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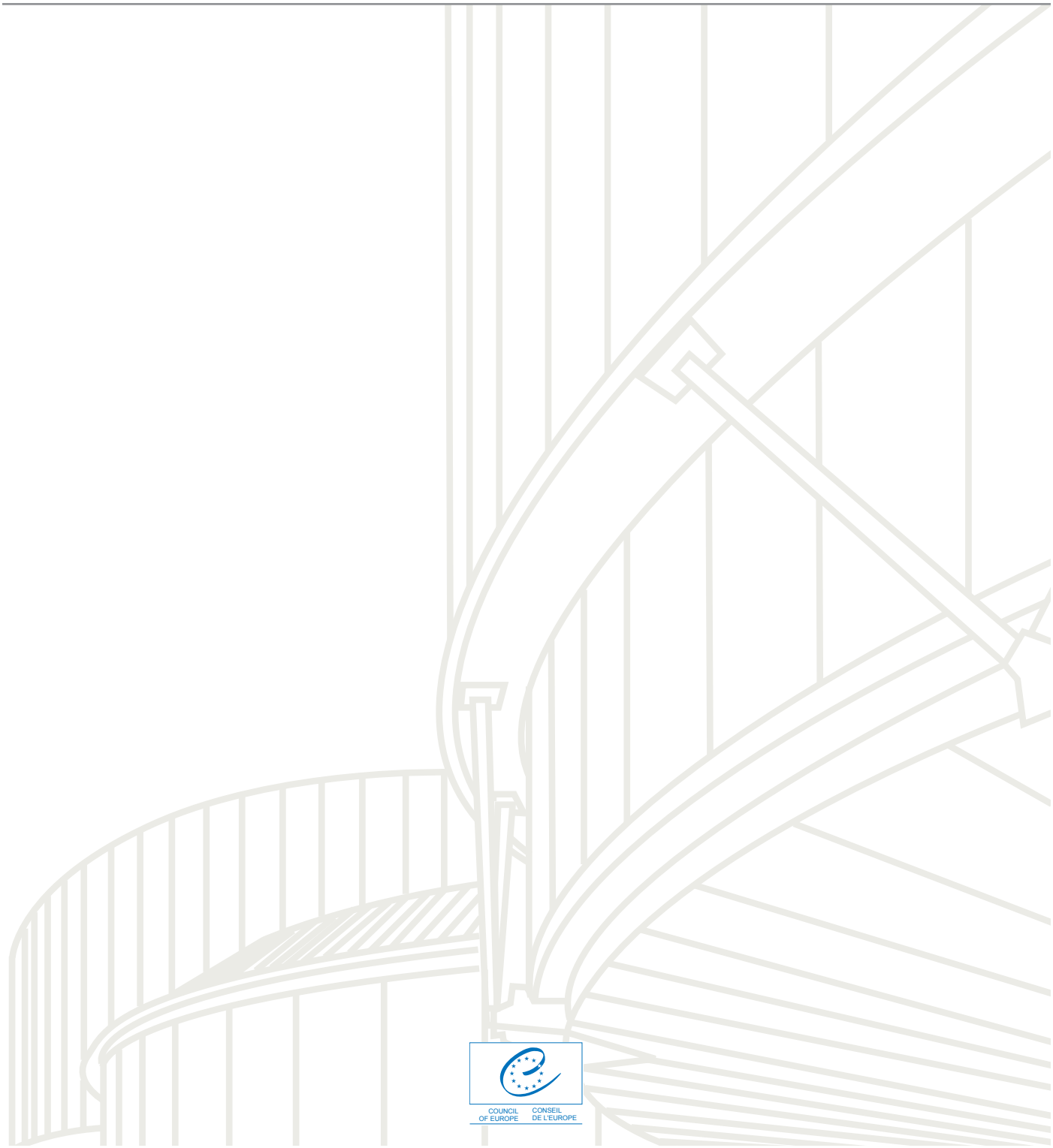

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TABLE OF CONTENTS

ARTICLE 2

Effective investigation

Inadequate investigation into the death of an officer killed in anti-communist demonstrations in 1989: *violation*

Agache and Others v. Romania - 2712/02
Judgment 20.10.2009 [Section III]

Facts – The applicants are the wife and children of Mr Agache, a *miliția* officer who died in December 1989 from injuries sustained at the hands of anti-communist demonstrators at the time of the flight of the Ceauşescus. Four days later an investigation was commenced by the public prosecutor's office at the County Court, and witnesses identified from photographs a number of persons who had beaten Mr Agache. In February 1999 the County Court convicted four persons and acquitted a fifth. In 2001 the Supreme Court of Justice dismissed the appeals on points of law lodged by both parties. The sentences imposed were not executed (three of the persons convicted were in Hungary). European arrest warrants were issued in respect of them; one of these was not forwarded to the Hungarian authorities, and the latter refused to enforce the other two.

Law – Article 2: The Court acknowledged that the investigation had been extremely complex, but observed that the proceedings had lasted for over eleven years, seven of them after the entry into force of the Convention in respect of Romania in June 1994. Furthermore, for more than three years after that date, no measures had been taken with a view to concluding the investigation, nor had any procedural steps been taken. Not until December 1997 had the public prosecutor at the County Court committed the five persons suspected of attacking and killing Mr Agache to stand trial. However, for an investigation to be considered effective the authorities had to have shown proof of expedition and diligence. The Government sought to justify the lengthy period of inactivity by referring to the "overall socio-political context in the aftermath of the 1989 revolution" which, in their view, could not be attributed to the authorities responsible for the investigation. However, the Court was unable to find that the authorities' inactivity had been justified on the basis of the evidence in the file. Although it emerged from correspondence between the applicants and the authorities between 1990 and 1992 that the investigation had encountered difficulties owing to the fact that some witnesses had retracted their statements, the courts had heard evidence from only three witnesses and two of the accused, basing their findings on the statements made by the other witnesses during the investigation stage. In the absence of other evidence they should have heard evidence from the eyewitnesses who had been traced, in order to establish the facts and the identity of the perpetrators. Lastly, the Court observed that three of the persons convicted of the attack leading to Mr Agache's death had not served the prison sentences imposed on them because the Romanian authorities had not taken the necessary steps to secure their extradition. Accordingly, the criminal proceedings had not been conducted with sufficient diligence. In the specific circumstances of the case, therefore, the proceedings at issue had not offered appropriate redress for the infringement of the values enshrined in Article 2.

Conclusion: violation (unanimously).

Article 41: EUR 25,000 in respect of non-pecuniary damage.

ARTICLE 3

Inhuman or degrading treatment

Overcrowding in prison: *violation*

Orchowski v. Poland - 17885/04
Judgment 22.10.2009 [Section IV]

(See Article 46 below, page 27)

ARTICLE 5

Article 5 § 1

Lawful arrest or detention

Preventive detention of paedophile on social-protection grounds: *no violation*

De Schepper v. Belgium - 27428/07
Judgment 13.10.2009 [Section II]

Facts – After serving eight prison sentences for acts of paedophilia, the applicant was sentenced again in 2001 by a criminal court to six years' imprisonment for rape and indecent assault of minors. In accordance with the Law on social

protection against abnormal behaviour, delinquency and certain sexual offences (Social Protection Act), that judgment also placed the applicant "at the Government's disposal" for a period of ten years after serving his sentence. This meant that the Minister of Justice could either release him under certain conditions or order his preventive detention. From 2002 onwards the authorities attempted to secure his admission to a psychiatric institution where he could be treated. Preliminary therapy was organised in the prison to prepare him for admission. However, all the institutions approached responded that they could not admit him as his dangerousness had not diminished. In 2006 the Minister of Justice ordered the applicant's preventive detention after the expiry of his prison sentence. His appeals against that decision were dismissed.

Law – Article 5 § 1: The fact that a person could be placed at the Government's disposal did not appear arbitrary as it was part of the sentence set by the Criminal Court at the time of conviction, in order to protect society against certain categories of dangerous criminals. The Minister of Justice, in deciding on the preventive detention of a person placed at the Government's disposal, was simply determining the conditions of application of a sentence. In the present case, the Minister had complied with the Social Protection Act. His decision had contained precise reasoning, endorsing a report by a neuropsychiatrist, which was itself based on an opinion by the prison psychologist. The lack of long-term specialist in-patient treatment was not the only reason for his decision. But it was a decisive factor, because, as the Minister expressly pointed out, a course of treatment specially adapted to the applicant's situation could have reduced his "dangerousness". The Court examined the authorities' efforts to secure him such treatment. As specialised public establishments could not admit him, the prison authorities had made attempts, from 2002 onwards, to place him in a psychiatric institution, but had been unsuccessful. Thus, before deciding on his preventive detention, the authorities had introduced in the prison, on the recommendation of specialists, a preliminary course of therapy that was a prerequisite for admission to a specialised institution. However, such admission had been impossible as the applicant's dangerousness had not diminished. The Belgian authorities had not therefore failed in their obligation to seek to provide the applicant with treatment adapted to his condition that might help him recover his freedom. The authorities' lack of success to date could be explained mainly by the evolution in the applicant's condition and the fact that it was therapeutically impossible for the institutions approached to treat him at that stage. However, this finding did not release the Government from their obligation to take all appropriate initiatives in order to find, in the near future, a public or private institution that would be able to treat such a case. In this connection the Court noted that under the Social Protection Act a detainee placed at the Government's disposal, after one year of preventive detention imposed by a lawful decision, was entitled to apply to the Minister of Justice for release. The application could be lodged again at yearly intervals.

Conclusion: no violation (unanimously).

(See *Weeks v. the United Kingdom*, no. 9787/82, 2 March 1987; *Stafford v. the United Kingdom* [GC], no. 46295/99, 28 May 2002, Information Note no. 42; and *Morsink v. the Netherlands*, no. 48865/99, 11 May 2004, Information Note no. 64)

Article 5 § 1 (f)

Expulsion

Lengthy detention (almost four years) of an alien for refusing to comply with an expulsion order: *violation*

Mikolenko v. Estonia - 10664/05
Judgment 8.10.2009 [Section V]

Facts – The applicant is a former Soviet and Russian Army officer who served in the territory of Estonia. After the restoration of Estonian independence, he was refused an extension of his residence permit in that country. In 2003 the Citizenship and Migration Board ordered him to leave the country. As he failed to leave within the stipulated time-limit and his immediate expulsion was impossible because he had no travel documents, an administrative court authorised his placement in a deportation centre on the basis of the Obligation to Leave and Prohibition of Entry Act. His detention was extended once every two months. The domestic courts found that the applicant's detention was lawful and appropriate to secure his cooperation and that the length of his detention in the deportation centre depended on him alone. In October 2007 an administrative court refused to further extend the applicant's detention. It found that the length of his detention had become

disproportionate and, in the circumstances, unconstitutional. The applicant was released from the deportation centre the next day.

Law – Article 5 § 1: The applicant's detention with a view to expulsion, at least initially, fell within the scope of Article 5 § 1 (f). It had been extraordinarily long: more than three years and eleven months. While the authorities had taken steps to have documents issued to him, it must have become clear quite soon that their attempts were bound to fail as the applicant refused to cooperate and the Russian authorities were not prepared to issue him documents in the absence of his signed application, or to accept a temporary travel document. Indeed, the Russian authorities had made their position clear in both respects by as early as June 2004. Thereafter, although the Estonian authorities had taken repeated steps to remedy the situation, there had also been considerable periods of inactivity. Moreover, the applicant's expulsion had become virtually impossible as for all practical purposes it required his cooperation, which he had not been willing to give. His further detention could not therefore be said to have been effected with a view to his deportation as this was no longer feasible. It was true that at some point the Estonian authorities could legitimately have expected that the applicant would be removed on the basis of the EU-Russia readmission agreement, which required the Russian authorities to issue travel documents to persons not willing to be readmitted voluntarily. However, the agreement had entered into force only in June 2007, about three years and seven months after the applicant was placed in detention. In the Court's opinion, the applicant's detention for such a long time even if the conditions of detention as such had been adequate could not be justified by an expected change in the legal circumstances. After the applicant's release he was informed that he still had to comply with the order to leave and was required to report to the Citizenship and Migration Board at regular intervals. Thus, the authorities had in fact had at their disposal measures other than the applicant's protracted detention in the deportation centre in the absence of any immediate prospect of his expulsion. The grounds for the applicant's detention had not therefore remained valid for the whole period of his detention owing to the lack of a realistic prospect of his expulsion and the domestic authorities' failure to conduct the proceedings with due diligence.

Conclusion: violation (six votes to one).

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

ARTICLE 6

Article 6 § 1 (civil)

Applicability

Injunction proceedings: *Article 6 applicable*

Micallef v. Malta - 17056/06
Judgment 15.10.2009 [GC]

Facts – The applicant's sister was an unsuccessful party to civil litigation which was decided on the merits in 1992. In 1985 an injunction was issued against her, following which her neighbour brought a substantive action. She challenged the injunction before the court, which declared it null and void, finding that it had been issued in breach of the adversarial principle. That judgment was set aside on appeal. In 1993 the applicant's sister instituted constitutional proceedings, alleging that the president of the court of appeal had lacked objective impartiality by reason of his family ties with the other party's lawyer. In 2002, after his sister's death, the applicant intervened in the proceedings. In 2005 the constitutional claim was dismissed. In 2006 the applicant lodged an application with the European Court. In a judgment of 15 January 2008 (see Information Note no. 104), a Chamber of the Court held, by four votes to three, that there had been a violation of Article 6 § 1 of the Convention on account of the lack of objective impartiality of the court of appeal.

Law – (a) *Preliminary objections*: The respondent Government contested the admissibility of the application on three grounds: firstly, that the applicant did not have victim status as he had not been a party to the proceedings; secondly, that the applicant had not exhausted domestic remedies; and, thirdly, that Article 6 was not applicable to injunction proceedings.

(i) *Victim status* – The direct victim had died during the constitutional proceedings, which had lasted over ten years at first instance and were necessary to exhaust domestic remedies. The constitutional jurisdictions had not rejected the applicant's request to intervene in the proceedings in his capacity as brother and heir of the plaintiff, nor had they refused to entertain his appeal. Furthermore, he had been made to bear the costs of the case instituted by his sister and could thus be considered to have a patrimonial interest to recover the costs. Moreover, the case raised important issues concerning the fair administration

of justice and thus relating to the general interest. The applicant therefore had standing to introduce the present application.

(ii) *Exhaustion of domestic remedies* – At the material time there had been no provision under Maltese law for challenging a judge on the basis of an uncle-nephew relationship with a lawyer. In raising this issue before the domestic constitutional courts, which had dismissed the Government's objection of non-exhaustion of ordinary remedies and examined the substance of the complaint, the applicant had made normal use of the remedies which were accessible to him and which related, in substance, to the facts complained of before the Court.

(iii) *Applicability of Article 6 § 1* – The injunction proceedings and the consequent challenge to their fairness were one set of proceedings connected to the merits of the cause and could not be seen as distinct from each other. Although preliminary proceedings did not normally fall within the protection of Article 6, the Court observed that there was now a widespread consensus amongst Council of Europe member States regarding the applicability of Article 6 to interim measures, including injunction proceedings. This was also the position that had been adopted in the case-law of the Court of Justice of the European Communities. In excessively long proceedings, a judge's decision on an injunction would often be tantamount to a decision on the merits of the claim for a substantial period of time, or even permanently in exceptional cases. It followed that, frequently, both the interim and the main proceedings decided the same "civil rights or obligations", within the meaning of Article 6, and produced the same effects. In the circumstances, the Court no longer found it justified to automatically characterise injunction proceedings as not determinative of civil rights or obligations. Nor was it convinced that a defect in such proceedings would necessarily be remedied in proceedings on the merits since any prejudice suffered in the meantime might by then have become irreversible and with little realistic opportunity to redress the damage caused, except for the possibility of pecuniary compensation. The Court therefore considered that a change in the case-law was necessary. Article 6 would be applicable if the right at stake in both the main and the injunction proceedings was "civil" within the meaning of Article 6 and the interim measure could be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it was in force. However, the Court accepted that in exceptional cases it might not be possible to comply with all of the requirements of Article 6. While the independence and impartiality of the tribunal or the judge remained an inalienable safeguard in such proceedings, other procedural safeguards might apply only to the extent compatible with the nature and purpose of the interim proceedings at issue. In the present case the substance of the right at stake in the main proceedings concerned the use by neighbours of property rights and therefore a right of a "civil" character. The purpose of the injunction was to determine the same right as the one being contested in the main proceedings and was immediately enforceable. Article 6 was therefore applicable.

Conclusion: preliminary objections dismissed (eleven votes to six).

(b) *Merits*: Under Maltese law, as it stood at the relevant time, there was no automatic obligation on a judge to withdraw in cases where impartiality could be an issue. Nor could a party to a trial challenge a judge on grounds of a sibling relationship – let alone an uncle-nephew relationship – between the judge and the lawyer representing the other party. Since then Maltese law had been amended and now included sibling relationships as a ground for withdrawal of a judge. In the dispute at issue in the applicant's case, the Court took the view that the close family ties between the opposing party's lawyer and the president of the court sufficed to objectively justify fears that the panel of judges lacked impartiality.

Conclusion: violation (eleven votes to six).

Article 41: Finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage.

Action in damages by asylum-seeker for refusal to grant him asylum: *Article 6 inapplicable*

Panjeheighalehei v. Denmark - 11230/07
Decision 13.10.2009 [Section V]

Facts – The applicant was an Iranian national. In July 1997 he travelled with his mother and sister to Denmark, where his mother applied for asylum for the family on the grounds that she had been an active member of an organisation that opposed the government. She also alleged that two years previously the applicant, then aged fourteen, had been detained and subjected to torture after taking part in a demonstration with her. The authorities refused to grant asylum because of doubts about

the mother's credibility and her appeal was dismissed after the Refugee Board found her accounts of the alleged events to be unreliable and divergent. On attaining his majority in 1999, the applicant asked for the asylum proceedings to be re-opened, notably on the grounds that he was wanted in Iran for being politically active and his two-year absence from the country would be viewed with suspicion. The Refugee Board refused his request in the absence of significant new information and the applicant was deported. In 2003 the applicant re-entered Denmark and again applied for asylum, this time on the grounds that on his return to Iran he had been detained and subjected to torture for almost two years. His request was granted in 2004 and he then sued the Refugee Board for damages for the pain and suffering he alleged he had suffered as a result of its refusal to grant him asylum in 1999. His claim was ultimately dismissed by the Supreme Court on the grounds that a claim for compensation necessarily entailed a review limited to the legality of the Refugee Board's decision and that the applicant's objections to the Board's decisions amounted in reality to a disagreement with its assessment of the evidence and its conclusive decision as to whether the facts of the case could justify asylum.

In his application to the European Court, the applicant complained that the Refugee Board's decision to deport him in 1999 had violated Article 3 of the Convention and that he had been denied access to court in respect of his claim for compensation, in breach of Article 6 § 1.

Law – Article 6 § 1: The Court reiterated that decisions regarding the entry, stay and deportation of aliens were not within the scope of Article 6 § 1. It accepted, however, that when he brought his action against the Refugee Board the applicant was no longer an asylum-seeker and that the compensation proceedings as such were not decisive for his entry, stay or deportation. It also noted that his action for compensation had been formulated as an ordinary tort action, rather than an appeal in the context of asylum proceedings. Nevertheless, his main arguments in the compensation proceedings had been that the Refugee Board's decisions had been inadequate. The Court agreed with the Supreme Court's analysis that, notwithstanding the additional financial element it raised, the applicant's compensation claim had amounted primarily and substantially to a challenge to the merits of the Refugee Board's decisions. Accordingly, although the subject matter of the applicant's action was also pecuniary, the proceedings had been so closely connected to the subject matter of the Refugee Board's decisions in 1999 as to be indistinguishable from the proceedings determining "decisions regarding the entry, stay and deportation of aliens".

Conclusion: inadmissible (incompatible *ratione materiae*).

Article 3: The applicant's application for asylum in 1999 had been based on his alleged arrest and torture as a consequence of his participation in the demonstration in 1995. He had not specified any other political activities in which he might have engaged, or claimed to have encountered any concrete difficulties with the Iranian authorities in the period between his release in 1995 and his entry into Denmark in July 1997. That understanding was consistent with his mother's explanation that the last contact the Iranian authorities had had with the family had been about a month after the demonstration. It was also relevant that the mother had been provided with a valid passport and 90-day visa and had had no problems with the authorities when leaving Iran with her two children. The applicant had thus failed to establish that at the time of his deportation in 1999 there had been substantial and concrete grounds for believing that he would be exposed to a real risk of torture or inhuman or degrading treatment or punishment on his return to Iran. While it was true that the applicant had in fact been subjected to ill-treatment following his return, there had been no special distinguishing features in 1999 that could or ought to have enabled the Refugee Board to foresee such treatment.

Conclusion: inadmissible (manifestly ill-founded).

Access to court

Inability of minority shareholders to challenge winding-up resolution in courts once recorded in commercial register: *violation*

Kohlhofer and Minarik v. the Czech Republic - 32921/03, 28464/04 and 5344/05
Judgment 15.10.2009 [Section V]

Facts – By a 2001 amendment to the Commercial Code shareholders of joint-stock companies were given the power to wind up the company and transfer all its assets to any shareholder owning more than 90% of its shares. Minority shareholders were to receive compensation. The applicants were minority shareholders in companies in respect of which such resolutions had been passed at a general

meeting. They had sought to challenge the resolutions in the ordinary courts because of perceived irregularities, but in each case their applications were dismissed on the grounds that the ordinary courts were precluded by the Commercial Code from examining the lawfulness of the resolutions once the transfers had been recorded in the commercial register. As minority shareholders, the applicants did not have standing either to participate in the proceedings before the judicial bodies responsible for administering the register, which, despite being informed of the proceedings pending in the ordinary courts, did not hold a hearing or adjourn the registration process.

Law – Article 6 § 1: There had been a limitation on the applicants' access to court to challenge the lawfulness of the resolutions, as the ordinary courts had declined jurisdiction on the grounds that the resolutions had already been registered in the commercial register. That limitation was lawful under domestic law. As to whether it pursued a legitimate aim, the Court recognised that affording companies flexibility to determine their shareholdership and limiting challenges to company resolutions and asset transfers could be seen as enhancing trade and economic development and promoting stability in commercial markets. It thus constituted a legitimate aim in the public interest. On the question of proportionality, the Court noted that the relevant provisions of the Commercial Code had prevented any further examination of the merits of the applicants' claims and that the applicants had had no standing in the registration proceedings. Their interests under Article 6 § 1 could not, therefore, be protected in those proceedings and the registration had not been adjourned pending the outcome of their challenge, even though they had informed the court responsible for registration of their views. The other legal avenues that had been suggested by the Government dealt with the separate issue of monetary satisfaction and had not been shown to be capable of giving rise to a discussion of the lawfulness of the resolution in circumstances comparable to a review by the ordinary courts. Accordingly, it had not been established that the limitation on the applicants' access to court was proportionate to the legitimate aim of furthering stability in the business community by preventing abusive challenges to resolutions.

Conclusion: violation (five votes to two).

Article 41: Finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage.

Inadequate judicial scrutiny of decision to refuse an application for a teaching post in a denominational university because of applicant's alleged heterodox views: *violation*

Lombardi Vallauri v. Italy - 39128/05
Judgment 20.10.2009 [Section II]

(See Article 10 below, page 20)

Fair hearing

Failure to notify defendant or his counsel of date of criminal-appeal hearing: *violation*

Maksimov v. Azerbaijan - 38228/05
Judgment 8.10.2009 [Section I]

Facts – The applicant was convicted of serious terrorist offences and sentenced to death (which was later commuted to life imprisonment). Subsequently, while in prison, he prepared an appeal to the Supreme Court without legal assistance, but did not attend the hearing, allegedly because he did not receive the summons. His appeal was dismissed. He then appealed, this time with the assistance of a lawyer, to the Plenum of the Supreme Court. Neither he nor his lawyer attended the hearing, again allegedly for want of notice. The substance of that appeal was also dismissed.

Law – Article 6 § 1: The Court was not satisfied that the applicant had been duly summoned to the Supreme Court's hearings as, in the absence of a postmark, there was no evidence that the summons had actually been sent to the applicant or otherwise delivered to him. There was no indication that the Supreme Court, while deciding to proceed with the hearing in the applicant's absence, had checked whether the summons had in fact been served. Given that a public prosecutor was present and made oral submissions at the appeal hearing while the applicant was not legally represented, the Supreme Court should have taken measures to ensure his presence in order to maintain the adversarial character of the proceedings. Although in certain cases the Court had found that the presence in person of the accused at a hearing of an appeal where only points of law were considered was not crucial, the applicant's case was

distinguishable from those in which the accused were represented by lawyers and had the opportunity to present their defence (see, for example, *Kremzow v. Austria*, no. 12350/86, 21 September 1993, and *Kamasinski v. Austria*, no. 9783/82, 19 December 1989). The applicant had been in no position to do this because of the lack of prior notice of the hearing. Accordingly, the proceedings before the Supreme Court and the Plenum of the Supreme Court had not complied with the requirement of fairness.

Conclusion: violation (unanimously).

Articles 46 and 41: Respondent State to take all measures to reopen cassation-appeal proceedings (four votes to three). No claim made in respect of damage.

Impartial tribunal

Lack of statutory right to challenge a judge on the basis of his/her family ties with a party's advocate: *violation*

Micallef v. Malta - 17056/06
Judgment 15.10.2009 [GC]

(See above, page 9)

Article 6 § 1 (criminal)

Reasonable time

Length of criminal proceedings against an accused serving a prison sentence abroad: *inadmissible*

Passaris v. Greece - 53344/07
Decision 24.9.2009 [Section I]

Facts – The applicant, a Greek national who had been imprisoned in Romania since November 2001 following the imposition of a life sentence, had filed several requests for transfer with the Romanian and Greek authorities on the basis of the European Convention on the Transfer of Sentenced Persons. He wished to be transferred to Greece to serve the remainder of the sentence imposed by the Romanian courts, to serve sentences previously imposed by the Greek courts and to be able to appear in three sets of criminal proceedings brought against him in Greece, which had been adjourned or postponed following the imposition of the sentence in Romania. However, although the Bucharest Appeal Court granted a request by the applicant in December 2004, the Greek Minister of Justice dismissed all of his applications, considering that he ought to serve more of his sentence in Romania.

Law – Article 6 § 1: (a) *As to the length of proceedings* – The Court reiterated that the Convention on the Transfer of Sentenced Persons merely provided the procedural framework for transfers. It did not imply any obligation on the Contracting States to grant a transfer request. For that reason, it was not necessary for the requested State to give reasons for its refusal to authorise a requested transfer. Thus, there was nothing to oblige the Greek authorities to grant the applicant's repeated requests. Accordingly, it could not be considered that the Greek State's responsibility was engaged by the delays in the proceedings that were pending in Greece, which arose from the fact that it was impossible to have the applicant appear on account of his imprisonment in Romania.

Conclusion: inadmissible (manifestly ill-founded).

(b) *As to the right of access to court* – As to the refusal to allow the applicant's transfer to Greece in order to be tried there, this was not a question of access to court, since the applicant, who was facing criminal charges, had already been committed for trial, with the difference that the proceedings had been adjourned on account of his inability to appear since he was serving a sentence in Romania. The applicant could not therefore claim to be a victim, in the Convention sense, of a violation of his right to access to court, particularly as he noted in his application that it was the victims of the offences committed by him who were suffering from this situation, since justice had not yet been dispensed in their regard.

As to the fact that the applicant had not yet been able to serve the sentences which had been imposed on him in Greece, it could not be claimed that the applicant, who was currently serving a prison sentence in Romania, imposed by the Romanian courts, was a "victim" of that circumstance.

Conclusion: inadmissible (incompatible *ratione personae*).

Tribunal established by law

Inclusion without sufficient legal basis of lay judges on bench of criminal court: *violation*

Pandjikidze and Others v. Georgia - 30323/02
Judgment 27.10.2009 [Section II]

Facts – By a judgment of 2001, the Criminal Division of the Supreme Court, sitting as a bench of one professional judge and two lay judges, convicted the applicants of high treason in the form of a plot against the constitutional order; one of them was further convicted of the unlawful purchase and handling of weapons. They were each sentenced to three years' imprisonment. In 2002 the Criminal Division, sitting as a bench of three professional judges, upheld that judgment.

Law – Article 6 § 1: Until the abolition of the office in question in 2005, the lay judges at the Georgian Supreme Court were individuals from other professions who were invited to take part, alongside a professional judge, in considering criminal cases examined at first instance by that court. They fulfilled those judicial duties as part of their civic duties. While the existence of the bench of the Criminal Division that had ruled in this case was provided for by the law in force, this did not suffice to confer on that judicial bench the status of a tribunal that was "established by law". The question arose whether the exercise by lay judges of judicial duties had had a sufficient legal basis in domestic law. The two relevant texts governing the exercise of the functions of lay judges – the Status of Judges Act and the Amending Act of 1999 – had already been abrogated at the time of the events under dispute, but had not been replaced by any other text. In short, the two lay judges who sat in the applicants' case had been required to dispense justice on an equal footing with the professional judge and, in view of their number, held the majority of votes necessary to determine the merits of a criminal charge. In so far as the exercise of their functions as judge resulted from a judicial practice that did not have a sufficient legal basis in domestic law, the bench on which they sat had not constituted a "tribunal established by law".

Conclusion: violation (unanimously).

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

Article 6 § 3 (c)

Defence through legal assistance

Denial of access to a lawyer to a person in police custody who exercised his right to remain silent: *violation*

Dayanan v. Turkey - 7377/03
Judgment 13.10.2009 [Section II]

Facts – In 2001 the applicant was arrested and taken into police custody during operations against Hizbullah ("Party of God"), an illegal armed organisation. He was informed of his right to see a lawyer at the end of the police custody period and to remain silent, which he chose to do. He was remanded in custody and charged with belonging to Hizbullah. The State Security Court sentenced him to twelve years and six months' imprisonment. The Court of Cassation upheld that judgment.

Law – Article 6 §§ 1 and 3 (c): The applicant complained that he had had no legal assistance while he was in police custody. In accordance with the generally recognised international norms, which the Court accepted and which formed the framework for its case-law, an accused person was entitled, as soon as he was taken into custody, to be assisted by a lawyer, and not only in connection with questioning. The fairness of proceedings against an accused person in custody required that he be able to obtain the whole range of services specifically associated with legal assistance. Counsel had to be able to provide freely for the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support to an accused in distress and checking of the conditions of detention. In the present case, it had not been in dispute that the applicant had not had legal assistance while in police custody because it was not possible under the law then in force. Such a systematic restriction, on the basis of the relevant statutory provisions, was sufficient in itself for a violation of Article 6 to be found, even though the applicant had remained silent when questioned in police custody.

Conclusion: violation (unanimously).

Article 41: EUR 1,000 in respect of non-pecuniary damage.

ARTICLE 8

Private life
Positive obligations

Ineffectiveness of procedure for gaining access to personal files held by secret services during communist period: *violation*

Haralambie v. Romania - 21737/03
Judgment 27.10.2009 [Section III]

Facts – In 2002 the applicant asked the National Council for the Study of the Archives of the *Securitate* ("the CNSAS") whether he had been the subject of surveillance measures in the past. He was informed in 2003 that a file in his name did exist but that, since the archives were held by the Romanian Intelligence Service, it was necessary to wait for his file to be transferred by that Service. In 2005 the Intelligence Service transmitted a file in the applicant's name to the CNSAS. In 2008 the CNSAS indicated that the date of birth in the file did not correspond to that of the applicant and that checks were therefore necessary. A few days later the CNSAS invited the applicant to come and consult the file on him created by the *Securitate* (the former secret services of the communist regime). He was given a copy of the file, which bore the annotations "opened on 12 April 1983" and "the file was microfilmed on 23 July 1996". A note indicated that Mr Haralambie had commented unfavourably on politics and the economic situation. A note was also made of an undertaking by the applicant, dating from 1979, to collaborate with the *Securitate*, with official comments to the effect that he was evading his security work and that he would be placed under investigation and his correspondence monitored.

Law – Article 8: In the context of access to personal files held by the public authorities, the authorities had a duty to provide individuals with an "effective and accessible procedure" for obtaining access to "all relevant and appropriate information". Domestic law gave every Romanian citizen the right to access their personal file held by the *Securitate* and other documents or information on them. The Romanian Intelligence Service and other institutions in possession of those files were obliged to guarantee the right of access to the files and to send them to the CNSAS at the latter's request. Domestic law had thus formally established an administrative procedure for gaining access to files. With regard to the effectiveness of that procedure, it should be noted that it was not until 2008 that the applicant had been invited to consult his personal file, which was more than six years after his initial request made in 2002 and five years after the CNSAS had informed him that a file on him existed. Furthermore, it was not until the application had been communicated to the Government that the applicant obtained a reply to his request. It was clear from the materials in the case file that the file on the applicant had been sent to the CNSAS in 2005. Whilst the law had not initially provided for a time-limit for transferring the file, the legislative change enacted in 2006 established a time-limit of sixty days for transferring files. The length of the administrative procedure in question had far exceeded the time-limit required under the 2006 Act. Moreover, having regard to the applicant's advanced age, the Court found that his interest in retracing his personal history during the era of the totalitarian regime was all the more urgent. Further, the Court did not accept that the quantity of files transferred or the shortcomings in the archive system could of themselves justify a delay of more than six years by the institutions concerned in granting the applicant's request. Having regard to the foregoing, the State had not satisfied the positive obligation incumbent on it to provide the applicant with an effective and accessible procedure allowing him to obtain access to his personal file within a reasonable time.

Conclusion: violation (unanimously).

Article 41: EUR 4,000 in respect of pecuniary damage and EUR 2,000 in respect of non-pecuniary damage.

Private life

Absence of any legal requirement for newspapers to give advance notice before publishing details of private life: *communicated*

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

The present application concerns the publication in a national newspaper and on the paper's website of articles and video stills purporting to show that the applicant had participated in Nazi-themed orgies with prostitutes. Edited video footage was also available on the website which showed the applicant engaging in sado-masochistic activities involving spanking with five women. The applicant was not informed in advance of the newspaper's intention to publish the materials. He sought an interim injunction after publication to prevent the video footage being available on the website. The application was refused on the basis that the material had already been widely disseminated and viewed and was therefore no longer private. In the principal proceedings for breach of privacy, the High Court found in the applicant's favour, after finding that the only possible public interest in the story would have been if there had been a Nazi aspect to the applicant's activities, but that there was no evidence of any such theme. The applicant was awarded 60,000 pounds sterling in damages.

The newspaper did not appeal. The applicant's complaint to the European Court is that the newspaper was under no obligation under domestic law to notify him prior to publication. In his submission, prior warning would have allowed him to seek an interim injunction and the courts to balance the conflicting Article 10 and Article 8 interests before the story was published and his privacy destroyed. The only effective remedy for such Article 8 complaints was, therefore, a legal requirement to notify subjects in advance of publication.

Communicated under Articles 8 and 13.

Private and family life

Publication of the applicant's identity in a judgment delivered in relation to his HIV-positive status: *violation*

C.C. v. Spain - 1425/06
Judgment 6.10.2009 [Section III]

Facts – The applicant, who was HIV-positive, was declared permanently and fully unfit for work in 2002 and claimed the corresponding compensation provided for in a life insurance policy taken out in 2000. When the insurance company refused to pay, the applicant brought civil proceedings against it. The applicant's complete medical record was placed in the case file. Considering this an infringement of his right to respect for his private life, he requested that his identity be removed from the documents in the file and from the judgment, together with all references to HIV, and that the hearing be held in private. The court rejected his requests, and subsequent appeals lodged by the applicant were unsuccessful.

Law – Article 8: The impugned measure had constituted an interference by a public authority with the exercise of the applicant's right to respect for his private life. That interference had been in accordance with the law and sufficiently foreseeable. Its purpose had been to give the other party access to the applicant's medical record, which was the subject of the proceedings. The court needed access to the information in order to examine the case and rule on the merits. The aim of the contested measure had thus been to protect the rights and freedoms of others and the smooth running of the proceedings. The Court's task was to establish whether there had been sufficient reasons to justify the divulgation in the domestic court's judgment of the applicant's full name and the fact that he was HIV-positive. The court could have limited the divulgation of the applicant's identity, in conformity with the law, on grounds of public policy and the protection of rights and freedoms. It was also legally possible to restrict access to judgments and court decisions when there was a risk of infringing people's right to respect for their private life or the guarantee of anonymity. The official in charge of the register would then decide to what extent access to a file should be restricted in the light of the legitimate interest of the person seeking access. The applicant applied for his name to be deleted from the case materials in so far as his health condition was mentioned. It would have sufficed to replace his name by his initials in the documents to which the public had access and in the judgment. That solution would have avoided the subsequent problem of access for parties with an interest in the case file and the text of the judgment (and of defining the "interest" concerned). Even the Spanish Constitutional Court omitted people's names from certain of its decisions, as did the Strasbourg Court. Having regard to the particular circumstances of the present case, and bearing in mind the need for special protection of the confidentiality of information concerning HIV infection, the divulgation of which can have devastating effects on the private and family lives of those concerned and on their social and professional situation, the publication in the judgment of the applicant's full name in connection with his state of health had not been justified by any pressing need.

Conclusion: violation (unanimously).

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

Private and family life
Positive obligations

Father's inability to consult conclusions of welfare report in proceedings concerning the custody of his son: *violation*

Tsourlakis v. Greece - 50796/07
Judgment 15.10.2009 [Section I]

Facts – In 2000 the applicant and his wife separated when their child was aged about eleven. In 2001 the Court of First Instance gave sole custody of the child to his mother. The Court of Appeal ordered a welfare report, to be prepared by the Child Welfare Society. In 2005 the Court of Appeal granted permanent custody of the child to his

mother. Following that judgment the applicant attempted to obtain a copy of the Society's report from the Court of Appeal case file. However, the report was not in the file. The Society told the applicant it could not grant his request because the report was a confidential document prepared for the exclusive attention of the Court of Appeal. The applicant then applied to the Ombudsman's Office, which informed him that the Society could not send him a copy of the report because he had not addressed his request via the competent public prosecutor. The applicant asked the public prosecutor at the Criminal Court to support his request, but the prosecutor refused.

Law – Article 8: The applicant's inability to consult the Child Welfare Society's report after the Court of Appeal judgment concerned the exercise of his right to effective access to information relating to both his private and his family life. The domestic legislation on the use of welfare reports was less than clear. Furthermore, the information contained in the report had been of relevance to the applicant and to his relationship with his son. While the Court of Appeal had taken the view that it was in the child's interests not to be taken away from his mother, it had recognised that the applicant showed great affection towards his son. Therefore, obtaining a copy of the report would have enabled the applicant to be informed of any negative findings contained in it which might have influenced the judges' decision and, if appropriate, to take them into consideration in order to improve the relationship with his son in the future. Moreover, it appeared that the applicant had also been involved in the preparation of the report, and he therefore had a legitimate claim to be informed of how the details he had provided had been analysed and taken into account by the Society. The authorities' refusal in substance to allow the contents of the report to be disclosed after the conclusion of the proceedings before the Court of Appeal, without giving any reasons, amounted to a breach of their positive obligation to ensure effective observance of the applicant's right to respect for his private and family life. It was for the authorities to demonstrate that compelling reasons existed for not disclosing to the individual concerned a report that contained personal information which affected him directly. In the instant case, neither the competent authorities nor the Government had advanced any such reasons, although the report in question, by its very nature, contained information of that kind.

Conclusion: violation (unanimously).

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

ARTICLE 9

Freedom of religion

Refusal to register religious groups for failure to demonstrate at least fifteen years' existence or affiliation to a centralised religious organisation: *violation*

Kimlya and Others v. Russia - 76836/01 and 32782/03
Judgment 1.10.2009 [Section I]

Facts – The first and second applicants were founder members of branches of the Church of Scientology in Russia. In 1994 the first centre for study of Dianetics (the creed of the Church of Scientology) was registered as a non-governmental organisation. The centre was subsequently refused re-registration because its aims were "religious in nature". Subsequently, the authorities refused to register as local religious organisations the branches founded by the applicants as they failed to provide evidence confirming at least fifteen years existence in the region.

Law – Article 9 interpreted in the light of Article 11:
(a) *Applicability* – The Court noted at the outset that there was no European consensus on the religious nature of Scientology teachings. Nor was it its role to decide whether a body of beliefs and related practices may be considered a "religion" for the purposes of Article 9. However, since the Russian authorities had been convinced of the religious nature of the branches, the Court concluded that Article 9 was applicable to the case. Moreover, given that religious communities traditionally existed in the form of organised structures and that the applicants' complaint concerned an alleged restriction on their right to associate freely with fellow believers, Article 9 had to be examined in the light of Article 11.

(b) *Merits* – A "religious group" without legal personality could not possess or exercise rights associated with legal-entity status – such as the right to own or rent property, to have a bank account, to hire employees and to take or defend legal proceedings – that were essential for exercising the right to manifest one's religion. Moreover, under Russian law, only registered "religious organisations" had the right to exercise certain

rights such as, for example, to establish places of worship, to hold religious services in places accessible to the public and to produce, obtain and distribute religious literature. Accordingly, the restricted status of religious groups did not allow their members to effectively enjoy their right to freedom of religion and association and there had consequently been an interference with the applicants' rights under Article 9. The interference was in accordance with domestic law and pursued the legitimate aim of the protection of public order. However, the applicants had been denied registration, not because of any alleged shortcoming on their part, but rather as a result of the automatic operation of the statutory requirement for the religious group to have existed for at least fifteen years. The ground for refusing registration was therefore purely formal and unconnected to the actual functioning of the religious groups concerned. The Government had failed to identify any pressing social need for such a restriction or any relevant and sufficient reason justifying the lengthy waiting period religious groups had to endure prior to obtaining legal personality. The contested restriction only targeted base-level religious communities that could not show their presence in a given region or their affiliation with a centralised religious organisation. It appeared therefore that only newly emerging religious groups which did not form part of a strictly hierarchical church structure were affected by the "fifteen-year rule". In view of the foregoing, the Court concluded that the interference with the applicants' freedom of religion and association could not be said to have been necessary in a democratic society.

Conclusion: violation (unanimously).

Article 41: EUR 5,000 each to the first and second applicants in respect of non-pecuniary damage.

Conviction of conscientious objector for refusing to perform military service: *no violation*

Bayatyan v. Armenia - 23459/03
Judgment 27.10.2009 [Section III]

Facts – The applicant, a Jehovah's Witness who had been declared fit for military service, informed the authorities that he refused to serve in the military for conscientious reasons but was ready to carry out alternative civil service. When summoned to commence his military service in May 2001, the applicant failed to report for duty and temporarily left his home for fear of being subjected by force. He was charged with draft evasion and in 2002 was sentenced to two and a half years' imprisonment. At the material time in Armenia there was no law offering alternative civil service for conscientious objectors.

Law – Article 9: The Court first took note of the fact that a majority of the Council of Europe Member States had adopted laws providing for alternative civil service for conscientious objectors. However, Article 9 had to be read together with Article 4 § 3 (b), which excluded from the definition of forced labour "any service of a military character or, in cases of conscientious objectors, in countries where they are recognised, service exacted instead of compulsory military service". Consequently, Article 9 could not be interpreted as guaranteeing a right to refuse military service on conscientious grounds. At the material time Armenia had not yet recognised the right to conscientious objection, but had officially committed itself to recognise such a right and meanwhile to pardon all convicted conscientious objectors allowing them to perform alternative civil service once such a law was adopted. Even though in light of the foregoing the applicant could have had a legitimate expectation that he would be allowed to perform civil service instead of serving a prison sentence, the authorities could not be regarded as having breached their Convention obligations by convicting him for his refusal to serve in the military. Lastly, the Court noted that Armenia had enacted a law on alternative service in 2003, but its substance and the manner of its application fell beyond the scope of the applicant's case.

Conclusion: no violation (six votes to one).

ARTICLE 10

Freedom of expression

Civil award against publishers of satirical article on food manufacturer's advertising methods: *violation*

Kuliś and Różycki v. Poland - 27209/03
Judgment 6.10.2009 [Section IV]

Facts – The first applicant owned a publishing house which published a weekly magazine and a supplement for children. The second applicant was the magazine's editor-in-chief. The children's supplement published an article criticising an advertising campaign by a potato-crisp manufacturer which had involved calling a popular children's cartoon character (Reksio) "a murderer". The first

page of the supplement featured a cartoon showing a boy holding a packet, with the name of the manufacturer on it, saying to Reksio: "Don't worry! I would be a murderer too if I ate this muck!" Above the cartoon was a large heading reading "Polish children shocked by crisps advertisement, 'Reksio is a murderer'". The article itself appeared on the second page. The crisp manufacturer brought civil proceedings for protection of its personal rights against both applicants and obtained an apology, costs and an order requiring the applicants to make a payment to charity. In making that order the regional court found that the applicants' article had discredited the manufacturer's products by using strongly pejorative words conveying disgust and repulsion. The applicants' appeals were dismissed.

Law – Article 10: The only point at issue was whether the interference had been necessary in a democratic society to protect the reputation or rights of others. The domestic courts had found that the use of the word "muck" in the cartoon was aimed at discrediting, without justification, the manufacturer's product. However, in the Court's view, the domestic courts had not given sufficient attention to the argument that the satirical cartoon was a riposte to what the applicants viewed as an unacceptable advertising campaign targeted at young children, one that used slogans that referred not only to the cartoon character, but also to sexual and cultural behaviour, in a scarcely appropriate manner. This clearly raised issues of public interest. Moreover, the applicants' primary aim had not been to denigrate the quality of the crisps but to raise awareness of the type of slogans used by the manufacturer and the unacceptability of such tactics to generate sales. Lastly, in performing its duty to impart information and ideas on matters of public interest, the press was entitled to have recourse to a degree of exaggeration or even provocation. While the wording employed by the applicants had been exaggerated, this had only been in reaction to an advertising campaign which had displayed a lack of sensitivity and understanding for the age and vulnerability of children. The style of the applicants' expression had thus been motivated by the type of slogans to which they were reacting and, in the context, had not overstepped the boundaries permissible to a free press. In sum, the reasons adduced by the domestic courts could not be regarded as relevant and sufficient to justify the interference, which was disproportionate to the legitimate aim pursued.

Conclusion: violation (unanimously).

Article 41: Awards to the first applicant of EUR 7,200 in respect of pecuniary damage and EUR 3,000 in respect of non-pecuniary damage.

Journalist's inability, owing to general police ban, to gain access to Davos during World Economic Forum: *violation*

Gsell v. Switzerland - 12675/05
Judgment 8.10.2009 [Section V]

Facts – The applicant is a journalist and the editor of a good-food magazine. In 2001, on the fringes of the annual meeting of the World Economic Forum (WEF) in Davos, various anti-globalisation organisations staged a separate international gathering. The applicant, who had been asked to write an article on the events and their effects on local restaurants and hotels, was refused access to Davos by the police, who had put in place numerous security measures after being informed that an unauthorised demonstration and disturbances were planned. The applicant made a complaint to the authorities, which was declared inadmissible. His subsequent public-law appeals were dismissed by the Federal Court.

Law – Article 10: The impugned measure had not targeted the applicant specifically in his capacity as a journalist. However, the measure, which had been applied in wholesale fashion by the cantonal police to all persons wishing to travel to Davos, amounted to interference with the exercise of the applicant's freedom of expression, as he had been on his way to Davos to write an article on a specific subject. The ban imposed on the applicant had not had any explicit legal basis. However, the domestic authorities and, at final instance, the Federal Court, had overcome this gap in the law by referring to the general police clause which the authorities, by virtue of Article 36 § 1 of the Federal Constitution, could invoke in the event of a "serious, direct and imminent threat". The Federal Court had ruled in 2000 that the general police clause was designed to deal with "serious emergencies" where no other legal means existed of averting a "clear and present danger", but could not be used by the authorities in foreseeable and recurring situations. In the instant case the Court acknowledged that it had been extremely difficult for the authorities to weigh up the situation and make a precise assessment of the risks inherent in the WEF and the anti-globalisation demonstrations in terms of public order and safety. Moreover, the threat had undoubtedly been serious. Nevertheless, the Court

was not satisfied that the scale of the demonstrations which actually took place had been unforeseeable for the competent authorities, in view of previous events around the globe and in the context of the WEF. Indeed, the Federal Court had found that the disturbances occurring in other cities in connection with other events – and, in particular, the riots occurring in Nice in December 2000, just a few weeks before the 2001 WEF – had given the competent authorities grounds to believe that there was a serious threat in relation to the WEF. The circumstances surrounding the 2001 WEF could therefore be said to have been foreseeable and recurring within the meaning of the Federal Court's case-law. The competent authorities could and should have taken action earlier in order to place the impugned measure on a more precise legal footing than Article 36 § 1 of the Federal Constitution. Furthermore, according to the Federal Court's case-law, measures restricting freedom of assembly were valid only if they were targeted, that is to say, directed at the person or persons responsible for the disturbance or the serious threat to public order. In the present case, however, the authorities had made no distinction between potentially violent individuals and peaceful demonstrators. The applicant had therefore been the victim of a general ban imposed by the cantonal police on all persons wishing to travel to Davos. In view of the specific circumstances of the case, the competent authorities had not been entitled to make use of the general police clause. The authorities' refusal to allow the applicant into Davos had therefore not been prescribed by law.

Conclusion: violation (unanimously).

Article 41: EUR 1,026 in respect of pecuniary damage; finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage.

Refusal of a teaching post in a denominational university because of alleged heterodox views: *violation*

Lombardi Vallauri v. Italy - 39128/05
Judgment 20.10.2009 [Section II]

Facts – Since 1976 the applicant had been lecturing in legal philosophy at the Faculty of Law of the Catholic University of the Sacred Heart in Milan, on the basis of contracts renewed on an annual basis. When the post was advertised for the 1998/99 academic year, the applicant applied. The Congregation for Catholic Education, an institution of the Holy See, informed the President of the University that some of the applicant's views "were in clear opposition to Catholic doctrine" and that "in the interests of truth and of the well-being of students and the University" the applicant should no longer teach there. The Board of the Faculty of Law held a meeting and, noting that the Holy See had not approved the applicant's appointment, decided not to consider his candidacy. Appeals by the applicant to the Regional Administrative Court and the *Consiglio di Stato* were dismissed.

Law – Article 10: (a) *Applicability* – Referring to its previous rulings, the Court observed that the protection afforded by Article 10 extended to the teaching profession. Furthermore, the factual basis for the refusal to renew the applicant's contract had been "views in clear opposition to Catholic doctrine"; this quite clearly related to the exercise of his freedom of expression. Accordingly, the Government's objection that this complaint was incompatible *ratione materiae* with the provisions of the Convention had to be dismissed.

(b) *Merits* – The decision of the Faculty Board, which amounted to interference, had been prescribed by law and had been aimed at protecting the rights of others in the form of the University's interest in basing its teaching on Catholic doctrine. As to the necessity of the impugned measure, consideration had to be given, on the one hand, to the applicant's right to freedom of expression, which entailed the right to transmit knowledge without restrictions, and, on the other hand, to the University's interest in dispensing teaching based on its own religious convictions.

As to the administrative stage of the proceedings before the Faculty Board, the Court noted that, when it decided not to consider the applicant's candidacy, the Board had not informed the latter (nor indeed examined) to what extent his supposedly unorthodox views were reflected in his teaching work and, accordingly, how they were liable to affect the University's aforementioned interest. The actual content of these "views" had remained completely unknown.

As to the effectiveness of the judicial review of the administrative proceedings, the Court considered that in the instant case it had not been for the domestic authorities to examine the substance of the Congregation's decision. However, the domestic administrative courts had confined their examination of the legitimacy of the impugned decision to the fact that the Faculty Board had noted the existence of the Congregation's decision.

By so doing, the domestic courts had declined to question the Board's omission to inform the applicant as to which of his views had come under criticism. Moreover, the fact that the applicant had not been told the reasons for his dismissal had in itself ruled out any possibility of adversarial debate. This aspect had not been addressed by the domestic courts either. Accordingly, the review by the courts of the application of the impugned measure had not been adequate in the instant case.

In sum, the University's interest in dispensing teaching based on Catholic doctrine could not extend to impairing the very substance of the procedural guarantees afforded to the applicant by Article 10 of the Convention. The interference with his freedom of expression had not been necessary in a democratic society.

Conclusion: violation (six votes to one).

Article 6 § 1: Since the approval of a decision emanating from a State not party to the Convention had produced legal effects in the context of the Faculty Board's decision, which fell within the jurisdiction of the domestic judicial authorities, it was the Court's task to ascertain whether the decisions given by those authorities had been compatible with the applicant's rights under Article 6 § 1. The domestic courts had taken the view that they could not rule on the legitimacy of the administrative decision in question because it had referred to the Holy See's decision. In the Court's view, this amounted to a restriction of the applicant's right of effective access to court; such restrictions were permissible under Article 6 of the Convention provided they pursued a legitimate aim and were proportionate to that aim. However, they must not result in the applicant being denied the right in question. As to whether the impugned measure had been proportionate, the Court reiterated that the domestic courts had declined to question the failure to indicate, firstly, which of the applicant's views supposedly ran counter to established doctrine and, secondly, the link between the views he had expressed and his teaching work. Furthermore, the fact that the applicant had not been told the reasons for his dismissal had in itself ruled out any possibility of adversarial debate. This aspect had not been addressed by the domestic courts either. In the Court's view, the review by the courts of the application of the impugned measure had therefore not been adequate in the instant case. The applicant had not had effective access to court.

Conclusion: violation (six votes to one).

Article 41: EUR 10,000 for non-pecuniary damage.

Orders suspending publication of newspapers under anti-terrorist legislation: *violation*

Ürper and Others v. Turkey - 14526/07 et al.
Judgment 20.10.2009 [Section II]

Facts – The applicants were the owners, executive directors, editors-in-chief, news directors and journalists of four daily newspapers whose publication and distribution was repeatedly suspended in 2006 and 2007 for periods ranging from fifteen days to a month by court orders issued *ex parte* under anti-terrorist legislation. The newspapers were accused of publishing propaganda in favour of a terrorist organisation, condoning crimes the organisation had committed, and revealing the identity of officials engaged in the fight against terrorism, so making them targets for terrorist attack. The applicants lodged unsuccessful objections to the suspension orders.

Law – Article 10: The dangers inherent in the imposition of prior restraints on publication, especially where the press was concerned, called for the most careful scrutiny by the Court. Although the Court had held in previous cases (see, for example, Observer *and* Guardian *v. the United Kingdom*, no. 13585/88, 26 November 1991) that prior restraints on the media were not *per se* incompatible with the Convention, the restraints in the applicants' case had been imposed not on particular types of article, but on the future publication of entire newspapers, whose content was unknown at the time the court orders were made. In the Court's view, both section 6(5) of the Prevention of Terrorist Act and the court orders had stemmed from the hypothesis that the applicants, whose "guilt" was established without trial in proceedings from which they were excluded, would recommit the same kind of offences in the future. The preventive effect of the suspension orders thus entailed implicit sanctions to dissuade the applicants from publishing similar articles in the future and to hinder their professional activities, when less draconian measures – such as the confiscation of particular issues or restrictions on the publication of specific articles – could have been envisaged. Accordingly, by suspending the publication and distribution of the newspapers, albeit for short periods, the domestic courts had largely overstepped the narrow margin of appreciation afforded to them and unjustifiably

restricted the press's essential role as a public watchdog. The practice of banning the future publication of entire periodicals under section 6(5) went beyond any notion of necessary restraint in a democratic society and, instead, amounted to censorship.

Conclusion: violation (unanimously).

Article 41: Awards ranging from EUR 5,000 to EUR 40,000 to the owners of the newspapers in respect of pecuniary damage. EUR 1,800 to each of the applicants in respect of non-pecuniary damage.

Award of damages against magazine in libel action by government minister: *no violation*

Europapress Holding d.o.o. v. Croatia - 25333/06
Judgment 22.10.2009 [Section I]

Facts – The applicant company was a newspaper publisher. In 1996 one of its magazines published an article under the headline "Minister Š. pointed a handgun at journalist E.V.!" in which it reported that the then Minister of Finance had been involved in an altercation with a journalist and had allegedly taken a handgun from a security officer and pointed it at the journalist saying that he would kill her, before laughing loudly at his joke. The minister sued the applicant company, which, in its defence, maintained that the information was true, of public interest and from a trustworthy source, E.V. It also said that it had checked with an (unidentified) source close to the government before going ahead with the story. After hearing evidence from eyewitnesses that was at variance with the account given in the article, the municipal court found on the facts that the magazine had published untrue information without properly verifying its accuracy. It awarded the minister damages and costs.

Law – Article 10: The sole issue before the Court was whether the interference with the applicant company's freedom of expression, which was prescribed by law and pursued the legitimate aim of protecting the reputation and rights of others, had been necessary in a democratic society. Article 10 did not guarantee wholly unrestricted freedom of expression even where, as here, it concerned press coverage of matters of serious public concern and political figures. The exercise of that freedom carried with it duties and responsibilities which assumed significance when a named individual's reputation was attacked. Journalists were required to act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. The article in question contained specific allegations of fact that were susceptible to proof. It was written in a manner that left the reader in no doubt as to the truthfulness of the information and gave no indication that it was merely reporting what others had said, but instead adopted the offending allegations as its own. The applicant company was therefore liable to demonstrate the veracity of those allegations. Eyewitnesses had testified before the domestic courts that at no point had a gun been pointed at E.V. and even E.V. had been unable to assert the contrary. There were, therefore, no elements to lead the Court to depart from the domestic courts' findings that the applicant company had failed to demonstrate that the information published was true. Further, although the seriousness of the allegations meant that they had required substantial justification, there was no evidence that the magazine had attempted to contact the minister or any of the eyewitnesses. Instead it had relied on its source in Government, who clearly could not have witnessed the incident. The applicant company had not, therefore, sufficiently verified the information prior to publication. If, in view of the time-constraints, the magazine had wished to publish without adequately checking the facts, a more cautious approach had been warranted and it should have been made clear that the information came from E.V. and was not undisputed fact. Lastly, neither the decision to award damages nor the measure of the award appeared to have been excessive, especially as it had been made against the applicant company, not individuals. In sum, the domestic courts had given "relevant and sufficient" reasons in support of their decisions and the damages awarded against the applicant company were not disproportionate to the legitimate aim pursued.

Conclusion: no violation (unanimously).

ARTICLE 11

Freedom of association

Dissolution of association for alleged breaches of the law and its own charter: *violation*

Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan - 37083/03
Judgment 8.10.2009 [Section I]

Facts – The applicant association was registered by the Ministry of Justice ("the Ministry") in 1995. Its charter required it to hold a general meeting every five years, but it did not do so until August 2002. Two weeks later it received a warning letter[1] from the Ministry requiring it to remedy certain breaches of domestic law and its own charter. The association replied that a meeting had been held and that steps were being taken to bring the charter into line with the statutory requirements. The Ministry then issued a second warning in which it noted irregularities in the convening of the meeting in August 2002, notably on account of alleged errors in the association's records of members and branches. At the end of October 2002, a third warning was sent noting that no information had been received regarding compliance with the previous two letters. The third warning letter also asserted that the association had breached a statutory ban on public associations interfering with the activities of private businesses. In March 2003 the Ministry obtained a court order for the association's dissolution for failure to remedy the breaches referred to in the three warning letters. Subsequently, following unsuccessful appeals, the association was dissolved.

Law – Article 11: The Court was prepared to accept that the dissolution of the applicant association had pursued the legitimate aim of protecting the rights and freedoms of others. The question whether that interference was prescribed by law would be examined with the closely-related broader issue of whether it was necessary in a democratic society. There were question marks over the foreseeability of the legislation, which was couched in general terms and appeared to give a wide discretion to the Ministry of Justice. In particular, the notion of activities "incompatible with the objectives" of the Law on Non-Governmental Organisations appeared to encompass an unlimited range of issues when in view of the severity of the only possible sanction – compulsory dissolution – they should have been precisely delimited. Nor were there any detailed rules governing such matters as the scope and extent of the Ministry's power to intervene in an association's internal management and activities, the procedure for conducting inspections or the time allowed to eliminate any shortcomings.

1. Under Article 31 of the Law on Non-Governmental Organisations a warning may be issued to any NGO committing "actions incompatible with the objectives" of the Law. A court order for dissolution may be made if the NGO receives more than two written warnings within a year.

The domestic authorities had relied on two grounds for dissolving the association. The first being alleged breaches of the rules on internal management, the second alleged engagement in unlawful activities.

As to the first, the Court noted that freedom of association did not preclude the States from laying down rules and requirements on corporate governance and management and from satisfying themselves that they were observed. Such rules served to ensure the members' rights to participate in the association's management and activities and to prevent abuse of the legal status and associated economic privileges enjoyed by non-commercial entities. The applicant association had clearly been at fault in failing to call a general meeting for around seven years or to bring its charter into conformity with domestic legislation. However, even before receiving the first warning, it had sought to rectify the position by convening a general meeting and should have been given a genuine chance to put matters right. Instead, the focus of the accusations had shifted to other alleged breaches and the Ministry had issued two further warnings in a relatively short time span, on each occasion giving the association only ten days in which to remedy the situation, without any explanation as to what specific measures were required. That deadline appeared to have been set arbitrarily and, on the face of it, was too short to afford the association a genuine chance to rectify matters. In any event, there appeared to be little justification for the Ministry interfering with the internal workings of the association to the extent it had in the two additional warnings, especially in the absence of any complaints by members. While it was legitimate for States to introduce certain minimum requirements as to the role and structure of an association's governing bodies, it was not the authorities' role to ensure observance of every single formality set out in an association's own charter. In any event, the domestic courts had not carried out any independent judicial inquiry into the alleged failings, but had simply accepted the findings of Ministry of Justice officials at face value, so that there was no sound evidence that they had, in fact, taken place or constituted a compelling reason for the interference. Accordingly, the domestic authorities had failed to adduce relevant and sufficient reasons for the interference. Lastly, outright dissolution was a disproportionate response to a mere failure to comply with certain internal management rules and less radical measures were called for.

As to the second ground, engaging in unlawful activities, the allegations had been extremely vague,

brief and lacking in detail. The domestic courts had simply accepted the Ministry's allegations as true, without examining any direct evidence of the alleged misconduct or hearing testimony from alleged victims or witnesses. In sum, the allegations were unproven and the decision to dissolve the applicant association on this ground was nothing short of arbitrary.

Conclusion: violation (unanimously).

Article 41: EUR 8,000 in respect of non-pecuniary damage.

ARTICLE 13

Effective remedy

Availability of effective remedy in respect of a complaint about the length of criminal proceedings: *relinquishment in favour of the Grand Chamber*

McFarlane v. Ireland - 31333/06
[Section III]

In January 1998 the applicant was released from prison in Northern Ireland and crossed the border to Ireland. There he was arrested in connection with a kidnapping that had taken place in December 1983. A forensic report compiled at the time had linked fingerprints found at the crime scene to the applicant from the outset, but the Irish police had chosen to wait for his release from prison before questioning him. The applicant sought judicial review on the ground that the delay in bringing the charges against him and the failure to conserve the original fingerprints would render his trial unfair. In July 2003 the High Court made an order prohibiting the trial in view of the loss of the original evidence but refused his application for relief in respect of the alleged delay. The order prohibiting the trial was overturned by the Supreme Court in March 2006 on the grounds that, although the fingerprint evidence had been lost, the forensic report had been preserved. The Supreme Court also ruled that it had been entirely legitimate for the Irish police to have waited for the applicant's release from prison before arresting him, as there had been insufficient evidence to initiate a prosecution before questioning him and the parameters of questioning him in prison in Northern Ireland would have been entirely different. After the case had been set down for trial, the applicant made a further application for judicial review, this time on the grounds that the delay since his arrest in January 1998 had violated the "reasonable-time" requirement under Article 6 § 1 of the Convention. That application was dismissed by the High Court in a decision that was upheld on appeal by the Supreme Court. The Supreme Court noted, *inter alia*, that the only specific relief the applicant had sought was an order prohibiting the trial, and, even assuming a breach of his constitutional right to an expeditious hearing, the circumstances had not warranted an order preventing his continued prosecution. A distinction had to be drawn between a finding of unreasonable delay under Article 6, which entailed an award of just satisfaction, and the balancing exercise the domestic courts were required to carry out when considering an application for an order prohibiting trial. The applicant had not claimed damages and it was not the Supreme Court's role to pronounce in the abstract on the availability of damages as a remedy.

The applicant complained to the European Court of the length of the proceedings (Article 6 § 1) and of the lack of an effective remedy in that respect (Article 13). He also lodged complaints under Article 6 § 3 and Article 8.

ARTICLE 14

Discrimination (Article 8)

Non-renewal of contract of married priest in teaching post: *communicated*

Fernández Martínez v. Spain - 56030/07
[Section III]

The applicant was ordained as a priest in 1961. In 1984 he sought from the Vatican an exemption from the obligation of celibacy. In 1985 he married his current wife in a civil ceremony and they had five children. From 1991 onwards he was a teacher of the Catholic religion and morals in a State secondary school. In 1996 a newspaper published an article on a movement of Catholic priests called the "Movement for optional celibacy", with a photograph of the applicant and his family taken at one of the meetings of this group, of which he was a member. In 1997 the Vatican granted the applicant an exemption from celibacy. The Diocese then informed the Ministry of Education of its intention not to renew the applicant's contract for the school year 1997/98 and also notified the applicant. He challenged that decision before the courts and at third instance lodged an *amparo*

appeal with the Constitutional Court, which dismissed it in 2007. The Constitutional Court recognised that the non-renewal of the applicant's contract had stemmed from the newspaper article, which was regarded by the Church as constituting a scandal. In addition, it took the view that the interferences with the applicant's rights were neither disproportionate nor unconstitutional and were justified by their religious nature in connection with the rules of the Church to which the applicant freely belonged and whose creed he purported to teach in a public educational establishment. The applicant sought to have this decision declared null and void, on the ground that two of the judges on the bench that had given the judgment were known for their affinity with the Catholic Church. The Constitutional Court dismissed this appeal because the only remedy that he could have used to challenge one of its judgments was an application for interpretation.

Communicated under Article 6 § 1, Article 8 in conjunction with Article 14, and Articles 9 and 10 of the Convention.

Discrimination (Article 1 of Protocol No. 1)

Residence requirement for entitlement to supplementary pension for employee who worked for a French company in Algeria prior to independence: *no violation*

Si Amer v. France - 29137/06
Judgment 29.10.2009 [Section V]

Facts – The applicant is an Algerian national who held French nationality until 31 December 1962 and currently lives in Algiers. From 1953 to 1962, the applicant worked in Algeria – a French territory until 5 July 1962 – in a company incorporated under French law. He had taken out, on a voluntary basis, a supplementary pension policy with the Employees' Inter-professional Insurance Fund. During this period the Fund received regular contributions, paid in due form by the applicant. In 1964 an agreement was signed between France and Algeria, which had become independent, regulating their relations with regard to supplementary pension schemes. Subsequently an amendment to the French inter-professional agreement of 1961 on supplementary pensions imposed a criterion of residence in France or Monaco in order to have validated employment that had been performed in Algeria. In 1998 the applicant applied to the French Fund for payment of a supplementary pension. His application was dismissed on the ground that he did not meet the residence requirement. The refusal was confirmed in writing in 1998 and 2002. The applicant brought proceedings against the Fund before the Paris *tribunal de grande instance*, which dismissed his claims. The appeal court upheld the judgment.

Law – Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: The existence of a difference in treatment between persons who had made contributions to a French supplementary insurance fund in respect of their periods of employment in pre-independence Algeria was established. The Court noted in this respect that the applicant was in an objectively similar situation to persons who had had an identical or similar professional career but who had subsequently resided in France or Monaco.

The impugned difference corresponded to the legitimate aim of ensuring, through the principle of the territoriality of supplementary pension schemes, the administration of relations in this area between France and Algeria following the latter's independence. The agreement signed by the two countries in 1964 was one of the measures intended to ensure a coherent and clear division in the settlement of past commitments and the respective outgoings incumbent on the States. In particular, it was intended to ensure the effectiveness of the rights of those individuals who had been repatriated to French territory. In addition, the need to divide the burden of past commitments was further justified, having regard to the preservation of the scheme's financial stability, by the fact that it was based on the principle of redistribution, in which pensions were financed not by past contributions from their beneficiaries but by contributions paid by current employers and employees. As to the proportionality of the means employed in pursuit of this legitimate aim, it was to be noted that the difference in treatment affecting the applicant resulted, firstly, from the combined application of certain articles of the Franco-Algerian Agreement of 1964, which provided for the full affiliation of Algerian nationals, employed in Algeria, to that country's supplementary pension schemes, with preservation of acquired rights. Nonetheless, this difference in treatment concerned, in principle, only the arrangements for implementing the supplementary scheme in question. From its entry into force, the terms of the agreement gave the applicant a right to payment that was equivalent to the right he had held prior to Algeria's independence. As to the right's effectiveness, it resulted from the application of the above-mentioned Franco-Algerian Agreement, an article of which made the

French and Algerian Governments responsible for defining the level of benefits to be paid to the persons affiliated with these countries' institutions and for nominating the relevant administrating institutions. In this regard, the Court considered that no shortcoming could be imputed to the French State, which had merely been required to guarantee the implementation of this agreement in respect of those persons affiliated to its internal institutions. In those circumstances, the impugned difference in treatment could not therefore be regarded as discriminatory, whatever the alleged consequences of provisions of EU law which had not been in force either when the above-mentioned Franco-Algerian Agreement entered into force, or at the time of the request for access to the pension rights, which had preceded the date on which supplementary pension schemes came under EU law, namely 1 July 2000.

Conclusion: no violation (unanimously).

Granting of financial assistance to a single category of Second World War orphans: *inadmissible*

Association nationale des pupilles de la Nation v. France - 22718/08
Decision 6.10.2009 [Section V]

Facts – The members of the applicant association are war orphans. In 2004 France passed a decree providing for financial assistance to orphans of persons who had died while being deported or been executed for acts of resistance (called "victims of acts of barbarity"). The applicant association brought an action in the *Conseil d'Etat* for judicial review of the decree. It argued that the compensatory measure, which it deemed to be discriminatory, should have been extended to orphans suffering in similar circumstances, particularly those whose parents had been killed in combat or had been "prisoners of war who had died in detention". The application was dismissed by the *Conseil d'Etat*, which found that the stipulations of the decree were not discriminatory.

Law – Article 14: The dispute concerned the granting of financial assistance to a single category of Second World War orphans defined by decree. Neither the applicant association nor the members cited by it had an existing possession and none of them could have a legitimate expectation of realising a claim against the State because they did not satisfy the conditions laid down by the aforementioned decree for claiming the financial assistance. Accordingly, the dispute that was the subject of the application did not fall within the scope of Article 1 of Protocol No. 1, so Article 14 of the Convention could not apply.

Conclusion: inadmissible (incompatible *ratione materiae*).

ARTICLE 34

Victim

Application introduced on behalf of applicant's sister, who had died while her constitutional claim concerning the alleged breach of her right to a fair trial was pending: *victim status upheld*

Micallef v. Malta - 17056/06
Judgment 15.10.2009 [GC]

(See Article 6 § 1 above, page 9)

ARTICLE 41

Just satisfaction

Awards in respect of non-pecuniary damage: no additional award in respect of applicants whose victim status derives from legal connection with the original party to the impugned domestic proceedings

Selahattin Çetinkaya and Others v. Turkey - 31504/02
Judgment 20.10.2009 [Section II]

Facts – The application related to two sets of proceedings concerning the allocation of plots of land. The applicants became parties to the proceedings after the death of their relatives.

Law – Article 6 § 1: The Court held that the proceedings in question had not complied with the reasonable-time requirement.

Conclusion: violation (unanimously).

Article 13: The Court noted the absence of a remedy in domestic law by which the applicants could have asserted their right to have their case heard within a reasonable time within the meaning of Article 6 § 1 of the Convention.

Conclusion: violation (unanimously).

Article 41: Where a violation of Article 6 of the Convention was found on account of the excessive length of proceedings brought by a group of individuals acting together who relied on the same factual and legal grounds and pursued the same aims, each of them could, in principle and without prejudice to the applicable rules, claim individual compensation in respect of non-pecuniary damage. The situation was different where a group of applicants derived its victim status from a legal link to a single initial party to the impugned domestic proceedings. This could arise, for instance, where the original party to the case was replaced by his heirs following his death or by the administrators of the estate after being declared bankrupt, or in the case of assignment of a debt. In such situations there was no need for the Court to take account of the number of applicants in deciding on the amount to be awarded, particularly since the increase in their number was not imputable to the respondent party. In the instant case the applicants had succeeded their relatives who had, in turn, succeeded their relatives, the initial parties to the impugned proceedings. The Court awarded the applicants EUR 20,000 jointly in respect of non-pecuniary damage.

ARTICLE 46

Execution of a judgment – General measures

Respondent State required to introduce an effective remedy securing redress for non-enforcement or delayed enforcement of judgments and to grant redress to all victims in pending cases of this kind

Yuriy Nikolayevich Ivanov v. Ukraine - 40450/04
Judgment 15.10.2009 [Section V]

Facts – The applicant complained of the non-enforcement of judgments in his favour and of the lack of an effective remedy at the domestic level.

Law – Articles 6 § 1 and 13 of the Convention and Article 1 of Protocol No. 1

Conclusion: violation (unanimously).

Article 46: The case concerned two recurring problems: the prolonged non-enforcement of final domestic decisions and the lack of an effective domestic remedy to deal with it. These problems lay behind the most frequent violations of the Convention continuously found by the Court since 2004 in over 300 cases in respect of Ukraine. It was therefore evident that the respondent State had demonstrated an almost complete reluctance to resolve the problems despite having been urged by the Court to take appropriate measures. In view of the approximately 1,400 applications currently pending against Ukraine concerning the same questions, the Court concluded that this was a practice incompatible with the Convention and, in line with its approach in the case of *Burdov v. Russia (no. 2)* (no. 33509/04, 15 January 2009, Information Note no. 115), considered it appropriate to apply the pilot-judgment procedure. The Court ruled that Ukraine must introduce in its legal system, at the latest within one year from the Court's judgment becoming final, an effective remedy which secured adequate and sufficient redress for the non-enforcement or delayed enforcement of domestic judgments and complied with the key criteria set in the Court's case-law. Ukraine was also required to grant redress, including by unilateral remedial offers or friendly settlements where possible, to all current applicants in such cases whose applications were communicated to the Government. In the event that no redress was granted, the Court would resume its examination of all similar pending applications. Pending the adoption of the above measures, the Court would adjourn for the same one-year period the proceedings in all Ukrainian cases lodged after the delivery of the present judgment and concerning solely the non-enforcement or delayed enforcement of domestic judgments.

Article 41: The Court awarded the applicant the amount of the outstanding judgment debts with an adjustment to cover inflation. It also awarded EUR 2,500 in respect of non-pecuniary damage.

Overcrowding recognised as a structural problem in detention facilities; respondent State required to introduce non-judicial complaints procedure affording expedited relief

Orchowski v. Poland - 17885/04
Judgment 22.10.2009 [Section IV]

Facts – The applicant has been serving a prison sentence in Poland since 2003. During that time, he has been transferred twenty-seven times between eight different prisons and remand centres. For most of the time he had less than 3 square metres (sq.m) of personal space inside his cells, which was the minimum prescribed under national law. At times he even had less than 2 sq.m. The applicant

lodged numerous complaints concerning the conditions of his detention with the domestic authorities, including a civil action for damages, but to no avail. In a letter of 31 March 2005 the Director of the Gdańsk Remand Centre acknowledged the problem of overcrowding, but dismissed the applicant's complaint as ill-founded.

Law – Article 3: (a) *Admissibility (exhaustion of domestic remedies)* – Prior to bringing his case before the Court, the applicant had lodged a formal complaint with the penitentiary authorities as required under the domestic law and continued to lodge similar complaints with various authorities. All of his complaints had been found to be ill-founded, even where the competent authority had recognised the general problem of overcrowding as in the Gdańsk Remand Centre. As to the existing civil remedies, which were merely of a compensatory nature, the Government had failed to refer to any decision of the domestic courts that demonstrated that persons detained in inadequate conditions had succeeded in obtaining an improvement in their situation. Lastly, given the limited form of redress provided by individual complaints to the Constitutional Court, the European Court could not recognise such complaints as an effective remedy in the circumstances of the applicant's case. The Government's non-exhaustion argument was therefore dismissed.

(b) *Merits* – In 2008 the Constitutional Court had found that detention facilities in Poland suffered from a systemic problem of overcrowding which was of such a serious nature as to constitute inhuman and degrading treatment. As for the applicant's personal situation, the European Court found it established that the majority of cells he had been held in had been occupied beyond their designated capacity, leaving him with less than the statutory 3 sq.m of personal space, and at times even with less than 2 sq.m. The Court further noted that the CPT[2]'s standard recommended living space per prisoner in multi-occupancy cells was higher than the national statutory minimum standard, namely 4 sq.m, and that the applicant was confined to his cell day and night, except for an hour of daily outdoor exercise. Having regard to the cumulative effects of the conditions in which the applicant was detained, the Court concluded that the distress and hardship he had endured exceeded the unavoidable level of suffering inherent in deprivation of liberty.

2. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

Conclusion: violation (unanimously).

Article 46: There were some 160 applications against Poland pending before the Court that raised the issue of inadequate prison conditions. The seriousness and the structural nature of overcrowding in Polish detention facilities had already been acknowledged by the Polish Constitutional Court, by all the national authorities involved in the proceedings before that Court and by the Government. Such overcrowding, which had been observed from 2000 at least until mid-2008, revealed a structural problem consisting of "a practice incompatible with the Convention". The Constitutional Court had obliged the State authorities to bring the situation into compliance with the constitutional requirements through legislative amendments and a series of measures reorganising the entire Polish penitentiary system. In parallel, a reform of criminal policy was envisaged with the aim of achieving wider implementation of preventive measures other than deprivation of liberty (following the recent case of *Kauczor v. Poland*, no. 45219/06, 3 February 2009, Information Note no. 116). The European Court was aware that solving a systemic problem of this magnitude could require significant financial resources. However, in principle, the lack of such resources could not justify prison conditions incompatible with Article 3. The civil courts had also meanwhile adapted their practice to allow prisoners to claim damages in respect of prison conditions, although this was only of value to persons who were no longer detained in overcrowded cells. Since such a remedy did not address the root cause of the problem, the Court invited the State to develop an efficient system of complaints to the authorities responsible for supervising detention facilities to enable them to react more speedily than the courts could and to order, if necessary, a detainee's long-term transfer to Convention-compatible conditions.

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

(See also *Norbert Sikorski v. Poland*, no. 17599/05, 22 October 2009)

ARTICLE 1 OF PROTOCOL No. 1

Possessions
Peaceful enjoyment of possessions

Total automatic loss of pension rights and welfare benefits as a result of a criminal conviction: *violation*

Apostolakis v. Greece - 39574/07
Judgment 22.10.2009 [Section I]

Facts – The applicant had been working for the Greek Artisan and Tradesmen's Insurance Fund, of which he became pensions director, since the age of eighteen. In the end he was forced to resign on account of criminal proceedings instituted against him. In 1998 the Court of Appeal convicted him of aiding and abetting the falsification of paybooks to the detriment of the Fund and sentenced him to eleven years' imprisonment. He was conditionally released that year, the period of pre-trial detention having been deducted from his sentence. Prior to that, in 1988, a right to a retirement pension had been conferred on the applicant after more than thirty years' service. In 1999 the Social Security Fund revoked the decision of 1988 and transferred part of the pension to his wife and daughter, on the basis of the criminal conviction and in accordance with the Pensions Code. The withdrawal of Mr Apostolakis's pension also caused him to lose his personal social-security rights. The applicant unsuccessfully appealed against those measures.

Law – Article 1 of Protocol No. 1: On joining the Greek civil service the applicant had acquired a right that constituted a "possession" within the meaning of Article 1 of Protocol No. 1. The withdrawal of the applicant's pension had amounted to an infringement of his right of property that was neither an expropriation nor a control of the use of property. Following his conviction the applicant had been automatically deprived of his retirement pension for the rest of his life. Aged sixty-nine, and unable to start a new professional occupation, he was personally deprived of any means of subsistence. Whilst the applicant's conduct had been criminally culpable, it had had no causal link with his retirement rights as a socially insured person. Moreover, the fact that the pension had been transferred to the applicant's family – the applicant being married and having children – did not suffice to offset that loss. In that connection it should be noted that the transfer had been effected in the same way as if the applicant had died, which meant that the pension amount had been reduced: seven-tenths of the initial sum, according to the applicant. Above all, there was nothing to rule out the possibility of the situation continuing in the future, as the applicant might become a widower or get divorced, for example, which would result in the loss of all means of subsistence. To that was added the fact that the withdrawal of the applicant's pension resulted in the loss of his social-security right. The margin of appreciation available to States allowed them to make provision in their legislation for the imposition of fines as a result of a criminal conviction. However, penalties of that kind, which would involve the total forfeiture of any right to a pension and social cover, including health insurance, amounted not only to a double punishment but also had the effect of extinguishing the principal means of subsistence of a person, such as the applicant, who had reached retirement age. Such an effect was compatible neither with the principle of resocialisation governing the criminal law of the Contracting States nor with the spirit of the Convention. Accordingly, the applicant had been obliged to bear an excessive and disproportionate burden which, even if account was taken of the wide margin of appreciation to be afforded to States in the area of social legislation, was not justified on the grounds relied on by the Government, namely, the proper functioning of the administration or the credibility and integrity of the public service.

Conclusion: violation (unanimously).

Article 41: EUR 23,327.64 in respect of pecuniary damage and EUR 1,000 in respect of non-pecuniary damage.

ARTICLE 2 OF PROTOCOL No. 1

Respect for parents' religious and philosophical convictions

Compulsory secular ethics classes, with no possibility of exemption for pupils in State secondary schools: *inadmissible*

Appel-Irrgang and Others v. Germany - 45216/07
Decision 6.10.2009 [Section V]

Facts – In 2006 the *Bundestag* in Berlin amended the School Act to include compulsory ethics classes for all State secondary-school pupils. The applicants, who are Protestants, asked the school to exempt the first applicant from the ethics classes, but to no avail. All their subsequent appeals were dismissed.

Law – Article 2 of Protocol No. 1: The applicants complained mainly that the ethics lessons were not neutral and that their secular nature was contrary to their religious beliefs. For the Court the aims of the lessons – which were to promote the propensity and ability of secondary-school pupils, regardless of their origins, to address the fundamental cultural and ethical problems of individual and social life

in order to develop their social skills and their aptitude for intercultural dialogue and ethical discernment – were in keeping with the principles of pluralism and objectiveness embodied in Article 2 of Protocol No. 1 and with the recommendations of the Parliamentary Assembly of the Council of Europe. The lessons were neutral and gave no more importance to one faith or religion than to another. They provided all pupils with the same basic values and taught them to be open to people whose beliefs differed from theirs. Furthermore, as the Federal Constitutional Court had pointed out, although teachers were expected to have their own views on the ethical issues addressed in the classes and to explain them to their pupils in a credible manner, they were not allowed to unduly influence the pupils. As to the teaching dispensed, the Court noted that the applicants had not pleaded that the course as it had actually been taught in the school year concerned had been disrespectful of their religious beliefs or intended to indoctrinate.

As to the applicants' argument that despite Germany's Christian tradition the Christian religion was not adequately represented in the ethics course, the Court considered that the school authorities' choice of a neutral course that made room for different beliefs and convictions did not, in itself, raise a problem in respect of the Convention. The Federal Constitutional Court endorsed that choice in view of the special practical circumstances and the religious orientation in the *Land* of Berlin. Furthermore, the matter fell within the margin of appreciation left to the States. As regards the applicants' claims that the ethics course was contrary to their religious beliefs, the Court observed that neither the School Act nor the curriculum could be considered to give priority to one particular belief or to omit or challenge other beliefs, including the Christian faith. The relevant provisions proposed addressing religious principles and invited schools to cover certain subjects in cooperation with religious or philosophical communities. As to the applicants' argument that the classes also contained ideas or conceptions critical of or opposed to Christian beliefs, the Court deemed that it was not possible to deduce from the Convention a right not to be exposed to convictions other than one's own. Moreover, nothing impeded the first applicant from continuing to attend the Protestant religion course offered by the school, and nothing prevented her parents from enlightening and advising their daughter by playing their natural role as educators and guiding her in a direction compatible with their own religious convictions.

Accordingly, by introducing mandatory ethics classes the national authorities had not exceeded the margin of appreciation conferred by Article 2 of Protocol No. 1. The Berlin authorities were therefore not obliged to allow a general exemption from the course. The fact that another German *Land* had decided to allow such an exemption made no difference to this conclusion.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 2 OF PROTOCOL No. 4

Article 2 § 1

Freedom of movement

Removal and retention by a mother of her daughter declared unlawful: *inadmissible*

D.J. and A.-K.R. v. Romania - 34175/05
Decision 20.10.2009 [Section III]

Facts – In 2000 custody of A.-K.R. (the second applicant) was granted to her mother, D.J. (the first applicant), following the latter's divorce from R.R. In 2004, during proceedings to amend R.R.'s rights of visiting and staying contact, the child's mother requested a change to the contact arrangements in view of her intention to emigrate to the United States to join her new husband. In November 2005 the Court of Appeal, ruling at final instance, held that the second applicant's removal to the United States did not hamper the exercise of her father's parental rights or his ability to request a change in the arrangements for contact with his daughter. In December 2004 the applicants left for the United States. In February 2005 R.R. brought an action before the County Court in Romania requesting that the child's removal to the United States and her retention there be declared wrongful for the purposes of the Hague Convention on the Civil Aspects of International Child Abduction. In a final judgment of May 2005 the County Court declared the removal of the second applicant to the United States and her retention there to be wrongful. R.R. also commenced proceedings before the American authorities seeking to obtain the child's return. In this connection the first applicant informed the American court examining the application that she did not object to the child's return. In May 2005,

having noted the consent of the first applicant, the court ordered the child's return to Romania. The applicants returned to Romania in June 2005 and left again for the United States in February 2006. In August 2006 the Romanian Court of First Instance made an order prohibiting the applicants from leaving Romania. The first applicant appealed against the decision and requested a stay of execution. In September 2006 the Youth and Family Court set aside the decision of August 2006, after noting that the Court of First Instance did not have jurisdiction to examine the case. The case was transferred to a different Court of First Instance. The applicants left again for the United States on 23 September 2006. R.R. brought an action before the courts seeking custody of the child and in March 2008 the Court of First Instance transferred custody to him. An appeal by the first applicant against that judgment is currently pending.

Law – Article 2 of Protocol No. 4: (a) *The proceedings under the Hague Convention* – The court judgment of 5 May 2005 had confined itself to declaring that the second applicant's removal to the United States and her retention there had been wrongful within the meaning of Article 3 of the Hague Convention. It was therefore clear that the Romanian authorities had not taken a decision ordering the return of the applicants to Romania or prohibiting them from leaving the country. Whilst it was true that proceedings for the child's return as provided for by the Hague Convention had been commenced by R.R. in the United States, those proceedings had ended on 27 May 2005 with a decision noting that the first applicant had agreed to return to Romania with her daughter. The first applicant herself acknowledged that she had returned to Romania of her own free will. The Court could not speculate as to the possible outcome of the proceedings in the United States had the child's mother not agreed to return to Romania. Hence, the County Court's decision could not be regarded as interference with the applicants' right to freedom of movement within the meaning of Article 2 of Protocol No. 4.

Conclusion: inadmissible (manifestly ill-founded).

(b) *The urgent application concerning the prohibition on leaving the country* – The first applicant and her daughter had been prevented from leaving the country for about a month between August and September 2006. However, the Court had to examine whether the applicants could be regarded as "victims" in the specific circumstances of the case. In its decision of September 2006 the Youth and Family Court had set aside the order prohibiting the applicants from leaving the country after finding that it was unlawful because the court had not had jurisdiction. In so doing it had recognised at least in substance the violation of the applicants' right to freedom of movement. The court's decision constituted appropriate redress for the first applicant and her daughter, on the basis that the finding of a violation constituted in itself sufficient just satisfaction. Moreover, given the promptness with which the impugned decision had been set aside (within one month approximately), the decision had been sufficient to fully remedy the complaint in question. In addition, the first applicant and her daughter had been able to leave Romania at the end of September 2006, when they travelled to the United States. Accordingly, they could no longer claim to be victims of any violation of Article 2 of Protocol No. 4 for the purposes of Article 34 of the Convention.

Conclusion: inadmissible (incompatible *ratione personae*).

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER

Article 30

McFarlane v. Ireland - 31333/06
[Section III]

(See Article 13 above, page 24)