CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

INFORMATION NOTE No. 10
on the case-law of the Court
September 1999

Statistical information

		September	1999
I. Judgments delivered			
Grand Chamber		3	52
Chamber I		0	2
Chamber II		3	7
Chamber III		6	8
Chamber IV		0	10
Total		**12**	**79**
II. Applications declared admissible			
Section I		23	95
Section II		5	239
Section III		20	140
Section IV		27	77
Total		**75**	**551**
III. Applications declared inadmissible			
Section I	- Chamber	2	44
	- Committee	97	394
Section II	- Chamber	9	91
	- Committee	72	360
Section III	- Chamber	30	113
	- Committee	70	403
Section IV	- Chamber	10	92
	- Committee	243	827
Total		**533**	**2324**
IV. Applications struck off			
Section I	- Chamber	0	5
	- Committee	6	6
Section II	- Chamber	2	6
	- Committee	2	5
Section III	- Chamber	3	24
	- Committee	4	8
Section IV	- Chamber	2	11
	- Committee	1	11
Total		**20**	**76**
Total number of decisions[1]		**628**	**2951**
V. Applications communicated			
Section I		68	306
Section II		19	217
Section III		24	274
Section IV		68	213
Total number of applications communicated		**179**	**1010**

[1] **Not including partial decisions.**

ARTICLE 3

DEGRADING TREATMENT
Dismissal of homosexuals from armed forces following intrusive questioning: *no violation*.

SMITH and GRADY - United Kingdom
(Nº 33985/96 and Nº 33986/96)
Judgment 27.9.99 [Section III]
(See Appendix I).

ARTICLE 5

Article 5(1)(c)

LAWFUL DETENTION
Failure to release from detention on remand found by the Federal Court to be unlawful: *communicated.*

MINJAT - Switzerland (N° 38223/97)
Decision 7.9.99 [Section II]

The applicant was placed in pre-trial detention pursuant to a detention order issued by an investigating judge. The Geneva Indictments Chamber then extended his detention. The applicant appealed to the Federal Court against the order extending his detention, submitting that it had failed to state the reasons for his detention, and requested the court to release him if it should find that the detention order was unlawful. The Federal Court set the order aside on the ground that it had not given an adequate statement of the reasons on which it was based, but referred to the Indictments Chamber the issue regarding the applicant's release pending trial. The Indictments Chamber subsequently made an order, stating reasons, extending the pre-trial detention. The applicant complains that the Federal Court failed to order his immediate release and alleges that he was unlawfully detained between the date on which the investigating judge's detention order expired and the date on which the Indictments Chamber gave its order stating reasons.
Communicated under Article 5(1) and (4).

Article 5(3)

LENGTH OF DETENTION ON REMAND
Length of detention on remand: *preliminary objection allowed (non-exhaustion)*.

CIVET - France (Nº 29340/95)
Judgment 28.9.99 [Grand Chamber]
(See Appendix II).

LENGTH OF DETENTION ON REMAND
Detention on remand already been found excessively long: *inadmissible.*

AHMAZ - France (N° 45013/98)
Decision 21.9.99 [Section III]

The applicant, who was suspected of having murdered his wife, was placed in pre-trial detention from 6 December 1991 to 25 September 1998, when he was sentenced to twenty years' imprisonment. After making a number of unsuccessful applications for his release pending trial, he lodged a complaint with the Commission about the length of his imprisonment. The Commission adopted its report on 20 March 1997 and, in a judgment of 23 September 1998, the Court concluded that there had been a violation of Article 5(3). The applicant now complains again of the length of his pre-trial detention.
Inadmissible under Article 5(3): the Court's judgment had erased the consequences of the violation of Article 5(3) in respect of the period from 6 December 1991, the date of the first court decision sentencing the applicant to imprisonment, to 20 March 1997, the date on which the Commission had adopted its report. The period to be taken into consideration in determining whether or not there had been a violation was therefore five months and twenty-four days and did not appear unreasonable in the light of the circumstances of the case: manifestly ill-founded.

ARTICLE 6

Article 6(1) [civil]

APPLICABILITY
Length of proceedings concerning an extraordinary remedy before the Head of State: *inadmissible.*

NARDELLA - Italy (N° 45814/99)
Decision 28.9.99 [Section III]

The applicant, who was a student at the material time, was refused a grant by the university authorities, who informed him that he could appeal to the regional administrative court against their decision. However, rather than instituting contentious proceedings, the applicant preferred to make a special application to the President of the Republic. His application, made on 15 February 1982, had still received no reply on 12 December 1998.
Inadmissible under Article 6(1): Article 6 does not apply to special applications to the President of the Republic: incompatible *ratione materiae*.

FAIR HEARING
Order for disclosure of adverse expert report obtained by one party in personal injury proceedings: *inadmissible*.

VERNON - United Kingdom (Nº 38753/97)
Decision 14.9.99 [Section III]

The applicant witnessed the drowning of his two children when the car in which they were travelling went into a river. He subsequently displayed symptoms of post traumatic stress disorder which seriously affected both his professional and personal life, and notably led to his divorce in 1993. He brought personal injury proceedings against the driver of the vehicle. The applicant's expert witnesses gave evidence stating that the prognosis was quite pessimistic. In January 1995, the applicant was awarded damages of over GBP 1,300,000. In the meantime, he had applied for a residence order concerning his other children. He asked the same experts to draft new reports on his mental state. The draft reports revealed that his mental condition had greatly improved. Following these proceedings, the defendants in the personal injury action appealed against the first judgment. Copies of the medical reports used in the family proceedings were anonymously sent to the defendants' solicitors, who succeeded in having the case listed for re-hearing with a view to the examination of these reports. The applicant, who had been informed by his lawyer that these documents were subject to professional privilege and as such need not be disclosed, nonetheless waived the confidentiality privilege in the light of a recent House of Lords judgment, despite the fact that such disclosure was not in his interests. He claims that he was then obliged to call the expert as a witness. The Court of Appeal refused, however, to allow the applicant himself to give evidence on his current mental condition or to call another witness on this matter. The Court of Appeal, taking into consideration his substantial recovery as it transpired from the last medical reports, drastically reduced his award for personal injury to just over GBP 600,000.
Inadmissible under Article 6(1): The applicant had every opportunity to explain the extent of his condition during his lengthy trial, and was represented by counsel who was able to make submissions to the Court of Appeal on his behalf. Moreover, the appeal proceedings were based on grounds of appeal and not on the re-hearing of the case and, according to the rule of procedure, the taking of new evidence on points of facts was exceptional. Two expert witnesses gave evidence at appeal in support of the applicant's arguments. The court justified its decision not to allow any further evidence to be called, notably by the wealth of evidence already provided by the applicant and the fact that it would delay the proceedings even more. Thus, the proceedings from trial to appeal did not deprive him of a fair and effective opportunity to present his case: manifestly ill-founded.
With regard to the disclosure of the confidential medical reports from the family proceedings, which the applicant considered had compelled him to call the expert as a witness in the personal injury proceedings, against his own interests, firstly regard must be had to the fact that it was him, following his lawyers' advice, who waived privilege and obtained the requisite order to produce the document in the proceedings and secondly his decision to call the expert as a witness should be considered a purely tactical one, intended to serve his best interests. Furthermore, the fact that the new medical report contradicted the evidence presented in the personal injury proceedings by the same expert was not sufficient as such to render the whole proceedings unfair. Overall, no requirement, legal or tactical, imposed on him to produce the report in issue and call the expert as a witness, operated in a way that rendered the proceedings unfair. Therefore, there was no basis for objecting on grounds of fairness to the approach adopted by the appeal court judges, who found that the rules governing disclosure should not be interpreted in such a way as to facilitate the running of contradictory claims in simultaneous proceedings: manifestly ill-founded.

FAIR HEARING
Refusal of court to hear witnesses in support of applicant's case while uncertainties remained concerning the other party's arguments: *communicated*.

MERCÜMEK - Turkey (Nº36591/97)
[Section I]

The applicant sought to withdraw the balance on his accounts with the defendant bank. The bank informed him that the money which he had deposited had already been withdrawn. The applicant initiated proceedings against the bank before the competent commercial court. The court-appointed experts found no conclusive evidence that the applicant had been paid the sums in issue. The bank later produced a document, allegedly signed by the applicant, according to which he had irrevocably released it from its obligation to pay him the sums deposited. The applicant maintained that the document had been forged. He requested that witnesses be heard on the matter of the authenticity of this document and submitted an expert legal opinion stating that other evidence than this document had to be taken into consideration by the court in order to assess the applicant's claim properly. His request was, however, rejected. The court finally dismissed the applicant's claim on the ground that no evidence proved that the document at stake had been forged by the bank. The Court of Cassation rejected the applicant's appeal as well as his further request for rectification of its judgment.
Communicated under Article 6(1).

ADVERSARIAL TRIAL
Property seized and sold without its owner being informed: *communicated*.

TSIRONIS - Greece (N° 44584/98)
[Section II]
(See Article 1 of Protocol No. 1, below).

ADVERSARIAL TRIAL
Civil proceedings by default due to a change of address: *communicated.*

SAURA BUSTAMANTE - Spain (N° 43555/98)
[Section I]

The applicant and two other persons contracted a debt, for which they were jointly and severally liable, with company C. Company C. instituted court proceedings for payment of its debt. The applicant was unaware of company C.'s claim and of the subsequent measures in the proceedings because the address given to the court by company C. (which had been given to that company as the applicant's address) was no longer valid. The applicant submits that this was a deliberate error. The proceedings against him were therefore conducted in *absentia*. The applicant and his two co-defendants were ordered jointly and severally to pay company C. the amount it had initially lent them plus default interest. As only one of the debtors was present in the proceedings, that debtor had to pay the entire debt. He subsequently instituted legal proceedings against his co-defendants for reimbursement of their share of the debt. It was on being summoned to appear in those proceedings that the applicant learnt of the order made against him *in absentia.* He lodged an *amparo* appeal with the Constitutional Court, but this was dismissed. The second set of proceedings were still in progress on the date on which the application was introduced.
Communicated under Article 6(1).

PUBLIC HEARING
Lack of public hearing before disciplinary body: *violation.*

SERRE - France (N° 29718/96)
Judgment 14.9.99 [Section III]

The regional chamber of the Veterinary Council, sitting in private, disqualified the applicant, who is a veterinary surgeon, from practice for three years, with a further five years suspended, for various breaches of the professional regulations. He appealed to the upper chamber of the Disciplinary Council. That chamber, also sitting in private, reduced the disqualification from practice to two years, with a further three years suspended. The applicant then lodged an appeal on points of law with the *Conseil d'Etat*. In his pleadings he submitted, *inter alia*, that his case had not been heard in open court. The Appeal Committee ruled his appeal inadmissible.
Law: The Court noted that as the matter at stake in the disciplinary proceedings was the right to practise as a veterinary surgeon in the private sector, there was no doubt that Article 6(1) applied to the disciplinary proceedings in the case. In concluding that there had been a violation the Court pointed out that the holding of proceedings in open court was a fundamental requirement.
Conclusion: Violation (unanimous).
Article 41: The Court awarded the applicant 10,000 French Francs (FRF) for non-pecuniary damage and FRF 65,830 for costs and expenses, but dismissed the applicant's claims in respect of pecuniary damage on the ground that it could not speculate as to what the outcome would have been if the disciplinary proceedings had been held in conformity with the Convention.

REASONABLE TIME
Length of civil proceedings: *violation*.

BOSIO and MORETTI - Italy (Nº 36608/97)
Judgment 6.9.99 [Section II]

The case concerns the length of civil proceedings brought against the applicants in April 1986. In April 1998 the parties reached a settlement which brought the proceedings to an end.
Law: The Court recalled that it had found in four judgments of 28 July 1999 that there existed in Italy a practice contrary to the Convention, resulting from an accumulation of breaches of the "reasonable time" requirement. It concluded that the length of the proceedings in this case (over 12 years) did not comply with that requirement and constituted a further example of the aforementioned practice.
Conclusion: Violation (unanimous).
Article 41: The Court awarded each of the applicants 25 million lire (ITL) for non-pecuniary damage. It also awarded the two applicants 8 million lire for costs and expenses.

REASONABLE TIME
Length of civil proceedings: *friendly settlement*.

BOHUNICKÝ - Slovakia (Nº 36570/97)
Judgment 13.9.99 [Section II]

The case concerned the length of civil proceedings which the applicant brought in 1989 against, *inter alios*, the Czechoslovak Railways, seeking damages in respect of non-payment of sickness payments. The final judgment in the case was given in 1995 and was served on the applicant in October 1996.
In settlement of the case, the Government agreed to pay the applicant 100,000 SKK to cover any damages and costs, without any acknowledgement of a violation of the Convention.

REASONABLE TIME
Continuation of domestic proceedings already been found excessively long: *admissible*.

PICCININI - Italy (N° 28936/95)
Decision 14.9.99 [Section II]

The applicant lodged a complaint with the Commission about the length of proceedings. The Commission concluded, in its report of 11 January 1994, that there had been a violation of Article 6(1), following which the Committee of Ministers passed a Resolution on 15 November 1996. However, the domestic proceedings are still pending, more than three years and nine months after the Commission's report.
Admissible under Article 6(1): The facts of which the applicant complained were new facts which had not been taken into consideration in the Commission's report. Furthermore, the length of the second stage of the proceedings did not have to be excessive in itself since the fact that a violation had been found in respect of the first stage amounted to an aggravating circumstance.

ROTONDI - Italy (N° 38113/97)
Decision 21.9.99 [Section II]
S.A.GE.MA. s.n.c.- Italy (N° 40184/98)
Decision 21.9.99 [Section II]

These two applications raise the same problem as the above decision. In the Rotondi case the second stage of the proceedings lasted more than one year and eight months, while in the S.A.GE.MA s.n.c. it lasted two years and two months.
Admissible under Article 6(1).

REASONABLE TIME
Calculation of length of proceedings - period to be taken into account following the partition of Czechoslovakia: *communicated*.

BOŘÁNKOVÁ - Czech Republic (Nº 41486/98)
[Section III]

The applicant's divorce was decreed in 1985. In the same year her ex-husband brought proceedings for the assets they had acquired during their marriage to be divided between them. Those proceedings were therefore commenced in the courts of former Czechoslovakia. On 18 March 1992 the Czechoslovakian Federation ratified the Convention. On 31 December 1992 the State was split into two separate States, the Czech Republic and the Slovak Republic. The Convention came into force in the Czech Republic, as the State succeeding to

Czechoslovakia's obligations, on 1 January 1993. At that time the proceedings for division of the assets acquired during the marriage were still pending. They ended finally in 1996 with a judgment of the District Court, a judgment which was upheld by the relevant regional court and subsequently ordered to be enforced. The applicant lodged an appeal on points of law which was dismissed by the Supreme Court in 1997.
Communicated under Article 6(1) (length of proceedings – the question arises as to whether, as the State succeeding to Czechoslovakia, the Czech Republic was bound by the Convention and its Protocols during the period 18 March 1992 to 31 December 1992, a period during which the Federal State was a Contracting Party).

REASONABLE TIME
Length of proceedings having chiefly been handled by notaries and not by a court: *admissible*.

SIEGEL - France (N° 36350/97)
Decision 28.9.99 [Section III]

Following his mother's death the applicant filed an application on 8 January 1993 with the *tribunal d'instance* asking for a notary be appointed to distribute his mother's estate. His brother, whom the court had informed of that application, requested on 27 April 1993 that the distribution be extended to his father's estate. In an order of 8 July 1993 the presiding judge of the *tribunal d'instance* granted the applications and appointed two notaries to distribute the estates. He instructed the parties to address their claims to them. Thereafter the proceedings were conducted exclusively before those two officers. The court's only involvement was to forward to the notaries, instructing them to reply, a request from the applicant who, not having received any information about the proceedings, was enquiring as to their progress. On 4 December 1997 the court discontinued the proceedings as the parties had decided to withdraw their application for distribution by the courts.
Admissible under Article 6(1).

IMPARTIAL TRIBUNAL
Presiding judge in child custody proceedings having been publicly engaged in a controversy with the father: *violation.*

BUSCEMI - Italy (N° 29569/95)
Judgment 16.9.99 [Section II]
(See Article 8, below).

IMPARTIAL TRIBUNAL
Applicant judged by statutory body having, prior to the proceedings, expressed its disapproval of him: *admissible*.

KINGSLEY - United Kingdom (Nº 35605/97)
Decision 14.9.99 [Section III]

The applicant was the managing director of several London casinos. The Gaming Board, a statutory body regulating the gaming industry, found him not to be a fit and proper person to hold the certificate of approval required to hold a management position in the gaming industry. His certificate was accordingly revoked, after a hearing conducted in private. He was informed of the decision of revocation by letter. As a result, he found himself unable to obtain any employment in the gaming industry. He sought leave to apply for judicial review of this decision on the ground, *inter alia*, that the panel of the Gaming Board which had judged him was biased. An internal decision of the Gaming Board, in particular, revealed

that, prior to the examination of his case, the Board, including the members of the panel, had clearly manifested their disapproval of the applicant. The High Court, which could not have remitted the case for re-consideration by the Gaming Board because of the "doctrine of necessity", rejected his application. It accepted that there was an appearance of bias, but did not find a real danger of injustice on the facts. The Court of Appeal agreed.
Admissible under Article 6(1) (impartial tribunal, public hearing).

IMPARTIAL TRIBUNAL
Impartiality of a judge whose spouse's debts were allegedly reduced by a bank party to the proceedings with which he was dealing: *communicated*.

SIGURÐSSON - Iceland (Nº 39731/98)
[Section I]

The applicant instituted compensation proceedings against the National Bank of Iceland. The Supreme Court rejected his claim. He claims that he then became aware that one of the Supreme Court judges and her husband had strong financial ties with the bank. The judge's husband allegedly had enormous debts with the bank and real property belonging to them was mortgaged as a security. The applicant further claims that the bank substantially reduced the debts while the case was under examination. His two requests to the Supreme Court to have the case reopened on the ground of the judge's lack of impartiality were rejected.
Communicated under Article 6(1) (independent and impartial tribunal, with a question on exhaustion - under Icelandic legislation, the participation of a judge can be challenged on the ground of lack of impartiality before the Supreme Court, which decides in plenary session, and the applicant does not seem to have exhausted this remedy).

Article 6(1) [criminal]

ACCESS TO COURT
Impossibility for a person convicted *in absentia* to lodge an appeal on points of law without having first challenged the conviction: *communicated.*

HASER - Switzerland (N° 30050/96)
Decision 7.9.99 [Section II]

The applicant was sentenced in *absentia* by an assize court of the Canton of Ticino. He lodged an appeal on points of law with the Court of Cassation of the Canton of Ticino. His appeal was held to be inadmissible because the Code of Criminal Procedure of the canton provided that persons sentenced in *absentia* must, prior to lodging any appeal on points of law, apply to have the judgment delivered in their absence set aside. The applicant alleges that this provision should not have been applied in his case because his lawyer had represented him at the trial and because he had expressly waived his right to apply to have set aside the judgment of the Assize Court in his application to the Federal Court. He considers that, notwithstanding his absence, his trial in the Assize Court was held in lawful conditions and that he was able to instruct the defence lawyer of his choice.
Communicated under Articles 6(1) and (3).

FAIR HEARING
Insufficient direction of trial judge to jury on interpretation to give to silence of the defendants: *admissible*.

CONDRON - United Kingdom (Nº 35718/97)
Decision 7.9.99 [Section III]

The applicants, a husband and wife, are both self-confessed heroin addicts. They were convicted of drug offences and sentenced to imprisonment. In their appeal, they contended that the trial judge should have excluded their "no comment" police interviews on the basis that they had merely followed their solicitor's advice in refusing to answer questions. The Court of Appeal found that the trial judge's direction to the jury was defective, as he should have advised them that an adverse inference could only be drawn if they concluded that the only sensible reason for the applicants' refusal to answer the questions was that they had no answer to them or none that would stand up to cross-examination. However, the Court of Appeal did not consider that this *lacuna* in the direction rendered the convictions unsafe, given the weight of the other evidence presented against the accused.
Admissible under Article 6(1), (2) and (3)(b) and (c).
[NB. The case is distinguishable from the John Murray v. United Kingdom judgment (Reports of Judgments and Decisions 1996-I) in that the adverse inferences were drawn by a jury, whereas in the Murray case the trial had been held before a professional judge without a jury.]

FAIR HEARING
Self-incrimination - applicants convicted for having refused to answer questions asked by the police: *admissible*.

QUINN - Ireland (Nº 36887/97)
HEANEY and McGUINNESS - Ireland (Nº 34720/97)
Decisions 21.9.99 [Section IV]

The three applicants were arrested on suspicion of serious terrorist offences. Their arrests were based on the suspicion that they belonged to an illegal paramilitary organisation, the IRA. After having been cautioned by police officers that they had the right to remain silent, they were each requested to give details concerning their whereabouts at the time of the relevant offences. All three refused to provide the information requested by the police. As a consequence, they were convicted and sentenced under Section 52 of the Offences Against the State Act 1939 to six months' imprisonment for failure to provide information requested by the police.
Admissible under Articles 6(1) (self-incrimination) and 6(2) (presumption of innocence), and 10 (right not to impart information) and also under Article 8 (private life) in the Heaney and McGuinness application.

FAIR HEARING
Frequent interruptions by judge during cross-examination of prosecution witness and examination of the accused by her own lawyer: *communicated*.

X. - United Kingdom (Nº 43373/98)
[Section III]

The applicant was charged with stealing GBP 2,905.21 from her employers. She pleaded not guilty but was convicted of theft and sentenced to two years' probation and a hundred hours of community service. She appealed on the ground that the judge had made frequent interruptions and had persistently hectored defence counsel, thus depriving her of a fair

hearing. The grounds of appeal made reference to the transcript of the trial, which showed interventions by the judge on almost every page of the cross-examination of the main prosecution witness and on most of the pages concerning the examination of the applicant by her own lawyer. The Court of Appeal found that the applicant's complaints regarding the judge's conduct had been justified, but nonetheless dismissed the appeal since the evidence against her was strong and there were no grounds to show that the conviction was unsafe or unsatisfactory.
Communicated under Article 6(1) (fair hearing).

REASONABLE TIME
Length of criminal proceedings: *violation*.

DJAID - France (Nº 38687/97)
Judgment 29.9.99 [Section III]

Facts: In November 1992 the applicant was arrested by the police in connection with an investigation into international drug trafficking. He was convicted in April 1994 and the conviction was upheld on appeal in February 1995. A few days later, the applicant lodged an appeal to the Court of Cassation, which was however rejected in May 1997. In the meantime, the applicant had been released after completing his sentence. He complains about the length of the proceedings.
Law: The period to be examined began in November 1992 and ended in May 1997. It therefore lasted 4 years 6 months 15 days. The case had a certain complexity, concerning as it did international drug trafficking, but the parties agree that the investigation was carried out diligently and the same is true of the proceedings before the first instance and appeal courts. On the other hand, the proceedings before the Court of Cassation lasted 2 years 3 months 12 days and, although the applicant may be held partly responsible for the length of the proceedings, having requested extensions of time-limits, that cannot justify the length of the procedure at issue. Almost a year passed between the lodging of the judge-rapporteur's report and the judgment of the court, and the Government have not provided any convincing explanation for this delay. Furthermore, the obligation of expedition which falls on the Government was particularly important for the applicant, in so far as he was regarded under domestic law as being in detention on remand.
Conclusion : Violation (unanimous).
Article 41: The Court considered that the applicant had undoubtedly sustained non-pecuniary damage, despite not having submitted any claim in this respect. It awarded him the sum of 20,000 francs (FRF).

INDEPENDENT TRIBUNAL
Independence and impartiality of courts-martial: *violation*.

MOORE and GORDON - United Kingdom
(N° 36529/97 and Nº 37393/97)
SMITH and FORD - United Kingdom (N° 37475/97 and Nº 39036/97)
Judgments 29.9.99 [Section III]

Facts: Each of the applicants was convicted by a court-martial while serving in the armed forces (the Air Force in the first case and the Army in the second). Their subsequent petitions and appeals, as far as the Courts-Martial Appeal Court (the full court in all cases except Mr Moore's), were unsuccessful. The applicants complained that the courts-martial which tried them were not independent and impartial, referring in particular to the role of the "convening officer".

Held: Article 6(1) - In view of the potential or actual penalties together with the nature of the charges against the applicants, the Court considered that the proceedings against each had determined criminal charges within the meaning of this provision. It recalled that it had already found in the Findlay v. the United Kingdom judgment (*Reports of Judgments and Decisions* 1997-I) that a general court-martial convened pursuant to the Army Act 1955 did not meet the requirements of independence and impartiality in view, in particular, of the central role of the convening officer, who was central to the applicant's prosecution and was closely linked to the prosecution authorities. Furthermore, in the Coyne v. the United Kingdom judgment (*Reports* 1997-V) the Court had found a district court-martial convened pursuant to the Air Force Act 1955 to have similar deficiencies and had concluded that the organisational defects were such that they could not be corrected by any subsequent review procedure. Violations had similarly been found in a series of further cases and the Court found no reason to distinguish the present cases. The courts-martial which dealt with the applicants' cases were not independent and impartial and could not guarantee them a fair trial. Having reached this conclusion, it was unnecessary to examine further specific complaints about the fairness of the proceedings.
Conclusion: Violation (unanimous).
Article 41: As the applicants had not responded to the Court's request that they submit their claims for just satisfaction, it was unnecessary to apply this provision.

Article 6(2)

PRESUMPTION OF INNOCENCE
Statements by the authorities indicating that a father is guilty of sexual abuse of his daughter in spite of the discontinuation of criminal proceedings against him: *admissible*.

C.L. and others - Sweden (Nº 22771/93)
Decision 7.8.99 [Section I]

The third applicant, born in 1979, is mentally retarded. The first two applicants are her parents. In June 1992 she was admitted to a child psychiatric ward for examination after suspicions arose that she had been sexually abused. From July 1992 she was placed under public care, her father being suspected of having abused her. In September 1992, her father was officially notified of the suspicions. In November 1992, however, the public prosecutor decided not to initiate proceedings given the lack of evidence. Although the decision became final in February 1993, the child remained in public care. The Social Council rejected the parents' request for further contact with their child. The County Administrative Court, examining the parents' appeal, found that the access restrictions were justified in order to protect the child from being abused by her father again. In the meantime, the parents had requested that the public care be terminated, which the Social Council also refused. They appealed to the County Administrative Court, submitting a number of expert opinions on their daughter's illness. The court, despite these expert opinions, decided that the child should stay in public care. In May 1995, the parents eventually obtained from the Administrative Court of Appeal a judgment according to which the care should come to an end, nothing suggesting that the child's development would be disrupted if she were to live with her parents again.
Admissible under Article 6(2) and 8.

PRESUMPTION OF INNOCENCE
Self-incrimination - applicants convicted for not having refused to answer questions asked by the police: *admissible*.

QUINN - Ireland (Nº 36887/97)
HEANEY and McGUINNESS - Ireland (Nº 34720/97)
Decisions 21.9.99 [Section IV]
(See Article 6(1) [criminal], above).

ARTICLE 8

PRIVATE LIFE
Dismissal of homosexuals from armed forces following intrusive questioning: *violation*.

LUSTIG-PREAN and BECKETT - United Kingdom (Nº 31417/96 and Nº 32377/96)
SMITH and GRADY - United Kingdom (Nº 33985/96 and Nº 33986/96)
Judgments 27.9.99 [Section III]
(See Appendix I).

PRIVATE LIFE
Disciplinary sanction imposed on judge for, *inter alia*, having watched at home a channel supposedly controlled by an illegal organisation: *communicated*.

ALBAYRAK - Turkey (Nº 38406/97)
[Section II]

A disciplinary investigation was initiated against the applicant, a judge of Kurdish origin. He was accused, *inter alia*, of displaying sympathy for the PKK, of being a regular reader of a pro-Kurdish newspaper and finally of having watched at home a satellite channel allegedly controlled by the PKK. The applicant maintained that he had always been a faithful servant of the Turkish Republic and that both the newspaper and the channel were legal at the relevant time. In July 1996, the Supreme Council of Judges and Public Prosecutors found him guilty. He was consequently transferred to another jurisdiction and given a reprimand. His appeals against the decision were to no avail. In August 1997, the Supreme Council considered that he could not be promoted for the next two years by reason of his transfer for disciplinary reasons. In February 1998, his request to be transferred to another jurisdiction and hold a higher rank was rejected by the Supreme Council.
Communicated under Articles 8, 10, 13 and 14.

PRIVATE LIFE
Environmental nuisance due to a quarry operating near the applicants' home: *communicated.*

PAGLICCIA and others - Italy (N° 35392/97)
Decision 7.9.99 [Section II]

The four applicants belong to the same family. In 1974 they had a house built in which they all live. In 1989 a company obtained a licence from the mayor's office to operate a stone quarry approximately 300 metres from their house. The applicants did not challenge the licence in the administrative court at the time it was issued. From the outset, the operation of the quarry caused neighbouring residents serious noise and air pollution. After a number of

campaigns to draw the authorities' attention to the problem, the applicants reported the matter to the police. Following criminal proceedings, joined by three of the applicants seeking damages as civil parties, the directors of the company were ordered to pay a fine for carrying on a polluting activity without obtaining authorisation from the proper authority, in this case the Region, and for causing injury to persons.
Communicated under Article 8. The Section also raised questions relating to exhaustion.

FAMILY LIFE
Court refusing several times to grant custody of a child to her father: *violation.*

BUSCEMI - Italy (N° 29569/95)
Judgment 16.9.99 [Section II]

Facts: On the applicant's separation from his girlfriend, Turin Youth Court awarded custody of their daughter to the mother. The mother subsequently gave the child to the father, who applied to the court for legal custody of the child to be transferred to him. On 5 May 1994 the court decided to place the child in a children's home with access for the mother once a week and for the father once a month. The court also appointed two experts, one a psychologist and the other a neuro-psychiatrist, in order to determine which parent should be awarded custody of the child. One of the experts carried on a secondary activity as a street trader. The applicant appealed against the decision to place the child in a children's home. The Court of Appeal dismissed his appeal, but allowed the father to commission two expert reports of his own. However, according to the applicant, the experts appointed by him were kept on the fringes of the investigation process, even if one of them was able to take part in a meeting to assess the material gathered. The official expert report concluded that neither parent was fit to give the child a sufficiently well-balanced upbringing. The unofficial report, which was published a few days later, criticised the conclusions of the official report with regard to the applicant. The applicant brought a further application, in which he contested the conclusions of the official expert report and the manner in which the experts' investigation had been conducted and again requested custody of his child. On 3 November 1994 the court upheld the decision to place the child in a children's home. The decision also envisaged the return – in the long term – of the child to her mother. The applicant's monthly right of access was maintained, albeit under strict supervision. As between 11 July and 5 September 1994 the applicant had been involved in a heated dispute in the press with the President of the Youth Court over the social role played by those courts, he requested on 21 November 1994 that the President withdraw from the case. The Youth Court dismissed that request as out of time since the decision relating to custody of the child had already been given when the request for the President to withdraw was filed. Some time later, following a road accident in which the child was involved, the applicant, who is a doctor, tried to make contact with her, but was reminded of the terms of his access rights by a decision of the President of the court. The applicant appealed – unsuccessfully – against the judgment of 3 November 1994. He also requested the Youth Court to review its ruling on access rights and to award custody of the child to her mother. His application was dismissed, whereupon he appealed. Both appeals were dismissed by the Court of Appeal on 14 February 1995 on the ground that the first had been lodged out of time and the second was premature, since the decision to place the child in a children's home was provisional. The applicant applied to the Court of Appeal once again, on 22 June 1995, for custody of the child to be awarded to him or to her maternal grandmother. The court dismissed his application on the ground, *inter alia*, that the child had become more stable since she had been placed in the children's home and had expressed a wish to return to her mother. On 9 August 1995 the Youth Court re-awarded custody to the mother and awarded the applicant strictly supervised monthly access. Some of the conditions attached to the access were subsequently lifted by a decision of the court. The applicant, who considered those improvements to be inadequate, lodged an appeal against that decision. The Court of Appeal dismissed his appeal on the ground that the child had become psychologically less stable. The

criminal complaints filed by the applicant against the experts who had written the report resulting in the child being placed in a children's home were unsuccessful. Lastly, an investigation of the complaint which he had brought against the President of the court on account of the latter's comments in the press concluded that there had been no injury to the applicant's reputation or honour. A complaint to the Supreme Council of the Judiciary received no response. The applicant complains of an extremely serious violation of respect for his family life as a result of an expert report which, he submits, was procedurally flawed. He also alleges that the statements made to the press by the President of Youth Court caused injury to his reputation and to his family life. Lastly, he submits that the issue of custody of his daughter should not have been decided by a judge with whom he had publicly had a dispute.

Law: Article 8 – (i) Conduct of the experts' investigation: the Court considered that the applicant had been able to play a sufficiently active role in the proceedings which had led to the authorities' interference with his family life. The applicant's criticism of the manner in which the experts' investigation had been conducted was not a decisive factor, particularly as one of the experts appointed by him had been able to discuss with the court-appointed experts the results of the examinations made during the investigation. Furthermore, the expert report had not been the only factor taken into account by the courts in deciding the case.

(ii) The public statements by the President of the court: the statements made to the press by the President of the court did not in any way amount to an infringement of the applicant's private or family life, since he had himself disclosed his identity in his first letter to the newspaper.

Conclusion: no violation (unanimous).

Article 6(1) – The Court pointed out that the duty of impartiality required the judicial authorities to maintain maximum discretion with regard to the cases with which they deal, even where they were provoked; it considered that the public statements by the President of the court had been such as to justify the applicant's fears as to his impartiality.

Conclusion: violation (unanimous)

Article 41: The Court rejected the claims under the head of pecuniary damage on the ground that it did not have any evidence that such damage had been sustained. Regarding non-pecuniary damage, it considered that a finding of a violation amounted in itself to just satisfaction, particularly having regard to the fact that the applicant had contributed to fuelling the dispute in which he had been involved.

FAMILY LIFE

Child remaining in public care despite exonerating evidence produced by parents: *admissible*.

C.L. and others - Sweden (Nº 22771/93)
Decision 7.8.99 [Section I]
(See Article 6(2), above).

HOME

Disciplinary sanction imposed on judge for having watched at home a channel supposedly controlled by an illegal organisation: *communicated*.

ALBAYRAK - Turkey (Nº 38406/97)
[Section II]
(See above).

ARTICLE 9

FREEDOM OF RELIGION
Bodies whose objects are wholly or mainly religious precluded from holding a national radio licence: *communicated*.

UNITED CHRISTIAN BROADCASTERS LTD. - United Kingdom (Nº 44802/98)
[Section III]

The applicant is a charity whose main objective is to promote and bring into effect national religious broadcasting in the United Kingdom and Ireland. The Radio Authority, which regulates radio broadcasting and allocates radio licences, invited applications for the licence for the first digital radio multiplex. The applicant wrote back expressing interest in applying for a licence. However, the Radio Authority explained that the Broadcasting Act 1990 prohibited the award of a licence to religious bodies, and refused to send an application form to the applicant.
Communicated under Article 9.

ARTICLE 10

FREEDOM OF EXPRESSION
Conviction for defamation: *violation*.

DALBAN - Romania (Nº 28114/95)
Judgment 28.9.99 [Grand Chamber]
(See Appendix III).

FREEDOM OF EXPRESSION
Conviction for incitement to hatred: *violation*.

ÖZTÜRK - Turkey (Nº 22479/93)
Judgment 28.9.99 [Grand Chamber]
(See Appendix IV).

FREEDOM TO RECEIVE INFORMATION
Disciplinary sanction imposed on judge for having read a pro-Kurd newspaper and watched a channel supposedly controlled by an illegal organisation: *communicated*.

ALBAYRAK - Turkey (Nº 38406/97)
[Section II]
(See Article 8, above).

FREEDOM TO IMPART INFORMATION
Associations required to inform the authorities before making a public statement: *communicated*.

KARADEMIRCI and others - Turkey
(N° 37096/97 and Nº 37101/97)
Decision 21.9.99 [Section I]

The applicant trade union members were convicted of publicly reading out a press release issued on behalf of their respective organisations without having carried out the prior legal formalities. There are two statutory preconditions for the distribution by an association of leaflets, written declarations or similar publications. Such documents cannot be made public without a decision of the governing body of the association and the names of those making the decision must appear on the text of the declaration. The authorities must also be informed of an intention to distribute such documents. This is done by lodging with the authorities the text of the declaration together with the governing body's decision. No communication of the declaration to the public must be made for twenty-four hours after the documents have been lodged. Failure to comply with those conditions is punishable by three to six months' imprisonment. The applicants in fact were given a suspended order to pay a fine.
Communicated under Articles 9, 10 and 11.

ARTICLE 11

FREEDOM OF ASSOCIATION
Foreigner ineligible to stand for election to works council: *inadmissible*.

KARAKURT - Austria (Nº32441/96)
Decision 14.9.99 [Section III]

The applicant, a Turkish national, was elected as member of the works council of his company. The Regional Court declared him ineligible to stand for election to the council on account of his nationality, in accordance with the relevant legislation. His appeals to the Court of Appeal and the Supreme Court were dismissed.
Inadmissible under Article 11: The term "association" has an autonomous meaning; the classification in domestic law has only a relative value and constitutes no more than a starting point. In the instant case, however, the Supreme Court found that works councils were not regarded, under Austrian Law, as associations. Members of the works councils, who are elected by members of the staff, exercise the functions of staff participation at work. Therefore, work councils cannot be considered as "associations" within the meaning of this provision: manifestly ill-founded.

ARTICLE 14

DISCRIMINATION (Article 8)
Disciplinary sanction imposed on judge for having read pro-Kurd newspaper and watched a channel supposedly controlled by the PKK: *communicated*.

ALBAYRAK - Turkey (Nº 38406/97)
[Section II]
(See Article 8, above).

DISCRIMINATION (Article 1 of Protocol Nº 1)
Rejection of non-resident's claim for restitution of property confiscated under the communist regime: *communicated*.

A.J. - Slovakia (Nº 39050/97)
[Section II]

In 1992 the applicant lodged a claim to obtain restitution of a property confiscated under the communist regime. The Land Ownership Act prescribed that it was necessary to have one's permanent residence in former Czechoslovakia in order to be entitled to the restitution of confiscated property. The Land Office, having established that the applicant's main residence was abroad at the relevant time, rejected his claim. His appeal was to no avail.
Communicated under Article 1 Protocol Nº 1 and Article 14.

ARTICLE 35(1)

EFFECTIVE DOMESTIC REMEDY (France)
Appeal to the Court of Cassation (France) against detention on remand: *preliminary objection allowed (non-exhaustion)*.

CIVET - France (Nº 29340/95)
Judgment 28.9.99 [Grand Chamber]
(See Appendix II).

FINAL DOMESTIC DECISION
Date to be taken in account when calculating the six month period.

MINCHELLA - Italy (N° 41838/98)
Decision 14.9.99 [Section IV]

The applicant complains of the excessive length of proceedings she had instituted for acknowledgement of her right to a pension. The judgment of the Court of Audit terminating the domestic proceedings was delivered on 15 December 1993 and deposited at the registry of that court on the same day. It was sent to the applicant on 27 January 1994 by the Court of Audit and became final one year and forty-five days after it had been deposited with the Registry, that is on 30 January 1995.
Inadmissible under Article 35(1): Whether the starting point for lodging the application was taken to be the date on which the judgment had been sent to the applicant or the date on which

it had become final, the application had in any event been introduced more than six months after the final domestic decision: time-barred.

SIX MONTH PERIOD
No effective domestic remedy - six-month period running from acquittal and not from the act complained of in the application.

VEZNEDAROĞLU -Turkey (Nº 32357/96)
Decision 7.9.99 [Section II]

The applicant, married to a human rights activist, was arrested on suspicion of being a member of the PKK. She was allegedly held under duress during her detention, which lasted several days, and was forced to sign a confession. She maintained before the public prosecutor and the National Security Court judge that she had been forced into signing the confession and had been tortured. She was tried before the National Security Court on the charge of being member of the PKK. She was eventually acquitted for lack of evidence.
Admissible under Article 3: Having regard to the circumstances, the applicant can be considered to have done all that could be expected to bring her complaint to the attention of the authorities with a view to the opening of an investigation into her allegation of torture. Furthermore, where an individual has an arguable complaint that there has been a violation of Article 3 the notion of an effective remedy entails, on the part of the State, a thorough and effective investigation capable of leading to the identification and punishment of those responsible. The applicant had thus complied with the requirement of exhaustion of domestic remedies.
In the absence of an effective domestic remedy, the six-month period runs from the act complained of. However, in exceptional circumstances, where an applicant first avails himself or herself of a domestic remedy and only at a later stage becomes aware, or should have become aware, of the circumstances which make that remedy ineffective, the six-month period is calculated from the time when the applicant became aware, or should have become aware, of the ineffectiveness of the remedy. In the instant case, it was not unreasonable for the applicant to wait for the verdict of the National Security Court before lodging an application with the Commission. The proceedings before this court were closely related to the substance of her complaint as she clearly made her torture allegation a key issue, expecting that an investigation would be opened into its merits. The six-month period started running from the date of her acquittal and the application was not time-barred.

ARTICLE 1 OF PROTOCOL No. 1

PEACEFUL ENJOYMENT OF POSSESSIONS
Modification of legislation inherited from the communist regime, resulting in the refusal to grant the applicant a housing subsidy: *inadmissible*.

RUDZIŃSKA - Poland (Nº 45223/99)
Decision 7.9.99 [Section IV]

In 1984, pursuant to an ordinance of 1983, the applicant's father opened a housing savings account on her behalf. The 1983 ordinance was intended to create a State-supported scheme aimed at co-financing housing in order to improve the chronic housing shortage. As part of the scheme, the State guaranteed that the amounts deposited would be reassessed in due time to ensure that their purchasing power be maintained. This guarantee took the form of a housing subsidy. In 1993, a Council of Minister's Order laid down new requirements, notably

that the subsidy would only be granted to those who had bought or built a house or flat. Those not entitled to it could obtain reimbursement of their savings, with interest. In May 1997, the applicant's bank informed her that she had 5,693 PLZ on her account, which included the housing subsidy should she be entitled to it. She maintained that the sum was not reasonably proportionate to the current price of individual houses and thus did not respect the State's initial obligations. The bank, however, confirmed that the sums communicated to her, including the subsidy, were correct. The authorities replied to her request for reassessment that her expectations that the housing subsidy would cover the whole difference between her savings and the full cost of a house were not justified.
Inadmissible under Article 1 Protocol Nº 1: The change of legislation that occurred in 1993 was meant to take into account the economic transition the country was going through and the excessive burden the housing scheme represented on the State budget. The applicant did not contend that she had complied with the requirement set in the 1993 Order to obtain a housing subsidy. Therefore, she was only entitled, pursuant to the same Order, to the reimbursement of her savings, with interest. Thus, she could not be considered as having been deprived of her possessions nor did the State exercise control over her property. In so far as she complained that her savings had lost their purchasing power due to inflation, there was no general obligation on States to maintain the purchasing power of sums deposited with banks or financial institutions by way of their systematic indexation. As regards her contention that the reduction of guarantees resulting from the 1993 Order prevented her from buying a house, it had to be borne in mind that Article 1 of Protocol No. 1 does not recognise any right to become owner of a property. Finally, according to the Convention organs' case-law, the provision does not guarantee a right to purchase housing within the framework of the supported housing co-operative scheme of Poland: manifestly ill-founded.

PEACEFUL ENJOYMENT OF POSSESSIONS
Act retroactively imposing a limitation on the increase of school fees for private schools: *inadmissible*.

[ETABLISSEMENTS SCOLAIRES] DOUKA S.A. and others - Greece (Nº 38786/97)
Decision 21.9.99 [Section II]

The applicants are private schools. The amount which private schools could charge by way of school fees for the school year 1996-97 was affected by a retrospective law which came into force in May 1997. Under that law, private schools could not increase their fees by more than 7% compared with the previous school year, on pain of a fine. The applicants submit that the running costs of private schools went up by 13.25% during the school year 1996-97.
Inadmissible under Article 1 of Protocol No. 1 and Article 13 of the Convention.

PEACEFUL ENJOYMENT OF PROPERTY
Applicant held personally responsible for his company's tax obligations: *partly admissible and partly inadmissible*.

KLAVDIANOS - Greece (Nº 38841/97)
Decision 21.9.99 [Section III]

In May 1986, the applicant resigned from the Board of Directors of a Greek company. In June 1986, the company was declared bankrupt and dissolved. An order to seize the applicant's house was issued with a view to securing the payment of the company's tax obligations. In September 1986, he unsuccessfully challenged the order before the administrative courts on the ground, *inter alia*, that he had resigned before the dissolution of the company and hence, according to the relevant law, could not be held personally responsible for it. However, on appeal he had the order of seizure declared invalid. In July

1988, the State appealed against this decision to the Supreme Administrative Court which, in May 1997, interpreted the relevant law to the applicant's disadvantage. It held that managing directors having resigned before the dissolution of their company remained liable until successors had taken office. The case was referred back to first instance for reconsideration. The case is still pending, as is the liquidation of the company's assets. According to Greek legislation, foreign companies subject to taxation in Greece have the same tax obligations as Greek companies save in one respect, i.e. its manager, Greek or non-Greek, bears no liability for the company's tax debts. The applicant claimed to have continuously raised the substance of his Convention complaints before the domestic courts, which the Government contested.
Admissible under Article 6(1) (length).
Inadmissible under Article 1 of Protocol No. 1 and Article 14.

DEPRIVATION OF PROPERTY
De facto expropriation of land with a view to build a public equipment: *admissible.*

BELVEDERE ALBERGHIERA - Italy (N° 31524/96)
Decision 21.9.99 [Section II]

In expropriation cases the Italian Court of Cassation has established a rule known as "substantive expropriation" pursuant to which, if the state occupies land as a matter of urgency and erects a public construction on it the land can no longer be restored to its owner, irrespective of any consideration as to the lawfulness of the purpose of the occupation. Owners of such land are entitled to compensation but must seek it through the courts. They have five years in which to do so from the day on which the public construction was completed. The applicant company complains that the above rule was applied to it. It owned land occupied as a matter of urgency by decision of the district council, which planned to build a road there, and succeeded in having that decision set aside by the Regional Administrative Court. The court had held that the plan was unlawful and was not in the public interest. As the authorities did not comply with that decision, the applicant brought enforcement proceedings in the same court for its land to be restored to it. Noting that the district council had in the meantime built the road, the court found against the applicant on the ground of the principle of "substantive expropriation." The applicant appealed – unsuccessfully – against that decision to the *Consiglio di Stato*, submitting, *inter alia*, that the application of that principle rendered the first judgment of the Administrative Court of no practical effect. The *Consiglio di Stato* held that since the works had, in the main, been completed before the date of delivery of the Administrative Court's first judgment, the transfer of title to the land had already become irreversible by that date and that there had therefore been no miscarriage of justice.
Admissible under Article 1 of Protocol No. 1. The Section also decided to hold a hearing on the merits.

DEPRIVATION OF PROPERTY
Property seized and sold without its owner being informed: *communicated.*

TSIRONIS - Greece (N° 44584/98)
[Section II]

The applicant, who is a sailor, took out a loan from a state bank for the purchase of some land. After falling into arrears with his repayments, he was informed by the bank that it intended to seize the property. The two parties then signed an agreement by which the applicant undertook to pay the amount due, that undertaking being certified by a bank document. Notwithstanding that agreement, the bank put the property up for auction a few months later. Notification of the sale was not served on the applicant, who had moved in the

meantime. Furthermore, on the date of the sale he was at sea, a fact of which, he argues, the bank and the process server were aware. On returning to the mainland he learnt of the sale of his property, whereupon he instituted proceedings to have the sale set aside. The proceedings were held to be inadmissible on the ground that they had been instituted after the sale had been completed. The applicant complains that since he was not informed of the sale of his property he was deprived of his right to a court and to an effective remedy.
Communicated under Article 6(1) and Article 1 of Protocol No. 1.

ARTICLE 3 OF PROTOCOL No. 1

VOTE
Liechtenstein national living in Switzerland prevented from voting in his country: *inadmissible*.

HILBE - Liechtenstein (N° 31981/96)
Decision 7.9.99 [Section IV]

In 1995 the applicant, a national of Liechtenstein, was refused permission to have his name entered on the electoral roll for a referendum on the ground that for a number of years he had been living outside his country and the law limited the exercise of the right to vote to persons habitually resident in the country. The applicant unsuccessfully appealed to the authorities. In 1986 Parliament confirmed that citizens of Liechtenstein living abroad could not exercise the right to vote.
Inadmissible under Article 3 of Protocol No. 1: only parliamentary elections fell within the scope of Article 3 of Protocol No. 1; referenda were excluded from that provision. According to the Commission's case-law, a residence requirement was not in itself contrary to the provisions of Article 3 of Protocol No. 1 (see, for example, Luksch v. Italy, DR 89, p. 175 and Polacco and Garofalo v. Italy, DR 90, p. 5). In the present case the legislation in question had been inspired by legitimate considerations in so far as nationals living abroad lost contact with "public affairs" and, furthermore, were not directly concerned by the work of elected assemblies. The residence requirement of which the applicant complained was neither unreasonable nor arbitrary: manifestly ill-founded.

ARTICLE 4 OF PROTOCOL No. 7

RIGHT NOT TO BE TRIED OR PUNISHED TWICE
Criminal as well as administrative penalties imposed for failure to complete tax declarations: *inadmissible.*

PONSETTI and CHESNEL - France (N° 36855/97 and Nº 41731/98)
Decision 14.9.99 [Section III]

Both applicants failed to fill in their tax returns. Their omission resulted in administrative penalties being imposed upon them by the tax authorities in the form of an increase in the tax payable. The authorities also instituted criminal proceedings against them, at the end of which they were convicted of tax fraud. The criminal court held that they had deliberately evaded paying tax. The applicants appealed – unsuccessfully – against their conviction, submitting that they had been punished twice on the basis of the same facts. They lodged appeals on points of law with the Court of Cassation, but these were also unsuccessful.

Inadmissible under Article 4 of Protocol 7: The administrative conviction and the criminal one were based on two provisions of the General Tax Code relating to entirely separate offences with different constituent elements. The tax offence was designed to punish only a failure to declare one's tax liability within the time-limit, whereas the criminal offence was designed to punish an intentional failure to do so: manifestly ill-founded.

PROCEDURAL MATTERS

TRANSITIONAL PROVISIONS
ARTICLE 5(4) OF PROTOCOL Nº 11

CASES REFERRED BY THE EUROPEAN COMMISSION OF HUMAN RIGHTS
At its 286th Session, the European Commission of Human Rights referred the following 11 cases to the Court:

CYPRUS v. TURQUIE (Nº 25781/94) concerning the situation in Cyprus and, with reference to the Commission's report in a previous application (No. 8007/77), alleging continuing violations of the Convention.

DIKME v. Turkey (Nº 20869/92) concerning alleged torture of the first applicant during custody and the length of time which he spent in custody before being brought before a judge, as well as denial of access to a lawyer and refusal to allow visits by the second applicant.

ILHAN v. Turkey (Nº 22277/93) concerning the applicant's allegations that his brother was severely injured on being apprehended by gendarmes and that medical treatment was not provided promptly.

AKKOÇ v. Turkey (Nº 22947/93 and Nº 22948/93) concerning, firstly, an allegation arising out of a disciplinary sanction imposed on the applicant, a teacher, for a statement made to the press, and secondly, her complaints arising out of the death of her husband, the lack of remedies and alleged torture, ill-treatment and intimidation suffered by her in respect of her application.

VODENICAROV v. Slovakia (Nº 24530/94) concerning the applicant's detention in a mental hospital during criminal proceedings and the fairness of the proceedings.

SENER v. Turkey (Nº 26680/95) concerning the applicant's conviction by a National Security Court on account of the publication of an article in a weekly review of which the applicant is responsible editor.

CAMP and BOURIMI v. the Netherlands (Nº 28369/95) concerning the applicants' complaint that the recognition of the second applicant, whose father died before he born without having recognised him, through letters of legitimation did not have retroactive effect from the time of the birth, as a result of which the second applicant was unable to inherit from his father and did not have legally recognised family relationships with his father and the latter's relatives prior to the letters of legitimation being granted.

PEERS v. Greece (Nº 28524/95) concerning the conditions of the applicant's detention and the opening of his correspondence with the Commission.

CONSTANTINESCU v. Romania (Nº 28871/95) concerning the applicant's conviction for defamation following publication in the press of statements he had made in the context of a dispute between him and the teachers' trade union's former leaders.

REHBOCK v. Slovenia (Nº 29462/95) concerning the alleged ill-treatment to which the applicant was subjected during his arrest and subsequent detention on remand, alleged lack of speediness as regards the examination of his requests for release and interference with his correspondence.

D.V. v. Bulgaria (Nº 31365/96) concerning the alleged unlawfulness of the applicant's detention for a psychiatric examination and the lack of possibility of a judicial appeal in this respect.

CASES REFERRED TO THE GRAND CHAMBER

The Panel of the Grand Chamber has decided to refer the following 4 cases to the Grand Chamber:

CYPRUS - TURKEY (Nº 25781/94)
(See above).

ILHAN - Turkey (Nº 22277/93)
(See above).

SALMAN - Turkey (Nº 21986/93)

This case concerns the applicant's allegation that her husband died as a result of ill-treatment received while he was in police custody.

MENNITTO - Italy (Nº 33804/96)

This case concerns the length of civil proceedings.

RULE 39 OF THE RULES OF COURT

INTERIM MEASURES
Expulsion to Russia: *refusal to apply Rule 39*.

BOGROV - Sweden (Nº 50866/99)
Decision 14.9.99 [Section I]

The applicant, a Russian national, joined the army after secondary school and was sent to Chechenia. In 1996, he deserted from the army. In August 1999, he went to Sweden where he applied for asylum. He maintained that he risked imprisonment for desertion in Russia. The immigration authorities rejected both his application and subsequent appeal. He was consequently held in detention pending expulsion. He also appealed against the detention order. However, none of these appeals suspended the expulsion process. He is to be expelled to Russia as soon as the administrative paperwork is finished.

INTERIM MEASURES
Extradition to China of a Chinese national arrested in Macao: *refusal to apply Rule 39*.

YONGHONG - Portugal (N° 50887/99)
Decision 14.9.99 [Section IV]

The applicant, a Chinese national arrested in Macao, faces extradition to China. He is accused of fraud and submits that that offence exposes him to capital punishment in his country. The Macao Supreme Court (*Tribunal Superior*) decided to authorise extradition after receiving an assurance from the Chinese authorities that he would be sentenced neither to life imprisonment nor to capital punishment. The applicant appealed. His appeal is pending before the full Macao Supreme Court.
Portugal has not made a declaration under Article 56 extending the Convention to Macao. A Chinese territory which will be under Portuguese administration until 20 December 1999, on which date it will be returned to China, Macao has the status of a legal person governed by Portuguese law. The Constitution and the laws of the Portuguese Republic apply there, the latter after publication in the local official journal. In addition, the Governor of Macao is answerable to the President of the Portuguese Republic for the administration of the territory. However, while the Portuguese Constitutional Court has residual jurisdiction in a number of areas, Macao has its own judicial system and its courts have had exclusive jurisdiction in the territory since 1 June 1999.

RULE 44(4) OF THE RULES OF COURT

RESTORATION TO THE LIST
Decision not to restore an application to the list.

GARLAND and others - United Kingdom (Nº 28120/95)
Decision 7.9.99 [Section III]

In February 1999 the Court struck this application out of its list on the grounds that the time-limit for the applicants' observations in response to the Government's own observations had expired in October 1997 and that the applicants had not responded to letters inquiring about their observations. By a letter of July 1999, the applicants' solicitors asked that the application be reinstated, relying on the fact that the case was dealt with by a solicitor who was involved, at the relevant time, in a case which led to public inquiry.
The Section, in accordance with Rule 44(4), did not consider that any exceptional circumstances justified the restoration of the application to the list.

APPENDIX I

Cases of Lustig-Prean and Beckett v. the United Kingdom and Smith and Grady v. the United Kingdom - Extract from press release

Facts: Duncan Lustig-Prean and John Beckett, British nationals, were born in 1959 and 1970 and live in London and Sheffield (United Kingdom) respectively. Jeanette Smith and Graeme Grady, British nationals, were born in 1966 and 1963 and live in Edinburgh and London (United Kingdom) respectively. All four applicants, who were at the relevant time members of the United Kingdom armed forces, are homosexual. The Ministry of Defence apply a policy which excludes homosexuals from the armed forces. The applicants, who were each the subject of an investigation by the service police concerning their homosexuality, all admitted their homosexuality and were administratively discharged on the sole ground of their sexual orientation, in accordance with Ministry of Defence policy. They were discharged in January 1995, July 1993, November 1994 and December 1994 respectively. In November 1995 the Court of Appeal rejected their judicial review applications.

Mr Lustig-Prean and Mr Beckett complained that the investigations into their sexual orientation and their subsequent discharges violated their right to respect for their private lives, protected by Article 8 of the Convention, and that they had been discriminated against contrary to Article 14. Ms Smith and Mr Grady made the same complaints under Articles 8 and 14. They further complained that the Ministry of Defence policy against homosexuals and consequent investigations and discharges were degrading contrary to Article 3 (prohibition of inhuman or degrading treatment or punishment), and that the policy limited their right to express their sexual identity in violation of Article 10 (freedom of expression) and that they did not have an effective domestic remedy for their complaints as required by Article 13. Article 14 was also invoked in conjunction with the complaints under Articles 3 and 10.

Law: **Lustig-Prean and Beckett case**

Article 8 - The Court considered the investigations, and in particular the interviews of the applicants, to have been exceptionally intrusive, it noted that the administrative discharges had a profound effect on the applicants' careers and prospects and considered the absolute and general character of the policy, which admitted of no exception, to be striking. It therefore considered that the investigations conducted into the applicants' sexual orientation together with their discharge from the armed forces constituted especially grave interferences with their private lives. As to whether the Government had demonstrated "particularly convincing and weighty reasons" to justify those interferences, the Court noted that the Government's core argument was that the presence of homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces. The Government relied, in this respect, on the Report of the Homosexual Policy Assessment Team (HPAT) published in February 1996. The Court found that, insofar as the views of armed forces' personnel outlined in the HPAT Report could be considered representative, those views were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation. It was noted that the Ministry of Defence policy was not based on a particular moral standpoint and the physical capability, courage, dependability and skills of homosexual personnel were not in question. Insofar as those negative views represented a predisposed bias on the part of heterosexuals, the Court considered that those negative attitudes could not, of themselves, justify the interferences in question any more than similar negative attitudes towards those of a different race, origin or colour.

While the Court noted the lack of concrete evidence to support the Government's submissions as to the anticipated damage to morale and operational effectiveness, the Court was prepared to accept that certain difficulties could be anticipated with a change in policy (as was the case with the presence of women and racial minorities in the past). It found that, on the evidence, any such difficulties were essentially conduct-based and could be addressed by a strict code of conduct and disciplinary rules. The usefulness of such codes and rules was not undermined, in the Court's view, by the Government's suggestion that homosexuality would

give rise to problems of a type and intensity that race and gender did not or by their submission that particular problems would arise with the admission of homosexuals in the context of shared accommodation and associated facilities. Finally, the Court considered that it could not ignore widespread and consistently developing views or the legal changes in the domestic laws of Contracting States in favour of the admission of homosexuals into the armed forces of those States. Accordingly, convincing and weighty reasons had not been offered by the Government to justify the discharge of the applicants.

While the applicants' administrative discharges were a direct consequence of their homosexuality, the investigations conducted into the applicants' sexual orientation deserved separate consideration, because the investigations continued after the applicants had admitted their homosexuality. The Government suggested that the investigations continued in order to verify the admissions of homosexuality so as to avoid false claims by those seeking an administrative discharge from the armed forces. This argument was rejected by the Court because both applicants wished to remain in the armed forces. In addition, the Court was not persuaded by the Government's argument that medical, security and disciplinary reasons necessitated the investigations. The Court rejected the Government's submission that the applicants knew they were not obliged to participate in the interviews, finding, in this latter respect, that the applicants had no real choice but to co-operate, as they wished to keep the investigations as discreet as possible. Accordingly, the investigations conducted after the applicants' confirmed their homosexuality were also considered unjustified.

The Court therefore took the view that neither the investigations nor the discharges of the applicants were justified within the meaning of Article 8 § 2.

Conclusion: Violation (unanimous).

Article 14 in conjunction with Article 8 - The applicants argued that they had been subjected to discriminatory treatment as a result of the Ministry of Defence policy against homosexuals in the armed forces. The Court considered that this complaint did not give rise to any issue separate to that already considered under Article 8.

Conclusion: No separate issue (unanimous).

Article 41 - The Court considered that the issue of just satisfaction was not yet ready for decision and reserved the question for a separate judgment.

Smith and Grady case

Article 8 alone and in conjunction with 14 - Since these complaints were similar to those of Mr Lustig-Prean and Mr Beckett, the Court adopted the same reasoning and reached the same conclusion.

Conclusion: Violation (unanimous).

Article 3 alone and in conjunction with Article 14 - The Court noted that it had already indicated, in the context of the complaints under Article 8, why it considered that the investigation and discharge together with the blanket nature of the policy of the Ministry of Defence were of a particularly grave nature. In addition, the Court did not exclude that treatment grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority as in the present case could, in principle, fall within the scope of Article 3. It also accepted that the Ministry of Defence policy together with the consequent investigations and discharges were undoubtedly distressing and humiliating for each of the applicants. However, the Court did not consider that, in the circumstances of the case, the treatment reached the minimum level of severity which would bring it within the scope of Article 3. It accordingly concluded that there had been no violation of Article 3 either alone or in conjunction with Article 14.

Conclusion: No violation (unanimous).

Article 10 alone and in conjunction with Article 14 - The Court considered that the freedom of expression element of the case was subsidiary to the applicants' right to respect for their private lives which was principally at issue. The Court therefore found that it was not necessary to examine the applicants' complaints under Article 10 either alone or in conjunction with Article 14.

Conclusion: Not necessary to examine (unanimous).

Article 13 in conjunction with Article 8 - The applicants argued that the judicial review proceedings did not constitute an effective domestic remedy within the meaning of Article 13. The Court noted that the sole issue before the domestic courts in the context of the judicial review proceedings was whether the policy was irrational and that the test of irrationality was that expounded by Sir Thomas Bingham MR in the Court of Appeal. According to that test, a court was not entitled to interfere with the exercise of an administrative discretion on substantive grounds save where that court was satisfied that the decision was unreasonable, in the sense that it was beyond the range of responses open to a reasonable decision-maker. In judging whether the decision-maker had exceeded this margin of appreciation, the human rights context was important, so that the more substantial the interference with human rights, the more the court would require by way of justification before it was satisfied that the decision was reasonable. The Court also noted that Sir Thomas Bingham MR emphasised that the threshold beyond which a decision would be considered irrational was a high one and it considered that this was confirmed by the judgments of the High Court and of the Court of Appeal. Both of those courts had commented very favourably on the applicants' submissions challenging the Government's justification of the policy and both courts considered that there was an argument to be made that the policy was in breach of the United Kingdom's Convention obligations. The Court observed that, nevertheless, those domestic courts were bound to conclude, given the test of irrationality applicable, that the Ministry of Defence policy could not be said to be irrational.

The Court therefore found that the threshold at which the domestic courts could find the policy of the Ministry of Defence irrational had been placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' private lives had answered a pressing social need or was proportionate to the national security and public order aims pursued by the Government, principles which lie at the heart of the Court's analysis under Article 8.

The Court concluded, accordingly, that the applicants did not have an effective domestic remedy in relation to the violation of their right to respect for their private lives.

Conclusion: Violation (unanimous).

Article 41 - As in the Lustig-Prean and Beckett case, the Court considered that the issue of just satisfaction was not yet ready for decision and reserved the question for separate judgment.

Judge Loucaides expressed in both cases a partly dissenting and partly concurring opinion which is annexed to the judgments.

APPENDIX II

Case of Civet v. France - Extract from press release

Facts: The applicant, Daniel Civet, a French national, was born in 1947 and is currently in prison in Aiguebelle (France). The applicant, who was the subject of a criminal investigation into allegations that he had committed a number of rapes, was charged and remanded in custody on 7 October 1993 by an investigating judge of Saint-Etienne *tribunal de grande instance*. From May 1994, the applicant submitted a number of applications for release, which were all dismissed by the investigating judge and the Indictment Division of the Lyons Court of Appeal. On 4 October 1994 the Court of Cassation struck out his sole appeal on points of law against a judgment upholding the dismissal of his application for release. On 27 June 1996 the applicant was sentenced to ten years' imprisonment by the Assize Court for the *département* of the Loire.

The applicant complained of the length of his pre-trial detention. He relied on Article 5 § 3 of the European Convention on Human Rights (the right to trial within a reasonable time or to release pending trial).

Law: Government's preliminary objections - The Government's main submission, as it had been before the Commission, was that Mr Civet had not exhausted domestic remedies as he had failed to submit the ground of appeal based on Article 5 § 3 of the Convention for examination by the Court of Cassation. The Government contended that an appeal on points of law to the Court of Cassation was a remedy which should have been used in relation to pre-trial detention. The Court noted that the Court of Cassation was indeed bound by the Indictment Division's unappealable findings of fact. That position was justified by the nature of an appeal on points of law to the Court of Cassation, a remedy whose purpose was different from that of an ordinary appeal. As the possibilities of appealing to the Court of Cassation were limited by Article 591 of the Code of Criminal Procedure to breaches of the law, the Court of Cassation, unlike a court of appeal, did not have jurisdiction to reassess matters of pure fact. However, in the Court's opinion, this did not mean that the "facts" and the "law" could be conceived of as two radically separate fields or that reasoning which effectively denied that the two were interwoven and were complementary was acceptable. Notwithstanding that its jurisdiction was limited to examining grounds "of law", the Court of Cassation nonetheless had the task of checking that the facts found by the tribunals of fact supported the conclusions reached by them on the basis of those findings. Thus, over and above examining whether a judgment referred to it complied with the formal requirements, the Court of Cassation ascertained that, regard being had to the facts of the case, the Indictment Division had given adequate reasons for its decision to prolong pre-trial detention. If it had not, its decision would be quashed. The Court therefore considered that the Court of Cassation was in a position to assess, on the basis of its examination of the proceedings, whether the judicial authorities had complied with the "reasonable time" requirement of Article 5 § 3 of the Convention.
In sum, Mr Civet, in failing to appeal to the Court of Cassation, did not provide the French courts with the opportunity which was in principle intended to be afforded to Contracting States by Article 35, namely the opportunity of preventing or putting right the violations alleged against them. The objection that domestic remedies had not been exhausted was therefore well-founded.
Conclusion: Preliminary objection allowed (12 votes to 5).
Judges Palm, Bratza, Fischbach, Hedigan and Zupančič expressed a dissenting opinion and this is annexed to the judgment.

APPENDIX III

Case of Dalban v. Romania - Extract from press release

Facts: The case concerned an application lodged with the European Commission of Human Rights by a Romanian national, Mr Ionel Dalban, who was born in 1928 and lived in Roman (Romania). Mr Dalban was a journalist and ran a local weekly magazine, *Cronica Romaşcană*. He died on 13 March 1998. In September 1992 Mr Dalban published an article in his magazine about a series of frauds allegedly committed by Mr G.S., the chief executive of a State-owned agricultural company, FASTROM of Roman. The article, and a later one, also cast suspicion on Senator R.T. in that connection. The applicant claimed that the information published was based on Fraud Squad reports. The Romanian courts found Mr Dalban guilty of criminal libel and sentenced him to three months' imprisonment (suspended). He was also ordered to pay G.S. and R.T. 300,000 Romanian lei. Despite his conviction, the applicant continued to publish information concerning the alleged fraud. In April 1998 the Procurator-General applied to the Supreme Court of Justice to have the applicant's conviction quashed on the grounds that the offence of criminal libel had not been made out. In a judgment of 2 March 1999 the Supreme Court allowed the application. With regard to the applicant's conviction for libelling G.S., it acquitted the applicant on the ground that he had acted in good faith. In respect of the libel of R.T., the court quashed the conviction and, while holding that

the applicant had been rightly convicted, decided to discontinue the proceedings in view of his death.

The applicant complained that his freedom of expression under Article 10 of the Convention had been violated. He also submitted that he had not been given a fair trial, contrary to Article 6 of the Convention, in that the courts had not examined the police documents on which his articles had been based.

Held: The Court noted, first, that the applicant had been convicted by the Romanian courts of libel through the press. It considered that Mr Dalban's widow had a legitimate interest in obtaining a ruling that her late husband's conviction had constituted a breach of his right to freedom of expression. The Court consequently held that Mrs Dalban had standing to continue the proceedings in the applicant's stead.

Article 10 of the Convention:

A. Loss of "victim" status: The Court dismissed the Government's argument that the applicant had ceased to be a "victim" as a result of the Supreme Court of Justice's decision, which the Government saw as having been in his favour. The Court reiterated that a decision or measure favourable to an applicant was not in principle sufficient to deprive him of his status as a "victim" unless the national authorities had acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention. The Court concluded that the applicant's widow could therefore claim to be a "victim" for the purposes of Article 34 of the Convention.

B. Merits of the complaint: It was not disputed before the Court that the applicant's conviction had constituted "interference by public authority" or that it had been "prescribed by law" and had pursued a legitimate aim ("the protection of the reputation … of others"). The Court noted that the articles in issue concerned a matter of public interest: the management of State assets and the manner in which politicians fulfil their mandate. In cases such as the present one, the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its essential role of "public watchdog" and to impart information of serious public concern. It would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth. In the instant case there was no proof that the description of events given in the articles was totally untrue and was designed to fuel a defamation campaign against G.S. and Senator R.T. The Government did not challenge the Commission's conclusion that even having regard to the duties and responsibilities incumbent on a journalist who avails himself of the right set out in Article 10 of the Convention, the applicant's conviction could not be considered as "necessary in a democratic society". The Court took notice of that and decided that, in relation to the legitimate aim pursued, convicting Mr Dalban of a criminal offence and sentencing him to imprisonment had amounted to disproportionate interference with the exercise of his freedom of expression as a journalist. There had accordingly been a violation of Article 10.

Conclusion: Violation (unanimous).

Article 6 § 1 of the Convention:

Having regard to the conclusion reached by it in respect of the complaint brought under Article 10 of the Convention, the Court did not consider it necessary to examine the case under Article 6 § 1 also.

Conclusion: Not necessary to examine (unanimous).

Article 41 of the Convention:

A. Damage: Mrs Dalban sought an award of 250,000,000 Romanian lei in respect of non-pecuniary damage, namely loss of reputation resulting from her late husband's conviction, and of pecuniary damage in the form of losses allegedly resulting from the closure of *Cronica Romaşcană*. The Court found no causal link between the complaints and the pecuniary damage allegedly suffered. In respect of non-pecuniary damage, however, it considered that the applicant and his widow had suffered such damage and that this could not be sufficiently redressed by the mere finding that there had been a violation. Having regard to the high rate of inflation in Romania, the Court expressed the sum to be awarded in French francs (FRF),

to be converted into Romanian lei at the rate applicable at the date of settlement. It awarded Mrs Dalban FRF 20,000.

B. Costs and expenses: The applicant had been granted legal aid both by the Commission and the Court and his widow did not seek to be reimbursed for any additional costs or expenses.

APPENDIX IV

Case of Öztürk v. Turkey - Extract from press release

Facts: The applicant, Ünsal Öztürk, a turkish national, was born in 1957 and lives in Ankara (Turkey). In November 1988 he published the second edition of a book by M.N. Behram entitled *Hayatın Tanıklığında – İşkencede Ölümün Güncesi* (A testimony to life – Diary of a death under torture) about the life of İbrahim Kaypakkaya, one of the leaders of the extreme left in Turkey. On 30 March 1989 the Ankara National Security Court found Mr Öztürk guilty, among other offences, of inciting the people to hatred and hostility, an offence under Article 312 of the Criminal Code. The applicant had to pay a fine of 285,000 Turkish liras and the copies of the edition in issue were confiscated. On 22 May 1991 the book's author, M.N. Behram, who had been charged under the same provisions of the Criminal Code as the applicant, was acquitted. Mr Öztürk then applied to the appropriate branch of the State prosecution service asking them to refer his case to the Court of Cassation by means of an appeal on points of law against his conviction. The State prosecution service allowed this application and lodged such an appeal, but this was dismissed by the Court of Cassation on 8 January 1993. The book, subsequently republished by a different publishing house, is at present on open sale.

The applicant complained of an unjustified infringement of his right to freedom of expression set forth in Article 10 of the European Convention on Human Rights; he further complained of an infringement of his right to the peaceful enjoyment of his possessions, guaranteed by Article 1 of Protocol No. 1.

Law: Article 10 of the Convention:

The Government's preliminary objection - The Government maintained that as the application to the Commission had been lodged on 24 May 1993 the Commission should have declared it inadmissible on the ground that it was out of time. The Commission had wrongly calculated the six-month period from 8 January 1993, when the Court of Cassation gave judgment on the second of two references to the Court of Cassation by Principal State Counsel, since such a reference, which was an extraordinary remedy, could not cause a new six-month period to begin to run. The Court noted that the remedy concerned could be exercised only by Principal State Counsel at the Court of Cassation, and only on the formal instructions of the Minister of Justice. It was not directly accessible to people whose cases had been tried and it should therefore, in principle, not be taken into consideration for the purposes of the six-month rule laid down in Article 35 of the Convention. It was a different matter, however, where, as in the present case this remedy had actually been exercised. In such a case it then became similar to an ordinary appeal on points of law, in that it gave the Court of Cassation the opportunity to set aside the impugned judgment, if necessary, and remit the case to the lower court, and therefore to remedy the situation criticised by the person whose case had been tried. In the present case, since the procedure set in motion by the applicant had proved to be effective, the six-month period had indeed begun to run on 8 January 1993, the date of the judgment rendered as a result. As the application had therefore been lodged in good time, the Government's objection had to be dismissed.

Merits of the complaint - Article 10 guarantees freedom of expression to "everyone". No distinction is made in it according to the nature of the aim pursued or the role played by natural or legal persons in the exercise of that freedom. By providing authors with a medium publishers participate in the exercise of the freedom of expression, just as they are vicariously

subject to the "duties and responsibilities" which authors take on when they disseminate their opinions to the public. Mr Öztürk's conviction for helping to publish and distribute Mr Behram's book unquestionably constituted interference with the exercise of his freedom of expression, and such interference breaches Article 10 unless it satisfies the requirements of the second paragraph of that provision.

"Prescribed by law"; legitimate aim - In the present case the Court accepted that the interference with the applicant's right to freedom of expression, being the result of his conviction under Article 312 § 2 of the Criminal Code, could be considered to have been prescribed by law. Having regard to the sensitive nature of the fight against terrorism and the need for the authorities to exercise vigilance when dealing with actions likely to exacerbate violence, the Court considered that it could also accept that the applicant's conviction pursued two aims compatible with Article 10 § 2, namely the prevention of disorder or crime.

"Necessary in a democratic society" - The Court reiterated the fundamental principles underlying its judgments relating to Article 10. It observed that the book in issue took the form of a biography through which the author intended, at least implicitly, to criticise the Turkish authorities' actions in the repression of extreme left-wing movements and thus give moral support to the ideology which İ. Kaypakkaya had espoused. The National Security Court had held that by venerating communism and the "terrorist" İ. Kaypakkaya the book had "expressly incite[d] the people to hatred and hostility". On that point, the Court reiterated that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest. It certainly remained open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks. Finally, where such remarks incited to violence, the national authorities enjoyed a wider margin of appreciation when examining the need for an interference with exercise of freedom of expression. In that connection, it was important to note that the bench of the National Security Court which tried the author of the book, M.N. Behram, had ruled that nothing in the book disclosed any incitement to crime for the purposes of Article 312 of the Criminal Code. In the Court's view, this striking contradiction between two interpretations of one and the same book separated in time by about two years and made by two different benches of the same court was one element to be taken into consideration.

The Court considered that the words used in the relevant edition of the book, whose content, moreover, did not differ in any way from that of the other editions, could not be regarded as incitement to the use of violence or to hostility and hatred between citizens. Admittedly, the Court could not exclude the possibility that such a book might conceal objectives and intentions different from the ones it proclaimed. However, it saw no reason to doubt the sincerity of the aim pursued by Mr Öztürk in the second edition of the book, especially as the first had sold out without occasioning criminal proceedings. The Court was prepared to take into account the background to the cases submitted to it, particularly problems linked to the prevention of terrorism, and accepted that it was for the domestic courts to determine whether the applicant had published the book with a reprehensible object, but the fact that domestic law did not require proof that the offence of which the applicant was accused had had any concrete effect did not in itself weaken the need to justify the interference under Article 10 § 2.

In the present case, the book had been on open sale since 1991 and had not apparently aggravated the "separatist" threat. Moreover, the Government had not explained how the second edition of the book could have caused more concern to the judicial authorities than the first, published in October 1988. The Court therefore discerned nothing which might justify the finding that Mr Öztürk had any responsibility whatsoever for the problems caused by terrorism in Turkey and considered that use of the criminal law against the applicant could not be regarded as justified in the circumstances of the case. Having regard to the fact that the preventive aspect of the interference under consideration – namely the seizure of some copies of the book – in itself raised issues under Article 10, the Court considered, in the circumstances of the case, that it could not attach decisive weight to the moderate amount of the fine imposed on the applicant. The Court accordingly took the view that it had not been

established in the present case that at the time when the edition in issue was published there was a "pressing social need" capable of justifying a finding that the interference in question was "proportionate to the legitimate aim pursued". Nor, on that point, could the Court accept the Government's argument, based on "developments in the case-law" since the applicant's conviction, that where a violation of the Convention initially committed had subsequently been made good the Court should not rule on the matter. The Court's sole task was to assess the particular circumstances of a given case. It reiterated that a decision or measure favourable to an applicant is not sufficient in principle to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention. In the present case, however, the applicant had not even benefited from any such decision or measure. Even supposing that "developments in the case-law" had prompted Mr Behram's acquittal, it could only be noted that these had not proved to be sufficiently pertinent to enable the Court of Cassation to remedy the situation the applicant now complained of before the Court. The Court accordingly concluded that there had been a violation of Article 10 of the Convention.

Conclusion: Violation (unanimous).

Article 1 of Protocol No. 1 - The Court noted that the confiscation of the copies of the edition in issue complained of by the applicant had been an incidental effect of his conviction, which it had held to have been in breach of Article 10. It was consequently unnecessary to consider this complaint separately.

Conclusion: Not necessary to examine (unanimous).

Article 41 of the Convention - The Court, making an equitable ruling on the basis of all the information in its possession, awarded the applicant USD 10,000 for pecuniary damage and FRF 20,000 for his costs and expenses.

Articles of the European Convention of Human Rights and Protocols Nos. 1, 4, 6 and 7

Convention

Article 2	:	Right to life
Article 3	:	Prohibition of torture
Article 4	:	Prohibition of slavery and forced labour
Article 5	:	Right to liberty and security
Article 6	:	Right to a fair trial
Article 7	:	No punishment without law
Article 8	:	Right to respect for private and family life
Article 9	:	Freedom of thought, conscience and religion
Article 10	:	Freedom of expression
Article 11	:	Freedom of assembly and association
Article 12	:	Right to marry
Article 13	:	Right to an effective remedy
Article 14	:	Prohibition of discrimination
Article 34	:	Applications by person, non-governmental organisations or groups of individuals

Protocol No. 1

Article 1	:	Protection of property
Article 2	:	Right to education
Article 3	:	Right to free elections

Protocol No. 2

Article 1	:	Prohibition of imprisonment for debt
Article 2	:	Freedom of movement
Article 3	:	Prohibition of expulsion of nationals
Article 4	:	Prohibition of collective expulsion of aliens

Protocol No. 6

Article 1	:	Abolition of the death penalty

Protocol No. 7

Article 1	:	Procedural safeguards relating to expulsion of aliens
Article 2	:	Right to appeal in criminal matters
Article 3	:	Compensation for wrongful conviction
Article 4	:	Right not to be tried or punished twice
Article 5	:	Equality between spouses