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

Information Note on the Court's case-law

No. 134 October 2010

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

The Information Note, compiled by the Court's Case-Law Information and Publications Division, contains summaries of cases examined during the month in question which the Registry considers as being of particular interest. The summaries are not binding on the Court. In the provisional version the summaries are normally drafted in the language of the case concerned, whereas the final single-language version appears in English and French respectively. The Information Note may be downloaded at <www.echr.coe.int/echr/NoteInformation/en>. A hard-copy subscription is available for 30 euros (EUR) or 45 United States dollars (USD) per year, including an index, by contacting the publications service via the on-line form at <www.echr.coe.int/echr/contact/en>.

The HUDOC database is available free-of-charge through the Court's Internet site (<www.echr.coe.int/ECHR/EN/hudoc>) or in a pay-for DVD version (<www.echr.coe.int/hudoccd/en>). It provides access to the full case-law and materials on the European Convention on Human Rights, namely the decisions, judgments and advisory opinions of the Court, the reports of the European Commission of Human Rights and the resolutions of the Committee of Ministers.

European Court of Human Rights
(Council of Europe)
67075 Strasbourg Cedex
France
Tel: 00 33 (0)3 88 41 20 18
Fax: 00 33 (0)3 88 41 27 30
www.echr.coe.int

ISSN 1996-1545

TABLE OF CONTENTS

ARTICLE 2

Effective investigation

Alleged failure to conduct effective investigation into fatal shooting of person mistakenly identified as suspected terrorist: *communicated*

Armani Da Silva v. the United Kingdom - 5878/08 7

ARTICLE 3

Inhuman or degrading treatment
Positive obligations

Failure to ensure appropriate medical treatment for person injured in police custody: *violation*

Umar Karatepe v. Turkey - 20502/05 7

ARTICLE 5

Article 5 § 1

Deprivation of liberty

Containment of peaceful demonstrators within a police cordon for over seven hours: *communicated*

Austin and Others v. the United Kingdom - 39692/09, 40713/09 and 41008/09 8

ARTICLE 6

Article 6 § 1 (civil)

Right to a court

Obligation to submit to arbitration as a result of clause agreed by third parties: *violation*

Suda v. the Czech Republic - 1643/06 9

Access to court

Imposition of small fines by courts for vexatious applications for rectification of judgments: *inadmissible*

Toyaksi and Others v. Turkey (dec.) - 43569/08 et al. 10

Fair hearing

Divergences in case-law of administrative and administrative military courts: *case referred to the Grand Chamber*

Nejdet Şahin and Perihan Şahin v. Turkey - 13279/05 10

Tribunal established by law

Decision by district-court president acting in his administrative capacity to reassign case to himself for judicial decision: *violation*

DMD Group, a.s., v. Slovakia - 19334/03 10

Article 6 § 1 (criminal)

Fair hearing

Criminal conviction based on statement made by defendant in police custody after swearing oath normally reserved for witnesses: *violation*

Brusco v. France - 1466/07 11

Equality of arms

Examination of appeal on points of law by Supreme Court at preliminary hearing held in presence of public prosecutor but in absence of accused: *violation*

Zhuk v. Ukraine - 45783/05 12

Independent and impartial tribunal

Doubts as to impartiality where two out of three members of bench who had ordered applicant's detention pending trial subsequently sat on bench that convicted him: *violation*

Cardona Serrat v. Spain - 38715/06 12

Article 6 § 3

Rights of defence

Failure to inform person in police custody before questioning of right not to incriminate himself and to remain silent: *violation*

Brusco v. France - 1466/07 13

ARTICLE 8

Private life
Positive obligations

Failure of authorities to implement court orders intended to afford applicant protection from violent husband: *violation*

A. v. Croatia - 55164/08 13

Video surveillance of supermarket cashier suspected of theft: *inadmissible*

Köpke v. Germany (dec.) - 420/07 15

Private life

Removal of judge from office for reasons partly related to her private life: *violation*

Özpınar v. Turkey - 20999/04 14

Family life

Decision to deprive applicant of parental responsibilities and to authorise the adoption of her son by his foster parents: *no violation*

Aune v. Norway - 52502/07 16

Refusal to grant adoptive parent order revoking adoption: *inadmissible*

Goția v. Romania (dec.) - 24315/06 17

ARTICLE 10

Freedom to receive information
Freedom to impart information

Denial of Internet access to prisoner: *communicated*

Jankovskis v. Lithuania - 21575/08 17

Freedom to impart information

Unjustified withdrawal of copies of municipal newspaper by editor-in-chief following publication: *violation*

Saliyev v. Russia - 35016/03 17

ARTICLE 11

Freedom of peaceful assembly
Freedom of association

Repeated refusals to authorise gay-pride parades: *violation*

Alekseyev v. Russia - 4916/07, 25924/08 and 14599/09 18

ARTICLE 13

Effective remedy

Judge denied an effective remedy in respect of Article 8 complaint: *violation*

Özpınar v. Turkey - 20999/04 20

ARTICLE 14

Discrimination (Article 8)

Prohibition under domestic law on the use of ova and sperm from donors for *in vitro* fertilisation: *case referred to the Grand Chamber*

S.H. and Others v. Austria - 57813/00 20

Difference in treatment between male and female military personnel regarding rights to parental leave: *violation*

Konstantin Markin v. Russia - 30078/06 20

Refusal to grant welfare benefits to foreign nationals: *violation*

Fawsie v. Greece - 40080/07
Saidoun v. Greece - 40083/07 22

ARTICLE 34

Hinder the exercise of the right of petition

Authorities' refusal to provide imprisoned applicant with copies of documents required for his application to the Court: *violation*

Naydyon v. Ukraine - 16474/03 23

ARTICLE 35

Article 35 § 1

Effective domestic remedy – Czech Republic

Purely compensatory remedy for violation of the "speediness" requirement under Article 5 § 4: *effective remedy*

Knebl v. the Czech Republic - 20157/05 23

Effective domestic remedy – Poland

Claim for compensation for infringement of personal rights under Articles 24 and 448 of the Civil Code on account of prison overcrowding: *effective remedy*

Łatak v. Poland (dec.) - 52070/08
Łomiński v. Poland (dec.) - 33502/09 24

Article 35 § 3

No significant disadvantage

Complaint concerning EUR 150 fine and deduction of one point from driving licence: *inadmissible*

Rinck v. France (dec.) - 18774/09 25

ARTICLE 46

Execution of a judgment – Measures of a general character

Respondent State required to introduce legislation to end discrimination between male and female military personnel regarding rights to parental leave

Konstantin Markin v. Russia - 30078/06 26

Respondent State required to take legislative and administrative measures to guarantee property rights in cases where immovable property has been nationalised

Maria Atanasiu and Others v. Romania - 30767/05 and 33800/06 26

ARTICLE 5 OF PROTOCOL No. 7

Equality between spouses

Alleged inequality of rights of male and female military personnel to parental leave: *inadmissible*

Konstantin Markin v. Russia - 30078/06 27

Referral to the Grand Chamber 27

ARTICLE 2

Effective investigation

Alleged failure to conduct effective investigation into fatal shooting of person mistakenly identified as suspected terrorist: *communicated*

Armani Da Silva v. the United Kingdom - 5878/08
[Section IV]

The applicant is a relative of Mr Jean Charles de Menezes, who was mistakenly identified as a terrorist suspect and shot dead on 22 July 2005 by two special firearms officers in London. The shooting occurred the day after a police manhunt was launched to find those responsible for four unexploded bombs that had been found on three underground trains and a bus in London. It was feared that a further bomb attack was imminent. Two weeks earlier, the security forces had been put on maximum alert after more than fifty people had died when suicide bombers detonated explosions on the London transport network. Mr de Menezes lived in a block of flats that shared a communal entrance with another block where two men suspected of involvement in the failed bombings lived. As he left for work on the morning of 22 July, he was followed by surveillance officers, who thought he might be one of the suspects. Special firearms officers were dispatched to the scene with orders to stop him boarding any underground trains. However, by the time they arrived, he had already entered Stockwell tube station. There he was followed onto a train, pinned down and shot several times in the head.

The case was referred to the Independent Police Complaints Commission (IPCC), which in a report dated 19 January 2006 made a series of operational recommendations and identified a number of possible offences that might have been committed by the police officers involved, including murder and gross negligence. Ultimately, however, it was decided not to press criminal or disciplinary charges against any individual police officers in the absence of any realistic prospect of their being upheld. Subsequently, a successful prosecution was brought against the police authority under the Health and Safety at Work Act 1974. The authority was ordered to pay a fine of 175,000 pounds sterling plus costs, but in a rider to its verdict that was endorsed by the judge, the jury absolved the officer in charge of the operation of any "personal culpability" for the events. At an inquest in 2008 the jury returned an open verdict after the coroner had excluded unlawful killing from the range of possible verdicts. The family also brought a civil action in damages which resulted in a confidential settlement in 2009.

In her application to the European Court, the applicant complains about the decision not to prosecute any individuals in relation to Mr de Menezes' death. In particular, she alleges that the evidential test used by prosecutors to determine whether criminal charges should be brought is arbitrary and subjective; that decisions regarding prosecutions should be taken by a court rather than a public official or at least be subject to more intensive judicial scrutiny; and that the procedural duty under Article 2 of the Convention was not discharged by the prosecution of the police authority for a health and safety offence.

Communicated under Articles 2 (procedural aspect) and 13.

ARTICLE 3

Inhuman or degrading treatment
Positive obligations

Failure to ensure appropriate medical treatment for person injured in police custody: *violation*

Umar Karatepe v. Turkey - 20502/05
Judgment 12.10.2010 [Section II]

Facts – In 2003 the applicant was arrested and remanded in custody with about thirty other people for having taken part in a demonstration. On the way to a court hearing he was allegedly struck by a police officer and sustained a cranial traumatism. He was taken to a hospital neurology ward, but the doctors refused to carry out the recommended tomography because the applicant was unable to pay for it. He was then taken back to the police station and released. The applicant and the public prosecutor brought actions against the police, but to no avail. Lastly, the applicant lodged a complaint against the head doctor at the hospital for breach of duty, but the doctor was acquitted.

Law – Article 3 (substantive aspect)

(a) *The injury* – That the applicant had been injured by the police while in their custody was not in dispute. The medical report drawn up shortly afterwards showed that the injury sustained attained the minimum level of severity required to bring it within the scope of Article 3. In any event there had been no need for the police to use such force against the applicant; they could have used other means to keep him under control. In fact, there was no evidence that the applicant had physically threatened the police or been so aggressive that it had been necessary to subdue him by force. The Government had failed to show that the force used had been justified and had not been excessive. The force used had been at the origin of the applicant's injury and had caused him suffering that amounted to inhuman and degrading treatment.

Conclusion: violation (six votes to one).

(b) *Medical treatment* – The applicant's transfer to the neurology ward for further examination was a medically significant step. By insisting that the applicant pay for the procedure, the head doctor at the hospital had prevented him from receiving proper treatment. It had been the authorities' duty to make sure the applicant received the necessary medical treatment while he was in their care. Lastly, after the applicant was taken back to the police station and released, neither the police nor the public prosecutor had shown any concern about the possible consequences of his injury for the applicant's health. The fact that the applicant had not received proper medical treatment for head injuries sustained while in police custody because he could not pay the corresponding fees had robbed him of his dignity. In treating him as they had, the medical and judicial authorities had failed in their positive obligation under Article 3. The applicant had been subjected to considerable hardship that had caused him anxiety and suffering beyond that inevitably associated with any deprivation of liberty. The authorities' failure to provide proper medical treatment amounted to inhuman and degrading treatment.

Conclusion: violation (unanimously).

The Court also held, by six votes to one, that there had been a violation of Article 5 § 1 (c) because the applicant's custody had not been extended in conformity with the relevant domestic law.

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

ARTICLE 5

Article 5 § 1

Deprivation of liberty

Containment of peaceful demonstrators within a police cordon for over seven hours: *communicated*

Austin and Others v. the United Kingdom - 39692/09, 40713/09 and 41008/09 [Section IV]

On 1 May 2001 a large demonstration against capitalism and globalisation took place in London. The organisers gave no notice to the police of their intentions and publicity material they distributed beforehand included incitement to looting, violence and multiple protests all over London. The intelligence available to the police indicated that, in addition to peaceful demonstrators, between 500 and 1,000 violent and confrontational individuals were likely to attend. In the early afternoon a large crowd made its way to Oxford Circus, so that by the time of the events in question some 3,000 people were within the Circus and several thousands more were gathered in the streets outside. In order to prevent injury to people and property, the police decided that it was necessary to contain the crowd by forming a cordon blocking all exit routes from the area. Because of violence and the risk of violence from individuals inside and outside the cordon, and because of a policy of searching and establishing the identity of those within the cordon suspected of causing trouble, many peaceful demonstrators and passers-by, including the applicants, were not released for several hours.

Following these events, the first applicant brought a test case in the High Court for damages for false imprisonment and a breach of her Convention rights. Her claim was dismissed and that decision was upheld on appeal. In a unanimous ruling, the House of Lords found that there had been no deprivation of liberty within the meaning of Article 5 since the intention of the police had been to protect both demonstrators and property from violence, and the containment had continued only as long as had been necessary to meet that aim. In its view, the purpose of the confinement or restriction of movement and the intentions of those responsible for imposing it were relevant to the question of whether there had been deprivation of

liberty and measures of crowd control that were proportionate and undertaken in good faith in the interests of the community did not infringe the Article 5 rights of individual members of the crowd whose freedom of movement was restricted.

Communicated under Article 5 § 1.

ARTICLE 6

Article 6 § 1 (civil)

Right to a court

Obligation to submit to arbitration as a result of clause agreed by third parties: *violation*

Suda v. the Czech Republic - 1643/06
Judgment 28.10.2010 [Section V]

Facts – The applicant was a minority shareholder in a public limited company, C. In November 2003 the general meeting of the company took a majority decision (without the vote cast by the applicant, who voted against) by which C. would be closed down without liquidation and its assets taken over by the main shareholder, the E. company. The redemption value of the shares held by the minority shareholders, including the applicant, was determined by contract. An arbitration clause in the contract provided that any re-examination of the redemption value would be a matter for arbitration and not ordinary court proceedings. Court proceedings brought by the applicant to have the redemption value re-examined and invalidated were unsuccessful.

Law – Article 6 § 1: The present case concerned neither voluntary arbitration nor compulsory arbitration required by law, but an agreement to submit to arbitration made by third parties, namely, the company of which the applicant was a minority shareholder and the main shareholder of that company. The Court had to examine the compatibility with the requirements of Article 6 § 1 of a given situation that obliged the applicant to have recourse to arbitration under a clause that he had not himself contracted. The applicant had instituted proceedings in the ordinary courts, which had found that the clause in question had been validly contracted and had declared the proceedings terminated without ruling on the merits of the case. The only option open to the applicant had therefore been to submit the case to the arbitrators named in the clause in question and wait for them to rule on whether they had jurisdiction to hear the case. Had he done so, however, he would have run the risk that the arbitrators, who were on the list of a private company and were guided by the rules governing that company, which he had not chosen, would rule not only on their jurisdiction but also, in the event that they accepted jurisdiction, on the merits of the case. Accordingly, the arbitrators imposed on the applicant would have indirectly determined the scope of jurisdiction of the ordinary courts because, if they had made an arbitration award on the merits of the case, any application by the applicant to the court would have been limited to procedural matters. It was only if the arbitrators had considered that the arbitration clause in question could not confer jurisdiction on them that the ordinary court could have ruled on the merits of the case. It was clear that the arbitration procedure would not in the present case fulfil two of the fundamental requirements of Article 6 § 1, namely, a) a lawful tribunal – because the arbitration clause gave decision-making power to arbitrators on the list of a limited liability company that was not an arbitration tribunal established by law – and b) a public hearing – because the arbitration procedure would not have been public and the applicant had not in any way waived his right to a public hearing. Lastly, national regulations concerning companies, governing relations between shareholders, were absolutely necessary to any activity subject to a market regime. These sometimes gave rise to an obligation on minority shareholders to sell their shares to the majority shareholder. The Court found that minority shareholders should be afforded appropriate means of defence in order to prevent an imbalance resulting in arbitrary and unjust deprivation of one person's property in favour of another. Requiring the applicant to submit his pecuniary claim to arbitration bodies that did not meet the fundamental guarantees of Article 6 § 1, without his having waived those guarantees, amounted to a violation of his right to a court.

Conclusion: violation (unanimously).

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

Access to court

Imposition of small fines by courts for vexatious applications for rectification of judgments: *inadmissible*

Toyaksi and Others v. Turkey - 43569/08 et al.
Decision 20.10.2010 [Section IV]

Facts – The applicants were issued with fines ranging from 120 to 170 Turkish liras[1] by the Court of Cassation and the Supreme Military Administrative Court under section 442 of the Code of Civil Procedure after unsuccessfully seeking the rectification of judgments that had been delivered by those courts. In their applications to the European Court, the applicants complained that the imposition of fines for having used a statutory legal remedy had violated their right of access to court.

Law – Article 6 § 1: The imposition of a fine in order to prevent a build-up of cases before the courts and to ensure the proper administration of justice was not, as such, in conflict with the right of access to court. The fines imposed on the applicants had constituted a penalty for vexatious rectification proceedings before the higher courts. None of the applicants had complained that they had been unable to have their cases heard due to the fines and their right of access to court had not been impaired in any way as they had had the opportunity to have their cases examined thoroughly before two levels of jurisdiction prior to their requests for rectification. There was no evidence that the amount of the fines had constituted a substantial economic burden. Accordingly, and in the specific circumstances of the case, the applicants' right of access to court had not been violated.

Conclusion: inadmissible (manifestly ill-founded).

Article 7: The impugned fine did not constitute a penalty within the meaning of this provision, its sole purpose being the proper administration of justice.

Conclusion: inadmissible (incompatible *ratione materiae*).

Fair hearing

Divergences in case-law of administrative and administrative military courts: *case referred to the Grand Chamber*

Nejdet Şahin and Perihan Şahin v. Turkey - 13279/05
Judgment 27.5.2010 [Section II]

The applicants' son, an army pilot, died in May 2001 in a plane crash which occurred during the transport of troops in Turkey. The parents applied unsuccessfully for the monthly pension payable to family members under the Anti-Terrorism Act. They brought proceedings before the Administrative Court and subsequently before the Supreme Military Administrative Court. The applicants complained of the diverging assessment of the circumstances of the plane crash made by the ordinary and military administrative courts. While the former had established the existence of a causal link between the incident and the fight against terrorism – a prerequisite for eligibility for the pension in question – the latter had held that no such link existed.

In a judgment of 27 May 2010 a Chamber of the Court held by six votes to one that there had been no violation of Article 6 § 1 of the Convention, on the ground that the applicants could not claim to have been denied justice on account of the examination of their case by the courts concerned or the approach taken by them in the circumstances of the case.

On 4 October 2010 the case was referred to the Grand Chamber at the applicants' request.

Tribunal established by law

Decision by district-court president acting in his administrative capacity to reassign case to himself for judicial decision: *violation*

DMD Group, a.s., v. Slovakia - 19334/03
Judgment 5.10.2010 [Section IV]

Facts – The applicant company sought to enforce a substantial financial claim against another company through proceedings in a district court. In 1999 a newly appointed president of the court in question decided to reassign the case to himself. On the same day he ruled that the enforcement of the applicant company's claim by the sale of shares was improper and discontinued the proceedings. The applicant company had no right of appeal. It subsequently brought a constitutional complaint in which it alleged that the president's decision to reassign the case to himself had deprived it of a hearing by a tribunal established by law and that frequent modifications to the district court's work schedule had made the process of assigning and reassigning cases uncontrollable and opaque. Dismissing that complaint, the Constitutional Court found that the case had been reassigned to help ensure the equal distribution of cases

1. Approximately EUR 60 to EUR 90 at the material time.

concerning enforcement proceedings and complied with the applicable rules. Between 1 March and 15 July 1999, a total of 348 cases were reassigned between the various sections of the district court in question, 49 of them to the president's section. The president made further amendments to the work schedule throughout the year.

Law – Article 6 § 1: The object of the term "established by law" was to ensure that judicial organisation in a democratic society did not depend on the discretion of the executive, but was regulated by law emanating from Parliament. Nor, in countries where the law was codified, could the organisation of the judicial system be left to the discretion of the judicial authorities, although that did not mean that the courts did not have some latitude to interpret relevant domestic legislation. Where a judge combined both judicial and administrative functions, the paramount importance of judicial independence and legal certainty required rules that were of particular clarity and clear safeguards to ensure objectivity and transparency, and, above all, to avoid any appearance of arbitrariness in the assignment of cases. The rules that had been applied in the applicant company's case were far from exhaustive and left significant latitude to the district-court president, as evidenced by the number of modifications made to the court's work schedule in 1999 and the absence of specific safeguards, such as a requirement to notify a superior court. Furthermore, the applicant company's case had been reassigned by an individual decree rather than as part of a general reorganisation of the workload. It was not possible, on the basis of the information available, to verify whether it had been reassigned on objective grounds or whether any administrative discretion had been exercised within transparent parameters. What was clear though was that the president of the district court had, in his judicial capacity, ruled on the applicant company's case (involving a claim of approximately EUR 2,900,000) in private on the same day that, acting in his administrative capacity, he had reassigned it to himself. Since his judicial decision had completed the proceedings and was not subject to appeal, the applicant company had been deprived of the possibility of raising any objections and of potentially challenging him for bias. It followed that the reassignment of the case was not compatible with the applicant company's right to a hearing before a tribunal established by law.

Conclusion: violation (unanimously).

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

Article 6 § 1 (criminal)

Fair hearing

Criminal conviction based on statement made by defendant in police custody after swearing oath normally reserved for witnesses: *violation*

Brusco v. France - 1466/07
Judgment 14.10.2010 [Section V]

Facts – After being attacked by two hooded individuals in 1998, a man lodged a complaint against the applicant, and one of the presumed aggressors also testified against him. The applicant was arrested and taken into police custody. Before the police questioned him, they made him take the oath witnesses were required to take. He confessed to having hired two men to "scare" the victim, but denied having asked them to use physical violence. He was placed under investigation and remanded in custody. In 2002 he was sentenced to imprisonment, and that judgment was subsequently upheld on appeal. The Court of Cassation dismissed his further appeals.

Law – Article 6 §§ 1 and 3: The applicant had been in police custody when he was made to swear an oath. At the time it was possible to place an individual in police custody even without substantial, consistent evidence or reasonable suspicion that he or she had committed an offence. In this case, however, the victim had lodged a complaint against the applicant and one of the presumed aggressors had identified him as the mastermind behind the operation. So the authorities had had reason to suspect that he had been involved in the offence, and the argument that he had been questioned as a mere witness was unconvincing. Furthermore, the applicant's arrest and placement in police custody could have had, and indeed did have, serious repercussions on his situation, as he had subsequently been placed under investigation and remanded in custody. So, at the time when the applicant had been required to take an oath while in police custody, criminal charges had already been brought against him and he should accordingly have had the right to remain silent and not to incriminate himself. The statements he had made under oath had been used against him by the courts to establish the facts and to convict him. The obligation to take an oath before giving evidence had amounted to a form of pressure on him, particularly in view of the threat of criminal proceedings were he to be found to have committed perjury. The Court noted that the law had changed

in 2004 and that the obligation to swear an oath and answer questions was no longer applicable to people placed in police custody under a warrant issued by an investigating judge.

Furthermore, the applicant does not appear to have been informed at the start of the interview that he had the right to remain silent, not to answer any questions or to answer only those questions he wished to answer. And as he had been allowed the assistance of a lawyer only after twenty hours in police custody, his lawyer had been unable to inform him of his rights or to assist him when he was questioned, as required under Article 6. The result had been an infringement of his right to remain silent and not to incriminate himself.

Conclusion: violation (unanimously).

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

Equality of arms

Examination of appeal on points of law by Supreme Court at preliminary hearing held in presence of public prosecutor but in absence of accused: *violation*

Zhuk v. Ukraine - 45783/05
Judgment 21.10.2010 [Section V]

Facts – The applicant was convicted of drug-dealing and sentenced to four years' imprisonment. He appealed to the Supreme Court of Ukraine, challenging his conviction on points of law. He also expressed his wish to be present at the hearing. He was no longer legally represented. In 2005, in the presence of the public prosecutor but in the absence of the applicant, a panel of three judges of the Supreme Court examined the case on the merits and dismissed his appeal.

Law – Article 6 § 1: In compliance with the domestic law, the Supreme Court had held a preliminary hearing in order to decide whether the appeal before it was sufficiently well-founded to warrant its examination in a public hearing in the presence of all necessary parties. Thus, the applicant's chances of being present and, accordingly, of making oral submissions at the hearing depended on whether his appeal passed the sifting-out procedure. While the lack of a public hearing before a jurisdiction whose competence was limited to questions of law might not be in breach of Article 6 § 1 *per se*, this was true in so far as the relevant court held a hearing in camera. This had not been so in the instant case: the prosecutor had had the advantage of being present at that preliminary hearing, unlike any other party, and of making oral submissions to the three-judge panel with a view to having the applicant's appeal dismissed and his conviction upheld. Procedural fairness required, however, that the applicant should also have been given an opportunity to make oral submissions in reply. The panel had dismissed the appeal at the preliminary hearing, thus dispensing with a public hearing which the applicant, who had requested that the hearing be held in his presence, would have been able to attend. Therefore, the procedure before the Supreme Court of Ukraine had not enabled the applicant to participate in the proceedings in conformity with the principle of equality of arms.

Conclusion: violation (unanimously).

Article 41: EUR 1,200 in respect of non-pecuniary damage.

Independent and impartial tribunal

Doubts as to impartiality where two out of three members of bench who had ordered applicant's detention pending trial subsequently sat on bench that convicted him: *violation*

Cardona Serrat v. Spain - 38715/06
Judgment 26.10.2010 [Section III]

Facts – Criminal proceedings were instituted against the applicant before the investigating judge. The case was then committed for trial before the *Audiencia Provincial*. In January 2002 the public prosecutor requested the applicant's pre-trial detention, in order to secure his presence at the trial and having regard to the indictable nature of the offence. In an order of February 2002, a division of the *Audiencia Provincial*, composed of three judges, ordered the applicant's pre-trial detention. The applicant subsequently challenged the two members of the division who had ordered his detention pending trial and were also due to sit on the bench that would decide the merits of the case. After his challenge had been dismissed, a division of the *Audiencia Provincial* convicted the applicant in May 2002 of the continuous offence of sexual abuse, with the aggravating circumstance that he had committed the offence before, and sentenced him to four years and six months' imprisonment. Appeals lodged by the applicant against the alleged partiality of the trial court were unsuccessful.

Law – Article 6 § 1: There was no evidence that the judges in question had not been subjectively impartial. In the present case the fear of a lack of impartiality was mainly due to the fact that two of the three members, including the president, of the trial bench of the *Audiencia Provincial* that had convicted the applicant had previously been members of the division of the same court that had decided to place him in pre-trial detention. The division of the *Audiencia Provincial* had not confined itself to granting an extension of the applicant's pre-trial detention, but had itself ordered him to be placed in pre-trial detention. In doing so it had altered, to his detriment, the situation of the applicant, who had earlier been granted provisional release by the investigating judge in the same criminal proceedings. In reaching its decision the division had not confined itself to a brief assessment of the charges against the applicant to justify the appropriateness of the measure requested by the public prosecutor but, on the contrary, had ruled on the existence of a risk that the applicant would intimidate prosecution witnesses. The division of the *Audiencia Provincial* had referred to the Code of Criminal Procedure, observing that the conditions for the application of the temporary measure in question were satisfied. One of the Articles of that Code required the court to satisfy itself that there were sufficient grounds for considering that the person being placed in pre-trial detention was criminally responsible for the offence. The terms used by the division of the *Audiencia Provincial*, read in the light of that Article, could have led the applicant to believe that, in the view of the judges of the division, there was sufficient evidence to conclude that an offence had been committed and that he was criminally responsible for it. Accordingly, the applicant had been given reasonable cause to fear that the judges had preconceived ideas regarding the case on which they were subsequently required to give an opinion in their capacity as members of the trial court. The matter at stake in the present case was the impartiality of two of the three members, including the president, of the division of the *Audiencia Provincial* which had convicted the applicant in May 2002. That factor enabled the present case to be distinguished from other cases in which the impartiality of one judge sitting on a bench of judges was called into question. In the circumstances of the case, the objective impartiality of the trial court could appear to be open to doubt. It followed that the applicant's fears in that regard could be considered objectively justified.

Conclusion: violation (unanimously).

Article 6 § 3

Rights of defence

Failure to inform person in police custody before questioning of right not to incriminate himself and to remain silent: *violation*

Brusco v. France - 1466/07
Judgment 14.10.2010 [Section V]

(See Article 6 § 1 (criminal) above, page 11)

ARTICLE 8

Private life
Positive obligations

Failure of authorities to implement court orders intended to afford applicant protection from violent husband: *violation*

A. v. Croatia - 55164/08
Judgment 14.10.2010 [Section I]

Facts – Between November 2003 and June 2006, the applicant's husband, who has been diagnosed as suffering from severe mental disorders with a tendency towards violent and impulsive behaviour, subjected the applicant to repeated psychological and physical violence including death threats and blows and kicks to the head, face and body. She was often abused in front of their daughter, who was herself the subject of violence on several occasions. The marriage ended in divorce in 2006. Between 2004 and 2009 various sets of criminal and minor-offences proceedings were brought against the husband and a number of protective measures were ordered. However, only some were implemented. For example, an eight-month prison sentence handed down in October 2006 following death threats was not served and the husband failed to undergo psycho-social treatment that had been ordered. He is currently serving a three-year prison sentence for making death threats against a judge.

Law – Article 8: In view of the applicant's credible assertions that over a prolonged period her husband had presented a threat to her physical integrity and repeatedly attacked her the State authorities had been under a positive obligation to protect her from his violent behaviour. However, they had

failed adequately to discharge that obligation. Firstly, in a case such as this, involving a series of violent acts by the same person against the same victim, the applicant would have been more effectively protected if the authorities had viewed the situation as a whole, rather than resorting to numerous sets of separate proceedings. Secondly, although various protective measures had been ordered, many of them – such as periods of detention, fines, psycho-social treatment and even a prison term – were not enforced, thus undermining their deterrent effect. There had been lengthy delays in securing compliance with the recommendations that had been made for continuing psychiatric treatment and even then this had only been in the context of criminal proceedings unrelated to the violence against the applicant. Indeed, it was still uncertain whether the husband had in fact undergone the treatment. In sum, the authorities' failure to implement the measures aimed at addressing the psychiatric condition which appeared to be at the root of the husband's violent behaviour and at providing the applicant with protection against further violence had left her at risk for a prolonged period.

Conclusion: violation (unanimously).

Article 14: The applicant had not produced sufficient prima facie evidence to show that the measures or practices adopted in Croatia in the context of domestic violence, or the effects of such measures or practices, were discriminatory.

Conclusion: inadmissible (manifestly ill-founded).

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

(See also *Opuz v. Turkey*, no. 33401/02, 9 June 2009, Information Note no. 120)

Private life

Removal of judge from office for reasons partly related to her private life: *violation*

Özpınar v. Turkey - 20999/04
Judgment 19.10.2010 [Section II]

Facts – In 2002 a disciplinary investigation was opened against the applicant, who was a judge. She was criticised in particular for allegedly having a close relationship with a lawyer, whose clients had apparently benefited, as a result, from favourable decisions on her part, and also for repeatedly arriving late for work and for her unsuitable clothing and make-up. Testimony was taken from many witnesses, who gave contradictory statements, and the cases that the applicant had dealt with were examined. No information from the investigation was disclosed to her. The disciplinary investigation file was transmitted to the National Legal Service Council, which decided in 2003 to remove her from office as a judge, mainly on the grounds that she had "undermined the dignity and honour of the profession". A request by the applicant for a review of that decision was denied. She then challenged her removal from office, which was confirmed by the National Legal Service Council in 2004, after a hearing in which she had taken part. She was notified of the refusal to reinstate her but was not told the reasons for that decision.

Law – Article 8: The decision to remove the applicant from office was directly related to her conduct, both professionally and in private. Moreover, her reputation had been impugned. There had therefore been an interference with her right to respect for her private life and it could be said to have had a legitimate aim, in relation to the duty of judges to exercise restraint in order to preserve their independence and the authority of their decisions. As regards the criticisms, in the proceedings against the applicant, concerning her conduct as a judge, they had not constituted interference with her private life. The ethical obligations of judges might encroach upon their private life when their conduct tarnished the image or reputation of the judiciary. However, the applicant nevertheless remained a private person entitled to Article 8 protection. Even if certain aspects of the conduct attributed to her – in particular decisions allegedly driven by personal considerations – might have warranted her removal, the investigation had not substantiated those accusations and had taken into account numerous actions that were unrelated to her professional activity. Moreover, she had been afforded few safeguards in the proceedings against her, because she had been called before the disciplinary body very belatedly and had not received the inspection reports beforehand. Any judge who faced removal from office on grounds related to private or family life had to be afforded guarantees against arbitrariness, and in particular a guarantee of adversarial proceedings before an independent and impartial supervisory body. Such safeguards were all the more important in the applicant's case as, with her removal from office, she had automatically lost the right to practise law. Accordingly, the interference with the applicant's private life had not been proportionate to the legitimate aim pursued.

Conclusion: violation (unanimously).

Article 13 in conjunction with Article 8: The applicant had been unsuccessful in her judicial appeal against the decisions of the National Legal Service Council. The Court had previously found that the impartiality of the Council panel that examined challenges to its decisions was highly questionable. Furthermore, during the proceedings, no distinction had been made between aspects of the applicant's private life that bore no direct connection with her duties and those that might have done. Accordingly, the applicant had not had access to a remedy meeting the minimum requirements of Article 13 for the purposes of her Article 8 complaint.

Conclusion: violation (unanimously).

Private life
Positive obligations

Video surveillance of supermarket cashier suspected of theft: *inadmissible*

Köpke v. Germany - 420/07
Decision 5.10.2010 [Section V]

Facts – The applicant, a supermarket cashier, was dismissed without notice for theft, following a covert video surveillance operation carried out by her employer with the help of a private detective agency. She unsuccessfully challenged her dismissal before the labour courts. Her constitutional complaint was likewise dismissed.

Law – Article 8: A video recording of the applicant's conduct at her workplace had been made without prior notice on the instruction of her employer. The images thereby obtained had been processed and examined by several fellow employees and used in the public proceedings before the labour courts. The applicant's "private life" within the meaning of Article 8 § 1 had therefore been concerned by these measures. The Court had to examine whether the State, in the context of its positive obligations under Article 8, had struck a fair balance between the applicant's right to respect for her private life and both her employer's interest in the protection of its property rights, guaranteed by Article 1 of Protocol No. 1, and the public interest in the proper administration of justice.

At the relevant time, the conditions under which an employer could resort to the video surveillance of an employee in order to investigate a criminal offence the employee was suspected of having committed in the course of his or her work had not yet been laid down in statute law. However, the Federal Labour Court had developed in its case-law important safeguards against arbitrary interference with the employee's right to privacy. This case-law had been applied by the domestic courts in the applicant's case. Moreover, covert video surveillance at the workplace following substantiated suspicions of theft did not affect a person's private life to such an extent as to require a State to set up a legislative framework in order to comply with its positive obligations under Article 8. As noted by the German courts, the video surveillance of the applicant had only been carried out after losses had been detected during stocktaking and irregularities discovered in the accounts of the department where she worked, raising an arguable suspicion of theft committed by the applicant and another employee, who were the only employees to have been targeted by the surveillance measure. The measure had been limited in time (two weeks) and had only covered the area surrounding the cash desk and accessible to the public. The visual data obtained had been processed by a limited number of persons working for the detective agency and by staff members of the employer. They had been used only in connection with the termination of her employment and the proceedings before the labour courts. The interference with the applicant's private life had thus been restricted to what had been necessary to achieve the aims pursued by the video surveillance. The domestic courts had further considered that the employer's interest in the protection of its property rights could only be effectively safeguarded by collecting evidence in order to prove the applicant's criminal conduct in the court proceedings. This had also served the public interest in the proper administration of justice. Furthermore, the covert video surveillance of the applicant had served to clear from suspicion other employees. Moreover, there had not been any other equally effective means to protect the employer's property rights which would have interfered to a lesser extent with the applicant's right to respect for her private life. The stocktaking could not clearly link the losses discovered to a particular employee. Surveillance by superiors or colleagues or open video surveillance did not have the same prospects of success in discovering a covert theft.

In sum, there was nothing to indicate that the domestic authorities had failed to strike a fair balance, within their margin of appreciation, between the applicant's right to respect for her private life and both her employer's interest in the protection of its property rights and the public

interest in the proper administration of justice. However, the balance struck between the interests at issue by the domestic authorities did not appear to be the only possible way for them to comply with their obligations under the Convention. The competing interests concerned might well be given a different weight in the future, having regard to the extent to which intrusions into private life were made possible by new, more sophisticated technologies.

Conclusion: inadmissible (manifestly-ill-founded).

Family life

Decision to deprive applicant of parental responsibilities and to authorise the adoption of her son by his foster parents: *no violation*

Aune v. Norway - 52502/07
Judgment 28.10.2010 [Section I]

Facts – When five months old, the applicant's son A., who was born in 1998, was taken unconscious to hospital and treated for a brain haemorrhage. Shortly afterwards, aware that his parents had a history of drug abuse and suspecting that he had been ill-treated, the authorities placed him in compulsory foster care, initially as an interim emergency measure and then permanently. The applicant has spent periods in detoxification centres since 2000. Since the autumn of 2005, she has been drug-free, has set up a business with her current partner, obtained a driving licence and planned to take up studies. In 2005 the local social affairs board (the "Board") deprived the applicant of her parental responsibilities with respect to A. and authorised his adoption by his foster parents. That decision was ultimately upheld on appeal by the Supreme Court in 2007 after it found that, despite positive developments in her situation, the applicant was unable to provide A. with proper care. Furthermore, although well adjusted in his new family, A. remained vulnerable, and needed reassurance that he would stay with his foster parents. Indeed, his need for absolute emotional security was likely to increase as he grew up as he became aware that both his mother and father had been heavy drug abusers and that he had been exposed to serious ill-treatment. Nor could the Court ignore the fact that the biological family, particularly the applicant's father and his partner, had protested about A.'s placement as they had fostered the applicant's other son and considered that the two boys should be together. There was a possibility that that conflict would continue if he was not adopted. It was also emphasised that A.'s foster parents had facilitated contact with the biological family far beyond their entitlement, both as regards the circle of people concerned and the extent of the contact. Indeed, there was no doubt that that openness to permitting contact would continue.

Law – Article 8: The interference with the applicant's private and family life had had a legal basis and pursued the legitimate aim of protecting the best interests of her son. For formal reasons, the Court had no jurisdiction under the Convention to examine the justification for the compulsory public-care measures. The only question that the Court could examine was whether it had been necessary to replace the foster-care arrangement with a more far-reaching type of measure, namely deprivation of parental responsibilities and authorisation of adoption, with the consequence that the applicant's legal ties with her son would be broken. Bearing in mind that authorisation of adoption against the will of the parents should be granted only in exceptional circumstances, the Court was satisfied that such circumstances had existed in the applicant's case. The applicant had not questioned the social authority and national court findings concerning the suitability of her son's foster parents or his attachment to them. Furthermore, nothing had come to light in the proceedings before the Court which would make it differ from the Supreme Court's conclusion that the applicant was unable to provide proper care for her son. A. had no real attachment to his biological parents and the social ties between the applicant and A. had been very limited. Indeed, A.'s particular need for security – which would no doubt increase with time – had been significantly challenged by the applicant's wish for A. to live with her father and by the conflict around A.'s placement in foster care. The applicant had stated clearly before the Court that there was no risk that the earlier conflicts would resume as she would not seek to have A. returned to live with her and that she considered it was in his best interest to grow up with his foster parents. However, from the material submitted to the Court and the pleadings of the applicant's lawyer, it appeared that there had still been a latent conflict which could challenge A.'s particular vulnerability and need for security. Adoption would counter such an eventuality. Moreover, from what the Court understood, the disputed measures corresponded to A.'s wishes.

As to the doubt raised by the applicant about whether the foster parents would continue to be open to contact (in the event of adoption it no

longer being the applicant's legal right to have such contact), the Court observed that, after the Supreme Court's judgment, the number of visits had remained the same, which clearly confirmed that the national courts had been correct in their assessment of the foster parents' good will. The disputed measures had not in fact prevented the applicant from continuing to have a personal relationship with A. and had not "cut him off from his roots".

The Court was therefore satisfied that the decision to deprive the applicant of parental responsibilities and to authorise the adoption had been supported by relevant and sufficient reasons and had been proportionate to the legitimate aim of protecting A.'s best interests.

Conclusion: no violation (unanimously).

Refusal to grant adoptive parent order revoking adoption: *inadmissible*

Goția v. Romania - 24315/06
Decision 5.10.2010 [Section III]

Facts – In 1983 the applicant and her husband were granted authorisation for the full adoption of a child born in 1976. The adoptive father died in 1992. In 2004 the applicant sought to have the adoption revoked on the ground that her adoptive daughter, then aged twenty-eight, was behaving badly towards her. Her requests were rejected. In 2006 she made a new request for an order revoking the adoption but it was declared inadmissible.

Law – Article 8: The domestic courts had found inadmissible, for lack of *locus standi*, the applicant's request for revocation of the adoption because Romanian law reserved that possibility for the adopted person. In addition, the Constitutional Court, in a well-reasoned decision, had found the relevant law to be in conformity with the Constitution. Moreover, it could not be inferred from the European Convention on Child Adoption, ratified by Romania in May 1993, that the States Parties were under any obligation to pass legislation allowing an adoptive parent to have an adoption revoked. Thus, the fact of denying the applicant the right to obtain an order revoking her daughter's adoption, twenty-one years after the adoption was granted, did not appear contrary to the provisions of Article 8. In the present case the domestic authorities had not overstepped their margin of appreciation.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 10

Freedom to receive information
Freedom to impart information

Denial of Internet access to prisoner: *communicated*

Jankovskis v. Lithuania - 21575/08
[Section II]

The applicant, who is currently serving a prison sentence, asked the prison authorities to grant him Internet access as he was considering enrolling on a university course, but his request was refused. That decision was upheld by the domestic courts, with the Supreme Administrative Court ruling that the prison authorities would be acting *ultra vires* if they allowed prisoners to use the Internet. It also considered that allowing prisoners Internet access would hamper the fight against crime as it would not be possible fully to monitor their activities.

Communicated under Article 10.

Freedom to impart information

Unjustified withdrawal of copies of municipal newspaper by editor-in-chief following publication: *violation*

Saliyev v. Russia - 35016/03
Judgment 21.10.2010 [Section I]

Facts – The applicant, the president of a non-governmental organisation, wrote an article criticising a deal for the acquisition of shares in a local energy producing company by a group of Moscow-based firms which the editor-in-chief of a municipally-owned newspaper agreed to publish. However, a number of copies of the issue containing the article were withdrawn from the news-stands shortly after distribution and later destroyed. The editor-in-chief resigned shortly afterwards. Following a complaint by the applicant to the regional prosecutor's office, the investigator in charge of the case decided not to open a criminal investigation after finding that the decision to withdraw the copies had been taken by the editor-in-chief in person in order to avoid potential lawsuits. The applicant unsuccessfully challenged that decision in the criminal courts. He also brought civil proceedings which were dismissed on the grounds that, as the owner, the newspaper was free to dispose of copies of the issue as it wished and that

there had been no contract between the applicant and the newspaper obliging the latter to distribute the issue containing the article.

Law – Article 10: The Court noted that copies of the newspaper had been withdrawn and destroyed after the article had been accepted by the editorial board, and after it had been printed and made public. After publication, any decision limiting the circulation of the article had to be regarded as an interference with the applicant's freedom of expression and not as a problem of right of access to the press, which enjoyed only minimal, if any, protection under the Convention. Further, the main reason for the withdrawal had been the content of the article. The Government had conceded that the editor-in-chief had withdrawn the newspapers for fear of possible civil or administrative sanctions. The withdrawal therefore amounted to interference with the applicant's rights under Article 10.

Although the Court accepted that the withdrawal had been ordered by the editor-in-chief, it nevertheless found on the facts that it amounted to a decision by "public authority" for the purposes of Article 10. In that connection, it noted that the newspaper's independence was severely limited by the existence of strong institutional and economic links with the municipality and by the constraints attached to the use of its assets and property, which the municipality owned. Though a professional journalist with his own ideas and opinions, the editor-in-chief had been appointed and paid by the municipality and was required by virtue of his status to ensure the newspaper's loyalty to the municipality. His decision to withdraw the newspaper could be characterised as an act of policy-driven censorship in which he had implemented the general policy line of the municipality as its agent. Further, under domestic law municipal authorities were treated on the same footing as federal or regional bodies for many purposes so that, even if their competence was limited, their powers could not be characterised as anything other than public. The order to withdraw the copies of the newspaper thus constituted interference by "public authority".

The Court was prepared to accept that the interference was prescribed by law and pursued the legitimate aim of protecting "the reputation or rights of others".

As to the question whether the withdrawal had been "necessary in a democratic society", the applicant had reported on a matter relating to the management of public resources that lay at the core of the media's responsibility and the right of the public to receive information and so attracted maximum protection under Article 10. However, instead of analysing the content or the form of the article to see whether the applicant had exceeded the limits of permissible criticism, the domestic courts had simply treated his complaint as a business matter. Yet the relationship between a journalist and an editor-in-chief was not only or always a business relationship. In the applicant's case it was not such a relationship, as the newspaper was, according to its own charter, a municipal institution created not as a profit-making business but as a forum for informing the public about local social, political and cultural issues. The domestic courts had effectively based their findings on the mistaken assumption that the case was basically about an owner's right to freely dispose of his property, without examining the reasons for the withdrawal of the copies or balancing the applicant's freedom of expression against any other interests that may have been at stake. Accordingly, the decision-making process in this case was deficient and the domestic courts' decisions had not contained any justification from the standpoint of Article 10 for the withdrawal of the newspaper. As to the critical views stated by the applicant in his article, they had been reasonably supported by facts which had never been challenged and had been expressed in an acceptable form. The withdrawal of the newspapers containing the applicant's article had, therefore, not been necessary in a democratic society.

Conclusion: violation (unanimously).

ARTICLE 11

Freedom of peaceful assembly
Freedom of association

Repeated refusals to authorise gay-pride parades: *violation*

Alekseyev v. Russia - 4916/07, 25924/08 and 14599/09
Judgment 21.10.2010 [Section I]

Facts – The applicant was one of the organisers of a series of marches planned to be held in Moscow in 2006, 2007 and 2008 to draw public attention to discrimination against the gay and lesbian community in Russia and to promote tolerance and respect for human rights. The organisers informed the mayor's office of their intention to hold the marches and undertook to cooperate with the law-

enforcement authorities in ensuring safety and respect for public order and to comply with noise restrictions. Their requests were, however, turned down on public-order grounds after petitions were received from people opposed to the marches. In the authorities' view, there was a risk of a violent reaction degenerating into disorder and mass riots. The mayor and his staff were also quoted in the media as saying that no gay parade would be allowed in Moscow under any circumstances "as long as the city mayor held his post" and that the mayor further called for an "active mass media campaign … with the use of petitions brought by individual and religious organisations" against the gay-pride marches. The organisers subsequently informed the mayor's office of their intention to hold short pickets instead, but were again refused permission. The applicant mounted an unsuccessful challenge in the domestic courts against the decisions not to allow the marches or the pickets.

Law – Article 11: The Government had argued that the bans were justified both on safety grounds and for the protection of morals. As to the first of these grounds, the mere risk of a demonstration creating a disturbance was not sufficient. If every probability of tension and heated exchanges between opposing groups were to warrant a ban, society would be deprived from hearing differing views on questions which offended the sensitivity of the majority opinion. The Moscow authorities had repeatedly, over a period of three years, failed to carry out adequate assessments of the risk to the safety of the participants and to public order. In the event of a counter-demonstration by those opposed to the marches, the authorities could have made arrangements to ensure that both events proceeded peacefully and lawfully, thus allowing both sides to express their views without clashing. Any threats of or incitement to violence against the participants could have been adequately dealt with through the prosecution of those responsible. Instead, by banning the marches, the authorities had effectively endorsed the intentions of those clearly and deliberately intent on disrupting a peaceful demonstration in breach of the law and public order.

In any event, the safety considerations had been of secondary importance in the decisions of the authorities, who had mainly been guided by the prevailing moral values of the majority. The mayor had on many occasions expressed his determination to prevent gay parades as he found them inappropriate. The Government had also stated in their submissions to the Court that such events had to be banned as a matter of principle because gay propaganda was incompatible with religious doctrines and public morals, and could harm children and vulnerable adults. The Court stressed, however, that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. The purpose of the marches and picketing had been to promote respect for human rights and tolerance towards sexual minorities. There had been no intention to exhibit nudity, engage in sexually provocative behaviour or criticise public morals or religious views. Indeed, the authorities had indicated that it was not the behaviour or the attire of the participants that the authorities found objectionable but the fact that they wished to openly identify themselves as gay men or lesbians, individually and as a group. The Court rejected the Government's claim that, in the absence of a European consensus in this sphere, they were entitled to a wide margin of appreciation. While noting that there was in fact a European consensus on a whole range of matters relating to the rights of homosexuals, it went on to state that in any event the issue of consensus was not relevant because conferring substantive rights on homosexual persons was fundamentally different from recognising their right to campaign for such rights. There was no ambiguity about the other member States' recognition of the right of individuals to openly identify themselves as belonging to the gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly. It was only through fair and public debate that society could address such complex issues as gay rights, which in turn would benefit social cohesion as all views would be heard. An open debate of the kind the applicant had repeatedly but unsuccessfully attempted to launch could not be replaced by officials spontaneously expressing uninformed views they considered popular. Consequently, the decisions to ban the events in question had not been based on an acceptable assessment of the relevant facts, did not meet a pressing social need and were thus not necessary in a democratic society.

Conclusion: violation (unanimously).

Article 13: In the absence of a legally binding rule requiring the authorities to issue a final decision before the dates on which the marches were planned, the judicial remedy available to the applicant was of a *post hoc* nature and not capable of affording adequate redress in respect of the alleged violations of the Convention.

Conclusion: violation (unanimously).

Article 14: The main reason for the bans on the gay marches was the authorities' disapproval of demonstrations which they considered promoted homosexuality. In that connection, the Court could not disregard the strong personal opinions publicly expressed by the Moscow mayor and the undeniable link between those statements and the bans. The applicant had thus suffered a difference in treatment on the grounds of his and other participants' sexual orientation for which the Government had not provided any valid justification.

Conclusion: violation (unanimously).

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

ARTICLE 13

Effective remedy

Judge denied an effective remedy in respect of Article 8 complaint: *violation*

Özpınar v. Turkey - 20999/04
Judgment 19.10.2010 [Section II]

(See Article 8 above, page 14)

ARTICLE 14

Discrimination (Article 8)

Prohibition under domestic law on the use of ova and sperm from donors for *in vitro* **fertilisation:** *case referred to the Grand Chamber*

S.H. and Others v. Austria - 57813/00
Judgment 1.4.2010 [Section I]

The applicants are two married couples. Both couples suffer from infertility and wish to use medically assisted procreation techniques. In the case of the first couple only *in vitro* fertilisation ("IVF") with the use of sperm from a donor would allow them to have a child of whom one of them is the genetic parent. The second couple require IVF with the use of ova from a donor if they are to have a genetically linked child. However, both of these possibilities are ruled out by the Austrian Artificial Procreation Act ("the Act"), which prohibits the use of sperm from a donor for IVF and ova donation in general. The Act does, however, allow other assisted procreation techniques, in particular IVF with ova and sperm from the spouses or cohabitating partners themselves (homologous methods) and, in exceptional circumstances, donation of sperm when it is introduced into the reproductive organs of a woman. The applicants applied to the Constitutional Court, which found that there had been an interference with their right to respect for family life; however, it considered that the interference had been justified, as the Act aimed at preventing unusual relationships (namely the division of motherhood into a biological aspect and the aspect of "carrying the child") and the exploitation of women.

In its judgment of 1 April 2010 (see Information Note No. 129), a Chamber of the Court held, by fives votes to two, that there had been a violation of Article 14 in conjunction with Article 8, as the couple requiring IVF with the use of ova from a donor had suffered an unjustified discriminatory treatment in comparison with a couple using artificial procreation techniques without resorting to ova donation. The Chamber also held, by six votes to one, that there had been a violation of Article 14 in conjunction with Article 8, as the couple requiring a sperm donation for IVF had suffered an unjustified discriminatory treatment in comparison with a couple using a sperm donation for *in vivo* fertilisation.

On 4 October 2010 the case was referred to the Grand Chamber at the Government's request.

Difference in treatment between male and female military personnel regarding rights to parental leave: *violation*

Konstantin Markin v. Russia - 30078/06
Judgment 7.10.2010 [Section I]

Facts – Under Russian law civilian fathers and mothers are entitled to three years' parental leave to take care of their minor children and to a monthly allowance for part of that period. The right is expressly extended to female military personnel, but no such provision is made in respect of male personnel. The applicant, a divorced serviceman, applied for three years' parental leave to bring up the three children of the marriage, but this was refused on the grounds that there was no basis for his claim in domestic law. He was subsequently granted approximately two years' parental leave plus financial aid by his superiors in view of his difficult personal circumstances. He neverthe-

less lodged a complaint with the Constitutional Court in which he submitted that the legislation was incompatible with the constitutional guarantee of equal rights. Dismissing that complaint, the Constitutional Court held that the prohibition on servicemen taking parental leave was based on the special legal status of the military and the need to avoid large numbers of military personnel becoming unavailable to perform their duties. It noted that servicemen assumed the obligations connected with their military status voluntarily and were entitled to early termination of service should they decide to take care of their children personally. The right for servicewomen to take parental leave had been granted on an exceptional basis and took into account the limited participation of women in the military and the special social role of women associated with motherhood.

Law

(a) *Admissibility* – Article 34: The Court rejected the Government's submission that the domestic authorities' decision to grant him parental leave and financial aid meant that the applicant could no longer claim victim status. There had been no express acknowledgment of a breach of the Convention. Nor could the decision be interpreted as an acknowledgement in substance, as it had been taken by reference to the applicant's difficult family and financial situation, not on the grounds of any statutory entitlement or of any recognition that there had been a breach of his right to equal treatment.

Article 37 – Despite the measures taken by the domestic authorities to redress the applicant's individual situation, the Court considered that it was not appropriate to strike the application out of its list. The impugned legislation remained in force and the application concerned an important question of general interest – alleged discrimination against male military personnel regarding entitlement to parental leave – which had not yet been examined by the Court. Respect for human rights thus required the further examination of the application on the merits with a view to elucidating, safeguarding and developing the standards of protection under the Convention.

Conclusion: preliminary objections dismissed (unanimously).

(b) *Merits* – Article 14 in conjunction with Article 8: Parental leave and parental allowances came within the scope of Article 8 thus making Article 14 applicable. Accordingly, while the States had no obligation under Article 8 to create a parental-leave scheme, where they did decide to do so, this had to be in a manner that was compatible with Article 14.

The applicant had been denied parental leave on a combination of two grounds: his sex and his military status. As to the first of these grounds the Court was not convinced by the Constitutional Court's argument that the different treatment of male and female military personnel was justified by the special social role of mothers in the upbringing of children. In contrast to maternity leave and associated allowances, which were primarily intended to enable the mother to recover from the fatigue of childbirth and to breastfeed, parental leave and parental-leave allowances related to the subsequent period and were intended to enable the parent to stay at home to look after the infant personally. At that point in a child's upbringing, both parents were "similarly placed". Further, the legal situation as regards parental-leave allowances had evolved since the Court's judgment in *Petrovic v. Austria* (no. 20458/92, 27 March 1998), in which the respondent State in that case had been allowed a broad margin of appreciation in the absence of any European consensus on the subject. Society had since moved towards a more equal sharing between men and women of responsibility for the upbringing of their children as demonstrated by the fact that the legislation in an absolute majority of Contracting States now provided that parental leave could be taken by both mothers and fathers. That being so, Russia could not therefore rely on the absence of a common standard to justify the difference in treatment.

As to the second ground, the applicant's military status, the Court considered that servicemen and servicewomen were in an analogous situation in their relations with their children and that very weighty reasons were required to justify a difference in treatment regarding their relations with their new-born children. The aim of the limitation of servicemen's rights – protecting national security through ensuring the operational effectiveness of the army – was without doubt legitimate. As to whether it was proportionate, the Court was not convinced by the Constitutional Court's argument that allowing servicemen to take parental leave would adversely affect the fighting power and operational effectiveness of the armed forces. There had been no evidentiary basis for that assertion. Instead, the Constitutional Court had based its decision on a pure assumption, without attempting to probe its validity by checking it against statistical data or by weighing the interest of maintaining operational effectiveness against the conflicting interest of protecting servicemen against discrim-

ination in the sphere of family life and promoting the best interests of their children. The fact that in the armed forces women were less numerous than men could not justify disadvantaging the latter, and the argument that servicemen wishing to take personal care of their children were free to resign was particularly striking, given the difficulty they would be liable to encounter in directly transferring essentially military qualifications and experience to civilian life. Accordingly, the reasons adduced by the Constitutional Court had provided insufficient justification for the much stronger restrictions imposed on servicemen; the difference in treatment could not be said to be reasonably and objectively justified and amounted to discrimination on the ground of sex.

Conclusion: violation (six votes to one).

Article 5 of Protocol No. 7 – In response to the applicant's complaint that the provisions of domestic law restricting parental leave to servicewomen had violated his right to equality between spouses, the Court observed that in accordance with the Explanatory Report to Protocol No. 7, the rights and responsibilities concerned by the right to equality between spouses were of a private-law character and Article 5 did not apply to other fields of law, such as administrative, fiscal, criminal, social, ecclesiastical or labour law. In the Court's view, the right to parental leave undoubtedly belonged to the sphere of labour law and formed part of the relations between employer and employee rather than between spouses. In any event, the impugned legislation favoured servicewomen irrespective of their marital status and thus concerned inequality between the sexes rather than inequality between spouses.

Conclusion: incompatible *ratione materiae* (unanimously).

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

Article 46: Respondent Government to amend legislation with a view to putting an end to the discrimination against male military personnel as far as their entitlement to parental leave is concerned.

Refusal to grant welfare benefits to foreign nationals: *violation*

Fawsie v. Greece - 40080/07
Saidoun v. Greece - 40083/07
Judgments 28.10.2010 [Section I]

Facts – Mrs Fawsie is a Syrian national and Mrs Saidoun a Lebanese national. They have both been officially recognised as political refugees, together with their children, since 1998 and 1995, and are legal residents in Greece. In 2005 the family allowance office rejected the applicants' requests for the allowance paid to mothers of large families. The rejection decision explained that the applicants did not have the status of "mother of a large family" within the meaning of the legislation, as neither they nor their children had Greek nationality or the nationality of one of the member States of the European Union or were refugees of Greek origin. The applicants' appeals against that decision were unsuccessful. In 2008 the legislature amended the law in question and it now provides that people officially recognised as refugees, together with their families, are included among the beneficiaries of the "large family" allowance.

Law – Article 14 in conjunction with Article 8

(a) *Applicability* – The granting of an allowance for large families enabled the State to show its respect for family life within the meaning of Article 8 and thus fell within its ambit. Accordingly, Article 14 taken together with that provision, was applicable in the present case.

(b) *Merits* – The Court did not call into question the desire of the Greek legislature to address the country's demographic problem. However, it did not agree with the criterion chosen, being based mainly on Greek nationality or origin, especially as it was not uniformly applied at the relevant time in the prevailing legislation and case-law. Only very strong considerations could lead the Court to consider a difference in treatment exclusively based on nationality to be compatible with the Convention. It noted moreover that the Supreme Administrative Court had, in 2000, found in favour of a person in a similar situation to that of the applicants. In addition, from 1997 onwards, the status of beneficiary of the allowance had been granted to nationals of European Union Member States, then from 2000 to nationals of States Parties to the European Economic Area, and finally, from 2008, to refugees such as the applicants. Lastly, under the Geneva Convention on the Status of Refugees, to which Greece was a party, States had to grant to refugees staying lawfully in their territory the same treatment with respect to public relief and assistance as was accorded to their own nationals. Therefore, the refusal of the authorities to award a large family allowance to the applicants had not been reasonably justified.

Conclusion: violation (unanimously).

Article 41: In the *Fawsie* case EUR 13,190.52 in respect of pecuniary damage and EUR 1,500 in respect of non-pecuniary damage; in the *Saidoun* case EUR 6,938.88 in respect of pecuniary damage and EUR 1,500 in respect of non-pecuniary damage.

ARTICLE 34

Hinder the exercise of the right of petition

Authorities' refusal to provide imprisoned applicant with copies of documents required for his application to the Court: *violation*

Naydyon v. Ukraine - 16474/03
Judgment 14.10.2010 [Section V]

Facts – A regional court of appeal refused to provide the applicant, who was serving a prison sentence, with copies of documents he had requested in connection with his application to the European Court, on the ground that, following the completion of the proceedings, it was under no obligation to send copies of documents from case files, except for court decisions.

Law – Article 34: The Court took note of the applicant's specific situation at the time he had lodged and pursued his present application. In particular, the criminal proceedings against him had been completed and the case file was kept at the trial court. Since he was in prison, the applicant could not consult the file himself. He had no contact with his family and only limited contact with the outside world. The applicant's property had been confiscated following his conviction and he had no source of income. No legal aid was available to him. Therefore, to complete his present application, the applicant had been dependent on the authorities. However, they had not taken into account his specific situation. Despite the fact that he had clearly stated that he needed the copies in connection with his application to the Court, his requests had been refused. As a result, the Court had had to ask the Government to provide the documents concerned. Even though the Government had now submitted the documents, this did not preclude the Court from ruling on the issue arising under Article 34. In the present circumstances, the authorities' failure to ensure the applicant was provided with a possibility of obtaining copies of documents he needed to substantiate his application had amounted to an unjustified interference with his right of individual petition.

Conclusion: violation (unanimously).

ARTICLE 35

Article 35 § 1

Effective domestic remedy – Czech Republic

Purely compensatory remedy for violation of the "speediness" requirement under Article 5 § 4: *effective remedy*

Knebl v. the Czech Republic - 20157/05
Judgment 28.10.2010 [Section V]

Facts – In his application to the European Court, the applicant complained, *inter alia*, of failure to comply with the requirement of "speediness" provided for in Article 5 § 4 of the Convention, in the context of a decision given regarding his request for release while he was in pre-trial detention.

Law – Article 35 § 1: The Government had pleaded failure to exhaust domestic remedies, on the ground that the applicant should have brought an action for damages (Law no. 82/1998, as amended by Law no. 160/2006). The Court observed that several respondent States had argued in recent cases that an action for compensation based on liability of the national authorities constituted an effective remedy with regard, among other things, to the requirement of Article 5 § 4 that decisions be taken "speedily". It also acknowledged that its case-law did not provide a clear answer and left the question largely open. Whilst underscoring the importance of preventive remedies, the Court conceded that it was difficult to put these in place where the length of examination of the lawfulness of detention was concerned. The time constraints imposed by the requirement that decisions be taken "speedily" were so strict that it appeared unlikely that an application could be made to yet another authority, during that period, with a view to expediting the review in question. Consequently, where the domestic courts failed to comply with that requirement, the Court considered that a compensatory remedy could in theory be regarded as effective on condition that it could result in a finding of a violation of the Convention and an award of appropriate redress, particularly for non-pecuniary damage. Furthermore, the Court did not see any reason why a compensatory remedy of that kind should not be examined by the civil courts.

As the Court had previously held (*Vokurka v. the Czech Republic* (dec.), no. 40552/02, 16 October 2007) that the compensatory remedy introduced

by Amendment Act no. 160/2006 could be regarded as effective with regard to the "reasonable-time" requirement under Article 6 § 1 of the Convention, it saw no reason why that remedy could not be applied regarding speediness of a review of the lawfulness of detention within the meaning of Article 5 § 4.

The Court pointed out, however, that as the Czech Constitutional Court could not take concrete measures with a view to expediting proceedings or award litigants any compensation, a constitutional remedy was not an adequate and effective remedy that had to be used in respect of a complaint regarding "speediness" within the meaning of Article 5 § 4.

Conclusion: inadmissible (non-exhaustion of domestic remedies).

The Court also held that there had been no violation of Article 5 § 3 of the Convention, but that there had been a violation of Article 5 § 4 in that the applicant had not been heard in person.

Effective domestic remedy – Poland

Claim for compensation for infringement of personal rights under Articles 24 and 448 of the Civil Code on account of prison overcrowding: *effective remedy*

Łatak v. Poland - 52070/08
Łomiński v. Poland - 33502/09
Decisions 12.10.2010 [Section IV]

Facts – In its pilot judgments of 22 October 2009 in the cases of *Orchowski v. Poland* and *Norbert Sikorski v. Poland* (nos. 17885/04 and 17599/05, Information Note no. 123), the Court concluded that from 2000 until at least mid-2008 there had been a structural problem of overcrowding in Polish prisons and remand centres. It went on to require the respondent State to take general measures under Article 46 of the Convention to solve the problem and to provide redress for past violations.

The issue of overcrowding also came before the domestic authorities giving rise to a series of landmark judgments by both the Supreme and Constitutional Courts and to legislative reform. Thus, in a judgment of 28 February 2007 the Supreme Court had acknowledged for the first time a detainee's right to lodge a claim against the State for compensation for infringement of his personal rights under Articles 24 and 448 of the Civil Code on account of overcrowding and conditions of detention. Following a series of diverging interpretations of that decision by the lower courts, it reaffirmed that principle in a further judgment of 17 March 2010. In a separate development, the Constitutional Court had ruled on 26 May 2008 that Article 248 of the Code of Execution of Criminal Sentences, which effectively allowed the indefinite and arbitrary placement of detainees in cells below the statutory minimum size, was unconstitutional and would lose its binding force within eighteen months. As a result, the Code was amended on 9 October 2009 so as to restrict the period for which detainees could be temporarily held in undersized cells to ninety days in emergencies and fourteen days in other, specified, circumstances. Provision was also made for prison sentences to be suspended where the prison population exceeded overall capacity.

The applications in the instant cases were lodged in October 2008, before the delivery of the pilot judgments in *Orchowski* and *Norbert Sikorski*. The Court accepted that both applicants had been held in overcrowded conditions for various periods ending on 26 November 2009 (in the case of Mr Łatak) and 6 December 2009 (Mr Łomiński). In all, there are some 270 similar cases currently pending before the Court.

Law – Article 35 § 1: The Government argued that both applicants had failed to exhaust domestic remedies as, in their submission, they could have (a) lodged a claim for compensation under Articles 24 and 448 of the Civil Code or (b) used the remedies available under the Code of Execution of Criminal Sentences.

(a) *Claim for compensation under Articles 24 and 448 of the Civil Code* – Since this remedy had been made available following the Court's pilot judgments in *Orchowski* and *Norbert Sikorski* relating to similar complaints, its effectiveness was to be assessed by reference to the current situation, not to the date the applications were lodged. The Court had noted in those judgments that the domestic civil courts' practice allowing prisoners to claim compensation was only just beginning to take shape and that there were divergences of interpretation. However, following the delivery of the Supreme Court's second judgment of 17 March 2010 a fully consolidated, consistent and established civil-court practice regarding the interpretation and application of Articles 24 and 448 of the Civil Code in overcrowding cases had emerged that unambiguously confirmed the effectiveness of that

remedy. Not only had that judgment reaffirmed the principles stated in the Supreme Court's 2007 ruling it had also, and more importantly, given supplementary guidance as to how the civil courts should verify and assess the justification for any reduction in the statutory minimum cell space.

However, given that that remedy could not be considered effective until the Supreme Court's judgment of 17 March 2010, only those applicants in respect of whom the three-year domestic limitation period had not yet expired and who still had adequate time to prepare and bring a claim under Articles 24 and 448 of the Civil Code could reasonably be required to make use of it. In practical terms, this meant that in all cases in which the alleged violation had come to an end in or after June 2008, either through the applicant's release or transfer to Convention-compliant conditions, he or she would be required to bring a civil action for compensation under Articles 24 and 448. In selecting that date, the Court was guided by the need to apply Article 35 § 1 with a degree of flexibility, by the fact that overcrowding had continued until at least mid-2008 by which time the Constitutional Court had itself identified the systemic violation of Article 3 and, lastly, by the need for applicants to have adequate time to have realistic recourse to the remedy bearing in mind the three-year domestic time-limit. As the violations alleged in both Mr Łatak's and Mr Łomiński's cases had ceased after June 2008, they were required to exhaust the remedy.

Conclusion: inadmissible (non-exhaustion).

(b) *Code of Execution of Criminal Sentences* – The remedy under the original legislation could not be considered effective for the reasons stated in the pilot judgments. As to the remedy under the amended legislation, the Court was not required to pronounce on its effectiveness as the applicants had already been moved into suitable cells by the time it came into force. However, with respect to the potential general impact of the remedy on the handling of future similar applications, the Court noted that the amended provisions not only specified the circumstances in which the minimum-space requirement could be reduced and set time-limits, they also afforded detainees a new legal means of contesting decisions to reduce cell space. Accordingly, without prejudice to the examination of the procedure in the particular circumstances of subsequent applications, it could not be excluded that applicants would be required to use the new complaints system in future cases.

Conclusion: preliminary objection dismissed (unanimously).

Article 35 § 3

No significant disadvantage

Complaint concerning EUR 150 fine and deduction of one point from driving licence: *inadmissible*

Rinck v. France - 18774/09
Decision 19.10.2010 [Section V]

Facts – The applicant, a lawyer by profession, was served with a penalty notice following an automatic speed check. After reading a survey in a motoring magazine concerning the reliability of the type of equipment used in the speed check, he requested the authorities to produce various technical documents. His request was refused. At the hearing, the court found that the proper operation of the radar had been sufficiently established by the fact that it had obtained technical approval and by the proof of its annual inspection. It rejected the applicant's request, found him guilty of the offence and ordered him to pay a EUR 150 fine. The Court of Cassation dismissed an appeal on points of law by the applicant, holding in particular that the legislative provisions stating that the police report was valid unless proved otherwise were not incompatible with the principle of equality of arms. The applicant subsequently had one point deducted from his driving licence for the offence. Before the European Court he complained of a breach of the principle of equality of arms on account of the refusal by the prosecution to produce technical information in its possession.

Law – Article 35 § 3 (b): The concept of "significant disadvantage" was based on the idea that the violation of a right had to attain a minimum threshold of severity in order to warrant examination by an international court. The assessment of that threshold was by its very nature relative and depended on the circumstances of the case, regard being had both to the applicant's subjective perception and to what was objectively at stake in the case. It thus involved the examination of criteria such as the financial implications of the issue and what was at stake for the person concerned. In the instant case the damage alleged by the applicant – a EUR 150 fine, EUR 22 in legal costs and the deduction of a point from his driving licence – had been particularly slight, and there was nothing in the file to indicate that his financial circumstances were such that the outcome of the case would have had significant repercussions on his personal life. The fact that he may have regarded the resolution

of the case as a question of principle was not sufficient. Accordingly, the applicant had not suffered any "significant disadvantage" with regard to his right to a fair trial.

Furthermore, there was no compelling reason relating to the European public order which justified continuing the examination of the complaint, as the distribution of the burden of proof in relation to summary offences and the limits to the rights of the defence, in particular the right to obtain disclosure of relevant evidence by the prosecution, had already been the subject of rulings by the Court. Lastly, the case had been duly examined by a domestic court, which had not failed to address any substantial issue with regard to the interpretation or application of the Convention or domestic law.

The three conditions for the new admissibility criterion had therefore been met.

Conclusion: inadmissible (no significant disadvantage).

ARTICLE 46

Execution of a judgment – Measures of a general character

Respondent State required to introduce legislation to end discrimination between male and female military personnel regarding rights to parental leave

Konstantin Markin v. Russia - 30078/06
Judgment 7.10.2010 [Section I]

(See Article 14 above, page 20)

Respondent State required to take legislative and administrative measures to guarantee property rights in cases where immovable property has been nationalised

Maria Atanasiu and Others v. Romania - 30767/05 and 33800/06
Judgment 12.10.2010 [Section III]

Facts – In March 2005 the High Court of Cassation and Justice ("the HCCJ") declared inadmissible an action to recover possession of a nationalised flat belonging to the first two applicants, on the ground that they should have made use of the restitution or compensation procedure applicable at the time under Law no. 10/2001 on the legal status of nationalised property. As they did not receive any response within the statutory time-limit to their subsequent claim for restitution of the flat under that law, the applicants brought proceedings against the city council, which in April 2005 was ordered by the HCCJ to give a decision. To date, the applicants' restitution claim has still not been determined by the city council. The third applicant complained of her inability to obtain compensation on the basis of Law no. 10/2001 for the damage sustained on account of the nationalisation of an area of land used by a university, despite a final judgment by the HCCJ in March 2006 establishing her entitlement to compensation. In June 2010 the Romanian Government informed the Court that her claim would receive priority treatment. She has received no compensation to date.

Law – Article 6 § 1: The first two applicants had been subjected to a disproportionate burden which had impaired the very essence of their right of access to a court.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 1: The unjustified absence of compensation, and the applicants' uncertainty as to when they might receive it, had imposed a disproportionate and excessive burden on them which was incompatible with their right to the peaceful enjoyment of their possessions under Article 1 of Protocol No. 1.

Conclusion: violation (unanimously).

Article 46

(a) *Application of the pilot-judgment procedure* – The ineffectiveness of the compensation and restitution mechanism was a recurrent and widespread problem which had persisted in spite of the adoption of the *Viaşu*, *Faimblat* and *Katz* judgments[1], in which the Court had indicated to the Romanian Government that general measures were required in order to secure the right to restitution in an effective and prompt manner. Hence, the present cases lent themselves to application of the pilot-judgment procedure.

(b) *Existence of a practice incompatible with the Convention* – The domestic authorities had sought to simplify the legislation by enacting a law establishing a single administrative procedure for all property claims; however, it had not proved suf-

1. *Viaşu v. Romania*, no. 75957/01, 9 December 2008, Information Note no. 114; *Faimblat v. Romania*, no. 23066/02, 13 January 2009; and *Katz v. Romania*, no. 29739/03, 20 January 2009, Information Note no. 115.

ficiently effective in practice. The HCCJ had ruled that claims must be examined within a reasonable time; however, in the absence of binding statutory time-limits, this requirement was in danger of remaining theoretical and illusory, and the right of access to a court in order to complain of delays in processing claims was liable to be deprived of its substance. In addition, the legislation on nationalised properties represented a very considerable burden on the State budget which was difficult to sustain. The flotation of the *Proprietatea* Fund on the stock exchange, scheduled to take place in 2005, had still not been completed, although the processing through the stock market of some of the claims from persons in receipt of "compensation certificates" would ease the pressure on the budget.

(c) *General measures* – The Court drew attention to Resolution Res(2004)3 and Recommendation Rec(2004)6 of the Committee of Ministers, adopted on 12 May 2004. It also suggested that the State should, by means of appropriate legal and administrative measures, ensure respect for the ownership rights of all persons in a similar situation to the applicants, taking into account the principles of the Court's case-law concerning the application of Article 1 of Protocol No. 1. These aims could be achieved, for instance, by amending the restitution mechanism and establishing simplified and effective procedures as a matter of urgency on the basis of legislation and of coherent judicial and administrative practice, with a view to striking a fair balance between the various interests at stake. While allowing the respondent State the necessary discretion in this exceptionally difficult exercise, the Court noted with interest the proposal put forward by the Government aimed at laying down binding time-limits for each administrative step, provided that the measure was realistic and was subject to review by the courts. The Romanian authorities might also follow the example of other countries by, for instance, overhauling the legislation in order to make the compensation scheme more foreseeable, or by setting a cap on compensation awards and paying them in instalments over a longer period.

(d) *Procedure to be followed in similar cases* – As the pilot-judgment procedure was aimed at allowing rapid redress to be afforded at national level to all those persons affected by the structural problem identified in the pilot judgment, and in view of the very large number of applications against Romania concerning similar issues, the Court decided to adjourn examination of all applications stemming from the same overall problem for a period of eighteen months from the date on which the present judgment became final, pending the adoption by the Romanian authorities of measures capable of providing adequate redress to all those concerned by the reparation legislation.

Article 41: EUR 65,000 jointly to the first two applicants in respect of pecuniary and non-pecuniary damage; EUR 115,000 to the third applicant in respect of pecuniary and non-pecuniary damage.

ARTICLE 5 OF PROTOCOL No. 7

Equality between spouses

Alleged inequality of rights of male and female military personnel to parental leave: *inadmissible*

Konstantin Markin v. Russia - 30078/06
Judgment 7.10.2010 [Section I]

(See Article 14 above, page 20)

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

Nejdet Şahin and Perihan Şahin v. Turkey - 13279/05
Judgment 27.5.2010 [Section II]

(See Article 6 § 1 (civil) above, page 10)

S.H. and Others v. Austria - 57813/00
Judgment 1.4.2010 [Section I]

(See Article 14 above, page 20)