceedings before the European Court the Government objected that the first four applicants had failed to exhaust domestic remedies as they had not brought an action under the 2006 Courts Act, as amended, and that the fifth applicant could no longer claim to be a victim of a violation.

Law – Article 35 § 1: Following the Court's judgment in *Parizov*,[1] the respondent State had passed legislation in 2008 amending the 2006 Courts Act. Its wording was clear and indicated that the new remedy was specifically designed to address the issue of the excessive length of proceedings before national authorities. The Supreme Court had exclusive competence to decide such complaints, on the basis of the Convention and the criteria established in the European Court's case-law, within six months. If it found the length of the proceedings to have been unreasonable, it would award compensation and, where appropriate, set a time-limit for the competent court to decide the case at issue. It was clear from statistical data submitted by the Government that the length remedy as specified by the 2008 legislation was fully operational. Not only was it designed to ensure the acceleration of pending proceedings, it also provided a compensatory remedy. The remedy was therefore to be regarded as effective within the meaning of Article 35 § 1 and had to be exhausted, although, particularly as regards the level of just satisfaction awarded, that position could be subject to review in the future. This exhaustion requirement did not concern cases already pending before the Court where the impugned proceedings had ended and the applicants could no longer use the remedy. As regards cases pending before the Court where applicants had used the remedy, the Court would assess in each individual case whether they could still claim to be victims within the meaning of Article 34 of the Convention. The complaint of the first four applicants was therefore declared inadmissible for non-exhaustion of domestic remedies, despite the fact that it had been introduced prior to the creation of the new remedy.

Conclusion: inadmissible (failure to exhaust domestic remedies).

Article 34 – The fifth applicant, who had already availed himself of the new remedy, had received compensation comparable to what the Court would have been likely to award and the competent court had been ordered to decide his case within a set time-limit. In those circumstances, he could no longer claim to be a victim of a violation of the "reasonable-time" requirement.

Conclusion: inadmissible (absence of victim status).

1. *Parizov v. "the former Yugoslav Republic of Macedonia"*, no. 14258/03, 7 February 2008.

ARTICLE 46

Measures of a general character

Respondent State required to provide effective remedy to contest detention pending trial and to claim compensation

Altınok v. Turkey - 31610/08
Judgment 29.11.2011 [Section II]

Facts – Before the European Court the applicant complained that the lodging of an objection against a decision by the assize court to refuse his request for release and to order his continued detention had been ineffective. He also complained that he had not had an effective remedy for claiming compensation.

Law – The Court found a violation of Article 5 § 4 because the remedy provided for in domestic law had not observed the principle of equality of arms between the parties, and a violation of Article 5 § 5 because the compensatory remedy referred to could not be regarded as effective.

Article 46: The violation of the applicant's right under Article 5 §§ 4 and 5 to an effective remedy for challenging his continued detention and seeking compensation had originated in a systemic problem. In relation to Article 5 § 4, the problem concerned the failure to provide detainees or their

lawyers with a copy of the public prosecutor's opinion during the examination of an objection. In relation to Article 5 § 5, it concerned the total lack of any compensatory remedy in such cases. Some three hundred applications concerning similar complaints that were likely to give rise to findings of a violation of the Convention were currently pending before the Court. The deficiencies in domestic law noted in the present case could give rise to numerous further applications in the future. This was an aggravating factor as regards the State's responsibility under the Convention for a past or present situation. The Court observed that general measures at national level were undoubtedly called for in the execution of this judgment.

(See also Resolution Res(2004)3 and Recommendation Rec(2004)6 of the Committee of Ministers of the Council of Europe, both adopted on 12 May 2004.)

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

Respondent State required to enact legislation concerning conscientious objectors and to introduce an alternative form of service

Erçep v. Turkey - 43965/04
Judgment 22.11.2011 [Section II]

(See Article 9 above, page 18)

Measures of a general character
Individual measures

Preventive detention in Germany: no indication of measures in view of adequate implementation at domestic level

O.H. v. Germany - 4646/08
Judgment 24.11.2011 [Section V]

Facts – In 1987 the applicant was convicted of attempted murder and given a nine-year prison sentence followed by preventive detention, which at the time was subject to a statutory maximum period of ten years. However, in 2006, after the applicant had completed his prison sentence and ten years' preventive detention, the court responsible for the execution of sentences ordered his continued preventive detention under a 1998 legislative amendment on the grounds that he was likely to reoffend. In his application to the European Court the applicant complained that his continued detention was unlawful (Article 5 § 1 of the Convention) and constituted a heavier penalty than that applicable when the offence was committed (Article 7 § 1).

Law – Article 5 § 1: For the reasons stated in *M. v. Germany*,[1] the preventive detention beyond the maximum period of ten years permitted by law at the time of the applicant's conviction and sentence was not justified under sub-paragraphs (a) or (c) of Articles 5 § 1.

As to whether it was justified under sub-paragraph (e) as being detention of a person "of unsound mind", the Court reiterated that, in principle, the detention of a person as a mental-health patient would only be "lawful" for the purposes of this provision if effected in a hospital, clinic or other appropriate institution. At the material time the applicant was detained in a prison wing for persons in preventive detention and the Court was not convinced that he had been offered an appropriate therapeutic environment for a person detained as being of unsound mind. Indeed, the director of psychiatry at the prison had confirmed that the applicant needed treatment in a psychiatric hospital. The fact that the applicant had refused treatment in such an institution did not exempt the domestic authorities from providing an appropriate medical and therapeutic environment. In that connection, the Court endorsed the view that had been expressed by the German Federal Constitutional Court in its leading judgment of 4 May 2011 on the question of preventive detention that persons in preventive detention had to be provided a high level of care by a multi-disciplinary team and individualised therapy if the standard therapies available in the institution were unlikely to work.

Lastly, in response to the Government's argument that continued preventive detention had been ordered to protect the public from further offences, the Court reiterated that the Convention did not permit a State to protect potential victims from the criminal acts of a person by measures which were itself in breach of that person's Convention rights.

Conclusion: violation (six votes to one).

Article 7 § 1: As in *M. v. Germany* the applicant's preventive detention had, in the absence of any substantial difference with the ordinary prison regime, to be considered a "penalty" and had been extended beyond the initial maximum period of

1. *M. v. Germany*, no. 19359/04, 17 December 2009, Information Note no. 125.

ten years with retrospective effect under a law enacted after the commission of the offence.

Conclusion: violation (unanimously).

Article 46: Following the Court's judgments in *M. v. Germany* and several follow-up cases, the Federal Constitutional Court had held in its judgment of 4 May 2011 that all provisions on the retrospective prolongation of preventive detention were incompatible with the Basic Law. It had further ordered that courts dealing with the execution of sentences had to review without delay the detention of persons – such as the applicant – whose preventive detention had been prolonged retrospectively and to examine whether they were highly likely to commit the most serious crimes of violence or sexual offences and whether they suffered from a mental disorder. As regards the notion of mental disorder, the Federal Constitutional Court had explicitly referred to the Court's interpretation of the notion of "persons of unsound mind" in Article 5 § 1 (e) of the Convention. Any detainee in the applicant's position in respect of whom these preconditions were not met had to be released by no later than 31 December 2011.

By that judgment the Federal Constitutional Court had implemented the Court's findings on preventive detention in Germany in the domestic legal order and had assumed full responsibility. By setting a relatively short time-frame for the domestic courts to reconsider the continuing preventive detention of those concerned, it had proposed an adequate solution to put an end to ongoing Convention violations. Accordingly, it was not necessary to indicate any specific or general measures regarding the execution of the judgment in the applicant's case.

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

(See also *Schmitz v. Germany*, no. 30493/04, 9 June 2011, and *Mork v. Germany*, nos. 31047/04 and 43386/08, 9 June 2011, both in Information Note no. 142)

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

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

De Souza Ribeiro v. France - 22689/07
Judgment 30.6.2011 [Section V]

(See Article 13 above, page 19)

Fabris v. France - 16574/08
Judgment 21.07.2011 [Section V]

(See Article 14 above, page 20)

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

Animal Defenders International v. the United Kingdom - 48876/08
[Section IV]

(See Article 10 above, page 19)