CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

INFORMATION NOTE No. 45
on the case-law of the Court
August-September 2002

The summaries are prepared by the Registry and are not binding on the Court.

Statistical information[1]

Judgments delivered	August	September	2002
Grand Chamber	0	0	8(10)
Section I	0	3	246(248)
Section II	0	3	112(120)
Section III	0	2	132(137)
Section IV	0	3	103(114)
Sections in former compositions	0	0	37(38)
Total	**0**	**11**	**638(667)**

Judgments delivered in September 2002					
	Merits	Friendly settlements	Struck out	Other	Total
Grand Chamber	0	0	0	0	0
former Section I	0	0	0	0	0
former Section II	0	0	0	0	0
former Section III	0	0	0	0	0
former Section IV	0	0	0	0	0
Section I	2	0	0	1[2]	3
Section II	2	1	0	0	3
Section III	2	0	0	0	2
Section IV	2	1	0	0	3
Total	**8**	**2**	**0**	**1**	**11**

Judgments delivered in 2002					
	Merits	Friendly settlements	Struck out	Other	Total
Grand Chamber	7(9)	0	0	1[2]	8(10)
former Section I	10	1	0	1[2]	12
former Section II	0	0	0	3[2]	3
former Section III	11	1	0	0	12
former Section IV	8(9)	1	1	0	10(11)
Section I	202(204)	42	1	1[2]	246(248)
Section II	96(102)	13(15)	3	0	112(120)
Section III	93(95)	37	2(5)	0	132(137)
Section IV	91(102)	11	1	0	103(114)
Total	**518(542)**	**106(108)**	**8(11)**	**6**	**638(667)**

1. The statistical information is provisional. A judgment or decision may concern more than one application: the number of applications is given in brackets.
2. Just satisfaction.

Decisions adopted		August	2002
I. Applications declared admissible			
Grand Chamber		0	3(4)
Section I		3	157(161)
Section II		1	67
Section III		0	55
Section IV		2	71(73)
Total		**5**	**352(359)**
II. Applications declared inadmissible			
Section I	- Chamber	2	266(305)
	- Committee	198	2398
Section II	- Chamber	2	68(93)
	- Committee	58	2358
Section III	- Chamber	0	43(49)
	- Committee	0	1461
Section IV	- Chamber	2	93(99)
	- Committee	0	1966
Total		**262**	**8653(8729)**
III. Applications struck off			
Section I	- Chamber	0	71(94)
	- Committee	4	60
Section II	- Chamber	3	14(15)
	- Committee	1	33
Section III	- Chamber	0	96(101)
	- Committee	0	12
Section IV	- Chamber	0	15(17)
	- Committee	0	18
Total		**8**	**311(342)**
Total number of decisions[1]		**275**	**9324(9438)**

1. Not including partial decisions.

Applications communicated	August	2002
Section I	17	259(264)
Section II	7	183(187)
Section III	0	210(212)
Section IV	4	184(217)
Total number of applications communicated	**29**	**837(881)**

Decisions adopted		September	2002
I. Applications declared admissible			
Grand Chamber		0	3(4)
Section I		15(21)	172(182)
Section II		15(18)	82(85)
Section III		24	79
Section IV		6(7)	77(80)
Total		**60(70)**	**413(430)**
II. Applications declared inadmissible			
Grand Chamber		1	1
Section I	- Chamber	24	290(329)
	- Committee	325	2723
Section II	- Chamber	9(13)[2]	77(106)
	- Committee	779	3137
Section III	- Chamber	7	50(56)
	- Committee	579	2040
Section IV	- Chamber	6	99(105)
	- Committee	350	2316
Total		**2080(2084)**	**10733(10813)**
III. Applications struck off			
Section I	- Chamber	2	73(96)
	- Committee	4	64
Section II	- Chamber	4	18(19)
	- Committee	5	38
Section III	- Chamber	11	96(101)
	- Committee	4	12
Section IV	- Chamber	2	15(17)
	- Committee	0	18
Total		**32**	**334(365)**
Total number of decisions[1]		**2172(2186)**	**11480(11608)**

1. Not including partial decisions.
2. Including one case (five applications) declared inadmissible after having been declared admissible.

Applications communicated	September	2002
Section I	29(31)	288(295)
Section II	30	210(214)
Section III	31(32)	241(244)
Section IV	68	248(281)
Total number of applications communicated	**158(161)**	**987(1034)**

ARTICLE 3

EXPULSION
Threatened deportation of 18-year old female to Tanzania, where she claims she will be subjected to female genital mutilation: *communicated*.

ABRAHAM LUNGULI - Sweden (Nº 33692/02)
[Section IV]

The applicant applied for asylum in Sweden in 2000. In 2001, the application was rejected on the basis that as she was over the age of 15 she would no longer be exposed to the risk of genital mutilation in her homeland, Tanzania. The appeals against this decision were rejected and she went into hiding. She was later discovered and taking to a detention centre pending expulsion.
Communicated under Article 3. (Rule 39 has been applied.)

ARTICLE 5

Article 5(1)

LAWFUL DETENTION
Admission to mental hospital without any legal basis: *admissible*.

H.L. - United Kingdom (Nº 45508/99)
Decision 10.9.2002 [Section IV]

The applicant is autistic, suffers from a severe learning disability and a "cynical mood disorder" and is prone to severe agitation and self-harm. He has spent most of his life in psychiatric care at Bournewood Hospital. From March 1994 to July 1997 he spent a relatively successful period with carers. In July 1997, however, he was transferred by the day-care centre which he attended every week to Bournewood Hospital after another crisis of self-harm and extreme agitation. He was admitted to the Intensive Behavioural Unit of the hospital. It was considered that his best interests required his admission for in-patient treatment. The applicant's responsible medical officer, Dr M. considered that it was not necessary to detain him compulsorily under the Mental Health Act 1983 as he was compliant and did not resist admission. He was thus admitted as an "informal patient". In or around September 1997 the applicant, represented by his cousin and next friend, applied for leave to apply for judicial review notably of the hospital's decision to admit him. The High Court refused the application. In October 1997 the Court of Appeal, in judicial review proceedings, indicated that it would find in his favour and granted leave to appeal to the House of Lords. As a consequence, the applicant was admitted to the hospital on an involuntary basis under the 1983 Act. Shortly thereafter he was discharged to his carers by the managers of the hospital. In June 1998 the House of Lords allowed the appeal.
Inadmissible under Articles 3, 8 and 13: The applicant complained about negligent care, treatment, assessment and decision-making while he was in hospital from July 1997 until his discharge, which caused him to suffer psychological and physical harm. As regards the exhaustion of domestic remedies, it was not demonstrated that section 139 of the 1983 Act excluded a negligence action which included a claim of a lack of "reasonable care" once the

consent of the High Court was obtained. A "reasonable care" requirement was not shown to be incompatible with proceedings about allegations of negligent care and treatment. In addition, this Court found a similar reasonable care requirement and the need to obtain the consent of the High Court to issue such proceedings to constitute a reasonable limitation on access to court by psychiatric patients. At worst, the applicant would have obtained reasons from the High Court as to why its consent would not be given. However, the applicant did not even seek the High Court's consent to issue any such negligence proceedings or take any steps to obtain information as to the chances of success of any such action. As to his submission concerning the effectiveness of the remedy while he was in the hospital, as early as September 1994, he had issued and subsequently pursued complex judicial proceedings with the assistance of legal representatives. In contrast, there was no evidence of any attempt to pursue with those representatives any proceedings concerning his treatment and care concerns, despite the fact that the applicant's carers had expressed some concern in this respect as early as August 1997. It was insufficient to rely on uncertainty as to legal aid being granted when the applicant did not even apply for such legal aid, or even for legal aid limited to obtaining counsel's opinion. The fact that the civil burden of proof would have been on the applicant to prove his allegations would not have rendered the remedy ineffective and, in any event, it was necessary to take into account the Government's submission concerning the application to such a case of the doctrine of *res ipsa loquitur* according to which where a person has suffered injury while under the control of the defendant, it will be considered that the defendant is more likely to know what happened and, in the absence of a satisfactory explanation from the defendant, a "finding of negligence will be considered to speak for itself". While the applicant pointed out that damages would not be awarded for anguish, fear and hopelessness, a substantial part of the applicant's complaints related to negligent care leading to physical and psychological harm. As to his doubts about whether he could have brought a successful action in negligence against the hospital and as to whether the domestic courts would have considered that it was fair, just and reasonable to impose a duty of care upon the relevant professionals, the existence of mere doubts as to the prospects of success of a remedy does not absolve the applicant from exhausting it. While the applicant submitted that he would have had difficulty in recounting his treatment in hospital, he made detailed factual submissions as regards his alleged ill-treatment to the Court. Moreover, his failure to pursue negligence proceedings meant that any evidential gap could not filled by way of discovery by the hospital of relevant medical and psychiatric records. As to the argument that the Commissioner would not have investigated had another remedy been available, only certain allegations to this Court were before the Commissioner and, further, his carers were the complainants before the Commissioner and not the applicant himself. The applicant did not assert that the complaint before the Commissioner was an effective remedy and such proceedings are not judicial and do not form part of the judicial process. In view of the above, the applicant did not demonstrate that he had exhausted all effective domestic remedies available to him.
Admissible under Article 5(1) and (4), as well as Article 14 in conjunction with Article 5.

Article 5(1)(c)

LAWFUL DETENTION
Transfer of prisoner to police station in order to film him on video, without his knowledge or consent, for identification purposes: *inadmissible*.

PERRY - United Kingdom (Nº 63737/00)
Decision 26.9.2002 [Section III]
(see Article 6(1) [criminal], below).

Article 5(4)

TAKE PROCEEDINGS
Absence of right to bring proceedings for review of lawfulness of detention after expiry of tariff period: *violation*.

BENJAMIN and WILSON - United Kingdom (Nº 28212/95)
Judgment 26.9.2002 [Section III]

Facts: The first applicant, after serving the tariff period of a life sentence for rape, was transferred to a secure hospital. In 1996 the Mental Health Review Tribunal declined to recommend his discharge. In 2001 the Secretary of State accepted the Tribunal's recommendation to discharge the applicant.
A discretionary life sentence was imposed on the second applicant in 1977, despite a psychiatric recommendation that he be made subject to a hospital order. After expiry of the tariff period, he was transferred to a secure hospital. In 1996 and in 2000 the Mental Health Tribunal declined to recommend his release.
In 1992 the Secretary of State had refused to certify the applicants as eligible for review by the discretionary lifer panels which had been set up and which had power to order release. The Court of Appeal confirmed that the rights in relation to these panels did not apply to life prisoners who were mental patients.
Law: Article 5(4) – The Mental Health Review Tribunal, although it satisfied the requirement of independence, did not have power to order release, and it was not sufficient that the Secretary of State's practice was to follow the Tribunal's recommendation. The plain wording of Article 5(4) refers to the decision-making power of the reviewing body and in the present case the power to order release lay with the Secretary of State, even though he may have been under some constraints of administrative law as regarded the situations in which he could or could not depart from a policy that had created legitimate expectations. Moreover, the possibility of challenging a refusal to follow that policy would not be a remedy, since Article 5(4) presupposes the existence of a procedure in conformity with its provisions without the necessity of instituting separate legal proceedings in order to bring it about. Similarly, although following entry into force of the Human Rights Act 1998 the Secretary of State would not be able to depart lawfully from the Tribunal's recommendation, the decision to release would still be taken by a member of the executive and not by the Tribunal. This was not a matter of form but impinged on the fundamental principle of separation of powers and detracted from a necessary guarantee against the possibility of abuse. Finally, although the first applicant had been released and the second applicant's release had never been recommended, both were entitled to a review of the lawfulness of their continued detention by a body satisfying the requirements of Article 5(4). As the Tribunal could not order their release, they were not able to obtain such a review.
Conclusion: violation (unanimously).
Article 41 – The applicants made no claim for damages.

ARTICLE 6

Article 6(1) [civil]

APPLICABILITY
Proceedings to challenge investigating judge brought by civil parties to criminal proceedings: *communicated*.

SCHREIBER and BOETSCH - France (N° 58571/00)
[Section I]

The applicants were claiming damages in connection with a court enquiry into an air crash. They challenged the investigating judge, whose impartiality they doubted, in a petition to the first presiding judge of the competent court of appeal. In an order not subject to appeal, the petition was dismissed and the applicants were jointly sentenced to a fine of 1 000 francs. The applicants complain of the unfairness of the proceedings on their challenge.
Communicated under Article 6(1) (applicability).

ACCESS TO COURT
Access to court to contest the imposition of restrictions on fishing : *violation*.

POSTI and RAHKO - Finland (Nº 27824/95)
Judgment 24.9.2002 [Section IV]

Facts : The applicants are fishermen operating on the basis of leases contracted with the State in 1989 and subsequently renewed several times. Since 1986, the Ministry of Agriculture and Forestry has by a series of decrees imposed various restrictions on fishing in order to safeguard fish stocks. In 1991, the Supreme Administrative Court declined jurisdiction in an appeal by the second applicant against one of these decrees. In 1994, in response to the applicants' petition concerning the 1994 decree, the Ombudsman found that the Ministry had not acted incorrectly. In 1996, the applicants received compensation for losses sustained as a result of the 1996 decree. A further decree was issued in 1998. The most recent lease, for the period 2000-2004, provides that salmon fishing is allowed "in so far as prescribed in the ... Decree on Salmon Fishing or other provisions".
Law: Government's preliminary objections – The objection based on failure to exhaust domestic remedies was joined to the merits. As to compliance with the six months time limit, since the applicants' complaints had their source in the issuing of the specific decrees, they did not relate to a "continuing situation": the fact that an event has significant consequences over time does not mean that it has produced a "continuing situation". Consequently, in so far as the application concerned the restrictions imposed by the 1994 decree, it had been lodged out of time. However, as the applicants were effectively complaining about the similar restrictions imposed by the subsequent decrees, the six months requirement had been met in that respect.
Article 6(1) – Up to the end of 1999, the applicants could arguably claim a "civil right" to fish salmon and salt-water trout to an extent exceeding the limits set out in the 1996 and 1998 decrees. Where a decree, decision or other measure, albeit not formally addressed to any individual natural or legal person, in substance affects the "civil rights" of such a person or of a group of persons in a similar situation, whether by reason of certain attributes peculiar to them or by reason of a factual situation which differentiates them from all other persons,

Article 6(1) may require that the substance of the measure in question is capable of being challenged by before a "tribunal". In the present case, a genuine and serious dispute over the existence and scope of the applicants' fishing rights may be said to have arisen, so that Article 6 applied. On the other hand, in the light of the explicit terms of the leases contracted in 2000, the applicants could not thereafter arguably claim a "right" to engage in fishing to an extent exceeding the limits set by law or decree.
Access to court – The Supreme Administrative Court declined jurisdiction in respect of a similar decree and it had not been demonstrated that a challenge to the 1996 and 1998 decrees would have been any more successful. The Court was not convinced that the applicants were required to lodge a claim for damages to obtain compensation for the effects of the decrees on their livelihood. Moreover, as to an action for breach of contract, although the earlier leases contained no reservation entitling the State unilaterally to restrict the applicants' fishing rights, the Court had not been made aware of any precedent where a decree had been found to have resulted in a breach of contract in comparable circumstances. Neither was the Court convinced that prosecution of a civil servant would have been an adequate remedy, in particular as the applicants would have had to show that a representative of the executive had committed an illegal act or at least acted negligently. Finally, in so far as it might be argued that the applicants could have obtained access to a court by violating the decrees and awaiting prosecution, no one can be required to breach the law in order to have a "civil right" determined in accordance with Article 6. In conclusion, no recourse was available whereby the applicants could have obtained a court determination of the effect of the decrees on the contractual terms of their leases. The preliminary objection had therefore to be dismissed and there had been a violation of Article 6.
Conclusion: violation (unanimously).
Article 1 of Protocol No. 1 – The applicants' right to engage in certain fishing in State-owned waters on the basis of their leases constituted a "possession" and the limitation of that right amounted to a control of the use of possessions. However, that control was justified, as it was lawful and pursued, by proportionate means, the legitimate general interest in protecting fish stocks. Moreover, the interference did not completely extinguish the applicants' right to fish salmon and salt-water trout in the relevant waters and they also received compensation for losses sustained as a result of the prohibition imposed by the 1996 decree.
Conclusion: no violation (unanimously).
Article 1 of Protocol No. 1 in conjunction with Article 14 – It was not established that there had been differential treatment to the detriment of the applicants in their exercise of their contractual right to fish salmon and whitefish in designated State-owned waters.
Conclusion: no violation (unanimously).
Article 13 – In view of the finding in respect of Article 6, it was not necessary to examine this complaint.
Conclusion: not necessary to examine (unanimously).
Article 41 – The Court rejected the applicants' claim in respect of pecuniary damage. It awarded each of them 8,000 € in respect of non-pecuniary damage and also made an award in respect of costs and expenses.

ACCESS TO COURT
Allegedly denial of access to court on account of failure of Supreme Administrative Court to refer to relevant legislation in rejecting an application for judicial review: *communicated*.

YANAKIEV - Bulgaria (N° 40476/98)
[Section I]

In 1986 the applicant became the tenant of an apartment "used and managed" and later owned by the State company which employed him. In 1992, following amendments to the Resolving of Housing Problems Act 1991, the applicant sought to purchase the apartment as the Act entitled him to do. The State company, which had become a State-owned joint-stock

company, agreed to sell it to him. In accordance with the relevant procedure, the applicant requested the mayor of the town where the apartment was situated to approve the sale. The mayor having failed to answer, the applicant filed an application for judicial review with the Regional Court against what appeared as a tacit refusal. The court quashed the refusal and returned the file to the mayor with instructions for him to issue an order approving the selling of the flat. It held that the mayor's refusal constituted an administrative act, within the meaning of the Administrative Procedure Act, which as such was subject to judicial review. However, the mayor refused to comply with the instructions and submitted a petition for review. The Supreme Administrative Court found that the mayor's refusal was not an administrative act and held that, in this context, he could not be considered as acting as an administrative authority, given that he was placed on equal footing with the contracting private party. The applicant lodged an appeal against this judgment; another panel of judges of the Supreme Administrative Court rejected it. In its judgments, the court did not refer to the Resolving of Housing Problems Act 1991 and, according to the applicant, consequently failed to rule on the merits.
Communicated under Article 6(1) (civil right, applicability, access to court) and Article 1 of Protocol 1 No.1.

ACCESS TO COURT
Impossibility of suing the State for damage to property allegedly caused by armed forces during war in Croatia: *inadmissible*.

OSTOJIĆ - Croatia (Nº 16837/02)
Decision 26.9.2002 [Section I]

The applicant is a Croatian citizen of Serbian origin, currently resident in Yugoslavia. In August 1995, he abandoned his home in Croatia because of military action by the Croatian army. The applicant claims that his property was subsequently destroyed by members of the Croatian army. He further claims that the authorities impeded him from returning to Croatia by not issuing Croatian identity documents until 1999. He finally re-entered the country in March 2000. In the intervening period, Parliament had amended the Civil Obligations Act twice. The first amendment, in 1996, stayed all proceedings concerning actions for damages resulting from terrorist acts (see *Kutić* v. *Croatia*, no. 48778/99, judgment of 1 March 2002, in which the Court found that this violated Article 6(1)); the second amendment, in 1999, stayed all proceedings concerning actions for damages resulting from actions of members of the Croatian army or police personnel acting in their official capacity during the war in Croatia. The applicant complained that this deprived him of his right of access to a court.
Inadmissible under Article 6(1): The applicant had not instituted any proceedings, although he could have done prior to the entry into force of the 1999 amendment. Even if he was prevented from entering Croatia, he could either have engaged a third party to represent him or corresponded by mail with the Croatian authorities: manifestly ill-founded.
Article 13: The applicant was able to lodge an action for damages until 1999 but had failed to do so: manifestly ill-founded.
Article 8 and Article 1 of Protocol No. 1, taken alone and in conjunction with Article 14: The events complained of took place prior to entry into force of the Convention in respect of Croatia: incompatible *ratione materiae*.

ACCESS TO COURT
Non-enforcement of final judgment: *admissible*.

TIMOFEYEV - Russia (N° 58263/00)
Decision 5.9.2002 [Section III]

In 1981 criminal charges were brought against the applicant for disseminating anti-Soviet propaganda. A search was carried out at his home and various assets were confiscated. The applicant was later found not guilty by reason of insanity and placed in a mental hospital. He was eventually released in 1986. In 1992 the Regional Public Prosecutor's Office issued a statement acknowledging that he had been unlawfully persecuted by the State. Between 1995 and 1997 he made several unsuccessful requests to recover the confiscated assets. In 1996 he brought claims for repossession and damages. In July 1998 the District Court partly granted his claims and ordered that he be paid compensation for the confiscated assets; the judgment was upheld on appeal. In February 1999 the applicant sought the enforcement of the judgment of July 1998 by writ of execution. The enforcement proceedings having failed to make any progress, he started proceedings against the bailiff for professional negligence. In July 1999 the District Court dismissed his complaint, holding that the proceedings had lawfully been stayed by the bailiff on the basis that supervisory proceedings had been instituted by the public prosecutor against the judgment of July 1998. Pursuant to domestic law, enforcement proceedings could be held in abeyance pending supervisory review. The enforcement proceedings were stayed several times for this reason. In April 2001, following a supervisory review request, the Regional Court quashed the judgment of July 1998 and the subsequent appeal judgment upholding it. After a new examination, the District Court made a new award in compensation for his assets and legal costs. His claims for repossession and non-pecuniary damages were dismissed. The applicant's appeal was rejected.
Admissible under Article 6(1) and Article 1 of Protocol No. 1: The applicant complained about the impossibility of obtaining execution of a final judgment against the State, partly because supervisory review proceedings prevented enforcement. He also complained that his dispute had not been settled within a reasonable time. The Government argued that after the judgment of July 1998 had been quashed a new examination of the case had been ordered and that domestic proceedings were still pending. In certain circumstances, the fact that proceedings are pending on the national level may be an obstacle to the examination of Article 6 complaints, especially in criminal cases, where the conformity of a trial with the requirements of Article 6(1) must be assessed on the basis of the trial as a whole. This consideration, however, could not be said to apply to the issues raised by the present case, since it was not clear to what extent the quashing of the judgment which entitled the applicant to certain pecuniary damages would have any bearing on the fact that he had not obtained enforcement of the judgment over the preceding two years. Moreover, after the Government had submitted their observations, the applicant's case had been re-examined and a new final judgment had been issued, but it did not appear that this new judgment had been enforced. Therefore, the Government's objection that the application was premature had to be dismissed.

ACCESS TO COURT
Non-enforcement of final judgment: *admissible*.

KARAHALIOS - Greece (N° 62503/00)
Decision 26.9.2002 [Section I]

The applicant is a public works contractor who brought proceedings to secure payment of the balance outstanding for works performed under public contract. This was granted by a court ruling which fixed the sums payable by the public authorities. The decision has become final

but, despite the steps taken by the applicant, the authorities have not as yet paid the amounts owing.
Admissible under Article 6(1) and Article 1 of Protocol No. 1 (objection of non-exhaustion): enforcement proceedings against the State, a remedy introduced by the constitutional reform of April 2001, is a means of recovering amounts owed by the State. However, this possibility did not yet exist at the date when the application came before the Court, and so the applicant cannot be blamed for not availing himself of it before he petitioned the Court. Although this new procedure now enables the applicant to secure the payment of the amounts owed, it cannot remedy the State's protracted failure to comply with the final court ruling that fixed the said amounts; the objection is therefore dismissed.

ACCESS TO COURT
Refusal of authority responsible for civil status register to give effect to a judgment granting *exequatur* to a foreign judgment: *communicated*.

WALLON - France (N° 61517/00)
Decision 24.9.2002 [Section II]

In 1995 the applicants adopted a boy in Poland. This was declared a full adoption by decision of the Warsaw court, which gave the child the applicants' family name. They then tried to secure an equivalent effect in France for the Polish full adoption judgment, which recorded the natural mother's consent to the adoption and specified that the father was unknown. The applicants firstly instituting proceedings to have the Polish birth certificate validated in France, which proved not to be the effective avenue for obtaining the desired result, ie the child's registration as their adoptive son. They then made a request that the Polish judgment certifying the full adoption of their son be given effect in France, which was granted. In December 1998 the Poitiers regional court accordingly made the Polish judgment enforceable in France and ordered its entry in the civil status register. The State Prosecutor, the supreme authority in the matter, has objected since 1999 to this entry on the grounds that the French judgment does not rule either on the similarity of the effects of the full adoption in Poland to a full adoption in France, or on the informed consent of the natural parents.
Communicated under Articles 6(1) and 8, taken alone and in conjunction with Article 14.

ACCESS TO COURT
Lack of access to court in respect of decisions taken on the proposal of the governor of the region covered by the state of emergency: *communicated*.

ADEMYILMAZ - Turkey (N° 41496/98)
ONUK - Turkey (N° 41499/98)
ALTINDAG - Turkey (N° 41501/98)
ELCI - Turkey (N° 41502/98)
BINGOL - Turkey (N° 41959/98)
KILICOGLU - Turkey (N° 42602/98)
KACMAZ - Turkey (N° 43606/98)
[Section I]

The applicants are alike in being civil servants who discharge their duties in the region where a state of emergency is in force. Six of them are primary school teachers and also members or heads of local branches of the trade union for educational, scientific or cultural staff. One applicant (No. 41959/98) was an engineer with the Roads Department of the Turkish Republic and also headed the local branch of a trade union. Transfer orders were issued in respect of all the applicants at the proposal of the governor of the region declared to be in a state of emergency. The appeals lodged by two of them were dismissed without examination

on the merits, as the decisions taken by the governor of the regions covered by the state of emergency were not open to any appeal before the courts.
Communicated under Articles 6, 10 (No. 43606/98), 11, 13 and 14 (No. 41959/98).

FAIR HEARING
Non-communication of the submissions of the *commissaire du Gouvernment* to the Court of Cassation and cumulation of functions of *commissaire* and of representative of the opposing party: *admissible*.

YVON - France (N° 44962/98)
Decision 19.8.2002 [Section III]

The applicant brought proceedings against the revenue directorate of Charentes-Maritime *département* to have the amount of his compensation for expropriation determined. The judge effecting the expropriation fixed upon a sum which the applicant challenged before the court of appeal. In these proceedings the director of the revenue office, acting as representative of the State, lodged a memorial and the Government Commissioner, who was likewise the director of the revenue office, filed submissions. The applicant asked that the intervention of the revenue office director as Government Commissioner be disallowed. His request was refused by the court of appeal, which found no irregularity in the dual capacity of the director of the revenue office as Government Commissioner and as director of revenue representing the expropriating department. The court of appeal fixed a higher amount than the earlier one. The Court of Cassation dismissed the applicant's appeal on points of law.
Admissible under Article 6(1).

Article 6(1) [criminal]

FAIR TRIAL
Self-incrimination: obligation to disclose information to tax authorities: *inadmissible*.

ALLEN - United Kingdom (Nº 76574/01)
Decision 10.9.2002 [Section IV]

The tax authorities served on the applicant a statutory notice requiring him to provide a certified statement of his assets and liabilities. As he failed to comply, despite a warning that such failure rendered him liable to a penalty of up to £300, he was presented with a "Hansard warning". This involved the reading out to him of a statement made by the Chancellor of the Exchequer outlining the possibility that in fraud cases the tax authorities might accept a money settlement rather than instituting criminal proceedings, the decision taking into account the tax-payer's cooperation. The applicant subsequently provided a schedule of his assets. He was then convicted of several offences, including cheating the public revenue of tax by delivering a false, misleading and deceptive schedule which omitted diverse assets. His appeals were dismissed.
Inadmissible under Article 6(1) – The right not to incriminate oneself does not in itself prohibit the use of compulsory powers to require persons to provide information about their financial affairs. Consequently, the requirement that the applicant make a declaration of assets to the tax authorities did not disclose any issue under Article 6(1), even though a penalty was attached to failure to comply. The applicant did not complain that the information which he supplied was used against him in the sense that it incriminated him in respect of any pre-existing offence. Moreover, he was not prosecuted for failing to provide information which might incriminate him in pending or anticipated criminal proceedings. He was charged with and convicted of making a false declaration of assets – this was not an example of forced self-incrimination about

an offence which he had previously committed but was the offence itself. While he may have lied to prevent the authorities uncovering conduct which might expose him to prosecution, the privilege against self-incrimination does not give a general immunity in respect of actions motivated by the desire to evade investigation by the tax authorities. Furthermore, not every measure aimed at encouraging individuals to provide information which may be of potential use in later criminal proceedings must be regarded as improper compulsion. The maximum penalty which the applicant risked was £300, while the use of the "Hansard warning" did not bring any improper inducement to bear.

FAIR HEARING
Admission as evidence in criminal proceedings of video footage taken without accused's knowledge or consent: *inadmissible*.

PERRY - United Kingdom (Nº 63737/00)
Decision 26.9.2002 [Section III]

The applicant was charged with a series of armed robberies. Several attempts were made by police to organise an identification parade, but the applicant failed to attend each time. Finally, the police decided to film him covertly when he was brought from prison (where he was on remand in relation to another matter) to the police station. He was filmed in a public area of the station. Subsequently, eleven volunteers imitated the actions of the applicant as recorded on video. Witnesses to the robberies were shown the twelve clips. Two witnesses positively identified the applicant. Neither the applicant nor his solicitor was aware of the existence or use of the tape, nor did they see it before it was used. At the trial, counsel for the defence sought to have the video excluded as evidence. The judge admitted the video as evidence on the basis that, while the police had infringed the official guidelines in a number of respects, the manner in which it was used was not unfair. In his summing-up to the jury, the judge clearly explained the special need for caution regarding identification evidence. He told them to ask themselves whether the video evidence was fair and informed them of the applicant's complaints about the honesty and fairness of his treatment and the failure of the police to follow the guidelines. He also outlined to them the other evidence against the applicant. The jury found the applicant guilty and he was sentenced to five years' imprisonment. On appeal, the Court of Appeal held that the judge was entitled to admit the video evidence and had correctly directed the jury.
Inadmissible under Article 5(1): The applicant was already detained on remand on the day he was brought to the police station. His presence at the police station came within Article 5(1)(c), in view of the offences under investigation and the making of the video in breach of official guidelines did not render his detention at the police station unlawful under domestic law or arbitrary for the purpose of Article 5(1): manifestly ill-founded.
Inadmissible under Article 6(1): The applicant had been given sufficient possibilities to test the video evidence at all stages. The use of evidence obtained without a proper legal basis or through unlawful means will not generally contravene Article 6(1) as long as proper procedural safeguards are in place and the source of the material is not tainted: manifestly ill-founded.

FAIR HEARING
Admission as evidence in criminal proceedings of evidence obtained through use of a listening device illegally installed in the suspect's home: *inadmissible*.

CHALKLEY - United Kingdom (Nº 63831/00)
Decision 26.9.2002 [Section III]

The applicant was suspected by the police of having committed a robbery. It was decided to conceal a listening device in his home. The applicant and his spouse were arrested in connection with credit card fraud, which had previously been the subject of a police enquiry but had not been followed up at the time. During their detention, police officers unlawfully entered the applicant's house, using his keys, and installed the device. They made a copy of the key. The applicant was subsequently arrested and charged with conspiracy to commit robbery and burglary. At his trial, he applied to have the evidence obtained through the listening device excluded. The judge denied his application. There was other evidence against the applicant, but when the recorded conversations were admitted, he decided to change his plea to guilty and was sentenced to ten years' imprisonment. The applicant appealed, claiming that his conviction was founded upon the trial judge's erroneous admission of evidence that was so damning to his case that conviction was inevitable. The Court of Appeal dismissed the appeal.
Inadmissible under Article 6(1): The Court was satisfied that proper procedural safeguards were in place and that the proceedings had not been unfair: manifestly ill-founded (cf. *Khan* judgment of 12 May 2000).
Admissible under Article 8: The Government conceded that the installation of the device was not in accordance with law.

TRIBUNAL ESTABLISHED BY LAW
Financial Markets Board allegedly not a "tribunal": *inadmissible*.

DIDIER - France (N° 58188/00)
Decision 27.8.2002 [Section II]
(see below).

IMPARTIAL TRIBUNAL
Participation of judge rapporteur in deliberations on the merits: *inadmissible*.

DIDIER - France (N° 58188/00)
Decision 27.8.2002 [Section II]

The Stock Exchange Transactions Board (*Commission des opérations en bourse* – hereinafter COB) applied to the Financial Transactions Council (*Conseil des marchés financiers* - hereinafter CMF) to have disciplinary proceedings instituted against the applicant. The CMF, ruling as a disciplinary board, decided to deprive him of his professional permit for six months and imposed a pecuniary penalty of 5 000 000 francs. The applicant appealed to the *Conseil d'Etat* in an administrative law action *(recours de pleine juridiction)* requesting annulment and stay of the execution of the impugned decision. The *Conseil d'Etat* dismissed the applicant's appeal. It noted that although the CMF sitting as a disciplinary board was not a court in the eyes of domestic law, an infringement of the principle of impartiality deriving from Article 6 could be invoked before the *Conseil d'Etat* in support of an appeal against a CMF decision. The applicant complained to the Court, in particular, of a violation of the presumption of innocence since the appeal to the *Conseil d'Etat* had no suspensive effect. He also claimed that the non-disclosure of the findings of the Government Commissioner of the

Conseil d'Etat had violated his right to a fair hearing. He further considered that the participation of the CMF's rapporteur in the deliberations after preparing the case had infringed the principle of an impartial tribunal. Finally, he contended that the CMF was not a "tribunal" within the meaning of Article 6(1) and that consequently he had not been able to benefit from two-tier jurisdiction within the meaning of Article 2 of Protocol No. 7.

Inadmissible under Article 6(2): As to the applicant's contention that the principle of presumption of innocence is infringed by the non-suspensive nature of the appeal proceedings before the *Conseil d'Etat*, this complaint required the Court to determine whether it was proper to refuse the applicant's request for a stay of execution. Stay of execution is never granted as of right, and is outside the jurisdiction of the Court *ratione materiae*: incompatible *ratione materiae*.

Inadmissible under Article 6(1): a) Regarding the non-disclosure of the Government Commissioner's findings, proceedings before the *Conseil d'Etat* afford a claimant sufficient guarantees, and no problem over the right to a fair hearing arose as far as the inter partes proceedings were concerned (*Kress v. France*, judgment of 7 June 2001): manifestly ill-founded).

b) Regarding the participation of the rapporteur responsible for the preparation of the case in the deliberations which preceded the judgment, it should firstly be established whether, having regard to the nature and extent of the rapporteur's functions and given his through knowledge of the case, the rapporteur had displayed an inclination during the preparatory enquiry and subsequent deliberations to prejudge the eventual decision of the CMF. Where a judge does not draw up an indictment, his thorough knowledge of the case does not give cause to question his impartiality in deciding on the merits. Now, under the system at issue, the rapporteur, being appointed after the referral of the case to the CMF by the President of the COB, cannot actuate the referral. Nor is he involved in formulating the complaints, and has no power to dismiss the case or, conversely, to broaden the scope of the referral. His task is to "record in writing the outcome of these operations". Accordingly, while the rapporteur dealt with the same questions as those on which he later ruled as a member of the CMF, he did so without drawing up an indictment and his intervention was limited to verifying the truth of the facts and then recording in writing the outcome of these operations. Thus, even if the rapporteur took part in the deliberations, his having gained an exact knowledge of the case by conducting the preparatory enquiry does not infringe the principle of impartiality. In so far as it is to be determined whether the rapporteur's preliminary appraisal could be deemed to anticipate the final determination, the latter is made on the basis of a case file kept at the disposal of the person charged. The file is presented by the rapporteur at a sitting which precedes the hearing. The person charged and, if applicable, the counsel for the defence, must be allowed to address the disciplinary board last. The final determination, arising from the deliberations, is made with the decision and is founded on points discussed during the hearing. In conclusion, there was no objective reason for thinking that the nature and extent of the rapporteur's functions in the preparatory phase impaired his objective impartiality in the deliberations: manifestly ill-founded.

Inadmissible under Article 6(1) and Article 2 of Protocol No. 7: Article 8 of decree no. 96-872 of 3 October 1996 on CMF disciplinary boards provides for an administrative law action before the *Conseil d'Etat* under its general jurisdiction *(recours de pleine juridiction)*. Consequently, neither Article 2 of Protocol No. 7 nor Article 6(1) has been violated. Indeed, however it may be designated in domestic law, the CMF can be considered a "tribunal" according to an independent interpretation of Article 6. Now, the construction which this provision places on "tribunal" is also that of Article 2 of Protocol No. 7. The review of the CMF's decisions performed by the *Conseil d'Etat* is comprehensive, so that in performing this review the *Conseil d'Etat* is also a judicial body with full jurisdiction, ie a "tribunal". The applicant was therefore secured the right to two-tier jurisdiction in a criminal case: manifestly ill-founded.

Article 6(3)(b)

ADEQUATE TIME
Lawyer having access to file and to psychiatric report only two days before start of trial: *communicated*.

MATTICK - Germany (N° 62116/00)
[Section III]

The applicant, suspected of attempted murder, was remanded in custody. During the investigation, an initial report by a psychiatric expert established that the conditions for limited criminal responsibility were met. In the course of the trial proceedings, the prosecution called for an additional psychiatric examination. The applicant's lawyer received a copy of the psychiatric report two working days before the trial proceedings opened. On the same day, the lawyer had also received eight of the nine case files concerning the applicant's twenty previous convictions. At the commencement of the trial hearing, the lawyer asked for an adjournment because he had not had sufficient time to prepare the case for the defence. The court did not grant his request. The applicant was convicted of attempted murder with aggravated assault and sentenced to five years and six months of imprisonment, part of which was to be unconditional. The appeals were dismissed by the higher courts.
Communicated under Article 6(3)(c).

Article 6(3)(e)

FREE ASSISTANCE OF INTERPRETER
Failure to provide interpreter for hearing on sentencing : *violation*.

CUSCANI - United Kingdom (Nº 32771/96)
Judgment 24.9.2002 [Section IV]

Facts: The applicant, an Italian national, was prosecuted for fraudulently evading VAT. He initially pleaded not guilty. No request was made for an interpreter at the preliminary hearings. At the trial, the applicant changed his plea to guilty. Defence counsel then informed the court for the first time that the applicant had considerable difficulties in communicating in English and requested that an interpreter be present at the subsequent hearing. The request was granted but at the subsequent hearing on sentencing the court noted that no professional interpreter was present and defence counsel stated that he would "have to make do and mend". He pointed out that the applicant's brother was present and the court agreed to make use of him, if need be, although in the end the applicant's brother was not asked to translate any statement. The applicant was sentenced to four years' imprisonment. He sought leave to appeal, on the ground that he had been sentenced on the basis that he had pleaded guilty to frauds totalling £800,000, whereas he accepted only an amount of £140,000. Leave was refused. The applicant later applied to the Criminal Case Review Commission, which concluded that there were grounds for finding that he had not fully understood the nature of the case to which he was pleading, partly because of his inadequate understanding of English and partly because of the inadequate explanation given by his lawyers. However, while it regarded the conviction as arguably unsatisfactory, it did not find that it could be said to be unsafe and consequently declined to refer the case to the Court of Appeal.

Law: Article 6(1) and (3)(e) – The issue of the applicant's lack of proficiency in English became a live issue when the trial court was informed that he wished to change his plea. The judge was thus put on notice that the applicant had clear problems of comprehension, yet despite having ordered that an interpreter be present, he allowed himself at the sentencing hearing to be persuaded by defence counsel's confidence in his ability to "make do and mend". The onus was on the judge to ensure that the absence of an interpreter would not prejudice the applicant's full involvement in a matter of crucial importance to him and that requirement could not be said to have been satisfied by leaving it to the applicant to invoke the untested language skills of his brother. While the conduct of the defence is essentially a matter between the accused and his lawyer, the trial judge was the ultimate guardian of the fairness of the proceedings and had been clearly apprised of the real difficulties.
Conclusion: violation (unanimously).
Article 41 – The Court rejected the applicant's claim for pecuniary damage. It made an award in respect of costs and expenses.

ARTICLE 7

NULLUM CRIMEN SINE LEGE
Criminal responsibility and conviction based on allegedly over-broad interpretation of the law: *communicated*.

RADIO FRANCE and others - France (N° 53984/00)
[Section II]
(see Article 10, below).

ARTICLE 8

PRIVATE LIFE
Access to records : *violation*.

M.G. - United Kingdom (Nº 39393/98)
Judgment 24.9.2002 [Section II]

Facts : During his childhood, the applicant spent several periods in the care of the social services department of the local authority. He had contact with his parents during that time. In 1995 he requested access to the authority's files and, in particular, requested specific information as to whether he had been on the "risk register" and whether his father had ever been investigated or convicted for crimes against children. Summary information and certain documents were disclosed to him but he requested full access to his records, since he suspected that he had been abused as a child and was considering the possibility of suing the authority. The authority replied that the records had been created prior to entry into force of the Access to Personal Files Act 1987.
Law: Article 8 – The records, containing the principal source of information about significant periods of the applicant's formative years, related to his private and family life. It was not suggested that the manner or breadth of disclosure was not in accordance with domestic law. The applicant had a strong interest in obtaining the documents (cf. *Gaskin* judgment, Series A no. 160) but had no statutory right of access to the records or any clear indication by way of a binding circular or legislation of the grounds on which he could request access or contest the refusal of access. Most importantly, he had no appeal against a refusal of access to any independent body. In that respect, there had been a failure to fulfil the positive obligation to

protect the applicant's private and family life in respect of access when he first requested it. Since entry into force of the Data Protection Act 1998, he has had access to an independent authority but, since he has not used the appeal process, it has not been demonstrated that there has been a failure of the State to fulfil a positive obligation since then.
Conclusion: violation (unanimously).
Article 41 – The Court made an award in respect of non-pecuniary damage.

PRIVATE LIFE
Modification on a Latvian passport of the spelling of the name of a "non-national permanent resident": *communicated*.

KUHAREC - Latvia (N° 71557/01)
[Section I]

The applicant is a "non-national permanent resident" of Latvia, of Russian extraction. The Latvian authorities issued her with a "non-national permanent resident" passport on the main page of which, in the box "name", her surname was spelt "Kuhareca", the final "a" being a modifiable case-ending that stands for the feminine nominative singular. The applicant, considering her name to be disfigured by this spelling, refused to take delivery of the passport. She claimed that as the surname at issue had no case-ending in the original language, there was no reason whatsoever to add one in an identity document written in Latvian. In her view, this grammatical adaptation of her name amounted to a distortion or even change of surname. The applicant asked to be issued with a new passport showing her name in the Latin alphabet as "KUHAREC" and not "KUHARECA", but this was refused. The regulations on "non-national permanent resident" passports in fact provide that the entry of the passport-holder's name must be made in accordance with the grammatical and orthographical rules of the Latvian language. The applicant is nonetheless permitted to have the original spelling of her surname marked on page 12 of her passport.
Communicated under Article 8.

PRIVATE LIFE
Modification on a Latvian passport of the spelling of a foreign name: *communicated*.

MENTZEN - Latvia (N° 71074/01)
[Section I]

The applicant, a Latvian national, married a German national named Mentzen whose surname was chosen as the couple's married name. When the applicant was issued with a new passport recording her marriage, the Latvian authorities marked her married name on the main page as "Mencena". Indeed, according to the rules on the spelling of foreign names in Latvian, all names are reproduced "in accordance with the grammatical and orthographical rules of the Latvian literary language" and "as closely as possible to their pronunciation in the original language". On page 14 of the passport, in the section headed "Special observations", a special stamp certified that the original form of the surname in question was "Mentzen". The orthographical and grammatical adaptation of the name was upheld by the courts at every level of domestic jurisdiction. The Constitutional Court acknowledged that page 14 of the passport was too inconspicuously placed in relation to the main page of the passport showing the modified spelling of the name, and that the two were so far apart as to hamper identification of the person. Consequently, since 1 July 2002 it has been permitted to enter the original version of the name on page 4 of the passport, after the main page.
Communicated under Article 8.

PRIVATE LIFE
Video recording of suspect at police station made without his knowledge or consent: *admissible*.

PERRY - United Kingdom (Nº 63737/00)
Decision 26.9.2002 [Section III]
(see Article 6(1) [criminal], above).

PRIVATE LIFE
Unlawful installation of listening device in suspect's home by police: *admissible.*

CHALKLEY - United Kingdom (Nº 63831/00)
Decision 26.9.2002 [Section III]
(see Article 6(1) [criminal], above).

PRIVATE LIFE
Search of lawyer's premises and removal of materials in the context of a tax fraud investigation: *inadmissible*.

TAMOSIUS - United Kingdom (Nº 62002/00)
Decision 19.9.2002 [Section I]

The applicant is a lawyer. The tax authorities, suspected that certain of his clients were involved in tax fraud, obtained an *ex parte* search warrant to search his premises. The procedure involved the instruction by the tax authorities of counsel nominated by the Attorney-General, whose task was to advise officers whether any of the material they intended to remove was subject to legal professional privilege. Any such material was handed back to the applicant's solicitors. A number of documents, files and books were removed. The applicant challenged the lawfulness of the warrant, arguing that it was not specific enough as to the materials to be seized. The Divisional Court upheld the warrant. Regarding the role of independent counsel, it did not consider that his presence tainted the lawfulness of the seizure and removal. It underlined that only the courts could determine whether material was subject to legal professional privilege. They could restrain a revenue official from removing material protected by privilege and, if officials acted unlawfully, the tax authorities could be liable in damages.
Inadmissible under Article 8: There had been an interference with the applicant's rights under this provision. The interference was in accordance with the law and pursued the legitimate aims of prevention of crime and disorder, as well as the economic well-being of the country. As to the necessity of the interference in a democratic society, although the warrant was issued in *ex parte* proceedings, there may be good reason not to give forewarning of a search and the scrutiny by a judge is nonetheless an important safeguard. As to the alleged lack of detail as to the article or persons subject to the search, the Court was not persuaded that in the circumstances the applicant was denied sufficient indication of the purpose of the search to enable him to assess whether the investigation team had acted unlawfully or exceede their powers. As for the supervision by counsel, counsel was under instructions to act independently from the investigating team and to give independent advice and the applicant had not claimed that counsel had erred in the exercise of his judgment. Finally, a prohibition on the removal of documents covered by legal professional privilege provided a concrete safeguard against interference with professional secrecy and the administration of justice, bearing in mind that removal of such documents was open to legal challenge and potentially the recovery of damages. The search was therefore not disproportionate to the legitimate aims pursued: manifestly ill-founded.

Inadmissible under Article 13: The applicant's complaint under Article 8 having been rejected as manifestly ill-founded, he had no arguable claim for the purposes of Article 13: manifestly ill-founded.

FAMILY LIFE
Reversal of court order to return infant to father in USA because the passage of time gave rise to a risk of psychological harm if separated from mother: *admissible*.

SYLVESTER - Austria (Nº 36812/97 and Nº 40104/98)
Decision 26.9.2002 [Section I]

The first applicant is a citizen of the USA. The second applicant is his daughter, born in 1994. Her mother is an Austrian national. On 30 October 1995, the mother quit the family home in Michigan with her daughter and returned to Austria without the first applicant's consent. The following day, the first applicant requested the Austrian courts, on the basis of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, to order the return of his daughter. This was the first in a series of many rulings by both Austrian and American courts.
The first judgment issued by the Graz District Civil Court on 20 December 1995 ordered the return of the second applicant to the family's former home. It found that the mother had wrongfully removed the child within the meaning of Article 3 of the Hague Convention. The mother's argument that returning her daughter would expose the latter to physical or psychological harm (Article 13(b) of the Hague Convention) was not accepted. The mother's appeals to the Regional Civil Court and Supreme Court were rejected. On 27 February 1996, the first applicant sought enforcement of the return order. On 16 April 1996, the first applicant was granted a divorce and sole custody of the second applicant by a Michigan court. The Graz District Civil Court ordered the enforcement of the return order on 8 May 1996. This was attempted unsuccessfully on 10 May 1996. Five days later, the mother lodged an appeal against the enforcement order, which had the effect of staying it. The order was quashed by the Regional Civil Court on 29 August 1996 and the matter remitted to the District Civil Court. The applicant's appeal against this decision was dismissed on 15 October 1996 by the Supreme Court, which held that the child's welfare took priority over all other matters and was not affected by the fact that it was the mother's actions that had led to the situation where the return of the child could give rise to psychological harm.
The Graz District Civil Court issued a second ruling on 29 April 1997, dismissing the father's application. An expert on child psychology advised the court that the lapse of time since the second applicant had last seen the first applicant (1 year and 6 months) was so long that he was now a total stranger to her and she would, if removed from her mother, be exposed to serious psychological harm. There was a warrant for the mother's arrest in the USA. Even though a safe harbour order was subsequently issued, there was no certainty that if she returned there with the child she would not lose custody later on. The applicant's appeals against this ruling to the Regional Civil Court and Supreme Court were rejected. Finally, the Graz District Civil Court awarded sole custody of the second applicant to her mother. That judgment became final in late 1998.
Admissible under Article 8.

ARTICLE 10

FREEDOM OF EXPRESSION
Conviction of a radio channel director, a journalist and a national broadcasting company for defamation of a civil servant: *communicated*.

RADIO FRANCE and others - France (N° 53984/00)
[Section II]

The first applicant is the national broadcasting company Radio France; the second applicant is the publishing director of the company; the third applicant is a journalist with a radio news station controlled by the same company. In January 1997 a weekly magazine published an article concerning Mr Junot, headed "Revelations from 1942 and 1943. Michel Junot, deputy to Chirac as Mayor of Paris from 1977 to 1995, was sub-prefect at Pithiviers in 1942 and 1943 and as such was responsible for keeping order in the two internment camps in his district, Pithiviers and Beaune-la-Rolande". On 31 January 1997, as part of the 5 pm radio news bulletin, the third applicant, naming the weekly as his source, reiterated certain points of the article in question, in particular that Mr Junot had allegedly organised the dispatch of a convoy of deportees to the Drancy camp. There were 62 repetitions of the news item on 31 January and 1 February. It was stated several times in the bulletins on 1 February that Mr Junot refuted the accusations made by the weekly. According to the applicants, this detail was regularly mentioned from 11 am onwards. Mr Junot brought proceedings against the applicants before the Paris Criminal Court for issuing a libellous statement about a civil servant, under the 1881 Freedom of the Press Act and section 9-3 of the Audiovisual Communication Act of 29 July 1982 which provides that when an offence of this kind is committed by one of the audiovisual communication media and there has been "prior concretion of the impugned message before its release to the public", the managing editor of the publication is prosecuted as principal and the author of the message as an accomplice. The Criminal Court found the second and third applicants guilty, as principal and accomplice, of the offence of libel against a civil servant. They were jointly ordered to pay a fine and damages. The applicant company was declared liable in tort and, by way of redress, was directed to broadcast a message informing listeners of the terms of the judgment. Regarding the second applicant's liability as managing editor of the publication, the court held that he could be absolved of all responsibility in connection with the first bulletin which was broadcast live. It found, however, that the message had subsequently been repeated by loop transmission, which came within the scope of section 92-3 of the aforementioned Act: "the sense of the text is to clear the publishing director of an audiovisual medium of blame in the event of a live transmission which he/she cannot effectively supervise and verify as to its content. This does not apply to a repetitive news bulletin whose content can be monitored and verified if only suitable arrangements are made". The court also held that the concept of "prior concretion" embodied in the aforementioned Act did not necessarily mean a recording; in the court's view, concretion would be the outcome of repeating a news item whose content has undergone concretion, which need not involve a recording process. The applicants' appeal on points of law, in which they challenged what they considered an extensive interpretation of section 93-3 of the Audiovisual Communication Act, was dismissed.
Communicated under Article 6(1) and (2), 7 and 10.

ARTICLE 11

FREEDOM OF ASSOCIATION
Transfer of civil servants, members or leaders of trade unions: *communicated*.

ADEMYILMAZ - Turkey (N° 41496/98)
ONUK - Turkey (N° 41499/98)
ALTINDAG - Turkey (N° 41501/98)
ELCI - Turkey (N° 41502/98)
BINGOL - Turkey (N° 41959/98)
KILICOGLU - Turkey (N° 42602/98)
KACMAZ - Turkey (N° 43606/98)
[Section I]
(see Article 6(1) [civil], above).

ARTICLE 14

DISCRIMINATION (SEX)
Refusal to pay military allowance for "head of family" to a woman where both she and her husband are members of the Air Force: *inadmissible*.

DUCHEZ - France (N° 44792/98)
BLENEAU - France (N° 47910/99)
Decision 26.9.2002 [Section I]

The applicants are regular servicewomen in the French Air Force, each married to a fellow-member of the service. They applied for payment of the military allowance at the same increased rate for "head of family" as was payable to their husbands, following a *Conseil d'Etat* decision (Costa case) that had established the possibility of concurrent payment to a husband and wife, both service personnel, of two military allowances at the "head of family" rate. The refusal of their request by the military authorities was founded on the stated impossibility of double payment to a married couple of a military allowance at the increased "head of family" rate. This decision was set aside by the administrative court prior to the entry into force of a validating law. The *Conseil d'Etat* eventually ruled that all married service personnel, irrespective of gender, could draw the military allowance at the "head of family" rate but that where both spouses were members of the armed forces the family supplements could not be drawn concurrently and were payable to the head of the family, namely the husband in the case in point.
Inadmissible under Article 1 of Protocol No. 1 in conjunction with Article 14: these two provisions are applicable as entitlement to the military allowance, to the extent that it is prescribed by the applicable legislation, is a pecuniary right. The applicants were refused the military allowance at the "head of family" rate because their husbands were already in receipt of it, in order to obviate payment to two married armed forces members of two allowances at increased rates in each case, since the family supplements were not payable concurrently. The allowance at the "head of family" rate is not awarded according to the beneficiary's gender but is paid in practice to the partner with the higher pay index, in order that the couple or family may draw the allowance at the highest possible rate. Thus men and women are not treated differently, nor are married and unmarried couples as the second applicant claimed (No. 47910/00). In fact certain couples serving in the forces were able to take advantage of a

loophole in the legal system so as to draw two concurrent allowances during the period which elapsed between the Costa case and the validating law. The applicant, although she had lodged her request during that period, was unable to qualify for the "head of family" military allowance. Thus she was treated differently from the service personnel who succeeded in their claims before the *Conseil d'Etat* following the Costa case. However, this difference in treatment is not contrary to the Convention. Indeed, the validating law was enacted for a justifiable purpose and the object of the alleged discrimination, said to arise from the adoption of that law, was a reasonable one. Thus the practice of awarding the allowance at the "head of family" rate to the partner with the higher pay index appears legitimate, reasonable and proportionate to the aim sought, even though in practice it is usually the male partner who receives this allowance: manifestly lacking in foundation.

ARTICLE 34

LOCUS STANDI
Locus standi of national broadcasting company: *communicated*.

RADIO FRANCE and others - France (N° 53984/00)
[Section II]
(see Article 10, above).

ARTICLE 35

Article 35(1)

EFFECTIVE DOMESTIC REMEDY (Croatia)
Creation of new domestic remedy after introduction of application: *inadmissible*.

NOGOLICA - Croatia (N° 77784/01)
Decision 5.9.2002 [Section I]

In October 1995 the applicant started two sets of proceedings before a Municipal Court against two newspapers which he accused of defamation. Both sets are still pending before domestic courts.
Inadmissible under Articles 6(1) and 13: In March 2002, the Croatian Parliament enacted the Act on Changes of the Constitutional Court Act. A new section 59(a) was introduced which later became section 63 of the 2002 Constitutional Act on the Constitutional Court. According to this provision, the Constitutional Court shall examine a constitutional complaint even before all legal remedies have been exhausted in cases where a competent court has not decided within a reasonable time. The provision has thus removed the obstacles that were decisive when the Court found in the Horvat case (*Horvat v. Croatia*, N° 51585/99, judgment of 26 July 2001) that former section 59(4) did not constitute an effective remedy in respect of length of proceedings. Although the Constitutional Court has not yet adopted any decision following the introduction of this new remedy, the wording of the provision is clear and indicates that it is specifically designed to address the issue of the excessive length of proceedings before domestic authorities. According to the new law, any individual considering that proceedings on the determination of civil rights and obligations or a criminal charge against him have not taken place within a reasonable time may lodge a constitutional complaint. The Constitutional Court must examine such a complaint and, if it finds it well

founded, must set a time-limit for a decision on the merits and will award compensation. The applicant did not lodge such a complaint. However, he introduced his application with the Court in September 2001, when the legislation had not been enacted and the question therefore arose whether he could be required to exhaust the remedy before the Court could examine his complaint. The issue whether domestic remedies have been exhausted is normally determined by reference to the date when the application was lodged but this rule is subject to exceptions which might be justified by the specific circumstances of each case. From a general point of view, when States do not provide an effective remedy in respect of length of proceedings, individuals will systematically have to refer their complaints to the Court and in the long term such a situation is likely to affect the operation at both the national and international level of the Convention system. Excessive length of proceedings is widespread in the Croatian legal system and, in rather limited period, the Court has received hundreds of applications against Croatia claiming violations of the reasonable time requirement. As regards the applicant, as his proceedings are still pending, the new remedy is open to him and could provide redress since it not only provides for compensation to be awarded but also obliges the Constitutional Court to set a time-limit for deciding the case on the merits. Thus, the applicant should avail himself of this remedy.

EFFECTIVE DOMESTIC REMEDY (France)
Length of proceedings: effectiveness of appeal based on article L. 781 of the Code of Judicial Organisation.

MIFSUD - France (N° 57220/00)
Decision 11.9.2002 [Grand Chamber]

The applicant complained of the length of proceedings he had instituted for the repayment of penalties ordered against him. These had been pending since 1994.
Inadmissible under Articles 6(1) and 13: the remedy available in French law under Article L.781-1 of the Judicature Code had acquired by 20 September 1999 the requisite degree of legal certainty to oblige an applicant to use it for the purposes of Article 35(1). It allowed litigants to obtain a finding of a breach of their right to have their case heard within a reasonable time and compensation for the ensuing loss in respect of all domestic proceedings without distinction, whether they be completed or pending. This purely compensatory remedy amounted to an "effective" remedy for the purposes of Article 35(1) of the Convention. Accordingly, any complaint based on the length of judicial proceedings lodged before the Court after 20 September 1999, without having first been submitted to the French courts under Article L.781-1 of the Judicature Code, was inadmissible, regardless of the stage reached in the proceedings at domestic level: non-exhaustion.

ARTICLE 43

The Panel has accepted a request for referral to the Grand Chamber of the following judgment:

T.A. - Turkey (Nº 26307/95)
Judgment 9.4.2002 [Section II]

ARTICLE 44

Article 44(2)(b)

The following judgments have become final in accordance with Article 44(2)(b) of the Convention (expiry of the three month time limit for requesting referral to the Grand Chamber) (see Information Notes Nos. 42 and 43):

McVICAR - United Kingdom (Nº 46311/99)
SPENTZOURIS - Greece (Nº 47891/99)
Judgments 7.5.2002 [Section I]

RIBES - France (Nº 41946/98 and Nº 50586/99)
Judgment 7.5.2002 [Section II]

DEDE and others - Turkey (Nº 32981/96)
Judgment 7.5.2002 [Section III]

At.M. - Italy (Nº 56084/00)
Judgment 7.5.2002 [Section IV]

MEULENDIJKS - Netherlands (Nº 34549/97)
GENTILHOMME, SCHAF-BENHADJI and ZEROUKI - France
(Nº 48205/99, Nº 48207/99 and Nº 48209/99)
GEORGIADIS - Cyprus (Nº 50516/99)
Judgments 14.5.2002 [Section II]

KARATAS and SARI - France (Nº 38396/97)
NUVOLI - Italy (N° 41424/98)
GOTH - France (Nº 53613/99)
Judgments 16.5.2002 [Section I]

D.G. - Ireland (Nº 39474/98)
CÂMARA PESTANA - Portugal (Nº 47460/99)
Judgments 16.5.2002 [Section III]

PELTIER - France (Nº 32872/96)
SURPACEANU - Romania (Nº 32260/96)
Judgments 21.5.2002 [Section II]

JOKELA - Finland (Nº 28856/95)
Judgment 21.5.2002 [Section IV]

TEMUR ÖNEL - Turkey (Nº 30446/96)
HACI ÖZEL - Turkey (Nº 30447/96)
AHMET ÖNEL - Turkey (Nº 30448/96)
MEHMET ÖNEL - Turkey (Nº 30948/96)
HACI OSMAN ÖZEL - Turkey (Nº 31964/96)
SZARAPO - Poland (Nº 40835/98)
Judgments 23.5.2002 [Section III]

GRONUŚ - Poland (Nº 29695/96)
McSHANE - United Kingdom (Nº 43290/98)
Judgments 28.5.2002 [Section IV]

W.F. - Austria (Nº 38275/97)
Judgment 30.5.2002 [Section III]

YAĞMURDERELI - Turkey (Nº 29590/96)
WESSELS-BERGERVOET - Netherlands (Nº 34462/97)
FAULKNER - United Kingdom (Nº 37471/97)
Judgments 4.6.2002 [Section II]

LANDVREUGD - Netherlands (Nº 37331/97)
Judgment 4.6.2002 [Section I (former composition)]

SAILER - Austria (Nº 38237/97)
KATSAROS - Greece (Nº 51473/99)
Judgments 6.6.2002 [Section I]

MARQUES FRANCISCO - Portugal (Nº 47833/99)
Judgment 6.6.2002 [Section III]

WILLIS - United Kingdom (Nº 36042/97)
Judgment 11.6.2002 [Section IV]

ANGUELOVA - Bulgaria (Nº 38361/97)
MEREU and S. NAVARRESE s.r.l. - Italy (Nº 38594/97)
Judgments 13.6.2002 [Section I]

TURKITE IS BANKASI - Finland (Nº 30013/96)
UTHKE - Poland (Nº 48684/99)
Judgments 18.6.2002 [Section IV]

KOSKINAS - Greece (N° 47760/99)
Judgment 20.6.2002 [Section I]

BURHAN BILGIN - Turkey (Nº 20132/92)
LEYLI BILGIN - Turkey (Nº 20133/92)
MUNIR BILGIN - Turkey (Nº 20134/92)
CANLI - Turkey (Nº 20136/92)
GÜNAL - Turkey (Nº 20142/92)
ISMET ŞEN - Turkey (Nº 20153/92)
MAHMUT ŞEN - Turkey (Nº 20154/92)
KEMAL ŞEN - Turkey (Nº 20156/92)
MEHMET TAŞDEMIR - Turkey (Nº 20158/92)
IĞDELI - Turkey (Nº 29296/95)
FILIZ and KALKAN - Turkey (Nº 34481/97)
Judgments 20.6.2002 [Section III]

BERLIŃSKI - Poland (Nº 27715/95 and Nº 30209/96)
AL-NASHIF and others - Bulgaria (Nº 50963/99)
Judgments 20.6.2002 [Section IV (former composition)]

COLOMBANI and others - France (N° 51279/99)
Judgment 25.6.2002 [Section II]

MIGOŃ - Poland (Nº 24244/94)
Judgment 25.6.2002 [Section IV]

L.R. - France (Nº 33395/96)
D.M. - France (Nº 41376/98)
DENONCIN - France (Nº 43689/99)
DELIĆ - Croatia (Nº 48771/99)
ERYK KAWKA - Poland (Nº 33885/96)
Judgments 27.6.2002 [Section I]

Article 44(2)(c)

On 4 September 2002 the Panel of the Grand Chamber rejected requests for referral of the following judgments, which have consequently become final:

KOMANICKY - Slovakia (Nº 32106/96)
Judgment 4.6.2002 [Section IV]

P. S. - Germany (Nº 33900/96)
Judgment 20.12.2001 [Section III]
(See Information Note Nº 37)

DELBEC - France (Nº 43125/98)
Judgment 18.6.2002 [Section IV]

PERHIRIN and others - France (Nº 44081/98)
Judgment 14.5.2002 [Section II]

ITAL UNION SERVIZI S.A.S - Italy (no. 1) (Nº 44396/98)
Judgment 12.2.2002 [Section IV]

ITAL UNION SERVIZI S.A.S - Italy (no. 2) (Nº 44913/98)
Judgment 12.2.2002 [Section IV]

ITAL UNION SERVIZI S.A.S - Italy (no. 3) (Nº 44914/98)
Judgment 12.2.2002 [Section IV]

DE DIEGO NAFRIA - Spain (Nº 46833/99)
Judgment 14.3.2002 [Section I (former composition)]

OUZOUNIS and others - Greece (Nº 49144/99)
Judgment 18.4.2002 [Section I]
(see Information Note Nº 41)

ESSAADI - France (Nº 49384/99) (Former Third Section's judgment of 26 February 2002)
Judgment 26.2.2002 [Section III (former composition)]
(see Information Note Nº 39)

SOLANA - France (Nº 51179/99)
Judgment 19.3.2002 [Section II]

BAILLARD - France (Nº 51575/99)
Judgment 26.3.2002 [Section II]

MIKULIĆ - Croatia (Nº 53176/99)
Judgment 7.2.2002 [Section I]
(see Information Note Nº 39)

XENOPOULOS - Greece (Nº 55611/00)
Judgment 28.3.2002 [Section I]

BURDOV - Russia (Nº 59498/00)
Judgment 7.5.2002 [Section I]
(see Information Note Nº 42)

V. I. - Italy (Nº 51674/99)
Judgment 11.12.2001 [Section II]

L. B. -Italy (Nº 56087/00)
Judgment 12.2.2002 [Section IV]

VASILIU - Romania (Nº 29407/95)
Judgment 21.5.2002 [Section II]

HODOS and others - Romania (Nº 29968/96)
Judgment 21.5.2002 [Section II]

ARTICLE 1 OF PROTOCOL No. 1

PEACEFUL ENJOYMENT OF POSSESSIONS
Employer's inclusion of waiters' tips in minimum wage: *no violation*.

NERVA and others - United Kingdom (Nº 42295/98)
Judgment 24.9.2002 [Section II]

Facts: The applicants were all waiters. Cash tips which they received were put in a kitty ("*tronc*") and distributed out at the end of each week. Initially, tips included in cheque or credit card payments were dealt with by payment of the equivalent in cash but subsequently they were included in the applicants' weekly pay slip as "additional pay". This system was eventually agreed to by staff. The cheque and credit card gratuities were subject to deductions by the employer in respect of income tax and national insurance contributions. The applicants, who at the relevant time were entitled to a statutory minimum remuneration, sued their employer for breach of contract, challenging the employer's right to count these tips as part of their minimum remuneration. The Court of Appeal held that tips included in cheque or credit card payments should count against the minimum remuneration requirement, notwithstanding the customers' intention. Leave to appeal was refused.
Law: Article 1 of Protocol No. 1 – It was not disputed that legal title to tips paid by cheque or credit card passed to the employer in the first instance or that the applicants duly received their share in accordance with the agreed proportion. Consequently, there had been no interference with each applicant's agreed right to an appropriate share of the tips. They each

received what they would have got via the *tronc* system, less tax and national insurance contributions. Indeed, they received them more speedily since, unlike the employer, they did not have to wait for the cheque and credit card payments to be processed. Furthermore, payment was guaranteed even if cheque or credit card payments turned out to be fraudulent. The applicants had not disputed that their employer complied with the statutory obligation to pay them a minimum wage. The applicants could not maintain that they had a separate right to the tips and a separate right to minimum remuneration calculated without reference to those tips. That assertion was not borne out by the legislation at issue as interpreted by the domestic courts. The fact that the domestic courts ruled in a dispute between private litigants that the tips at issue represented "remuneration" could not of itself be said to engage the liability of the State under Article 1 of Protocol No. 1. The conclusion of the domestic courts that the employer, and not the customer, paid the tips at issue out of its own funds could not be considered arbitrary or manifestly unreasonable. Moreover, the applicants could not claim that they had a legitimate expectation that the tips at issue would not count towards remuneration. Such a view assumed that the customer intended that this would not be the case, which was too imprecise a basis on which to found a legitimate expectation which could give rise to "possessions".
Conclusion: no violation (6 votes to 1).
Article 14 in conjunction with Article 1 of Protocol No. 1 – The applicants had not established that either the applicable legislation or its interpretation by the domestic courts discriminated against them *vis-à-vis* employees in other sectors of employment covered by that legislation. Indeed, the applicants, being in a sector covered by the minimum wages legislation, were treated more favourably than employees in sectors outside the scope of that legislation.
Conclusion: no violation (unanimously).

PEACEFUL ENJOYMENT OF POSSESSIONS
Reduction of supplementary pension following modification of relevant law: *communicated*.

BUCHHEIT and MEINBERG - Germany (Nº 51466/99 and Nº 70130/01)
[Section III]

The applicants were contractual employees of the Hamburg City Council. At the commencement of their employment as such, the supplementary pension scheme was governed by a law of 1961 which underwent several subsequent amendments. According to a law of 1981 amending the aforesaid law, the pension was to be calculated on the basis of the years of employment and the last gross wage amount: after 35 years' service, the supplementary pension could be as high as but not more than 75% of the last gross wage. A new law of 1984 amending the manner of determining supplementary pensions stipulated that the calculation should be made not in relation to the final wage but in relation to the notional net wage of a contractual municipal employee. This resulted in a reduction of the two applicants' supplementary pensions. The first applicant alleged a 95% reduction of his supplementary pension, the second 50%. Following the enactment of a new law on supplementary pensions in 1995, the pension has been calculated on the basis of the years of employment completed and the last gross wage amount, but this law does not apply to people recruited after 1995. The applicants made separate petitions to the labour courts to establish that their supplementary pension entitlements under the 1981 law were unaffected by the 1984 law. The courts dismissed their claims. The Federal Constitutional Court decided not to entertain the constitutional appeal filed by each.
Communicated under Article 1 of Protocol No. 1, taken separately and in conjunction with Article 14.

ARTICLE 2 OF PROTOCOL No. 7

REVIEW OF CONVICTION
Financial Markets Board and Council of State not offering examinations by two tribunals in disciplinary proceedings: *inadmissible*.

DIDIER - France (N° 58188/00)
Decision 27.8.2002 [Section II]
(see Article 6(1) [criminal], above).

Other judgments delivered in September 2002

Article 5(3)

GRISEZ - Belgium (Nº 35776/97)
Judgment 26.9.2002 [Section I]

length of detention on remand – no violation.

Article 6(1)

BECKER - Germany (Nº 45448/99)
Judgment 26.9.2002 [Section III]

length of civil proceedings – violation.

DE LACZAY and others - Sweden (Nº 30526/96)
Judgment 24.9.2002 [Section IV]

length of civil proceedings – friendly settlement.

Article 10

MEHMET BAYRAK - Turkey (Nº 27307/95)
Judgment 3.9.2002 [Section II]

convictions for making separatist propaganda – friendly settlement.

Article 41

VASILOPOULO - Greece (Nº 47541/99)
Judgment 26.9.2002 [Section I]

just satisfaction.

Article 1 of Protocol No. 1

AZAS - Greece (Nº 50824/99)
Judgment 19.9.2002 [Section I]

adequacy of compensation for expropriation; irrebuttable presumption of benefit accruing from expropriation; limit on State's liability to cover legal fees – violation (cf. *Katikaridis and others and Tsomtsos and others* judgments (*Reports* 1996-V) and *Papachelas* judgment (ECHR 1999-II)).

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